

(2023) 12 OHC CK 0144

In the Orissa High Court

Case No : Writ Petition (C) No.1822, 1561, 2539 Of 2023

Kabita Jena And Others

APPELLANT

Vs

Rajat Kumar Mishra And Others

RESPONDENT

Date of Decision : 22-12-2023

Acts Referred:

Constitution of India, 1950 — Article 162, 166, 226, 227, 309, 320

Code of Civil Procedure, 1908 — Order 1 Rule 9

Odisha Secretariat Service (Method of Recruitment) and Condition of Service of

Assistant Section Officer Rules, 2016 — Rule 6, 6(2), 6(5), 6(6), 10(3), 10(4), 11, 23

Jammu and Kashmir Subordinate Services Recruitment Rules, 1992 — Rule 9A, 9(iii)

Odisha Revised Scale of Pay Rules, 2017 — Rule 3

Citation : (2023) 12 OHC CK 0144

Hon'ble Judges : Dr. B.R. Sarangi, ACJ; Murahari Sri Raman, J

Bench : Division Bench

Advocate : Budhadev Routray, S.K. Samal, S.P. Nath, S. Routrary, S. Sekhar, J. Biswal, A.K. Das, Manoj Kumar Mishra, T. Mishra, S. Senapati, R. Mishra, Pradipta Ku. Mohanty, P. Mohanty, S.N. Dash, S.K. Sahoo, K.T. Muduli, R.N. Mishra

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, ACJ

1. The background facts, which led to filing of these three writ appeals, succinctly put, as follows:-

The Odisha Public Service Commission (for short 'OPSC'), on being requisitioned by the Home Department, Government of Odisha to fill up 796 numbers of Assistant Section Officers ('ASO' in short) belonging to Group B posts, published an advertisement on 31.12.2021. Accordingly, online applications were invited from prospective candidates fixing the last date of submission of such registered online applications to 25.02.2022. The scale of pay for such posts was Rs.35,400/- in Level 9 Cell 1 as per the Pay Matrix provided under Rule 3 of the Odisha Revised Scale of Pay Rules, 2017. Pursuant to the said advertisement, the candidates, having requisite qualification and satisfying the eligibility criteria,

offered their candidatures within the last date prescribed. As against 796 posts, total number of 1,48,000 candidates submitted their applications. Their applications were duly scrutinized and admission certificates were issued in favour of them for appearing in the written examination, which was fixed to 21.08.2022, but subsequently postponed to 27.08.2022. A provisional list of candidates, who were shortlisted for document verification and skill test, was published on 07.11.2022. Vide Notification dated 17.11.2022, they were called upon to attend the skill test, which was scheduled to be held on 04.12.2022.

2. At that point of time, some unsuccessful candidates, whose names did not appear in the select list published on 07.11.2022, agitated before the office of the OPSC making allegation with regard to the conduct of the examination and preparation of select list by the OPSC on 07.11.2022. In response to the same, the OPSC published press notes on 10.11.2022 and 22.11.2022 clearly stating therein that as per the provisions stipulated under clause 6 (c) of the advertisement dated 31.12.2021, the select list was prepared basing on the minimum qualifying mark in each subject and accordingly 1104 candidates (1.5 times of the advertised vacancies, category wise) were called upon to attend the document verification, which was conducted from 14.11.2022 to 18.11.2022. Having not satisfied with the clarification issued by the OPSC, some of the candidates, whose names did not reflect in the merit/select (short listed) list, approached this Court by filing W.P.(C) No. 32174 of 2022 with the following prayer.

"It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to issue Rule Nisi calling upon the Opp. Parties to show cause as to why appropriate writ/writs shall not be issued quashing the merit/select (shortlisted) list published in notice dtd.07. 11.2022 by the OPSC for documents verification and skill test under Annexure-5, by declaring the procedure followed by the OPSC authorities in short listing the candidates for preparation of merit/select list in ASO recruitment examination, 2022 as published in Press Notes dtd.10.11.2022 and dtd.22.11.2022 is illegal and further be pleased to direct the Opp. Parties to prepare the fresh merit/select (shortlisted) list of candidates by taking total aggregate marks in all subjects in written test without insisting minimum qualifying marks in each subject and on perusal of causes shown if any or upon insufficient causes shown make the said rule absolute and may pass such other order/orders as deemed just and proper.

