2023:DHC:4661-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.07.2023

\+ **W.P.(C) 703/2023, CM Nos.2744/2023 & 13170/2023**

SUDEEP RAJ SAINI ..... Petitioner

versus

HIGH COURT OF DELHI & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Akhil Sibal, Senior Advocate with Mr. Pradeep Chhindra and Ms. Sanya Kumar, Advs.

For the Respondents : Dr. Amit George, Mr. Piyo Harold Jaimon, Mr. Rayadurgam Bharat, Mr. Amol Acharya and Mr. Arkaneil Bhaumik, Advs. for R-1.
Mr. Nimish Chib, Adv. for R-3.
Mr. Abhinav Vashisht and Mr. Sacchin Puri, Senior Advocates with Mr. Mukesh Kumar Sharma, Mr. Tarun Dabas, Ms. Akshita Jaitley, Mr. Manish Kumar Bhardwaj, Mr. Devvart Sharma and Mr. Naveen, Advs. for R-4.
Mr. Abhinav Vashisht and Mr. Sacchin Puri, Senior Advocates with Mr. Mukesh Kumar Sharma and Ms. Akshita Sachdeva Jaitley, Advs. for R-5.
Mr. Sahil Khurana, Adv. in CM (M) 13170/2023.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

INTRODUCTION

1. The petitioner has filed the present petition under Article 226 of the Constitution of India, *inter alia*, impugning a notice dated

13.10.2022 (hereafter '**the impugned notice**') whereby, respondent no.1 (hereafter '**the DHC**') had awarded 01 (one) additional mark in Law-III paper and 0.5 (half) mark in the paper of General Knowledge and Language, to all the candidates who had appeared in the Delhi Higher Judicial Services Mains (Written) Examination, 2022 (hereafter the **'DHJS Mains (Written) Examination'**). By virtue of the additional mark awarded in Law-III paper, respondent no.3 (Mr. Mayank Garg) as well as two other candidates qualified the DHJS Mains (Written) Examination and were admitted to the *viva voce*. Respondent no.3 was, subsequently, selected for joining the Delhi Higher Judicial Services (hereafter '**the DHJS**') as he was placed at serial no. 21 in the select list, in the order of merit. However, the other two candidates were not selected.

2. The petitioner also impugns the selection of respondent no.5 (Mr. Sandeep Kumar Sharma) to join the DHJS pursuant to clearing the Delhi Higher Judicial Services Examination – 2022 (hereafter '**DHJS Examination, 2022**'). According to the petitioner, respondent no.5 did not satisfy the eligibility criteria for selection to the DHJS or to appear for the DHJS Examination, 2022. The petitioner essentially challenges the selection and appointment of respondent no.3 and respondent no.5 to the DHJS.

3. The petitioner claims that it is not open to the DHC to award additional marks to candidates in the DHJS Mains (Written) Examination-2022 as the same is contrary to the relevant rules and also affects the integrity of the selection process.

4. The petitioner has also challenged the selection of respondent no.2 (Mr. Murari Singh) who is placed at rank 5 in the order of merit, respondent no.4 (Mr. Kumar Mitakshar) who is placed at rank 33 in the order of merit, and respondent no. 6 (Mr. Shankar Naryanan), who is ranked 1st (first) in the order of merit. However, it is not necessary to address the petitioner's challenge to the selection of respondent nos. 2 and 4 as respondent no. 2 has since withdrawn his candidature and respondent no. 4 has joined the Uttar Pradesh Higher Judicial Services.

5. Selection of respondent no. 6 is challenged on the ground that he does not satisfy the eligibility criteria. Respondent no. 6 had pursued the Master of Law Program at the University College London over a period of about nine months (23.09.2015 to 06.06.2016), during the period of seven years, preceding the last application for the DHJS Examination, 2022. The petitioner claims that the period spent by respondent no. 6 in pursuing the said course cannot be considered as a period spent practicing as an Advocate. This contention was rejected by this Court in the decision in ***Karan Antil v. High Court of Delhi & Ors.***[1] and the challenge to respondent no. 6's selection was repelled**.** Concededly, the decision in ***Karan Antil v. High Court of Delhi & Ors.***[1] covers the petitioner's challenge to the selection of respondent no. 6 and the same is accordingly rejected.

6. It is relevant to note that one of the candidates who had also appeared for the DHJS Examination, 2022 and is placed at rank 35 in

[1]***Karan Antil v. High Court of Delhi & Ors.: Neutral Citation No-2023:DHC:2409-DB*** decided on 10.04.2023

the order of merit, has also filed an application seeking intervention in the present petition (CM No.13170/2023), challenging the selections of respondent no.3 and respondent no.5 to the DHJS. Mr. Akshay Makhija, learned senior counsel, appeared for the said applicant and advanced submissions in support of the petitioner's challenge of the impugned notice and the selection and appointment of respondent no.3 and respondent no.5 to the DHJS.

7. The limited controversy that falls for consideration of this Court is whether, the impugned notice dated 13.10.2022 is illegal and whether respondent no.5 was eligible for selection and appointment to the DHJS, pursuant to the DHJS Examination, 2022.

FACTUAL CONTEXT

8. On 23.02.2022, the DHC issued an advertisement inviting applications for filling up forty-five (45) vacancies (including two anticipated vacancies) by direct recruitment to the DHJS through the DHJS Examination, 2022. The number of vacancies advertised included thirty-two (32) vacancies in the general category (including two anticipated vacancies) and thirteen (13) vacancies in the reserved category (Schedule Cast and Schedule Tribe).

9. The DHJS Examination, 2022 comprised of three successive stages. The first stage, was an objective type examination – Delhi Higher Judicial Service Preliminary Examination. Those candidates who cleared the said examination were eligible to appear for the second stage of the examination – the DHJS Mains (Written) Examination. Those candidates who cleared the DHJS Mains (Written) Examination

were called for the third stage of the competitive examination, that is, the *viva voce*. The final list of the candidates was declared on the basis of the marks in the DHJS Mains (Written) Examination and the *viva voce*.

10. The DHJS Mains (Written) Examination comprised of four papers which are described in Paragraph V of the Appendix to the Delhi Higher Judicial Service Rules, 1970 (hereafter '**the DHJS Rules**'). The brief description of the said papers, as set out in the Appendix to the DHJS Rules, is set out below:

"MAIN (WRITTEN) EXAMINATION

Papers	**Description**	**Max. Marks.**
Paper-I	**General Knowledge & Language –** This is to test the candidate's knowledge of current affairs etc. and power of expression in English. Credit will be given both for substance and expression. Conversely deduction will be made for bad expression, faults of grammar and misuse of words etc**.**	150
Paper-II	**Law – I –** Constitution of India, Code of Civil Procedure, Indian Evidence Act, Limitation Act, Registration Act and such other subjects as may be specified by the High Court from time to time.	200
Paper- III	**Law – II** – Transfer of Property Act, Indian Contract Act, Sale of Goods Act, Partnership Act, Specific Relief Act, Arbitration Law, Personal Law and such other subjects as may be specified by the High court from time to time.	200
Paper -IV	**Law – III** – Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and such other subjects as may be specified by the High court from time to time."	200

11. The marks obtained by all the candidates who had successfully cleared the DHJS Mains (Written) Examination were required to be withheld till the evaluation of their *viva voce*. As stated above, the

marks obtained by the candidates in the DHJS Mains (Written) Examination and the *viva voce* determined the order of merit.

12. The general category candidates were required to secure a minimum of 45% marks in each paper and 50% aggregate in the DHJS Mains (Written) Examination, for qualifying to be called for the *viva voce*.

13. The Delhi Higher Judicial Service Preliminary Examination was held on 03.04.2022 and its results were declared on 22.04.2022. In all 1,909 (one thousand nine hundred and nine) candidates appeared for the said examination and 140 (one hundred and forty) candidates secured the minimum qualifying marks. Out of the aforesaid candidates, 123 (one hundred and twenty-three) candidates were from the general category.

14. The DHJS Mains (Written) Examination was held on 14.05.2022 and 15.05.2022. The result of the said examination was declared on 26.08.2022. Those candidates who had qualified in the said examination were admitted to the *viva voce*, however their marks were not disclosed.

