

(1989) 10 GUJ CK 0004
In the Gujarat High Court

Bharatsing Nathusing Rathod and Others	APPELLANT
Vs	
Director General of Police, Gujarat State and Others	RESPONDENT

Date of Decision : 27-10-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 16, 16, 309

Citation : (1990) 2 GLR 830

Hon'ble Judges : R.J. Shah, J

Bench : Single Bench

Judgement

R.J. Shah, J.—In all the above petitions, common questions arise. The petitions are, therefore, being disposed of by this common judgment.

2. The facts leading to the present group of petitions, broadly speaking, are as under:

The petitioners are Unarmed Head Constables. The next promotional post in the case of the petitioners is that of Sub-Inspector of Police. Instruction 61(1) contained in the Gujarat Police Manual, 1975, Vol. I, Administration (First Edition), it is provided "inter alia" as under:

61. Unarmed Police Sub-Inspectors:

(1) Sub-Inspectors are recruited direct by competitive examination and by promotion of Officers from the lower ranks. 50 per cent of the appointments on the sanctioned cadre of Sub-Inspectors are filled by direct recruitment. Half of the remaining 50 per cent posts are filled by promotion of Officers from the lower ranks and the other half by promotion of Head Constables on passing the Sub-Inspector" course at the Police Training School.

Instruction 165(1)(a) provides as under:

Departmental examination qualifying for promotion to Sub-Inspectors:

(a) The Departmental examination for promotion of Head Constables to the rank

of Sub-Inspectors will be held in the month of May each year at District head-quarters on the dates fixed by the Inspector General of Police. The written and oral tests will be from parts of the same examination and only one result sheet will be issued....

Instruction 165(2) provides as under:

165(2). Practical test:

(a) Those candidates who have obtained passing marks and above in written test alone will be called for an interview and assessment of record before the Examination Board shown in Rule 165(1)(b).

(b) Method of holding the test. This test will be in respect of those who have passed in written test. The Inspector General of Police will fix up the dates for holding the practical test after the written test is over. The candidates will be tested by the Examination Board at a suitable place or places selected by the Inspector General of Police. The subject for the practical test will carry the following marks:

(i) Interview 50 marks

(ii) Assessment of service records 100 marks

(c) Interview : Interview is meant to test personality and alertness.

(d) Assessment of service record : The allocation of 100 marks prescribed for "Assessment of service record" will be as under:

Maximam	No.	of	Remarks	marks	to	be	Item
							given
							1.
							Rewards 30
							In this connection the total length of service should be taken into consideration.
							2. Remarks 50
							Similarly, the nature of work for which the rewards or remarks are obtained should also be considered e.g. rewards for doing good investigation or for any specific good action would indicate aptitude and capacity to become a good Officer.
							3. Punishments 20
							Full marks may be given to Head Constables for having no punishments at all provided other remarks are good. For every warning. 1 mark should be deducted, for every reprimand 1 1/2 marks, for extra duty or for every other minor punishment 2 marks and for every major punishment 4 marks should be deducted.

(e) To qualify for the examination, a candidate shall secure 50 per cent of the aggregate on the items. Ordinarily, no Head Constable will be allowed to appear more than three times for the test.

(f) After the test is over, the results of the Examination will be declared and shall be communicated to all concerned.

(g) Name of candidates who have passed this examination will be kept on the

select list and will be appointed as Sub-Inspectors vide Rule 61.

(h) The examination is only qualifying and candidates passing it will acquire no claim to promotion.

3. It appears that as per Correction Slip No. 35, Rule 165(2)(b) (i)(ii)(c) and (d) have been introduced, providing as under:

The existing Rule be deleted and replaced by the following 165(2)(b)(c). The practical test will consist only of oral interview, consideration of rewards and punishments. The concerned UHC's service record will be taken into consideration at the time of holding oral interview. The marks will be given as under:

1. Oral interview : 100 marks

The question of professional importance will be put to the candidates by the members of the Examination Board and marks will be given on the basis of the candidate's general and professional knowledge, alertness, smartness, personality, etc. Each candidate will be subjected to the oral interview for sufficient time as for the Board to come to a conclusion about the fitness of the candidate for promotion.

2. Consideration of rewards : 30 marks

Full 30 marks may be given to UHC who is awarded "Police Medal". One mark for every reward of GST and two marks for every rewards of "GST+Cash Reward" may be given to UHC concerned.

3. Punishment : 20 marks

Full 20 marks may be given to Head Constables for having no punishment at all provided other remarks are good. For every warning, 1 mark should be deducted. For every reprimand 1 1/2 marks for extra duty or for every other minor punishment 2 marks and for every major punishment 4 marks should be deducted.

4. The petitioners allege that there was no departmental examination held in 1982 and it was in 1983 that the examinations of both the years 1982 and 1983 were held. The written test was held on 15-12-1983 and 16-12-1983. All the petitioners had appeared for the written test. The results of the written test were announced in January 1984. Out of the 600 candidates, who appeared in the written test, only 192 Head Constable candidates were declared to have passed the same and the petitioners were among those 192, who had passed the written test. The petitioners say that the oral test, termed as "Practical Test" was held during the period from 1-2-1985 and 8-2-1985. The petitioners further state that a list of successful candidates, who passed the practical test, was declared on 11-3-1985. Out of the aforesaid 192 candidates, 64 candidates were declared to have passed and orders were issued directing those 64 candidates to report for training at Junagadh on 18-3-1985. The petitioners were not included in the

aforesaid 64 candidates. The petitioners have, therefore, raised constitutional and other challenges, as stated in the petition.