And for this act of kindness, the petitioner shall as in duty bound, ever pray."

3. The aforesaid writ petition was listed on 02.12.2022 and the learned Single Judge, while entertaining the writ petition, issued notice and passed an interim order on 02.12.2022 to the following effect.

"1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. Manoj Kumar Mishra, learned senior counsel appearing for the petitioners, Mr. Ashok Kumar Parija, learned Advocate General of Odisha for the

State-Opposite Parties and Mr. P.K. Mohanty, learned senior counsel appearing for the Odisha Public Service Commission (in short and hereinafter referred to as 'OPSC').

3. The present writ petition has been filed by the petitioners questioning the method of selection process adopted by the OPSC while conducting the recruitment examination for appointment to the post of Assistant Section Officers (ASO) in Group-B of Odisha Secretariat Service under the Home Department, Government of Odisha.

4. The main plank of challenge of Mr. Mishra, learned senior counsel appearing for the petitioners is that the OPSC does not have authority to fix subject wise cut-off marks other than as provided in the Rules. After the selection process was commenced by taking resort to Clause-(6)(c) of the Rules, wherein it has been provided that the Commission shall be competent to publish the qualifying marks in any advertisement.

5. Mr. Mohanty, learned senior counsel appearing for the OPSC submits that the OPSC subsequently adopted the mechanism by imposing cut-off mark on each subject when there is no rule in the advertisement published vide Advertise No.26 of 2021-2022.

6. The Rule i.e. relevant for the purpose of the present case is Rule-6 of the Odisha Secretariat Service (Method of Recruitment) and Condition of Service of Assistant Section Officer Rules, 2016, which has been enacted by exercising power under proviso to Article 309 of the Constitution of India. Part-II of the Rules provides the method for selecting candidates for recruitment. Para-2 of the Rules provides method of recruitment adopted while selecting candidates for the appointment to the post of ASO of the Orissa Secretariat. Rule-4(a)(i) provides that selection procedure shall be done in a competitive examination to be held at least once in a year in accordance with Rule-6.

7. Rule-6 which deals with direct recruitment provides basically two stages for selection and recruitment of the candidates to the post of ASO. Rule-6(5) provides that the scheme of such subjects for the written examination shall be as specified in the schedule i.e. 1st stage of selection.

8. For second stage of selection, Rule-6(6) provides only those candidates, who have been short listed after the written examination, shall be called for skill test in computer as provided in the schedule, which shall be of qualifying in nature. One should secure at least 40% of the total marks in the skill test to qualify. Therefore, Mr. Mishra, learned senior counsel appearing for the petitioners argued that in the present the thrust of his attack would be confined to interpretation of Rule-6(5) of 2016 Rules, which provides that scheme and the subject in written examination and syllabus is specified in the schedule appended to the Rules. On a bare perusal, it does not disclose that any qualifying mark (subject wise) has been provided therein. It only provides that the total marks after each category of examination (Total four categories) under which the

examination is to be held and the duration of such examination. Therefore, there is no mention about any qualifying marks to be obtained by the candidates by taking the written examination to be conducted by OPSC as per the Rules.

9. In view of the above, Mr. Mishra, learned senior counsel for the petitioners submits that the OPSC has exceeded its jurisdiction and in the process, it has not followed the 2016 Rules diligently and scrupulously while conducting the examination. It is also submitted that the OPSC at a later stage of examination has developed and adopted a new mechanism and as such included subject wise minimum qualifying marks for the examination, which is not there in the relevant Rule as well as in the schedule appended to the Rules. Accordingly, Mr. Mishra, learned senior counsel for the petitioners challenge the further continuance of the selection process, which is going on at the moment under the control and supervision of Odisha Public Service Commission.

10. Mr. Mohanty, learned senior counsel appearing for the OPSC, per contra, submits that the Rules confer ample power and authority on the OPSC, a constitutional body in view of the Article 320 of the Constitution of India to conduct any examination. Therefore, the conduct of the Odisha Public Service Commission in providing cut off mark in each subject at a later stage is well within their scope and jurisdiction. In the said context, he also refers to Rule 6 Sub-rule(5) of the 2016 Rules.