15. In all, 45 (forty-five) candidates who had qualified in the DHJS Mains (Written) Examination were called to appear for the *viva voce*. The schedule for the same was published by the DHC on 23.09.2022. The *viva voce* was scheduled to be held over a period of three days – 12.10.2022 to 14.10.2022. In all, 15 (fifteen) candidates were to be interviewed on each day.

16. In terms of the aforesaid schedule, the petitioner appeared for his *viva voce* on 12.10.2022. However, the *viva voces* scheduled on the other days were deferred.

17. Respondent no.3 secured 89 (eighty-nine) marks out of 200 (two hundred) marks in paper-IV (Law-III) and thus, did not secure the qualifying threshold of 45% marks in the said paper. His result along with the other candidates who had not qualified in the DHJS Mains (Written) Examination was declared on 26.08.2022. Being aggrieved by failure to qualify by just one mark in Law-III paper, respondent no.3 instituted a writ petition before this Court[2], *inter alia,* praying for rechecking / re-examination and re-assessment of his answer sheet in respect of Law-III paper.

18. The said writ petition was dismissed by this Court by a judgment dated 12.09.2022.[3] Another candidate, Mr. Gaurav Gaur, had secured 86 (eighty-six) marks in Law-III paper and thus, had not qualified the DHJS Mains (Written) Examination. He too filed a writ petition before this Court[4], seeking similar reliefs as sought by respondent no.3 in W.P.(C) No.12643/2022. By an order dated 15.09.2022, this Court dismissed the said writ petition as well.

19. Another candidate, Mr. Anil Kumar, had not qualified the DHJS Mains (Written) Examination, as he had secured 67 (sixty-seven) marks out of the maximum of 150 (one hundred and fifty) marks in the General

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[2] W.P. (C) No. 12643 of 2022 captioned ***Mayank Garg v. Delhi High Court through its Registrar General.***

[3] ***Mayank Garg v. Delhi High Court through its Registrar General: 2022:DHC:3589-DB*** decided on 12.09.2022

[4] W.P.(C) No.13312 of 2022 captioned ***Gaurav Gaur v. High Court of Delhi***

Knowledge and Language paper. His marks in the said paper were short of the qualifying threshold of 45% marks by 0.5 (half) marks. He filed a writ petition under Article 32 of the Constitution of India before the Supreme Court[5], *inter alia,* seeking re-evaluation of his marks. The Supreme Court dismissed the said writ petition by an order dated 16.09.2022, with liberty to the petitioner to approach the DHC for verifying whether each question was marked and the total was correct.

20. In the meanwhile, Mr. Anil Kumar, who was unsuccessful in prevailing in his petition, before the Supreme Court[5] filed another writ petition[6], before this Court, *inter alia,* praying that he be declared as qualified in the DHJS Mains (Written) Examination. This petition was also dismissed by this Court on 07.10.2022.

21. Respondent no.3 and Mr. Gaurav Gaur challenged the orders passed by this Court dismissing their respective writ petitions [judgment dated 12.09.2022 in W.P.(C) No.12643/2022][3] and order dated 15.09.2022 in W.P.(C) No.13312/2022] by filing a Special Leave Petitions[7] (Civil) No.17240/2022 & 17290/2022 before the Supreme Court. The said Special Leave Petitions were dismissed as withdrawn by a common order dated 10.10.2022, passed by the Supreme Court. The contents of the said order are set out below:

> "After the matter was argued for some time, learned counsel appearing for the petitioners seeks permission to withdraw the present Special Leave Petitions as the petitioners propose to make a representation to the

[5] W.P.(C) No.739/2022 captioned ***Anil Kumar v. High Court of Delhi***
[6] W.P.(C) No.14252/2022 captioned ***Anil Kumar v. High Court of Delhi***
[7] SLP (C) No. 17240 of 2022 captioned ***Mayank Garg v High Court of Delhi at New Delhi*** and SLP (C) No. 17290 of 2022 captioned ***Gaurav Gaur v High Court of Delhi***

> appropriate Authority. As and when such a representation is made, the same be considered in accordance with law and on its own merits for which we have not expressed anything in favour of the petitioners.
>
> The Special Leave Petitions stand dismissed as withdrawn."

22. Thereafter, respondent no.3 made a representation to the DHC requesting that he be included in the list of candidates admitted to the *viva voce* scheduled to be held from 12.10.2022 onwards by re-evaluation of the answer sheet, relaxation of the minimum qualifying marks and / or moderation.

23. The Examination Committee of the DHC (hereafter '**the Committee**') considered respondent no.3's representation in a meeting held on 10.12.2022 and resolved that as a one-time measure, 01 (one) additional mark be awarded to all candidates who had appeared in Law-III paper and 0.5 (half) mark be awarded to all the candidates who had appeared in General Knowledge and Language paper.

24. On 13.10.2022, the DHC issued the impugned notice implementing the aforesaid recommendation, that is, awarding 0.5 (half) mark in General Knowledge and Language paper and 01(one) mark in Law-III paper to all candidates who had appeared in the DHJS Mains (Written) Examination.

25. Pursuant to the award of the additional marks, three candidates who had otherwise failed to qualify in the DHJS Mains (Written) Examination, were declared successful and were shortlisted for the *viva voce*.

26. The *Viva voce* of the candidates scheduled on 13.10.2022 and 14.10.2022 were thereafter, rescheduled and were finally held on 31.10.2022 and 01.11.2022.

27. The DHC declared the final result of candidates and the select list on 10.11.2022.

28. The petitioner was placed at rank no. 34 amongst the general category of candidates in the order of merit. The petitioner's name was not included in the select list which comprised of 33 (thirty-three) candidates. It is relevant to note that one of the candidates who was found to be ineligible (Mr. Ashish Rastogi), as he did not qualify the eligibility criteria of continuous practice for not less than seven years preceding the receipt of the applications, had preferred a writ petition, which was allowed by a Co-ordinate Bench of this Court.[8] Consequently, he was required to be included in the list of candidates selected for joining the DHJS. The said decision indicates that Mr. Ashish Rastogi was required to be placed at the seventeenth position in the order of merit. Thus, even though respondent no.2 and respondent no.4 are no longer in the fray, the petitioner has not been selected as he would now stand at serial no. 33 in the order of merit against recruitment to the said thirty-two vacancies.

29. The petitioner's challenge to the selection of respondent no.5 is premised on the assertion that he did not satisfy the requirement of Rule 9(2) of DHJS Rules. In terms of the said Rule, a candidate "*must have*

[8] ***Ashish Rastogi v. High Court of Delhi & Anr.: Neutral Citation No-2023:DHC:1954-DB*** decided on 17.03.2023

been continuously practising as an Advocate for not less than seven years as on the last date of receipt of applications". The petitioner claims that respondent no.5 had joined the Department of Legal Affairs, Government of India (hereafter '**the Department of Legal Affairs'**) during the period 06.03.2017 to 12.09.2017 at a consolidated fee of ₹60,000/- per month. According to the petitioner, respondent no.5's employment with the Department of Legal Affairs cannot be considered as a period during which he was practicing as an Advocate.

SUBMISSIONS OF COUNSEL

30. Mr Sibal, learned senior counsel appeared on behalf of the petitioner. He contended that awarding additional marks in Law-III paper to all candidates, who had appeared for the DHJS Mains (Written) Examination would in effect amount to relaxing the DHJS Rules for qualifying the said examination. He referred to the decision of this Court in ***Chander Kirti Negi v. High Court of Delhi***[9] in support of his contention.