5. The petitioners in Special Civil Application No. 5312 of 1985 had originally prayed "inter alia" for the following reliefs:

(i) for an appropriate writ, direction or order, quashing and setting aside the result of the examination held on 11-3-1985 insofar as and to the extent it concerns the present petitioners;

(ii) for a direction to the respondents to declare the petitioners as fit for promotion on the basis of their performance in the examination; and

(iii) for a writ of certiorari or any other appropriate writ, declaring the Instructions 165(2)(b) of the Bombay Police Manual, 1975 as violative of Articles 14 and 16 of the Constitution of India;

6. The above Special Civil Application No. 5312 of 1985 and some other petitions were permitted to be amended as per the order dated 22-9-1989 passed in Civil Application No. 1764 of 1989 and similar orders were passed in such other Civil Applications. As a result of the said amendment application having been granted, prayer Clause 18(AA) came to be added in the main petition as under:

18(AA). Your Lordships be pleased to issue a writ of certiorari or any other appropriate writ, direction or order of this Hon'ble Court declaring the Instruction 165(2)(b) of the Bombay Police Manual, 1975 as corrected by the opponents by way of correction slip Rule 165(2)(b)(I)(II)(c) & (d) of the Gujarat Police Manual, Vol. I, 1975, as violative of Articles 14 and 16 of the Constitution of India.

7. All the above petitions are opposed by the respondents.

8. The petitioners challenge the aforesaid provisions regarding practical test, as being arbitrary and irrational because they provided for exclusive reliance on practical test without considering the cumulative performance at written and practical test. The submission in this connection is that there should not be minimum qualifying marks so far as the practical test is concerned and further that the total performance of a candidate in the written as well as practical test should be taken into consideration before declaring him to be successful or otherwise. In support of the aforesaid submission, attention has been invited to the case of State Bank of Travancore v. Saumini 1983 (3) SLR 299. The facts in this case were that original petitioner was stated to be a clerk-typist in the State Bank of Travancore and she had appeared for written test conducted for promotion as officers junior management grade (Groups A & B). She was stated to have come out successful in the written test and she was also called for interview. According to the petitioner, she had done well in that interview also. Moreover, the petitioner was a double graduate and was having a clean record of service with no adverse entry against her in the confidential reports. The writ petition was for the issue of a writ of mandamus directing the respondents Nos. 1 and 3 not to make regular promotions on the basis of Ext. P4, or to issue a writ

of certiorari quashing Ext. P4 select list prepared by the authority as it was patently arbitrary and discriminatory, violative of Articles 14 and 16 of the Constitution of India. Other incidental reliefs sought in the writ petition were to include the petitioner in the select list and for the grant of promotion to her accordingly. It was not in dispute that the said petitioner had fared well in the written test. The only reason for her non-inclusion in the select list for promotion was that she failed to obtain the minimum percentage of marks prescribed at the interview. In the petitioner's case, the deciding factor was evidently the interview which lasted only for a few minutes. The submission was that the same rendered her performance in the written test totally irrelevant.

9. After referring to the decision of the Supreme Court in *Lila Dhar Vs. State of Rajasthan and Others*, the Division Bench of Kerala High Court in the above case has reproduced the following paragraph from the said decision:

Thus, the written examination assesses the man's intellect and the interview test the man himself, and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a College, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life greater weight has per-force to be given to performance in the written examination. The importance to be attached to the interview test must be minimal. That was what was decided by this Court in *Peeriakaruppan v. State of Tamil Nadu* AIR 1971 SC 2203 ; *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and other cases.

In the case before the Kerala Division Bench, learned single Judge had observed in paragraph 16 of the judgment under appeal as follows:

Therefore, I have no doubt in a case where the oral test-the interview plays an overwhelmingly important part the decisive factor as in the case as to disqualify a candidate when he does not get a minimum fixed there, the whole selection would be vitiated. Going by *Lila Dhar's* case too, the marks of both the interview and the written examination should be added together and the persons who top the aggregate total marks should be selected. In a country where sixty per cent of the people are below the poverty line but where the right to equality is made a fundamental right, any method of selection which is likely to favour the elitist class should not be favoured upon. To give the predominant place to the interview oral test is likely to favour candidates belonging to the affluent class. A man of real worth and quality because of the social position in which he and his family may be placed because of the environment in which he was brought up and in which he may still be placed may give a totally wrong impression of oneself. A person coming from the financially well-to-do class who might have had his schooling in a public school of the elitist class, though really not of that standard and of that depth of learning in any subject as the other candidate from

the poorer class, may give the impression of a smart fellow a good first impression. It would be a deceptive impression. This is not an interview by a psychiatrist who could make a judgment of Leadership and initiative even from the first impression. As the Supreme Court itself has recognised as of some weight, an interview examination is a highly subjective and impressionistic test where the result is likely to be influenced by many uncertain and imponderable factors such as the predilections and prejudice of the interview, his attitudes and approaches, his preconceived notions and idiosyncrasies. It is likely to give scope for discrimination and manipulation.

The Division Bench agreed with the aforesaid view of the learned single Judge and dismissed the appeal.

