

Shaber Ayaz and Others Vs. State and Others

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Court : Jammu and Kashmir

Decided On : Aug-13-2015

Judge : Mohammad Yaqoob Mir

Appeal No. : SWP Nos. 1344, 1361, 1407, 1491 & 1598 of 2015

Appellant : Shaber Ayaz and Others

Respondent : State and Others

Judgement :

(This Judgment Delivered at Srinagar Bench)

1) Initially vide advertisement notice dated 29.12.2012, applications were invited for filling up 49 posts of Prosecuting Officers (for short Pos). Later on vide addendum dated 13.08.2013 to the said advertisement notice, the number of posts to be filled up was notified as 98 with following break-up

OM	RBA	ST	SC	ALC	Social Caste	Total
56	19	10	08	03	03	98

2) The issues raised in SWP No.1344/2015 and in the connected petitions are identical, therefore, determination of issues in SWP No.1344/2015 will govern other petitions as well.

3) The process of selection as was set in motion is divided into four stages, Viz.:

i) physical test;

ii) written test of the eligible candidates as per syllabus;

iii) interview of the candidates on making the grade in the written test; and

iv) final selection.

4) The second stage i.e. written examination process is mainly under challenge on the count that:

1. Most of the questions as appeared in the question paper were out of syllabus;

2. Syllabus as was notified was not strictly adhered to;

3. Marks allocation to the questions as formulated in the question paper was irrational.

5) During the course of arguments, learned Advocate General has produced copy of the booklet (question paper) as was set for written test for the POs, copy whereof was also provided to the learned counsel for the petitioners so as to ascertain and analyze which questions were out of syllabus, which questions were wrongly framed and how allocation of marks was irrational.

6) For appreciating the rival submissions and contentions, it shall be quite appropriate to notice the syllabus prescribed in the notification for written examination as follows:

1) Constitution of Jammu and Kashmir.

2) Below given Major Acts in whole with amendments till date:

* Ranbir Penal Code, Svt. 1989.

* Code of Criminal Procedure, Svt. 1989.

* Evidence Act, Svt. 1977

3) Below given Minor Acts and Local and Special Laws, in whole, with latest Amendments, till date.

I) MINOR ACTS.

S. No.	ACTS
1.	Armed Forces Special Powers Act, 1990
2.	Arms Act, 1959.
3.	Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production Supply and Distribution) Act, 2003.
4.	Essential Commodities Act, 1955 (ECA).
5.	Explosive Substances Act, 1908.
6.	Explosives Act, 1884.
7.	Foreigners Act, 1946.
8.	Immoral Traffic (Prevention) Act, 1956.
9.	Motor Vehicles Act, 1988.
10.	Narcotic Drugs and Psychotropic Substances Act, 1985.
11.	Passport Act, 1967.
12.	Passport Entry Into India Act, 1920.
13.	Prevention of Food Adulteration act, 1954.
14.	Prevention of Money Laundering Act, 2002.
15.	Army Act.
16.	Drug Control Act, 1950.
17.	Extradition Act, 1962.
18.	Information Technology Act, 2000.

19.	Police Forces (Restrict of Rights) Act, 1966.
20.	Railways Act, 1989.
21.	Whistle Blowers Protection Act, 2011.
22.	The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
23.	Disaster Management Act, 2005
II) LOCAL AND SPECIAL LAWS:	
S. No.	ACT
1.	Cinematograph Act, 1989.
2.	Contempt of Courts, 1997.
3.	Egress and Internal Movement Control Ordinance, 2005 (EIMCO).
4.	Enemy Agents Ordinance, 2005.
5.	Excise Act, 1958.
6.	Forest Act, 1987.
7.	Identification of Prisoners Act, 1994.
8.	Official Secrets Act, 1977.
9.	Police Act, 1983 (1927 A. D.) and Police rules, 1927 AD Vol. i to iv.
10.	Prevention and Suppression of Sabotages Act, 1965.
11.	Prevention of Beggary act, 1960.
12.	Prevention of Corruption Act, 2006.
13.	Prevention of Cruelty to Animals Act, 1990.
14.	Public Gambling Act, 1977.
15.	Public Property (Prevention of Damage) Act, 1956

16.	Unlawful Activities (Prevention) Act, 1967.
17.	Public Safety Act, 1978.
18.	Habitual Offenders (Control and Reforms) Act, 1956.
19.	Instruments (Control and Noises) Act, 1959.
20.	Juvenile Justice Act, 1997.
21.	Medical Termination of Pregnancy Act, 1974.
22.	Police Enhanced Penalties Ordinance, 2005.
23.	Prevention of Black Marketing and maintenance of Essential Commodities Act, 1988.
24.	Prevention of Insult to State Honour Act, 1979.
25.	Prevention of Unfair Means Examination Act, 1987.
26.	Protection of Human Rights Act, 1997.
27.	Protection of Women from Domestic Violence Act, 2010.
28.	Suppression of Indecent Advertisements Act, 2003.
29.	Jammu and Kashmir Right to Information Act, 2009.
30.	Transplantation of Human Organs Act, 1997.