31. Next, he contended that the decision to award additional marks was prompted by the extreme hardship faced by respondent no.3 and not on account of any error in the marking system or in the conduct of the examination. Thus, the decision to award marks was solely for the purpose of declaring respondent no.3 as successful in the DHJS Mains (Written) Examination. And, the only hardship faced by respondent no.3 was that he did not qualify in the DHJS Mains (Written)

[9] ***Chander Kirti Negi v. High Court of Delhi: 2020 SCC OnLine Del 1585*** decided on 10.12.2020

Examination as his marks in Law III paper were short of the qualifying marks, by just 01 (one) mark. The DHC had also awarded 0.5 (half) marks to all candidates in General Knowledge and Language paper for the similar reason: to include a candidate, Mr Anil Kumar, who was declared unsuccessful solely for the reason that the marks obtained by him in General Knowledge and Language paper were short of the required threshold of 45% by 0.5 (half) mark. He submitted that the award of marks solely for the reason of including certain candidates who had not qualified in the examination on account of shortage of the marks, in the list of successful candidates in effect amounts to altering the results of the examination, which is impermissible. He earnestly contended that the issue involved is covered by the decision of the Supreme Court in ***Umesh Chandra Shukla v. Union of India & Ors.***[10]

32. Insofar as the petitioner's challenge to the selection of respondent no.5 is concerned, Mr Sibal submitted that respondent no.5 was in full time employment under the Department of Legal Affairs. He was paid a fixed remuneration and was not permitted to take up any other work. He submitted that given the nature of his employment, he could not be considered as a practicing advocate. Mr Sibal relied upon the decision of the Gujarat High Court in ***Jalpa Pradeepbhai Desai v. Bar Council of India & Ors***[11]. He submitted that in that case, the Gujarat High Court had not accepted that a person employed as a legal consultant would be considered as a practising advocate. He also relied upon the decision of

[10] ***Umesh Chandra Shukla v. Union of India & Ors.: (1985) 3 SCC 721*** decided on 02.08.1985
[11] ***Jalpa Pradeepbhai Desai v. Bar Council of India & Ors..: 2017 SCC OnLineGuj. 707*** decided on 21.06.2017

the Allahabad High Court in ***Shiv Kumar Pankha & Anr. v. Honerable High Court of Judicature at Allahabad & Anr.***[12] to the same effect.

33. He submitted that in terms of Rule 49 of the Bar Council of India Rules and Rule 103 of the Bar Council of Delhi Rules, a person who is employed exclusively with non-court related legal work, would not be eligible for enrolment as an advocate. Further, he submitted that merely because the nature of the work for which respondent no.5 was employed was legal work did not entitle him to claim that he was an advocate in practice. He submitted that the exception to the said rule as carved out by the Supreme Court in ***Deepak Aggarwal v. Keshav Kaushik & Ors.***[13]**,** is applicable only if an advocate is employed to plead and act on behalf of his employer in the court of law. He submitted that in such a case, even though a person, is in full time employment of his employer, he would, nonetheless, be considered as a practicing advocate. Mr Sibal also referred to certain observations made by the Co-ordinate Bench of this Court in ***Ashish Rastogi v. Hon'ble High Court & Anr.***[8] in support of his contention.

34. He also submitted that respondent no.5 had not disclosed the fact that he was employed with the Government of India, and his selection was liable to be set aside on this ground alone.

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[12] ***Shiv Kumar Pankha & Anr. v. Honerable High Court of Judicature at Allahabad & Anr.: 2019 SCC OnLine All. 5052*** decided on 05.04.2019
[13] ***Deepak Aggarwal v. Keshav Kaushik & Ors.: (2013) 5 SCC 277*** decided on 21.01.2013

35. Mr Dayan Krishnan, learned senior counsel appearing on behalf of respondent no.3 countered the submissions made on behalf of the petitioner and submitted that the examining body had inherent powers to moderate the marks awarded in the examination. He submitted that in the present case, Law-III paper was marked strictly and that the same was also noted by this Court in ***Mayank Garg v. Delhi High Court through Its Registrar General.***[3] He submitted that in cases of strict marking, the courts could always examine and moderate/normalise the marks. He also referred to the decision in ***Mahinder Kumar & Ors v. High Court of Madhya Pradesh Through Registrar General & Ors***[14] and on the strength of the said decision submitted that the court/examining authority had the inherent power to normalise the marks. He submitted that this power was implicit in the power to evaluate and assess. Next, he referred to the decision of the Supreme Court in ***State of Uttar Pradesh & Ors. v. Atul Kumar Dwivedi & Ors.***[15] and submitted that the power for scaling/ normalisation was held to be inherent in the provisions delegating powers to evaluate, to the examination authorities. He submitted that since the DHC was entrusted with conducting written examinations and the *viva voce*, the power to moderate and scale marks was inherent. And, the decision of the DHC to award additional marks to all candidates could not be faulted. He also referred to the decision of the Supreme Court in ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at***

[14] ***Mahinder Kumar & Ors v. High Court of Madhya Pradesh Through Registrar General & Ors.: (2013) 11 SCC 87*** decided on 12.07.2013
[15] ***State of Uttar Pradesh & Ors. v. Atul Kumar Dwivedi & Ors.: (2022) 11 SCC 578*** decided on 07.01.2022

Chandigarh & Anr.[16]and submitted that the Supreme Court had accepted that in cases where the marking was strict, but not discriminatory, the tool of moderation of marks is permissible.

36. He submitted that the decision in the case of ***Umesh Chandra Shukla v. Union of India & Ors***[10] was not applicable as in that case, the Supreme Court had concluded that the mode of evaluation was not the reason which impelled moderation of marks in that case. He contended that in the present case, it was apposite to moderate the marks as undeniably the marking in Law-III paper and General Knowledge and Language paper was strict. This was pointed out by this Court in ***Mayank Garg v. Delhi High Court Through Its Registrar General***[3] and the order dated 28.10.2022 in ***Bipin Kumar Sharma v. High Court of Delhi at New Delhi***[17]**.**

37. Lastly, Mr Krishnan referred to the decision in the case of ***Rabindra Tiwary v. Lt. Governor, Govt. of NCT of Delhi & Anr.*** [18], where, this Court had held that an unsuccessful candidate who had participated in the selection process, is estopped from challenging the same.

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[16] ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh & Anr.: (2020) 15 SCC 377*** decided on 13.12.2019
[17] W.P.(C) 14990/2022 captioned ***Bipin Kumar Sharma v. High Court of Delhi at New Delhi*** dated 28.10.2022
[18] ***Rabindra Tiwary v. Lt. Governor, Govt. of NCT of Delhi & Anr.: Neutral Citation No.: 2023/DHC/000341*** decided on 17.01.2023

38. Mr Abhinav Vashisht, learned senior counsel, advanced submissions on behalf of respondent no.5. He submitted that respondent no.5 was never an employee of the Department of Legal Affairs. He stated that on 03.12.2016, the Ministry of Law and Justice had issued a circular for engagement of legal consultants in the Department[19]. The circular also provided that the selected candidates would be paid a consolidated amount of ₹60,000/- per month as fees. He also referred to the nature of duties required to be performed by the person engaged in terms of the said circular. He emphasised that the nature of duties included giving advice on all matters referred by various ministries/department of the Government of India; to look after government litigation work; to conduct court cases; and to appear in courts on behalf of the Central Government, whenever required. He also submitted that respondent no.5 was not entitled to any employee benefits such as provident fund, gratuity, transport allowance etc. The said circular expressly provided that engagement as a legal consultant would not entitle the candidate to claim any post under the Government. He contended that the remuneration paid to respondent no.5 was for rendering professional services. He submitted that respondent no.5's engagement by the Department of Legal Affairs was as an independent legal consultant and not as a full time employee. He also contended that there was no relationship of a master and a servant and that respondent no.5 was paid a fee for the professional services rendered by him. He referred to the earlier decision of this Court in ***Karan Antil v. High***

[19] Circular No. 7/6/2016-Admin.I (LA) dated 03.12.2016

Court of Delhi & Ors.[1] and submitted that the petitioner was not disqualified to be enrolled as an advocate.

39. Mr Vashisht also referred to the additional affidavit, affirmed by respondent no.5 setting out the details of the legal work performed by him while he was engaged as a legal consultant with the Department of Legal Affairs, he pointed out that respondent no.5 had rendered assistance in regard to court cases, which also included briefing law officers engaged to appear in court proceedings. He submitted that the work performed by respondent no.5 was similar to the nature of work performed by advocates, assisting arguing counsels in proceedings before a court of law.