10. The Supreme Court in the case of P.K. Ramachandra Iyer and Ors. v. Union of India and Ors. and some other matters 1983 (3) SCR 495 has again considered the aforesaid aspect. In one of the matters i.e., C.A. No. 1043 of 1981, which the Supreme Court was then considering, the facts were that the appellant Dr. Om Prakash Khanduri had filed Writ Petition No. 553 of 1980 in the High Court of Delhi, alleging that he was selected for the post of Senior Computer with Indian Agricultural Statistics Research Institute, an affiliate of ICAR (Indian Council of Agricultural Research). ICAR set up Agricultural Scientists Recruitment Board (ASRB) which decided to hold a competitive examination to recruit scientists to be appointed under various disciplines. ICAR framed rules setting out the terms and conditions for admission to the competitive examination. Appellant applied for admission to the competitive examination in "Agricultural Statistics" discipline. The written test was held from 1st to 4th February, 1978. The Board incharge of the selection and appointment of the comparative merits as evidenced by the performance in the written examination selected 20 candidates including the appellant as having obtained the prescribed qualifying marks for the purpose of viva voce examination, which was held on April 10th and 11th, 1978. After the viva voce test, 13 candidates were declared as successful and were offered appointment as scientists in the discipline "agricultural statistics". The appellant failed to qualify for the same. According to the appellant, 21 vacancies remained unfilled. Appellant contended that he had secured 364 marks out of 600 in the written examination and 38 marks out of 100 in the viva voce test. It was alleged that the appellant was declared unsuccessful because the Board incharge of the examination had by itself determined without authority that anyone who obtained less than 40 marks at the viva voce examination would not be eligible for selection for the posts. It was, therefore, contended that the action of the Board in fixing minimum qualifying marks in the viva voce examination and basing the final selection on his arbitrarily fixed criterion lacks both the authority of law and rules and that the Board had acted arbitrarily and without the authority of law. Appellant accordingly made representations, but had failed to evoke a sympathetic reply and so the appellant had filed the writ petition in the High Court of Delhi, which was dismissed in limine on the ground that the writ petition against the respondent was not maintainable. Hence there

was the aforesaid before the Supreme Court by way of Special Leave.

11. This aspect of the matters has been considered by the Supreme Court in paragraph 44 of the judgment. After considering the Rule 13 and 14, the Supreme Court has observed as under:

On a combined reading of Rules 13 and 14, two things emerge. It is open to the Board to prescribe minimum marks which the candidates must obtain at the written test before becoming eligible for viva voce test. After the candidate obtains minimum marks or more at the written test and he becomes eligible for being called for viva voce test, he has to appear at the viva voce test. Neither Rule 13 nor Rule 14 nor any other rule enables the ASRB to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. On the contrary, the language of Rule 14 clearly negatives and such power in the ASRB when it provides that after the written test if the candidate has obtained minimum marks, he is eligible for being called for viva voce test and the final merit list would be drawn up according to the aggregate of marks obtained by the candidate in written test plus viva voce examination. The additional qualification which ASRB prescribed by itself, namely, that the candidate must have a further qualification of obtaining minimum marks in the viva voce test does not find place in Rules 13 and 14. It amounts virtually to a modification of the Rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm. It however does not appear in the facts of the case before us that because of an allocation of 100 marks for viva voce test, the result has been unduly affected. We say so for want of adequate material on the record. In this background, we are not inclined to hold that 100 marks for viva voce test was unduly high compared to 600 marks allocated for the written test. But the ASRB in prescribing minimum 40 marks for being qualified for viva voce test contravened Rule 14 inasmuch as there was no such power in the ASRB to prescribe this additional qualification, and this prescription of an impermissible additional qualification has a direct impact on the merit list because the merit list was to be prepared according to the aggregate marks obtained by the candidate at written test plus viva voce test. Once an additional qualification of obtaining minimum marks at the viva voce test is adhered to, a candidate who may figure high-up in the merit list was likely to be rejected on the ground that he has not obtained minimum qualifying marks at viva voce test. To illustrate, a candidate who has obtained 400 marks at the written test and obtained 38 marks at the viva voce test, if considered on the aggregate of marks being 438 was likely to come within the zone of selection, but would be eliminated by the ASRB on the ground that he has not obtained qualifying marks at viva voce test. This was impermissible and contrary to Rules and the merit list prepared in contravention of the Rules cannot be sustained.

The aforesaid decision, therefore, shows that it is permissible and possible to prescribe minimum qualifying marks in the viva voce test and that if the Rules had permitted such prescription, then the reasoning in the said case would have been otherwise. It is because the Supreme Court found that the existing Rules did not permit ASRB to prescribe for itself minimum qualifying marks at the viva voce test, it had concluded as aforesaid. Incidentally, this, decision does not support the submission that the success or failure of a candidate should be considered on the cumulative performance of a candidate in the written test and viva voce test.

12. In the said decision, the Supreme Court ultimately held on the aspect under consideration that it was not possible at that late stage to reject the entire selection on the ground that the ASRB committed a serious legal error in prescribing minimum qualifying marks at the viva voce test and drawing up merit list on the said impermissible method. The Supreme Court also held that it would be equally improper to disturb the selection of those who had been selected and appointed wayback in 1978. The Supreme Court observed that even though it was true that a serious legal error had been committed in drawing up the merit list, it would be unwise at that late stage to reject the entire selection, disturbing those who were already selected and might have put in service of not less than five years. The Supreme Court, however, directed that the merit list should be drawn in respect of those who though called for viva voce did not qualify for being put in the merit list and further that ignoring the concept of minimum qualifying marks, a merit list in respect of them should be drawn up on the basis of aggregate marks. The Supreme Court further directed that if there was a vacancy and if the petitioner came within the zone of selection on the aggregate marks obtained by him, his case should be considered for appointment prospectively and not retrospectively and that was the only relief which the Supreme Court was inclined to grant to the petitioner.

13. It was also pointed out on behalf of the petitioners, on the basis of the observations made in *Subhash Chancier v. State of Haryana and Ors.* 1984 (1) SLR 165 by Division Bench of Punjab and Haryana High Court, that no doubt there could be a composite examination comprised of a written test and the viva voce, but both because of the objectivity and certainty of the written examination as also because of the fact that it carried as many as 700 marks against the 200 allotted to the viva voce test, the written test was clearly entitled to pre-eminence and the viva voce was supplementary thereto. It was also pointed out that the said Division Bench had further observed that it would follow from the aforesaid that any procedure which reverses this basic premises and reduces the written test to a virtual farce would be both against the letter and the spirit of the rules. Such a view, however, has not been endorsed by the Supreme Court as stated hereinabove.

14. In the case of *State of U.P. Vs. Rafiquddin and Others*, the facts were that some of U. P. Civil Service (Judicial Branch) Rules, 1951 were being considered.