31.	The Jammu and Kashmir State Lands (Vesting of Ownership to the Occupants) Act, 2001.
32.	Prevention of Defacement of Property Act, 1985.
33.	Stamp Act, Svt. 1977.
34.	Registration Act, Svt. 1977.
35.	Govt. Servants (Held in Detention Act), 1956.
36.	The Jammu and Kashmir State Vigilance Commission Act, 2011.
37.	Environment (Protection) Act, 1986.
38.	Air (Prevention and Control of Pollution) Act, 1981.
39.	Representation of The People Act, 1957.

III) Brainmapping/Narco-Analysis Tests vis- -vis the Evidence Act and Judgments , thereupon;

IV) Concept of trial through Video Conferencing;

V) Law Commission latest reports/recommendations;

VI) Police Reforms with Recent judgment and Model Police Act;

VII) Legal jurisprudence and professional ethics;

VIII) Lokpal and Lokayukta;

IX) National Commission for Women and Women Empowerment; T. R. A. I.

X) Place of Worship Bill;

XI) Broadcasting Content Complaints Council;

XII) Supreme Court Guidelines in;

i. Vishaka and others v/s State of Rajasthan and others;

ii. D. K. Basu case.

NOTE:

1. The focus shall be on application of the laws.

2. The candidates are expected to substantiate their submissions with relevant judgments by citing case laws and Obiter Dicta/Ratio Decidendi of such judgments.

3. Relevant issues (especially current affairs) pertaining to laws, their implementation reaction from society, Judiciary, Media and other pressure groups, and critical analysis thereof.

4. Some questions shall be set to test the candidate s knowledge of written/spoken Urdu language, with focus on legal terminology.

7) After written examination was conducted, the Board of Officers constituted vide PHQ order No.1078 of 2015 dated 18.04.2015 has recorded the proceedings which reveal that the Board comprised of following officers:

S. No.	Name of the officer	Designation
1.	Sh. L. Mohanti-IPS, Addl. DGP, PHQ	Chairman
2.	Sh. Surinder Gupta-IPS, DIG Udhampur-Reasi	Member
3.	Sh. Sikander Mohan Kapoor, JDP ZPHQ Jammu.	Member
4.	Sh. Gowher Hussain Mir, JDP PHQ JandK	Member
5.	Sh. Ranjit Kanwar, SSP Principal PTTI Vijaypur	Member

6.	Sh. Mubashir Latifi, SSP Member Crime Branch Jammu.	Member
7.	Mrs. Rashmi Wazir, SSP Commandant IR- 4th Bn.	Member
8.	Sh. Zubair Ahmad Khan, SSP Commandant JKAP-9th Bn.	Member
9.	Sh. Gh. Jeelani Dar, CPO SHRC Srinagar	Member
10.	Sh. Rajesh Bakshi, CPO Crime Branch Jammu	Member

8) The Board of Officers had undertaken the process of evaluation of answer scripts of the candidates who had appeared in the examination for the posts of Pos. The said officers have recorded as to from 1734 candidates who had qualified the physical test, how many candidates appeared for written test. Then it has been recorded as to how the papers were evaluated. It is also recorded therein that during the course of scrutiny of Section I of the question paper (multiple choice question) a key was prepared by the Board Members under the supervision of Chairman. During scrutiny, clerical mistakes were detected in five questions i.e. question No.8, 26, 28, 35 and 39 of series A and these questions posted in respective series i.e. B, C and D. Then it is further recorded that vis- -vis essay type question, the candidates have been assessed on the basis of their proficiency in English writing, general awareness, knowledge of law and latest case laws. General essay type question of 25 marks was got evaluated only by the field Police officers whereas Section III i.e. writing of short notes on know-how of law subjects was got evaluated by the officers of the Prosecuting Cadre nominated in the Board. It is based on proper assessment and evaluation marks have been awarded, based on which list of candidates who have made the grade for being called for interview have been called and admitted to interview.