40. Dr Amit George, learned counsel appearing for the DHC, opposed the petitioner's challenge to the selection of respondent no.3 and the award of additional marks by the DHC. He submitted that the petitioner's challenge was an afterthought and had been raised more than two months after the culmination of the selection process. He also submitted that the petitioner had participated in the examination process and therefore, was precluded from challenging the same.

41. He submitted that the petitioner's case was fundamentally flawed as it required this Court to review the administrative action on merits. He submitted that judicial review of an administrative action was limited and did not extend to re-appreciating the basis of the ultimate conclusions arrived at by the concerned authority, or to exercise an expansive merit review. He referred to the decision of the Supreme

Court in ***Kalinga Mining Corporation v. Union of India & Ors.***[20] in support of his contention. He earnestly contended that the averments in the petition amounted to seeking a full-fledged review on merits, which is impermissible.

42. He submitted that the decision of the Committee to award the additional marks was judicious and rational and therefore, warranted no interference by this Court. He contended that the exercise of discretion is a necessary facet in the decision-making process by an administrative authority. And, that the impugned notice was a culmination of the decision-making process by an administrative authority in exercise of its discretion. He contended that the DHJS Rules did not proscribe or in any manner constrain the DHC from exercising its discretion in regards to any matter that was not expressly proscribed by the DHJS Rules. He submitted that the DHJS Rules were enacted in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India by the Lt. Governor of Delhi in consultation with the DHC. He submitted that in the aforesaid backdrop, in terms of Section 21 of the General Clauses Act, 1897, the DHC had the discretion to relax any condition notwithstanding that there is no express provision permitting relaxation of the DHJS Rules.

43. Next, he submitted that the DHJS Examination, 2022 was *sui generis*. It was the first examination which was conducted after the outbreak of Covid-19 Pandemic; that is, after a gap of almost three years

[20] ***Kalinga Mining Corporation v. Union of India & Ors.: (2013) 5 SCC 252*** decided on 07.02.2013

from the previous one. He referred to the decision of the Supreme Court in ***High Court of Delhi v. Devina Sharma***[21], whereby the Supreme Court had directed relaxation of the DHJS Rules relating to the age requirement, which was non-derogable under the DHJS Rules. He submitted that the discretion to award additional marks must be considered in the backdrop that the DJHS Examination, 2022 was held after almost three years.

44. In respect of the petitioner's challenge to the selection of respondent no.5, Dr. George submitted that the same was examined by the Vigilance Committee of the DHC. The Vigilance Committee of the DHC had examined the nature of employment and the work required to be performed by respondent no.5 and concluded that respondent no.5 was not a salaried employee but was engaged as a legal consultant on a contractual basis. The Vigilance Committee of the DHC further concluded that respondent no.5 did not cease to be an advocate during the period of his engagement with the Government of India and therefore, the contention that he was ineligible for being appointed to the DHJS, could not be accepted.

REASONS & CONCLUSIONS

Challenge to the Impugned Notice

45. As noted above, it is respondent no.3's and the DHC's case that the decision to award an additional 01 (one) mark in Law-III paper and 0.5 (half) mark in General Knowledge and Language paper to all the candidates who had appeared in the DHJS Mains (Written)

[21] ***High Court of Delhi v. Devina Sharma: (2022) 4 SCC 643*** decided on 14.03.2022

Examination, amounts to moderation of marks, which is not proscribed by the DHJS Rules. According to respondent no.3 the said moderation of marks was resorted to as the marking of the said papers were strict. It was also suggested that the DHC's decision to award additional marks was pursuant to the observations of the Supreme Court that such a case was a "hard case".

46. Respondent no.3 had not succeeded in seeking re-evaluation or re-assessment of his answer sheet in Law-III paper. He had approached this Court by way of a writ petition seeking such relief but the same was rejected by this Court.[3] Respondent no.3 had sought to appeal the said decision before the Supreme Court but was unsuccessful. The Supreme Court dismissed this Special Leave Petition[7] in terms of a common order dated 10.10.2022 passed in the Special Leave Petition preferred by respondent no.3 and the Special Leave Petition preferred by Mr. Gaurav Gaur raising similar grievances. The contents of the said order are reproduced below:

> "After the matter was argued for some time, learned counsel appearing for the petitioners seeks permission to withdraw the present Special Leave Petitions as the petitioners propose to make a representation to the appropriate Authority. As and when such a representation is made, the same be considered in accordance with law and on its own merits for which we have not expressed anything in favour of the petitioners.
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> The Special Leave Petitions stand dismissed as withdrawn."

47. It is apparent from the above that the Supreme Court had not made any observations in favour of respondent no.3. The Supreme

Court had merely observed that as and when representation, if any, is made by respondent no.3 and for Shri Gaurav Gaur the petitioners in those petitions, the same would be considered in accordance with law. Thus, any suggestion that respondent no.3's representation was required to be considered on merits without reference to the DHJS Rules is unmerited.

48. The petitioner's representation was considered by the Committee at a meeting held on 10.12.2022 and the Committee recommended that as a one-time measure an additional 01 (one) mark be awarded to all candidates in Law-III paper.

49. The Committee also noted that insofar as the remaining three papers were concerned, there were no candidates whose marks were short of the minimum qualifying mark by one mark, except Mr. Anil Kumar (Roll No.137) whose marks in General Knowledge and Language paper fell short of the qualifying threshold by 0.5 (half) mark. Although, his representation was not under consideration, the Committee also recommended that 0.5 (half) mark be awarded to all candidates who had appeared in General Knowledge and Language paper as well. The relevant extract of the Minutes of the Meeting which indicate the reasons that persuaded the Committee to accede to respondent no.3's representation is set out below:

> "The matter has been considered by this Committee in view of the directions issued by the Hon'ble Supreme Court to the petitioner in SLP(C) No.17240/2022 titled "Mayank Garg vs. High Court of Delhi at New Delhi".

> In view of the peculiar facts and circumstances, and the extreme hardship faced by Mr. Mayank Garg, (Petitioner in SLP(C) No.17240/2022) coupled with the fact that there would not be any breach of zone of consideration which is three times the number of vacancies in each category advertised, this Committee resolves to recommend that as a one-time measure, additional 01 mark be awarded across the board to all the candidates (including shortlisted candidates) in Law-III Paper.
>
> The Committee has been apprised that as regards the remaining three Papers, there is no other candidate who is short of the minimum qualifying marks by 01 mark except Mr. Anil Kumar (Roll No.137) who is short by only 0.5 mark in General Knowledge & Language Paper.
>
> The Committee, therefore, resolves to recommend that additional 0.5 mark be awarded across the board to all the candidates (including shortlisted candidates) in General Knowledge & Language Paper as well."

50. It is at once apparent from the above that the decision of the Committee to recommend additional 01 (one) mark in Law-III paper was solely for the purpose of addressing the "*extreme hardship faced by respondent no.3*". The Minutes of the Meeting also indicate that the Committee was perhaps willing to enhance the marks in the other three papers as well, but there were no candidates who had failed to qualify the DHJS Mains (Written) Examination, other than Mr. Anil Kumar, for want of one mark or less, in any of the three papers.

51. Mr. Anil Kumar's mark in General Knowledge and Language paper was short by 0.5 (half) mark and therefore, the Committee also decided to address his grievance by awarding an additional 0.5 (half) mark, across the board to all the candidates in General Knowledge and Language paper as well.

52. The recommendations of the Committee were accepted and thereafter, the DHC issued the impugned notice.

53. It is important to note that, the Committee in its meeting held on 17.10.2022 also considered the representations of two other candidates, Mr. Gaurav Gaur and Mr. Bipin Kumar Sharma, who were not called to appear for the *viva voce* because their marks in Law-III paper were short of the minimum qualifying marks by 04 (four) and 02 (two) marks respectively. The Committee did not accede to their representation for the reason that their case did not fall under the criteria of extreme hardship as accepted in the meeting held on 17.10.2022. It is relevant to refer to the reasons for rejecting the representations as noted in the Minutes of the Meeting held on 17.10.2022. The relevant extract of the same is reproduced below:

> "Considered both the representations.
>
> In the meeting held on 12.10.2022, this Committee was of the unanimous view that in the case of the two representationists, the shortfall of marks was only 01 mark (0.5% of the maximum marks) or event lesser in the concerned subject and, therefore, these were cases of extreme hardship.
> In that view of the matter, the Committee had resolved to recommend that as a one-time measure, additional 01 mark be awarded across the board to all such candidates.
> The Committee, after considering the facts that as regards the remaining three Papers, there was no other candidate who was falling short of the minimum qualifying marks by 0.5% or less except Mr. Anil Kumar (Roll No.137) who was falling short by only 0.5 marks, i.e. by 0.33%, in General Knowledge & Language Paper, decided that additional 0.5 mark be awarded across the board to all the candidates (including shortlisted candidates) in General Knowledge & Language Paper as well.
>
> In the present representations, the Committee noted that the shortfall of marks is 1% or even more in the concerned subject.