Considering the Scheme underlying Rule 19 and the proviso thereto, it was held by the Supreme Court that obtaining of the minimum aggregate marks in the written test and also the minimum in the viva voce was the sine qua non before the Public Service Commission could proceed to make its recommendation in favour of a candidate for appointment to the service. This was on the basis of the Rules, as they stood in the year 1970, i.e., prior to their amendment in January 1972. The Commission under the said proviso had power to fix the minimum marks for viva voce for judging the suitability of a candidate for service. Thus a candidate who had merely secured the minimum of the aggregate marks of above was not entitled to be included in the list of successful candidates unless he had also secured the minimum marks which had been prescribed for the viva voce test. It was also held that claim to seniority under Rule 22 could be upheld if a candidate was not approved for appointment under Rule 19 and had not found his way into the service on the recommendation of the Commission. This decision clearly indicates that if a particular set of Rules provide for obtaining of minimum aggregate marks in the written test and also the minimum in viva voce in a matter pertaining to service, then such Rules would not offend any of the Articles of the Constitution. It has also been noted in the said case that the Commission had fixed 35% minimum marks for viva voce test. It has further been observed in this case that the viva voce test is a well-recognised method of judging the suitability of a candidate for appointment to public services and this method is almost universal, followed. In this view of the matter, the Supreme Court further held that the High Court Committee which took decision for recruitment of candidates to the said service on the basis of the 40% aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law, as the Rules at the relevant time did not contemplate any such Committee and any decision taken by it could not be implemented. In this decision, the Supreme Court has also observed that the High Court committed a serious error in applying the principles of natural justice to a competitive examination. Supreme Court has pointed out that there is a basic difference between an examination held by a college or university or examining body to award degree to candidates appearing at the examination and a competitive examination. The examining body or the authority prescribes minimum pass marks. If a person obtains the minimum marks as prescribed by the authority, he is declared successful and placed in the respective grade accordingly to the number of marks obtained by him. In such a case, it would be obligatory on the examining authority to prescribe marks for passing the examination as well as for securing different grades well in advance. A competitive examination on the other hand is of a different character. The purpose and object of the competitive examination is to select most suitable candidates for appointment to public services. A person may obtain sufficiently high marks and yet he may not be selected on account of the limited number of posts and availability of persons of higher quality. Having regard to the nature and characteristics of a competitive examination it is not possible nor necessary to give notice to the candidates about the minimum marks which the

Commission may determine for purposes of eliminating the unsuitable candidates. The rule of natural justice does not apply to a competitive examination."

15. Again, in the case of *Mehmood Alam Tariq and Others Vs. State of Rajasthan and Others*, it has been observed that the arguments in the case on the legality of the prescription of minimum qualifying marks in the viva voce turned more on the undesirability of such a condition in the background of the increasing public suspicion of abuse of such situations by the repositories of the power. The standards of conduct in public-life over the years have unfortunately not helped to lessen these suspicions. Tests of this kind owing to repeated onslaughts on the sensibilities of the public in the past tend themselves too readily to the speculation that on such occasions considerations other than those that are relevant prevail. The Supreme Court then proceeded to observe that on a careful consideration of the matter, they were persuaded to the view that the prescription of minimum qualifying marks of 60 (33%) out of the maximum marks of 180 set apart for the viva voce examination does not, by itself, incur any constitutional infirmity; that the principles laid down in the case of *Ajay Hasia, Lila Dhar, Ashok Kumar Yadav* did not militate against or render impermissible such a prescription, that there was nothing unreasonable or arbitrary in the stipulation that officers to be selected for higher services and who were with passage of time expected to man increasingly responsible positions in the core services such as the Administrative Services and the Police Services should be men endowed with personality traits conducive to the levels of performance expected in such services; that there were features that distinguish for instance Accounts service from the Police service - a distinction that drew upon and was accentuated by the personal qualities of the officer; that academic excellence is one thing, ability to deal with the public with tact and imagination is another; that both were necessary for an officer and that the Administrative and Police services constitute the cutting edge of the administrative machinery and the requirement of higher traits of personality was not an unreasonable expectation.

16. Thus, the aforesaid submissions made on behalf of the petitioners that the provisions regarding practical test as being arbitrary and irrational as the same provided for exclusive reliance on practical test without considering the cumulative performance at that written and practical test does not seem to be well founded.

17. This brings me to the consideration of contentions regarding practical test itself. As stated above, original provisions regarding practical test have been amended as per the Correction Slip No. 35. All-the-same, there are some common features in the two sets of provisions. Under the repealed provision, interview carried 50 marks whereas under the amended provision, oral interview carries 100 marks. Under the old provisions, assessment of service records was separately provided carrying 100 marks whereas under the new provisions, the

service record would be taken into consideration at the time of holding oral interview. Under the old provisions, assessment of service records was further sub-divided into rewards, remarks and punishments carrying respectively 30, 50 and 20 marks. Under the amended provisions, rewards and punishments carry the same number of marks and the provisions regarding remarks which existed under the old provisions are not to be found under the amended provisions. Substantially, therefore, in principle, the scheme behind the old and new provisions is more or less similar, though not identical. The scheme regarding practical test as obtained under the old provisions had come in for scrutiny before a Division Bench of this Court (Coram : P. S. Poti, C.J. & S. B. Majmudar, J.) in *Shantilal Ambalal Panchal and Anr. v. State of Gujarat and Ors.* 1984 GLH 217. Amongst other things, the Division Bench has observed that the so-called practical test was really not a practical test at all; that 150 marks were also not for the interview, for the interview carried only 50 marks; there were no proper criteria laid down as to how those 50 marks were to be awarded for the interview, excepting the indication in Instruction 165(2)(b) of the Gujarat Police Manual that it was meant to test personality and alertness and that the same left a lot of room for arbitrary marking. It has also been observed that since the practical test was going to assume importance inasmuch as it would not change the result only marginally but also would affect adversely the best performance in the written examination if a candidate failed to secure minimum marks at the practical test, the need for a very objective approach for the assessment of marks at the interview existed. While summing up, the Division Bench had pointed out some objectionable features as under:

Selection made entirely to depend on a second stage which is referred to as practical test, a test which is not really any practical test, but purports to be an interview coupled with assessment of service records;

No guidelines or criteria for award of marks for interview are fixed;

Similar absence of guidelines for award of marks for "remarks";

The marks awarded for punishment are arbitrary in the case of petitioner No. 1 particularly when the remarks as awarded and not specifically controverted do not support three punishments for extra duties;

The arbitrary fixation of 30 marks for rewards and further the fixation of 1/2 mark for one reward without considering the question of opportunity for the candidates to obtain the rewards.