9) Learned counsel for the petitioners along with some of the petitioners while referring to Section I of the question booklet firstly pointed out that question No.4 is

wrongly formulated. Question No.4 as formulated reads as under:

Q. No.4. No Magistrate shall authenticate the detention of an accused person in custody for a total period exceeding 90 days, if the investigation is not completed in relation to an offence punishable:

- a) With death
- b) With life imprisonment
- c) With imprisonment for a term of not less than 10 years.
- d) All the above.

Learned counsel for the petitioners would submit that 90 days has been wrongly recorded, it should have been 60 days but this contention is repelled by the counsel for the respondents by inviting attention of this Court to Section 20 of the Jammu and Kashmir Criminal Laws(Amendment) Act, 2013, in terms whereof Section 167 of the Code of Criminal Procedure has been amended providing that in case of offences punishable under sections 326A, 326B, 376, 376A,376C, 376D and Section 376E, the period of fifteen days and sixty days be read as thirty days and ninety days respectively which would mean that the Power of the Magistrate under Section 167 Cr. P. C to authorize detention up to 90 days is permissible relatable to the punishments prescribed, for above referred offences.

10) Regarding question No.8, clear stand of the respondents is that one marks for this question has been awarded to all candidates.

11) Question Nos.10 to 13, according to learned counsel for the petitioners, pertains to the Constitution of India which was not in the syllabus. This contention too is repelled by learned counsel for the respondents by referring to the note as appended to Annexure-A of the advertisement notice prescribing syllabus, wherein note 3 reads as under: The relevant issues(especially current affairs) pertaining to laws, their implementation....reaction from society, Judiciary, Media and other pressure groups, and critical analyses thereof.

In addition thereto, it is also highlighted that the preamble of the Constitution of India is also referred to in various minors act as are included in the syllabus notified. Then the nature of questions is such which even otherwise fall within the ambit of current affairs pertaining to laws and their implementation.

12) Next learned counsel for the petitioners referred to question No. 23 which pertains to offence under Section 376-C RPC. According to learned counsel all the four answers were not correct but same is repelled by learned counsel for respondents by stating that answer (a) i.e. sexual intercourse committed by a person in authority was the right answer. In this connection, learned counsel referred to Section 12 of the Jammu and Kashmir Criminal Laws (Amendment) Act, 2013. Section 376-C begins with the heading sexual intercourse by a person in Authority .

13) Next learned counsel referred to question No.26 as according to him none of the answers was correct because an Executive Magistrate can order a person who is likely to commit breach of peace to execute a bond under Section 112 Cr. P. C. The question No.26 reads as under:

An Executive Magistrate can order a person who is likely to commit breach of peace to execute a bond under - Cr PC.

a) Sec 107

b) Sec 109

c) Sec 109

d) Sec 151.

The Board which has been constituted for evaluation of answer scripts has clearly indicated in the decision that answer to the question i.e. option (a) was the appropriate answer, whosoever has ticked marked the same, has been awarded one mark. It being so, contention is correctly repelled.

14) Learned counsel next referred to question No.2, which reads as under:

The provision of hostile witness is provided under - of Evidence Act:-

- a) Sec 155
- b) Sec 133
- c) Sec 154
- d) Sec 154.

According to him from amongst the options, option (c) and (d) were the correct answering. The Board who had scrutinized the papers have taken a conscious decision that whosoever has answered (c) or (d), has been given one mark rightly because Section 154 is the correct answer, therefore, no reason for the candidate/law graduate to get confused.

15) Next learned counsel while highlighting question No.30 would submit that the answers were not correct. Question No.30 reads as under:

In case of death of a complainant while trial is pending:

- a) Trial ceases automatically,
- b) Trial does not cease automatically,
- c) Trial is left to the discretion of Judge,
- d) Trial is left to the discretion of family members of complainant.

The contention is rightly repelled by the counsel for respondents by stating that out of four options, option (b) was the correct answer.

16) Next learned counsel for the petitioners referred to question No.31. Two answers i.e. (b) and (c) from amongst four answers were correct but the position has been dealt with i.e. whosoever has answered (b) or (c) has been considered for award of marks.

17) Learned counsel next referred to formulation of question No.36 i.e. who can take the plea of ignorance of Indian Law . The answer to this question lies in four options as given, therefore, no issue.

18) Learned counsel next referred to question No.38 which reads as under:

In a civil Suit, the person who files suits and the person against whom the suit is filed are called

- a) Accused, prosecutor
- b) Accuser, defendant
- c) Appellant, respondent
- d) Plaintiff, defendant.

Learned counsel would submit that CPC was not in the syllabus but if a law graduate does not know as to who can be the plaintiff and defendant in a civil suit, that shall be too much for a law graduate because it is a general knowledge question.