> Therefore, the Committee is of the unanimous opinion that the instant cases cannot be considered to be the cases of extreme hardship and they do not fall within the criteria laid down in the meeting held on 12.10.2022.
>
> In view of the foregoing, this Committee resolves to recommend that the representations of Mr. Gaurav Gaura and Mr. Bipin Kumar Sharma be rejected and the representationists be informed accordingly."

54. It is clear from the above that the Committee was of the view that since the marks obtained by Mr. Gaurav Gaur and Mr. Bipin Kumar Sharma in Law-III paper were short by more than one mark, their case could not be considered as a case of "extreme hardship".

55. It is material to note that no exercise was conducted to examine whether there was any flaw in the marking of Law-III paper or that the same required to be moderated or normalized by award of additional marks. Thus, we are unable to accept that the Committee had directed award of the additional marks in the two papers on account of any error in the marking or evaluation. An additional mark was awarded in two papers solely because the Committee was of the view that failure of the candidates (respondent no.3 and Mr. Anil Kumar) to satisfy the qualifying criteria by one mark or less presented a case of "extreme hardship". It is also apparent that the impugned notice was issued only to address what the Committee felt was "extreme hardship" of respondent no.3. Resultantly, another candidate[22] who had also failed to qualify the DHJS Mains (Written) Examination as his marks in Law-III

[22] Rajeev Kumar, Roll No.131

paper were short of the threshold of 45% marks, by one mark also qualified the said examination.

56. It is clear that the Committee did not recommend increase of the marks because it found that the marking was strict and required to be moderated. Further, no exercise was conducted to determine the quantum of additional marks required to be awarded to normalize the marking. The Committee increased the marks for a singular reason; that is to address the hardship of those candidates who had missed qualifying the DHJS Mains (Written) Examination by one mark or less in any paper. It is also apparent from the Minutes of the Meeting of the Committee held on 17.10.2022, that the Committee would have awarded an additional 01 (one) mark in other papers as well (Law-I and Law-II papers) if there was any candidate who had not qualified the DHJS Mains (Written) Examination for want of one mark or less in those papers. Indisputably, the decision of the Committee was not to normalize the marks in any paper but to award grace marks to all candidates who had failed to meet the qualifying threshold by one mark or less.

57. The fact that the marks were awarded across the board to all candidates, does not take away from its nature or the reason why the additional marks were awarded. The same were awarded not because all the candidates who had appeared in Law-III paper deserved an additional one mark but for the reason that falling short of qualifying criteria by one mark or less was considered by the Committee as a case of "extreme hardship", which warranted such a one-time measure.

58. Thus, the only question to be addressed is whether it is permissible for the DHC to award additional marks solely for the purpose of qualifying the candidates who would otherwise fail to qualify in the DHJS Mains (Written) Examination but for the additional marks.

59. Rule 7C of the DHJS Rules, *inter alia,* requires the DHC to hold written examination and the *viva voce* in the manner as prescribed in the Appendix to the DHJS Rules and in the subjects with the syllabi, as prescribed by the DHC from time to time. Rule 7C of the DHJS Rules reads as under:

> "**7C. Selection for appointment by direct recruitment.-** The High Court, before making recommendations to the Administrator, shall invite applications by advertisement and may require the applicants to give such particulars as it may prescribe and shall hold written examination(s) and viva voce test in the manner as prescribed in the Appendix to the Rules and in the subjects with the syllabi as prescribed by the High Court from time to time."

60. The Appendix to the DHJS Rules expressly prescribes the minimum qualifying marks for the Preliminary Examination; minimum qualifying marks for the DHJS Mains (Written) Examination; and the *viva voce*. Award of additional marks – not as a part of the evaluation process but to include certain unsuccessful candidates – in effect, circumvents the qualifying criteria under Paragraph VI of the Appendix to the DHJS Rules. Paragraph VI of the Appendix to the DHJS Rules is reproduced below:

> **"VI. <u>Minimum qualifying marks for the Main (Written) Examination:</u>**

Category	Minimum Qualifying Marks in each Paper (in %)	Minimum Qualifying Marks in the aggregate (in %)
General	45%	50%
Reserved Categories i.e., SC, ST and Persons with Disability	40%	45%"

61. Clearly, to address the hardship faced by any candidate as a result of his failing to clear the DHJS Mains (Written) Examination for want of a single mark or less in any paper would subvert the integrity of the evaluation process. The entire purpose of fixing a threshold qualifying mark in each paper under Para-VI of the appendix to the DHJS Rules is to ensure that only those candidates who secure the qualifying marks in each paper are admitted to the *viva voce*.

62. In ***Umesh Chandra Shukla v. Union of India & Ors.***[11], the Supreme Court considered the case where the DHC had awarded two marks in respect of each written paper to every candidate who had appeared in 1984 Delhi Judicial Service Examination. The criteria for qualifying the written test were fixed at 50% in each written papers (five in numbers) and 60% in the aggregate. The said criteria were relaxed for candidates belonging to the Scheduled Castes and Scheduled Tribes categories. For such categories of candidates, the minimum marks required in each paper was 40% of the maximum marks and 50% in aggregate. The DHC had awarded two additional marks in each paper to all candidates as an exercise in moderation. The DHC had explained that few candidates who otherwise secured very high marks would have been kept out of the zone of consideration for final selection for the

reason that the marks secured by them were one or two marks below the qualifying marks for each paper. The affidavit filed on behalf of the DHC referred to certain "hard cases" which persuaded the DHC to add additional marks by way of moderation. The Supreme Court held that the addition of marks by way of moderation in order to qualify candidate(s) to appear for the *viva voce* would indirectly amount to amending the DHJS Rules which was impermissible. The relevant extract of the said decision is set out below:

> "13. 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 appeared 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 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 complete 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 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 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 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."

63. We are of the view that the said decision squarely covers the present case. In the present case, there is no doubt that the additional marks have not been awarded pursuant to an exercise of normalization – that is, to counter the effect of erroneous questions, questions out of syllabus, strict evaluation of the answer sheets by examiners or any other systemic flaw in the evaluation process, that required rectification by the award of additional marks – but to include respondent no.3 and other candidates who had failed to qualify as the marks secured by them in Law-III paper and General Knowledge and Language paper were short by one mark or less.

64. Dr. George's contention that the DHC has the discretion to award marks by an administrative order in absence of any explicit rules to the contrary, is misconceived. In the present case, the DHJS Rules expressly stipulates the qualifying marks and therefore, the DHC has no discretion to alter the same in exercise of its statutory or administrative powers. The DHC is bound to include only those candidates in the list

of qualified examinees who have secured the minimum threshold of 45% marks in each paper. Undeniably, the DHC has the discretion as an examining authority to evolve the process for a fair evaluation and to determine whether the candidates have achieved the qualifying marks. If it is found that the evaluation process is flawed or in any manner subverted, it would be open for the examining authority to take such measures to rectify or to mitigate the impact of such flaw/ deficiency. However, the examining authority must come to the conclusion that the evaluation process is flawed, unfair, deficient or had not met the intended object of selection. And such flaw/ deficiency can be remedied by normalization or moderation of marks. If the DHC had found that the marking in certain paper was strict and therefore, excluded a large number of deserving candidates, it would be open for the DHC to take remedial measures and moderate the marks to compensate for the strict marking. Similarly, if it is found that any question was erroneous or incapable of being answered correctly, it would be open for the DHC to award additional marks to compensate for the marks lost by the examinees. But it is not open for an examining authority to simply award grace marks because some candidates had failed to achieve the qualifying criteria.