18. Regarding the facts of the case of the petitioners before the Division Bench, the Division Bench found that the petitioners despite the fact that they had been selected out of 189 candidates in the written test and had come within the 22 interviewed and despite the fact that they had more than 50% marks interview, remarks and punishments put together they were losing only for the reason that in rewards they had not made up 50% marks which was not on account of their fault, since obtaining rewards depended on they being placed in a position where

they could obtain them.

19. The Division Bench finally observed as under:

For these reasons, we feel that the petitioners had been dealt with unfairly. If the system of 1/2 mark for one reward not contemplated in Instruction 165(2)(b) but arbitrarily fixed without regard to the opportunity offered to earn that reward is found to be unreasonable, there is no need to strike down the rule as such. Even within the frame work of the rule, it is open to the selecting body to frame for the future a more intelligible rational rule. So far as the present case is concerned it is sufficient to say the method of assessment or rewards has led to mischievous results and has given rise to an anomalous situation, consequent on which, to that extent there is certainly arbitrariness. Hence we find that it may not be necessary for the purpose of this case to go into the validity of Instruction 165(2)(b) though we feel that at the earliest opportunity the rule requires to be looked into and treated properly by the rule making authority lest on a future occasion there be a similar challenge. While we do not want to strike down Instruction 165(2)(b), it need not be taken as our approving the rule. We are saying so because we do expect that there should be a more rational approach to the question of selection giving due weight to the written test, making the assessment at interview real, by laying down appropriate criteria there for and making assessment of service records more objective so as to reflect the real merit of the candidates. While we leave the matter at that for the reason that we can decide this case even without striking down the rule we consider the grievance of the petitioners as legitimate. Since we find that the assessment of rewards in their case did not yield a proper result we would issue a mandamus to the respondents in this case to take immediate steps to see that ignoring the result arising from the marking as to rewards, the cases of both the petitioners are considered and on the marks obtained by them otherwise their selection results be declared. In other words, while we save the rule we give relief to the petitioners in that in the case of both the petitioners, we direct that in view of what we have found here their right to selection be adjudicated on the basis of examining whether they have obtained 50% of the marks excluding 30 marks set apart for rewards. If they have, then they are entitled to be promoted at the relevant selection.

(Emphasis supplied)

20. The learned Advocates for the petitioners have relied on a decision dated 5-11-1984 rendered by a Division Bench of this Court (Coram : P.S. Poti, C.J. & R.C. Mankad, J.), in Special Civil Application No. 3820 of 1981 with Special Civil Application No. 5381 of 1983, L.V. Ashara v. Gujarat Public Service Commission. It seems that one L.V. Ashara was the petitioner in the above Special Civil Application No. 3820 of 1981 and J. N. Patel was the petitioner in Special Civil Application No. 5381 of 1983. Both the petitioners were candidates at the examinations held by the Gujarat Public Service Commission for selection of candidates for appointment to the posts of Executive Engineers in Gujarat

Service of Engineers, Class I, and Deputy Executive Engineers, Gujarat Service of Engineers, Class II, and they had challenged the selection and merit lists of candidates prepared by the commission, inter alia, on the ground that the Commission had acted arbitrarily in fixing qualifying or minimum marks for viva voce test. The Rules in question were called the Executive Engineers (Civil) Gujarat Service of Engineers, Class I, Recruitment Rules, 1979 which have been made by the Governor of Gujarat in exercise of the powers conferred on him by Article 309 of the Constitution of India. Rule 4 of the said Rules, provided as under:

4. The Commission will fix what should be the qualifying marks in any or all the subjects of the examination and in the total either generally for all candidates or separately for candidates from the Scheduled Castes/Scheduled Tribes/Socially and Educationally Backward Class including Nomedic and Denotified Tribes in respect of vacancies reserved for such candidates and for other candidates, and a candidate shall not be deemed to have qualified in the examination if he fails to obtain the qualifying marks fixed by the Commission in the viva voce and Personality Test.

Regarding said Rule 4, the Division Bench observed that it dealt with qualifying marks; that the rule though not happily worded, clearly empower the Commission to prescribe qualifying marks for written as well as viva voce tests; that, however, on plain reading of the rule, it was evident that whereas the rule made it obligatory on the commission to prescribe qualifying marks for the written test, so far as viva voce test was concerned, it was left to the discretion of the Commission whether or not to prescribe qualifying marks; that it was interesting to note that the rule did not lay down that the Commission shall have power or discretion to fix qualifying marks for viva voce; and that it no doubt conferred power on the commission to fix qualifying marks for viva voce test, but it did so in a rather indirect manner by saying that a candidate should not be deemed to be qualified in the examination, if he failed to obtain the qualifying marks fixed by the Commission. It was, therefore, held that viva voce test was considered as important as written test; the rule itself would have provided for qualifying marks and not left it to the discretion of the Commission. Such, however, is not a case in the present group of petitions. The aforesaid Instruction 165(2)(e) clearly provides that to qualify for the examination, a candidate should secure 50% of the aggregate marks on the items. Items under the old instruction cover rewards, remarks and punishments and under new instructions, cover rewards and punishments. The scheme of both the sets of rules is, therefore, different and the provisions in question in both the sets of Rules are not identical or similar. The decision in the aforesaid Special Civil Applications, therefore, is of little or no assistance in the present group of matters. Incidentally, it requires to be noted that relying on the aforesaid decision in the case of Shantilal Ambalal Panchal (supra), the said Division Bench in the said decision came to conclude as under:

In the instant case as observed above, undue importance is given to the oral test. If the candidate is unable to obtain qualifying marks at the oral test then notwithstanding his outstanding performance at the written test he would not be eligible to be included in the merit list. Thus, so much importance is given to the viva voce test that it effectively negates the result of the written test. In absence of any basis or rationale in adopting 50 per cent of the total marks as qualifying marks at the viva voce test, it is difficult to hold that the Commission has adopted fair and reasonable standard for making objective assessment for the qualities required of the candidate for being selected for the post in question. Fixing of qualifying marks has no nexus with the examination. We are, therefore, of the view that the action Commission in fixing the qualifying marks for viva voce test was arbitrary, unreasonable and unjustified. The Commission, in our opinion, should have in the circumstances disclosed on the facts of the case, prepared the merit list on the basis of aggregate marks obtained by each candidate at the written as well as viva voce test.

In view of what has already been observed in this connection on the basis of the aforesaid Supreme Court decision, it is not possible to act in the present group of petitions on the basis of the said ratio.

21. It is not in dispute that the State has not challenged the said decision of the Division Bench in Shantilal's case. On the contrary, the State claims on the basis of the affidavit dated 25-2-1988 of Mr. P. C. Pande, Dy. Inspector General of Police (Administration) filed in Special Civil Application No. 5312 of 1985 that because of the said decision in Shantilal's case, certain modifications were made as per the correction slip in deference to the suggestions made by the said Division Bench. It has further been claimed in the said affidavit of Mr. P. C. Pande that since it was not possible to prescribe any particular guideline to assess a service record, the provision for such assessment had, therefore, been deleted and further that while considering a candidate's performance at practical test, his service records were not taken into consideration. The said submission regarding taking into consideration the service record does not seem to be very accurate because in the amendment, as per the Correction Slip No. 35, what has been stated in this connection is as under:

The concerned UHC's service record will be taken into consideration at the time of holding oral interview.

The aforesaid contents of the Correction Slip No. 35 go to show that at the time of oral interview, the service record was also to be taken into consideration.

22. Apart from the aforesaid, regarding the oral interview carrying 100 marks pursuant to the said Correction Slip No. 35, in the said affidavit of Mr. Pande, it has been stated as under:

I say that the said 100 marks allocated for the oral interview are divided into five heads, viz.:

- (a) Proficiency;
- (b) General Knowledge;
- (c) Alertness;
- (d) Smartness;
- (e) Personality;

I say that 20 marks are allocated for each of the above qualifications. I say that each member of the interviewing Committee assesses a candidate individually and gives the marks under each of the above-referred heads. I say that thus each of the members of the interviewing committee gives marks to a candidate out of total 100 marks. I say that at the end of the interviews, an average is arrived of the marks allocated by each of the members and the average this arrived at is considered to be the marks secured by the candidate concerned. Thus, I submit that there is no scope for any arbitrariness in holding the aforementioned oral interview.

23. As stated in the Oxford English Dictionary, 1970 Edition, Vol. I, Page 215 "alertness" means:

The quality of being alert; quickness in observing and acting, briskness, activity, nimbleness.

24. As stated in Universal Dictionary, First Edition (1988) at page 47, "alert" means:

1. Vigilantly attentive, watchful, alert to danger;
2. Mentally responsive and perceptive, quick;
3. Brisk, lively;

25. The meaning of word "alert" in New World Dictionary, Second College Edition, at page 33 is as under:

1. Watchful and ready, as in facing danger.
2. quick in thought or action, active;

n.1. a warning signal as of an expected air raid, alarm; 2. the period during which such a warning is in effect.

26. The dictionary meaning of the word "smartness" as per The Oxford English Dictionary, 1970 Edition, Vol. IX, page 264 is as under:

1. Pain, smarting;
2. That which induces pain or distress, sharp discipline, severity (of something);
3. Vivacity and wit in conversation or writing;

4. Trimness or fashionableness in dress;
 5. Briskness, activity, alertness;
 6. Extreme cleverness or shrewdness esp for one's own advantage;
27. As per Universal Dictionary, First Edition (1988) at page 1435, "smarter-smartest" means:
1. a. Characterised by sharp, quick thought, brights;
 - b. Amusingly or impertinently clever, witty, a smart answer;
 2. Characterised by sharp, quick, movement; specifically : (a) forceful; stringing, a smart slap, (b) brisk, energetic, a smart pace;
 3. Characterised by or involving astuteness or shrewdness;
 4. Neat, fresh and spruce, as in dress or appearance;
 5. Associated with or consisting of persons of fashion and sophistication, fashionable.
28. The meaning of word "smart" in New World Dictionary Second College Edition at page 1344, is as under:
1. a. to cause sharp, stinging pain, as a slap;
 - b. to be the source of such pain, as a wound;
 - c. to feel such pain.
 2. to feel mental distress or irritation, as in resentment, remorse, etc. n. 1. a smarting sensation, pain or distress
 2. Shrewdness, intelligence or acumen.
- adj. 1. causing sharp or stinging pain;
2. sharp or stinging, as pain;
 3. brisk vigorous, lively;
 4. a. intelligent, alert, clever, witty,
 - b. shrewd or sharp, as in one's dealings.
 5. neat, trim spruce.
 6. a. in keeping with the current fashion, stylish,
 - b. characteristic of or used by those who follow the current fashions.
 7. impertinent, flippant, or saucy.
 8. quite, strong, intense, numerous, etc.