11. Mr. Mohanty, learned senior counsel for the OPSC, furthermore, refers to the advertisement published by the OPSC under Annexure-1 i.e. Advertisement No.26 of 2021-2022 and draws attention of this Court towards Clause-6(6) under the Heading of Method of Selection and submitted that by virtue of advertisement, the Commission has Power and competence to fix up qualifying marks for candidates in the written examination. In such view of the matter, Mr. Mohanty, learned senior counsel appearing for the OPSC submits that justification of imposing qualifying marks in respect of each subject for the ASO examination. Further, he submits that the candidates having appeared in the selection test and estoppels to selection process of the advertisement. Therefore, he also submits that the writ petition at their instance is not maintainable.

12. Mr. Ashok Kumar Parija, learned Advocate General of Odisha appearing for the State-Opposite Parties submitted that a large number of candidates i.e. almost one lakh fifty thousand candidates to appear in the first stage of the examination i.e. written examination as per Rule 6(5). Therefore, the OPSC short listed the candidates. Accordingly, the OPSC device the mechanism to short list the candidates in a fair and transparent manner and to pick the best candidates from among the lot. He further contended that the OPSC has ample power under the Rules to device the sole mechanism while conducting the written examination and further referring to the advertisement issued by the OPSC, learned Advocate General further submits that the OPSC has not committed any wrong while imposing cut-off mark. It is further contended by learned Advocate General that since final mark has not been published yet, the stage to challenge the merit list

has not come to the said context part. Further, learned A.G. submits that once candidates know about the final mark, only he can approach this Court for redressal of their grievances or protection of their rights. In view of the aforesaid fact, learned A.G. also submits that the writ petition is not maintainable at this stage.

13. In reply to the submissions made by learned senior counsels appearing for the State as well as the OPSC, Mr. Mishra, leaned senior counsel for the petitioners relies upon the judgment of Hon'ble Supreme Court reported in (2022) 8 SCC 713 (Krishna Rai (Dead) through Legal Representatives and others vrs. Banaras Hindu University through Registrar and others). Referring to the contentions of Mr. Mohanty, learned senior counsel for the OPSC submits that having participated in the selection process, it is not more open to the candidates to question the process and selection and terms and conditions contained therein. Relied upon the Hon'ble Supreme Court judgment, Mr. Mishra, submits that there is no estoppels. Therefore, such plea cannot be taken by learned senior counsel appearing for the OPSC at all for the test of the present matter next. Mr. Mishra relied upon the judgment of the Hon'ble Supreme Court in the case of the Goa Public Service Commission vrs. Pankaj Rane and others (2022 SCC Online SC 440) to support his contention where the minimum qualifying marks in the oral interview was not prescribed in the relevant Rules for examining body i.e. Goa Public Service Commission device the mechanism and adopted a minimum qualifying mark to short list the candidates in the via voce test. The same was challenged before the High Court. The High Court allowed the writ petition by holding that such a procedure is not purview under the Rules. Finally, the matter was decided by the Hon'ble Supreme Court detailed the judgment as affirmed the judgment of the High Court.

14. The moot question that is required to be adjudicated in the present case is whether the OPSC was within its scope and jurisdiction while introducing cut-off marks for different subject, which is not specifically prescribed in the relevant Rule 2016 and further by introducing such a mechanism, they have also deviate the practice followed previous years and whether the introduction of such subject wise cut-off mark is permissible in view of the provision in Rule-6(5) as no such cut-off mark has been prescribed as schedule as appended in the rules.

15. In such view of the matter, this Court is of the considered view that this matter needs proper adjudication after filing counter affidavit by the contesting opposite parties. Accordingly, issue notice to the opposite parties. Learned counsel for the petitioner is directed to serve adequate number of extra copies of the brief on the opposite parties within three working days. The opposite parties are directed to file their counter affidavits within a period of ten days after serving a copy thereof on learned counsel for the petitioner, who shall file rejoinder, if any, within three days.