65. Further, the exercise of normalization is required to be done prior to the declaration of the results.

66. One may sympathize with respondent no.3 or other candidates who have missed achieving the qualifying threshold marks by a whisker; but awarding additional marks for including them in the list of

qualified candidates subverts the integrity of the selection process apart from the same being contrary to the DHJS Rules. Any decision of the DHC regarding award of additional marks is required to be pivoted to the evaluation process and its efficacy; not the individual cases.

67. The reliance placed by the learned counsel appearing on behalf of respondent no.3 and the DHC, on the decisions of the Supreme Court in ***Mahinder Kumar & Ors v. High Court of Madhya Pradesh through Registrar General & Ors.***[14]***, State of Uttar Pradesh & Ors. v. Atul Kumar Dwivedi & Ors.***[15] and ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh & Anr.***[16], are misplaced.

68. In ***Mahinder Kumar & Ors v. High Court of Madhya Pradesh Through Registrar General & Ors*** [14], the unsuccessful candidates had challenged the selection of candidates done by the High Court of Madhya Pradesh in the cadre of Madhya Pradesh Higher Judicial Service. They *inter alia* contended that it was not open for the High Court of Madhya Pradesh to normalise the marks secured by the candidates in their written examination. They claimed that the same was contrary to the relevant rules. It is relevant to note that in that case, the High Court of Madhya Pradesh had fixed the minimum qualifying marks in two written papers as 35% of the maximum marks in case of Scheduled Castes/ Schedules Tribes candidates, and 40% in case of candidates belonging to the General Category. The candidates, who qualified the said criteria, would be admitted to the *viva voce*. A large number of candidates had appeared for the written examination. Their

papers were evaluated by several District Judges. In the aforesaid backdrop, a decision was taken by the Selection Committee that the written papers of the candidates securing the qualifying marks would be further evaluated for the purpose of normalisation and the marks obtained by those candidates in the *viva voce* would be added to the marks as normalised for the purpose of determining their position in the order of merit. The object of normalisation was to eliminate any variance in marks secured by the candidates, which was occasioned by different examiners evaluating the papers.

69. The Supreme Court repelled the contention that normalisation was not permitted or was contrary to the rules. The Supreme Court held that the High Court had the powers to determine a fair procedure for evaluation of papers. There is no cavil with the proposition that the High Court is not proscribed or prohibited from adopting any fair procedure for evaluation of the answer sheets. The normalisation in ***Mahinder Kumar's.*** case[14] was only to ensure that there was a higher degree of uniformity in evaluation of the answer sheets of the candidates. There is no controversy that the DHC is fully empowered to determine the evaluation procedure. However, the procedure to be adopted is necessarily required to be for the purpose of ensuring uniform and fair evaluation. Such procedure cannot be evolved with the sole objective of including one or two additional candidates who had otherwise failed to qualify the examination, despite a fair and a uniform evaluation of the answer sheets. As stated above, the DHC is not precluded from moderating or using the statistical device of scaling for

the purpose of fair evaluation of all the candidates. However, it is impermissible for the High Court to add marks merely for including certain disqualified candidates. The evaluation procedure must necessarily be to ensure a uniform and fair evaluation.

70. In ***State of Uttar Pradesh & Ors. v. Atul Kumar Dwivedi & Ors.***[15], a large number of candidates had appeared in the examination for the recruitment of 2400 posts of Sub Inspector of Police, 210 posts of Platoon Commander in Provincial Armed (PAC2), and 97 posts of Fire Officer (Grade-II) in Uttar Pradesh (UP) Police. The candidates had appeared in written examinations over a period of twelve days. The sets of question papers were different. In the said context, the Supreme Court held that it was permissible for moderation of marks where there were multiple numbers of examiners. It was also permissible to adopt the tool of scaling of marks for candidates who were tested in different places. Both the devices, moderation and scaling, are intended to ensure a fair and uniform evaluation of answer sheets.

71. In ***Sanjay Singh & Anr. v. U.P. Police Service Commission Allahabad & Anr.***[23], the Supreme Court had *inter alia* examined whether it would be apposite to use the statistical tool of scaling in the judicial service examination. The Supreme Court observed that the statistical tool for scaling was permissible where the candidates being evaluated had opted for different subjects. It was, thus, necessary to align the marks obtained by the candidates opting for different subjects,

[23] ***Sanjay Singh & Anr. v. U.P. Police Service Commission Allahabad & Anr. :(2007) 3 SCC 720*** decided on 09.01.2007

on a uniform scale. The Supreme Court had, as an illustration, observed that 70 (seventy) marks out of 100 (hundred) in mathematics does not mean the same as 70 (seventy) marks out of 100 (hundred) in English. Thus, the marks obtained by candidates opting for different subjects required to be scaled for the purposes of *inter se* evaluation. The Supreme Court further observed that "*in the Judicial Service Examination, the candidates were required to take the examination in respect of all five subjects and the candidates did not have any option in regard to the subjects. In such a situation moderation appears to be an ideal solution*".

72. In ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh& Anr.***[16], the Supreme Court accepted the suggestion to award 30 (thirty) grace marks – 20 (twenty) grace marks in Civil Law-I paper and 10 (ten) grace marks in Civil Law-II paper – in written examination held for appointment against 109 (hundred and nine) posts of Civil Judge (Junior Division) in Haryana Civil Service (Judicial Branch). In that case 14,301 (fourteen thousand three hundred and one) candidates had appeared for Preliminary Examination. Out of the aforesaid number, 1282 (twelve hundred and eighty-two) candidates had qualified for being admitted to the Main Examination. 1195 (eleven hundred and ninety-five) candidates had taken the Main Examination but only 9 (nine) candidates had qualified to be admitted to the *viva voce*. Thus, only 0.702% candidates had managed to pass the examination and the remaining 99.298% had failed. The examination process had failed to serve its intended purpose

of selecting a reasonable number of candidates. In this context, the Supreme Court had appointed Justice (Retd.) A.K. Sikri, a former Judge of the Supreme Court to examine the examination process. He evaluated the selection process and submitted a report. He did not find any flaw in the selection process. However, he found that the evaluation of all candidates in respect of Civil Law-I paper was wanting. He concluded that the time available for the candidates to answer each question in the said paper was barely 8.5 minutes. The questions required descriptive answers and the paper was lengthy. In addition, the marking in Civil Law-II paper was strict and the highest marks awarded to any candidate in that paper was 95 out of 200, that is, 47.5%. He reported that the evaluators seemed to expect lengthy answer in respect of each question covering all aspects in detail without recognizing the limitation of time available with the candidates to answer the questions.

73. The Supreme Court accepted the suggestion to award the additional mark to address the anomaly caused by the evaluation process.

74. Undisputably, if the Committee was of the view that there was a flaw or deficiency in the evaluation process, it possessed the discretion to take measures to address the same. The decision in ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh& Anr.***[16] also highlights that the recourse to devices of moderation or normalization of marks are available only in cases where the marking process or the evaluation process are found to be wanting. As to which measure is required to address the flaw or deficiency in the

evaluation process would depend on the flaw or the deficiency found. In the present case, the concerned Committee has found no flaw or deficiency in the marking process. It is necessary to note that in ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh& Anr.***[16] the Supreme Court had awarded grace marks keeping in view the reasonable number of candidates expected to clear the said examination. In that case, the grace marks were not directed to be awarded to address any hardship of any particular candidate.

75. The contention that the petitioner is precluded from raising any objections to the award of additional marks as he had participated in the examination is unmerited and cannot be accepted. This is not a case where the petitioner is challenging the evaluation procedure after having tacitly accepted the same by participating in the examination. The petitioner is not challenging the procedure as notified or as provided in the DHJS Rules. The petitioner's challenge is in respect of the award of additional marks, which was not a part of the declared procedure.