29. The Dictionary meaning of the word "personality" as per the Oxford English Dictionary, 1970 Edition, Vol. VII page 727 is as under:

1. The quality, character, or fact of being a person as distinct from a thing; that quality or principle which makes a being personal;
2. That quality or assemblage or qualities which makes a person what he is, as distinct from other persons; distinctive personal or individual character, esp. when of a marked or notable kind;
3. A personal being, a person;
4. Bodily parts collectively, body, person;
5. The fact of relating to an individual person, or to a particular persons the quality of being directed to or aimed at an individual, esp. in the way of disparagement or unfriendly reference.

30. As per the Universal Dictionary, First Edition (1988) at page 1154, "personality" means:

1. The State or quality of being a person;
2. a. The dynamic character, self, or psyche that constitutes and animates the individual person and makes his experience of life unique;
b. A person as the embodiment of distinctive traits of mind and behaviour,
3. The pattern of collective behavioural; temperamental, emotional and mental traits of an individual;
4. The distinctive qualities of an individual, especially those distinguishing personal characteristics that make one socially appealing.
5. a. A person of prominence or notoriety, a celebrity, personalities in the news;
A person with an amusing or striking turn of mind, a character;
6. Plural. Remarks of a personal nature especially when offensive;
7. The characteristics of a place or situation that give it a distinctive quality;

31. The meaning of the word "personality" as per New World Dictionary, Second College Edition, at page 1062, is as under:

1. the quality or fact of being a person;
2. the quality or fact of being a particular person; personal identity, individuality.
3. a. habitual patterns and qualities of behaviour of any individual as expressed by physical and mental activities and attitudes, distinctive individual qualities of a person, considered collectively.
b. such qualities applied to a group, nation, etc., or to a place.

4. a. the sum such qualities as impressing or likely to impress others. b. personal attractiveness.

5. a. a person, esp. a notable person, personage.

6. remarks usually of an offence or disparaging nature, aimed at or referring to a person.

32. It can, therefore, clearly be seen in view of the aforesaid dictionary meanings that it is difficult, if not impossible, to draw clear cut lines while judging alertness and smartness of one and the same person. It is also difficult, if not impossible, to draw clear-cut lines between alertness and smartness of a person while considering the personality of that very person. The above dictionary meanings of the aforesaid three words clearly go to show that the words are to an extent inter-connected and also overlap in meaning. To say the least on the one hand, the aforesaid three words are overlapping to an extent and on the other, they do not permit themselves to be judged in watertight compartments so that 20 marks on each of the aforesaid heads could be reserved on the basis that they are distinct, separate and such as would enable one to give each of them individualistic treatment. In that view of the matter, the contention of the respondents cannot be accepted that there is not scope for any arbitrariness in holding oral interview pursuant to the said correction slip in the aforesaid three out of the five heads mentioned therein. On the contrary, there is ample scope for arbitrarily assigning marks while taking interviews of candidates in the aforesaid manner.

33. Furthermore, so far as service of the candidates are concerned, it has been claimed in the said affidavit of Mr. P. C. Pande that since it was not possible to prescribe any particular guideline to assess the service record, the provision for such assessment had, therefore, been deleted and further that, while considering a candidate's performance at practical test, his service records were not taken into consideration. The aforesaid contents of the affidavit of Mr. Pande fly in the face of the actual amendment made as per the Correction Slip No. 35 in this connection, which is to the following effect:

The concerned UHC's service record will be taken into consideration at the time of holding oral interview.

Thus, if the service records have been taken into consideration by the officers taking the interview, then the same has been done without any guidelines in that connection. If the service records of the candidates have not been taken into consideration at the interview, then the same has been done contrary to the said guidelines. From both angle, therefore, the situation is unfortunate.

34. This brings me to the consideration of rewards which have been allocated 30 marks as per the said Correction Slip No. 35. In the provisions that existed prior to the said Correction Slip, 30 marks were allocated regarding rewards with a note in the remarks column as under:

Similarly, the nature of work for which the rewards of remarks are obtained should also be considered e.g., rewards for doing good investigation or for any specific good action would indicate aptitude and capacity to become a good Officer.

In a similar provision as per the said Correction Slip No. 35, it has been provided as under:

Full 30 marks may be given to UHC who is awarded "Police Medal". One mark for every reward of GST and two marks for every reward of "GST+Cash reward" may be given to UHC concerned.

It is to noted that the remarks which existed regarding the rewards as per the old provisions are no longer to be found in the new provisions as per the said correction slip.

35. In this connection, it has been claimed in the said affidavit of Mr. Pande vide paragraph 11 as under:

I say that the Head Constables in the Police Department are given postings either at various Police Stations or in other branches viz., C.I.D. (Crime), C.I.D. (Intelligence); and Anti-Corruption Bureau. I say that at any of the said postings a Head Constable has equal chances to earn rewards provided he performs his duties conscientiously and diligently and efficiently. I say that even those Head Constables who are placed in clerical posts are given rewards at the time of inspection for maintaining proper records. I say that no Head Constable is kept at a particular posting for a very long period. A Head Constable is transferred from one post to another in the aforementioned branches and thus the Head Constables have chances to work even in Police Stations and the different branches and in each of such postings, Head Constables concerned has an ample chance for receiving rewards.

36. As stated above, one of the objectionable features noted in the aforesaid Division Bench decision was the arbitrary fixation of 30 marks for reward and further the Fixation of 1/2 marks for one reward without considering the question of opportunity for the candidates to obtain the rewards. The Division Bench also held that the method of assessment of rewards was capable of leading to mischievous results and also create an anomalous situation, as it had done in the case before the Division Bench and so to that extent, according to the Division Bench, there certainly was arbitrariness. It seems to me that even though vide the said Correction Slip No. 35 some change in this connection, as stated above, has been brought about, it has failed to do away with the objectionable features pointed out in this connection. So, it is obvious that the Division Bench decision holds the field in this connection. The aforesaid new provisions regarding records are therefore, unreasonable and also arbitrarily fixed, as the same are also without regard to the opportunity offers to earn the rewards. Since, however, it is open within the framework of the institution to the selecting body to frame for the future a more intelligible rational institution there

is no need to strike down the institution as such. It is possible to decide the present group of matters even without striking down the institution as it is felt that the grievance of the petitioners in this connection is legitimate.