16. List this matter on 20th of December, 2022 at 2.00 P.M.

A free copy of this order be handed over to Mr. P.K. Mohanty, learned senior counsel appearing for the OPSC for communication and compliance.

Sd/-

I.A. No.16237 of 2022

17. Heard.

18. Issue notice as above.

19. As an interim measure, it is directed that the process of selection for the post of ASO may continue as per schedule, however, no final merit list shall be published/notified till the next date.

Urgent certified copy of this order be granted on proper application.

Sd/-

4. In compliance of the interim order dated 02.12.2022 passed by this Court, the selection process for the post of ASO continued. Accordingly, the skill test was held on 04.12.2022. The candidates, whose name found place in the select list, appeared in the skill test. But, the result was not published/notified abiding by the interim order passed by the learned Single Judge. The matter was finally heard on 10.02.2023 and the judgment was pronounced on 19.05.2023. The learned Single Judge proceeded to decide the matter on the following grounds:

“(a) Rule-6(6) of the Rules, 2016 mandates the OPSC to short list candidates on the basis of the written test.

(b) Rule-6 does not prescribe any method of short listing of candidates. It is within the discretion of the OPSC to choose the method of short listing.

(c) The method of short listing is a policy decision of the employer. The prescription of minimum qualifying marks in each of the subjects in the written test is a fair, reasonable and universally accepted method of short listing.

(d) Even otherwise, the Home Department vide its letter No.30965 dated 02.09.2021, which is in the nature of executive instructions, under Article 162 of the Constitution of India, empowers the OPSC to prescribe the minimum qualifying marks in all or any of the subject of the written test.”

Finally, in paragraphs 62 and 63 of the judgment, the learned Single Judge issued directions to the following effect:

“62. In view of the aforesaid analysis of fact as well as the legal position as narrated by the Hon’ble Supreme Court in a catena of judgments, this Court is persuaded to come to a conclusion that the OPSC had no authority to fix the minimum qualifying mark subjectwise after the written test was over. Moreover, in the light of aforesaid Supreme Court judgments, this Court is also of the clear view that the Petitioners are not estopped by the fact that they had appeared in

the recruitment test, therefore, they would be debarred to challenge the illegal conduct of the Opposite Parties.

63. Accordingly, the writ petition stands allowed. The merit/select (short listed) list published vide Notice dated 07.11.2022 by the OPSC for document verification and skill test under Annexure-5 is hereby quashed. Consequential, Press Notice dated 10.11.2022 and 22.11.2022 are also hereby quashed. It is further directed that the OPSC shall redraw the select /merit (short listed) list strictly in terms of the Rule-6(5) and Rule-6(6) as well as the schedule appended to the Rules, 2016 on the basis of the aggregate marks secured by the candidates. Accordingly, the candidates shall be called for verification of document and to participate in the skill test on the basis of redrawn merit/select (short listed) within a period of two months from today. Further it is directed that both the State Government as well as the OPSC shall ensure that the selection process continues strictly in terms of the Rules, 2016. There shall be no order as to cost."

5. By virtue of the above judgment of the learned Single Judge, since the select list, which was prepared on 07.11.2022, was quashed, some of the successful candidates, who were adversely affected by the judgment, filed RVWPET No. 257 of 2023. The same was heard on 13.07.2023 and the judgment was delivered on 31.07.2023. While deciding the said review petition, learned Single Judge formulated the following three questions:-

"(i) Whether the grounds taken in the review petition are good grounds to come to a conclusion that there exists an error apparent on the face of the record and, accordingly, the same calls for interference in judgment dated 19.05.2023 by this Court in exercise of its review jurisdiction?

(ii) Whether the writ petition which is in the shape of a review/recall application by the parties, who were not arrayed as Opposite Parties to the original writ petition, is maintainable in law?

(iii) Whether the review petition at the instance of the present Petitioners is entertainable within the parameters of law laid down for entertaining a review/recall application, particularly keeping in view the factual background of the present case?"