76. Dr. George relied on the decision of this Court in ***Rabindra Tiwary v. Lt. Governor, Govt. of NCT of Delhi***[18] and had referred to the observations of this Court in paragraph no. 18 of the said decision to the effect that the petitioner cannot be permitted to challenge the impugned notice dated 13.10.2022 after being unsuccessful in being selected. The reference to the impugned notice dated 13.10.2022 in paragraph no. 18 of the said judgment is an apparent error. The opening

sentence of paragraph 18 of the said judgment clearly indicates that it is so. This Court had observed that "*the petitioner had participated in the selection process pursuant to the impugned notification without any reservation as to the allocation of vacancies….*". These observations in effect were to repel the challenge to the impugned advertisement dated 24.02.2022 which specified the vacancies and their allocation amongst general and reserved categories. However, the date of the impugned notice in the judgment is incorrectly mentioned as 13.10.2022. It is relevant to mention that the decision in ***Rabindra Tiwary v. Lt. Governor, Govt. of NCT of Delhi***[18], was rendered following the decision of the Supreme Court in the case of ***Ramesh Chandra Shah & Ors. v. Anil Joshi & Ors.***[24]. In that case, the Supreme Court held that the candidates who had participated in the selection process and were unsuccessful were precluded from challenging the selection process as they were *"deemed to have waived their right to challenge the advertisement and the procedure of selection"*. This principle would have no application where the procedure under challenge was evolved or tweaked after the candidates had participated in the selection process. Their participation in the examination cannot be considered as a waiver of their right to challenge the alteration in the procedure that was occasioned after they had participated in the evaluation process. In the present case, the decision to award the additional marks was taken after the aspirants had taken the DHJS Mains (Written) Examination.

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[24] ***Ramesh Chandra Shah & Ors. v. Anil Joshi & Ors. : (2013) 11 SCC 309*** decided on 03.04.2013

77. It is also important to note that the results of the DHJS Mains (Written) Examination pertaining to the candidates that had qualified in the said examination were not to be disclosed till the candidates had been evaluated by the *viva voce*. The consolidated results would determine the order of merit. The purpose of withholding the disclosure of their results was to ensure fair *viva voce* evaluation. It was perceived that the disclosure of the results may influence the *viva voce* marking of the candidates.

78. In ***Ashok Kumar Yadav & Ors. v. State of Haryana & Ors.***[25], the marks obtained by the candidates in the written examination were not disclosed to the members of the Haryana Public Service Commission who had conducted the *viva voce* examination. The Supreme Court observed that "*If the members, who interviewed the candidates, did not know what were the marks obtained by the candidates at the written examination, it is difficult to see how they could have manipulated the marks at the viva voce examination with a view to pushing up the three candidates related to ..... or any other candidates of their choice so as to bring them within the range of selection.*".

79. In ***Pranav Verma & Ors. v. Registrar General of the High Court of Punjab & Haryana at Chandigarh & Anr.***[16], the Supreme Court referred to the aforesaid decision in ***Ashok Kumar Yadav's*** case[25]. The Supreme Court rejected the plea that the marks of the main examination should be disclosed before conducting the *viva voce*. The Supreme

[25] ***Ashok Kumar Yadav & Ors. v. State of Haryana & Ors.: (1985) 4 SCC 417*** decided on 10.05.1985

Court observed that such a practice would invite criticism of likelihood of bias or favoritism. The relevant observations of the Supreme Court are reproduced below:

> "28. As regards the petitioners' plea that marks of the Main Exam should be disclosed before conducting viva-voce, we are of the considered opinion that such a practice may not insulate the desired transparency, rather will invite criticism of likelihood of bias or favouritism. The broad principles to be laid down in this regard must be viewed keeping in view the selections for various categories of posts by different Selecting Authorities, for such a self-evolved criteria cannot be restricted to Judicial Services only. If the Members of the Interviewing Boards are already aware of the marks of a candidate secured in the Written Examination, they can individually or jointly tilt the final result in favour or against such candidate. The suggested recourse, thus, is likely to form bias affecting the impartial evaluation of a candidate in viva-voce. The acceptance of the plea of the petitioners in this regard will also run contrary to the authoritative pronouncement of this Court in *Ashok Kumar Yadav and Others v. State of Haryana*. As the written examination assesses knowledge and intellectual abilities of a candidate, the interview is aimed at assessing their overall intellectual and personal qualities which are imperative to hold a judicial post. Any measure which fosters bias in the minds of the interviewers, therefore, must be done away with."

80. In the present case, the DHC had adopted the procedure of not disclosing the marks obtained by the qualifying candidates in their written examination prior to the *viva voce*. But this rule, was also compromised in respect of candidates who were admitted to the *viva voce* by virtue of additional marks awarded in terms of the impugned notice.

81. In view of the above, the impugned notice issued by the DHC awarding additional marks to the candidates who had appeared in Law-

III paper and General Knowledge & Language paper in the DHJS Mains (Written) Examination is set aside.

Challenge to the appointment of Respondent no. 5

82. The petitioners challenge to the selection of respondent no.5 is premised on the basis that he is ineligible to apply for appointment to the DHJS pursuant to the notice dated 23.02.2022 as he did not qualify the criteria laid down by Rule 9(2) of the DHJS Rules. It is also contended on behalf of the petitioner that respondent no.5's selection falls foul of Article 233(2) of the Constitution of India, which stipulates that *"a person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment"*.

83. Rule 9 of the DHJS Rules provides for the qualification for direct recruits. In terms of Sub-rule (2) such person *"must have been continuously practicing as an advocate for not less than seven years as on the date of receipt of applications."*

84. Respondent no.5 was engaged by the Department of Legal Affairs during the period 06.03.2017 to 12.09.2017 at a consolidated fee of ₹60,000/- per month. According to the petitioner, the said engagement constitutes full time employment and thus, rendered respondent no.5 ineligible to be enrolled as an Advocate under Rule 49 of the Bar Council of India Rules and Rule 103 of the Rules of the Bar Council of Delhi.

85. Rule 49 of the Bar Council of India Rules as it existed prior to 22.06.2001 reads as under:

> "49. An advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment.
>
> Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full time salaried employee.
>
> "Law Officer" for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer."

86. By a resolution dated 22.06.2001, the Bar Council of India deleted the second and third paragraphs of Rule 49 of the Rules of the Bar Council of Delhi.

87. Rule 103 of the Rules of the Bar Council of Delhi is set out below:

> "103. A person who is otherwise qualified to be admitted as an Advocate but is either in full or part-time service or employment or is engaged in any trade, business or profession shall not be admitted as an Advocate.
>
> Provided however that this rule shall not apply to:
>
> (i) Any person who is an Articled Clerk of an Attorney;
>
> (ii) Any person who is an assistant to an Advocate or to an Attorney who is an Advocate;
>
> (iii) Any person who is in part-time service as a Professor, Lecturer or Teacher-in-Law;

(iv) Any person who by virtue of being a member of a Hindu joint family has an interest in a joint Hindu family business, provided he does not take part in the management thereof, and

(v) Any other person or class of persons as the Bar Council may from time to time exempt.

(vi) Any person who has held office as a Judge of any High Court in India may on retirement be admitted as an advocate on the roll of any State Bar Council where he is eligible to practice.

(vii) Any person who is a Law Officer of the Central Government or the Government of a State or of any public Corporation or body constituted by statue.

For the purpose of this Clause a "Law Officer" shall mean a person who is so designated by The terms of his appointment and who by the said terms is required to act and or plead in Court on behalf of his employer."

88. Respondent no.5 was enrolled as an advocate with the Bar Council of Delhi on 12.07.2010, and claims that he has been in continuous practice as an advocate since the date of his enrollment.

89. The principal question to be addressed is whether respondent no.5 had ceased to be eligible to be enrolled as an advocate on account of being engaged by the Department of Legal Affairs for a period of little over six months (06.03.2017 to 12.09.2017), within the period of seven years preceding the last date of submission of application for the DHJS Examination, 2022.