19) Then learned counsel referred to question No.39. Same reads as under:

In a criminal case, an accused person, who in consideration of his non-prosecution offers to give evidence against other accused, is called

- a) Accomplice
- b) Hostile witness
- c) Approve
- d) Hostile accomplice.

Due to typographical error in the word Approve R has not been recorded but the Board has examined this issue and have taken a decision that a person who has answered option (c) has been awarded marks. The typographical mistake is not

that which would disable the candidates in answering the question.

20) Next learned counsel referred to question No.40 by highlighting that written statement is a concept under Civil Procedure Code which was not within the syllabus but same contention is repelled by learned counsel for the respondents by stating that written statement can be filed in other cases also and when same is filed after having been voluntarily signed and sworn, can be filed even in other criminal proceedings as well.

21) Next learned counsel referred to question No.42 which reads as under:

Who is the final authority to appoint judges in the District

- a) The Chief Minister
- b) The Governor
- c) The High Court
- d) The Legislative Assembly.

There is no question of any ambiguity. The question has been formulated in a manner so as to test ability of the candidates, same cannot be said to be out of syllabus or incorrectly framed.

22) Next learned counsel while referring to question No.44 and 45 claimed that these were out of syllabus. Question No.44 and 45 are reproduced here-under:

Q. No.44. When a bill becomes an Act:

- a) When it is passed by both the Houses and assented to by the President;
- b) When the Prime Minister assent to it;
- c) When the Law Minister approves it;
- d) When it is passed by both the Houses

Q. No.45. Rajya Sabha is also known as:

- a) Lower House;
- b) Upper House;
- c) Council Representatives;
- d) None of these.

The contention is rightly repelled by the learned counsel for respondents by stating that these question fall within the ambit of note 3 of the syllabus.

23) Next it has been contended by some of the candidates that in Section-II of the question paper, 25 marks have been awarded for Essay but there is nothing wrong in it and the essay has been asked to be written on issues which fall within the ambit of syllabus. Same is the position about Section-III for which 10 marks have been earmarked. The petitioners cannot claim that the marks earmarked for Section-II and Section-III have been earmarked so as to leave scope for medaling with the merit, unless otherwise proved or established.

24) Whether answers have been correctly or improperly evaluated is not known at this stage, further neither mala fides have been attributed nor it is anywhere highlighted that any candidate has been favoured. Unless there are specific charges, such position cannot be looked into.

25) Apart from afore-stated position, an interim relief has been granted in two petitions that the petitioners in those petitions shall be admitted to interview, however, their result has been directed to be produced in a sealed cover whereas in another petition direction has been issued that the process of selection shall not be finalized until further orders from this court.

26) Judgment relied upon by the petitioners in support of their contentions rendered by the High Court of Orissa in WP(C) Nos.10842 and 13086 of 2015 decided on 28.07.2015 is of no help to the petitioners as the said judgment has its own peculiar facts and features i.e. in the said judgment it has been stated that 24 questions out of 100 as set by Odisha Public Service Commission were wrong. Later on an Expert Committee had been constituted by the OPSC. The said

Committee noticing typographical errors as well as ambiguity in questions had concluded that 76 questions were in order, therefore, on the basis of that Expert Committee report, Commission had taken a decision that the performance of the candidates on 76 questions would reflect their true merit, as such, it was decided that 76 questions would be evaluated and the marks secured by the candidates will be pro-rated to arrive at the total marks to be awarded out of 100 marks to the candidates. In the said background, the preliminary written examination of Odisha Judicial Service, 2015 for recruitment to the post of Civil Judges under the Odisha Judicial Service was set aside and fresh preliminary written examination was directed to be conducted.

27) Reverting back to the case in hand, the circumstances are not similar as noticed in detail hereinabove. The position in the context of the objections raised vis- -vis questions being out of syllabus, wrong options of answers and wrong formulation of questions, stands threadbare discussed and clarified. Furthermore, the High Level Committee as was constituted by the respondent-authority has clarified the matter, therefore, the judgment of Orissa High Court, as relied upon by the petitioners does not cover the case of the petitioners in view of having its own facts and circumstances.

28) Keeping in view the afore-stated facts and circumstances, it would not be appropriate at this stage to interfere with the process of selection as is in progress nor there is any ground available at this stage for so doing. However, the petitioners who have failed to make the grade are at liberty to re-agitate if any ill treatment, mala fides or any favouritism shall be discernible or any other valid ground shall be or will become available on completion of selection process. In that eventuality, the final selection/appointment shall be open to question on any such or other grounds as may become available.

29) Viewed thus, all the petitions in the aforesaid backdrop shall, accordingly, stand disposed of.

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