6. The findings of the learned Single Judge, which contained at paragraphs-40, 41 and 42 of the judgment rendered in review petition, read as follows:-

"40. With regard to observance of principles of natural justice and providing an opportunity to the Petitioners is concerned, this Court would like to refer to a judgment of the Hon'ble Supreme Court in Union of India and Others v. Bikash Kuanar, reported in (2006) 8 SCC 192. In paragraph-12 of the aforesaid judgment, it has been held as follows:-

"12. The matter relating to appointment or recruitment of EDDA is not governed by any statute but by departmental instructions. It is now trite that if a mistake

is committed in passing an administrative order, the same may be rectified. Rectification of a mistake, however, may in a given situation require compliance with the principles of natural justice. It is only in a case where the mistake is apparent on the face of the records, a rectification thereof is permissible without giving any hearing to the aggrieved party.”

Since the Petitioners were not necessary parties to the earlier writ petition and further the error in the selection process was apparent on the face of the record, by applying the principle as reflected in paragraph-12 of Bikash Kuanar’s case (supra), this Court holds that rectification of such errors/mistakes is permissible without giving any hearing to the aggrieved party, if any, there is one. Thus, this Court found no force in the argument of learned Senior Counsel appearing for the Petitioners that the judgment dated 19.05.2023 rendered by this Court in the previous writ petition is vitiated in any manner by nonjoinder of a party, who according to this Court, are not necessary parties, and by not providing such parties an opportunity of hearing before giving a direction for rectification of the mistake/error in the selection process as it cannot be construed that the Petitioners can be in any manner be called as aggrieved parties.

41. In view of the aforesaid analysis of the legal as well as factual position, this Court found no ground whatsoever to entertain the review petition as well as the writ petition filed by the Petitioners. Hence, both the review petition as well as writ petition are hereby dismissed.

42. Accordingly, both the review petition as well as the writ petition stand disposed of.”

7. After disposal of the review petition, the review petitioners, whose name found place in the select list prepared on 07.11.2022, filed W.A. No. 1822 of 2023 seeking following relief:-

“It is therefore, most humbly prayed that this Hon’ble Court be graciously pleased to

i) Admit the writ appeal

ii) Call for the record

iii) Set aside the impugned judgments dated 19.05.2023 and 31.07.2023 of the Hon’ble Single Judge passed in W.P.(C) No. 32174 of 2022 and RVWPET No. 257/2023 under Annexures-8 & 9 respectively and the prayer made in the writ application be dismissed.

iv) And/or pass such other order/orders direction/directions as this Hon’ble Court may deem fit and proper for the ends of justice.

And for the said act of kindness, the appellants as in duty bound shall ever pray.”

8. Some other selected candidates, whose names found place in the select list dated 07.11.2022, without applying for any impletion of party or filing a review

petition and not being parties to W.P.(C) No. 32174 of 2022, have directly filed W.A. No. 1561 of 2023 with following relief:-

"It is therefore, most humbly prayed that this Hon'ble Court be graciously pleased to:

i) Admit the writ appeal.

ii) Call for the record.

iii) Set aside the impugned judgment dated 19.05.2023 of the Hon'ble Single Judge passed in W.P.(C) No.32174 of 2022 under Annexure-8 and the writ application may be dismissed.

iv) And/or pass such other order/orders, direction/directions as this Hon'ble Court may deems fit and proper for the ends of justice.

And for the said act of kindness, the appellants as in duty bound shall ever pray."

9. Similarly, aggrieved by the judgment dated 19.05.2023 passed by the learned Single Judge in W.P.(C) No.32174 of 2022, the OPSC, which was a party to the said writ petition, filed W.A. No. 2539 of 2023. Though there was delay in filing the writ appeal, the same has already been condoned. In the said appeal, the following reliefs are sought:-

"In the circumstances, it is most graciously prayed for that this Hon'ble Court may be pleased to admit this writ appeal, call for the records, and after hearing the parties, set aside the impugned order dated 19.05.2023 passed by the Ld. Single Judge of this Hon'ble Court in W.P.(C) No.32174 of 2022 and further to pass appropriate orders to allow this appeal.

Or may pass any other order (s)/direction (s) as is deemed proper to the facts of the case in the interest of justice.

And for this act of kindness, the appellants, as in duty bound, shall ever pray."