90. On 03.12.2016, the Department of Legal Affairs issued a circular for engagement of legal consultants in the Department of Legal Affairs on a contractual basis. The terms of engagement provided that the selected candidates were to be remunerated by payment of consolidated fee of ₹60,000/- per month. The circular expressly stated that the

candidate would not be entitled to the benefits like provident fund, pension, gratuity, transport allowance and any other benefits available to government servants who had been appointed in the government. It was also expressly stipulated that the candidate shall not have "*any claim to the post under the government on the basis of this engagement…*"

91. Undisputedly, the retainer paid by the Department of Legal was accounted for as expenditure for "professional services".

92. The nature of work required to be performed by respondent no.5 was described in the circular as under:

> "5. **Nature of duties:**
>
> (i) To give advice on all matters referred by the various Ministries / Department of the Government of India;
>
> (ii) To look after Government litigation work;
>
> (iii) To conduct court cases and to appear in courts on behalf of the Central Government, wherever required;
>
> (iv) To perform administrative and other works as may be assigned."

93. Respondent no.5 filed an affidavit affirming that during his engagement with the Department of Legal Affairs, he looked after government litigation works in various matters, drafted and assisted in drafting pleadings to be filed before the courts on behalf of the Central Government. He also advised the ministries and departments of the Central Government on various issues.

94. Respondent no.5 also filed an additional affidavit setting out the legal cases in which he, along with the officers had briefed the counsel

appearing in those matters. Respondent no.5 has also provided material (orders passed by courts) to establish that he was actively participating in court proceedings since his enrolment as an advocate. However, it is conceded that his appearance is not marked in any matter for the Government of India during the period he was engaged with the Department of Legal Affairs.

95. The concerned committee of the DHC had examined the petitioner's challenge and had found that respondent no.5's engagement, for a short period of over six months with the Department of Legal Affairs, could not be construed as a full time employment with the Government of India.

96. It is important to note that respondent no.5 was not a salaried employee of the Department of Legal Affairs and he was engaged only on payment of professional fees. Income tax was deducted at source on the fees paid to respondent no.5 at the rates as applicable in respect of payment/credit of professional fees. The nature of services to be performed by respondent no.5 also clearly qualify as practice of law. His services entailed conducting cases and appearing in court on behalf of the Central Government whenever required.

97. The fact that respondent no.5 may not have represented the Government in court proceedings during the short period when he was engaged by the Department of Legal Affairs would not alter the nature of services that he was required to perform.

98. In terms of Rule 49 of the Bar Council of India Rules, *"an advocate shall not be a full time salaried employee of any person,*

government, firm, corporation or concern, so long he continues to practice". We are unable to accept that the engagement of respondent no.5 with the Department of Legal Affairs can be construed as respondent no.5 being "a full time salaried employee". As stated above, respondent no.5 was not paid any salary by the Government of India.

99. In ***Deepak Aggarwal v. Keshav Kaushik & Ors.***[13] the principal question that fell for consideration of the Supreme Court was articulated as under:

> "Whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/Assistant Advocate General, who is a full time employee of the Government and governed and regulated by the statutory rules of the State and is appointed by direct recruitment through the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution?"

100. The Supreme Court held that although the Public Prosecutors and Assistant Public Prosecutors are in full time employment of Government of India, they did not fall foul of Rule 49 of the Bar Council of India Rules as what was relevant was the functions performed by said Law Officers. The Supreme Court observed that "*if a person has been engaged to act and / or plead in the court of law as an advocate although by way of an employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 of the Bar Council of India Rules as he continues to practice law*". However, the Supreme Court also observed that if the employee "*if he is employed to mainly act and/or plead in a court of law but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate*"

101. The functionality test as explained by the Supreme Court essentially requires the determination whether a person is engaged to provide services as an advocate or as an employee.

102. Respondent no.5 had also drawn the attention of this Court to the Scheme for engaging Law Clerk-cum-Research Associate on short term contractual assignments in the Supreme Court. The said Scheme also expressly provided that "*The current Scheme does not bar any Law Clerk to get enrolled as an Advocate during their assignment in the Supreme Court.*". *Senso Stricto*, a Law Clerk does not act or plead in the court. However, the work of a Law Clerk or Law Researcher is so intrinsically connected with the court, that an Advocate's full time engagement as a Law Clerk-cum-Research Associate does not disentitle him for being enrolled as an Advocate. The functionality test must be construed in a meaningful manner. Purposive interpretation of Rule 49 of the Bar Council of India Rule and Rule 103 of the Rules of the Bar Council of Delhi, requires that the said rules be construed bearing in mind their object. Clearly, the object of Rule 49 of the Bar Council of India Rule is to ensure that an Advocate is a professional, whose independence is not compromised by an employee-employer relationship and he is engaged in the practice of law. We are of the view that this test would be fully satisfied in the case of respondent no.5.

103. In the present case, the engagement of respondent no.5 with the Department of Legal Affairs requires him "*to conduct court cases and to appear in courts on behalf of the Central Government, wherever*

required". The petitioner was actively engaged in court matters and had briefed arguing counsels that had appeared in those cases.

104. In ***Jalpa Pradeepbhai Desai v. Bar Council of India & Ors.***[11], the Division Bench of the Gujarat High Court had considered a case where the appellant was selected by the Gujarat Industrial Development Corporation to be appointed as a Legal Consultant (Legal Expert) on contractual basis while she was completing the last year of five year L.L.B. Course from Maharaja Sayaji Rao University, Vadodara. It was her contention that she was entitled to enroll as an Advocate and the bar of Rule 49 of the Bar Council of India Rule did not apply. However, the Gujarat High Court did not accept the said contention. In that case, the appellant was employed as an expert and not to carry on the functions as an Advocate. Clearly, the said decision is inapplicable in the facts of the present case.

105. In the case of ***Ashish Rastogi v. Hon'ble High Court of Delhi and Anr.***[8], the petitioner was holding the post of Senior Manager (Law), Law Department, Steel Authority of India Limited. The functions of the petitioner also included representing SAIL in legal proceedings before courts and other forums. A Co-ordinate Bench of this Court had considered the functions performed by the said petitioner and had concluded as under:

> "26.From perusal of the above-mentioned duties, it is evident that the predominant function of a Law Officer of SAIL is to act and/or plead and perform functions which any other advocate would perform in relation to court cases including drafting of contracts and pleadings, filing of cases/pleadings and monitoring their progress, attending conferences with lawyers including Senior Advocates, rendering legal opinions etc. In effect his duties and

> functions with SAIL, encompassed all that a lawyer would do in his normal course of practice of law. The list of his appearances before various courts, Tribunals, etc. show that he has been in continuous practice for the past 7 years. He thus meets the requirement of Rule 9(2) of the DHJS Rules, 1970. Therefore, the contention of R-1 is untenable and is accordingly rejected."

106. The Supreme Court had upheld the said decision by an order dated 17.05.2023. The relevant extract of the said decision is set out below:

> "…. We have however perused the documents relied on by the respondent No. 1 to show that he satisfies the eligibility criteria to enter into judicial service. It is also noticed that respondent No. 1, as a law officer for the Steel Authority of India Limited (SAIL), has discharged various responsibilities including those functions as are needed to be discharged by any other young lawyer, such as appearing in Court, drafting of pleadings and contracts, filing of cases as well as attending conferences with senior counsel rendering legal opinion etc.
>
> It is further noticed from para 26 of the impugned judgment that the Court has reached the rightful conclusion to the effect that the respondent satisfies the requirement of the Delhi Higher Judicial Service Rules, 1970."

107. The functions performed by respondent no.5 are no different than the work done by young advocates. They are required to draft pleadings, research law, brief senior advocates and also render advice on legal matters. Respondent no.5 was also engaged to do similar works.

108. In view of the above, we are unable to accept that the decision of the concerned Committee of the DHC to accept that respondent no.5 had satisfied the criteria of Rule 9(2) of the DHJS Rules, requires any interference. We find no flaw with the said decision.

109. In view of the above, the petitioner's challenge to the appointment of respondent no.5 to the DHJS is rejected.

110. In view of our conclusions that the award of additional marks in Law-III paper and in the General Knowledge and Language paper of the DHJS Mains (Written) Examination is unsustainable. The impugned notice dated 13.10.2022 is set aside. Consequently, the DHC is directed to redraw the select list of candidates and take consequential steps.

111. The petition is partly allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 12, 2023
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