37. The provisions regarding punishments on a comparison of the old with the new are noticed to be identical. If we examine the provisions regarding punishment, we find maximum number of marks to be given is 20 and full marks have to be given to Head Constables for having no punishment at all provided other remarks are good. For every warning one mark is to be deducted; for every reprimand, 1 1/2 marks, for extra duty or for every other minor punishment, 2 marks and for every minor punishment 4 marks should be deducted. The aforesaid provision in the first place does not make it clear as to what should happen to a Head Constable who has no punishment at all, but his other remarks are not good. There are no guidelines provided as to how markings should proceed in the aforesaid connection. To that extent, there is arbitrariness in that respect. In the next place, if a Head Constable has been in service for a long time as compared to another, then the punishment aspect would adversely affect a person, who has been in service for a lessor period. In a given case, it can be vice-versa also, but on an average one can say that there are more chances of punishment in the case of a person, who has been longer in service rather than in the case of a person who has been in service for a shorter period. The provision in this connection also is, therefore, not happily provided and urges on arbitrariness by studies hereinabove.

38. It is not possible at this late stage to set aside the result of the entire examination on the grounds that practical test is defective as pointed out hereinabove and serious errors have been committed in taking the practical test and pronouncing the result of the examination pursuant to such a practical test. At the same time, it would equally be improper to disturb the result of those candidates who have been held to have passed the examination on the basis of such a practical test. The sum total is that petitioners have lost the selection without a fair assessment of their right to be selected. It would seem that within the framework of the rule, it is open to the selecting body to frame for the future a more intelligible rational rule. So far as the present group of petitions is concerned, the defects noted regarding practical test are as under:

(1) There is no clear-cut distinction between the alertness, smartness and personality. Not only that, but there is also overlapping of meanings so far as the said three words are concerned;

(2) Consideration of rewards is defective, as pointed out hereinabove. Since the assessment of rewards do not yield a proper result, a mandamus will need to be issued to the respondents in that connection, as was done in the aforesaid Shantilal's case; and

(3) So far as punishment is concerned, it is also defective as aforesaid. The same also, therefore, calls for an appropriate order;

39. In the result, out of the 100 marks for oral interview, 40 marks allotted to alertness and smartness will need to be ignored. The oral interview is, therefore, to be considered on the basis of 60 marks and not 100 marks. Likewise, 30 marks for consideration of rewards and 20 marks for punishment will also need to be ignored in the light of all the aforesaid.

39.1. From the aforesaid discussion, it is evident that it is possible within the framework of the rule in question and open to the selecting body to provide for the future a more intelligible rational rule in the above connection.

40. In every system of selection where oral interview forms a part of the said system, there is necessarily an element of arbitrariness since it is not possible to root out such arbitrariness 100% from such a system; but then an effort has to be made in that direction and within the permissible limits to limit the scope of arbitrariness to such an extent that the out-come of such an effort brings out a fair and reasonable assessment of a candidate, who is exposed to such a system. In the present group also, it is possible to do such an exercise within the framework of the rule in question to do away with the element of arbitrariness to a considerable extent in the system. The rule-making authority concerned may, therefore, consider:

(i) Whether it would like to change the terminology from "practical test" to "oral interview";

(ii) Whether oral interview could be restricted to 100 marks;

(iii) Whether these 100 marks could be further divided as under:

100 marks oral interview

(a) 30 marks - general knowledge;

(b) 30 marks - personality;

(c) 20 marks - education qualification & experience;

(d) 20 marks - confidential reports of a candidate for the last 7 years;

(iv) the passing standard could be fixed at 45 marks;

41. For persons, who are taking interview, it may be relevant to consider:

(a) in a class such as the present, people can aspire to become Sub-Inspector of Police almost at the fag-end of their career. This is desirable also so that such persons can have better pensionary benefits;

(b) it is proper, advisable and necessary that by and large the persons who are serving in such departments as the present should on the whole feel satisfied so that when their service career ends without blemish, they may have the satisfaction that they have retired when they were in a promoted post;

It would seem that the aforesaid two considerations call for a rather liberal

approach in the matter of assessment of performance in such oral interviews.

42. The net result, therefore, would be that for the purpose of the present group of petitions, the practical test would only be required to be considered as of 60 marks and not of 150 marks. In view of the aforesaid, those petitioners who have secured 30 marks and above in the practical test as per the result sheet maintained by the respondents are entitled to be treated as having passed the aforesaid practical test at the aforesaid examinations. Since it is found that the assessment in the case of the petitioners did not yield a proper result, a mandamus is ordered to be issued to the respondents in the present group of petitions to take immediate steps to see that ignoring the result arising from marking as to (1) alertness and smartness, (2) rewards; and (3) punishments, the case of the petitioners should be considered and on the marks obtained by them otherwise, their examination results be declared. In other words, the result of the examination of the petitioners in all the above petitions be declared on the basis of examining whether they have obtained 50% of the 60 marks which remained after making deductions as aforesaid from the total number of marks assigned to practical test. The respondent No. 1-Director General of Police is hereby ordered to carry out the aforesaid directions on the basis of the material available to report to Government within six weeks from the date of this order. Respondent No. 3-State of Gujarat shall within one month thereafter pass appropriate orders in regard to all the petitioners in the above petitions based on such result. Rule in each of the petitions is made absolute accordingly. In the facts and circumstances of the case, there will be no order as to costs. Writ to be served forthwith.