10. On perusal of the reliefs sought in all the three writ appeals, i.e. W.A. No. 1822 of 2023, W.A. No. 1561 of 2023 and W.A. No. 2539 of 2023, it appears that challenge has been made to the judgment dated 19.05.2023 passed by the learned Single Judge in W.P.(C) No. 32174 of 2022 and also the order dated 31.07.2023 passed in RVWPET No. 257 of 2023. Essentially, the reliefs sought by the appellants in all these three writ appeals being identical, they were heard together and are disposed of by this common judgment.

11. In W.A. No. 1822 of 2023, Mr. Budhadev Routray, learned Senior Advocate is appearing along with Mr. S.D. Routray, learned counsel for the appellants, whose names found place in the select list, but were not made parties to the writ petition and whose review petition was dismissed by the learned Single Judge. He contended that the right, which had been accrued in favour of the appellants by reflecting their names in the select list, was affected since they were not made parties in the writ petition and, as such, the writ petition suffered from non-

joinder of parties. According to him, even if such question was raised and argued, the learned Single Judge, without giving any finding thereon, allowed the writ petition, which cannot be sustained in the eye of law. It is further urged before this Court that when the successful candidates, whose name found place in the merit list, filed the review petition before the learned Single Judge and the learned Single Judge came to a finding that the application filed is maintainable, but ultimately did not give them any opportunity of hearing, while passing the order by quashing the merit list. Even though the issue of non-joinder of parties was raised by other opposite parties to the proceeding, learned Single Judge did not frame any issue to that effect nor give any reply in the final judgment. Therefore, he contended that the judgment passed by the learned Single Judge dated 19.05.2023 in W.P.(C) No. 32174 of 2022 is to be quashed, so also the judgment dated 31.07.2023 passed in RVWPET No. 257 of 2023. As a consequence thereof, the merit list prepared on 07.11.2022 should be restored and the candidates should be selected on the basis of the skill test conducted pursuant to such merit list.

11.1. As regards merits of the case, learned Senior Advocate vehemently urged before this Court that Clause 6 (c) of the advertisement, prescribing method of selection, has not been challenged. The provisions contained in Rule 6 (2), 6(5) and 6 (6) under Part-III (Direct Recruitment) of the Odisha Secretariat Service (Method of Recruitment and Conditions of Service) Rules, 2016 (in short "2016 Rules"), read with the Schedule appended to the said Rules, stipulate that power has been vested with the Commission to formulate the methodology. If the same has been adhered to, the fixing of minimum qualifying mark in each subject cannot be faulted with, as 2016 Rules do not specify any minimum qualifying mark, so far as the written test is concerned. But Rule 6(5) of the said Rules states that the scheme and subjects for the written examination and the syllabus shall be, as specified in the schedule. Under the heading 'schedule', which has been referred to in Rule 6 (5), it has been indicated that only those candidates who have been shortlisted, after the written test, shall be called for skill test in computer by the Commission which shall be of qualifying nature.

11.2. It is further contended that under Clause 6(c) of the advertisement it has been stated that the Commission shall be competent to fix up the qualifying marks in any or all the subjects of the examination. Therefore, the discretion has been left to the Commission to fix up the qualifying marks taking any or all subjects of the examination. Hence, taking qualifying mark in any of the subjects, if the merit list is prepared, it cannot be said that the OPSC has acted arbitrarily, unreasonably or contrary to the provisions of law, though admitted fact is that in earlier examination, the Commission had taken the aggregate marks in all subjects together.

11.3. It is also contended that since Clause 6 (c) of the advertisement has not been challenged, the effect of such clause remained as it is, as the 2016 Rules is completely silent about the minimum qualifying marks required to be attained in

written test and the OPSC has also earlier in its own wisdom devised the criteria for selection of the post of ASO by taking aggregate marks of the total subjects, which was completely within its domain, but realising such loophole in the said mechanism and by understanding that if a candidate fails in a particular subject, but because of his higher percentage of marks in other subjects, its aggregate marks also goes up and that candidate gets selected, this time OPSC fixed the qualifying mark in each subject. Therefore, no illegalities or irregularities has been committed by the OPSC so as to cause interference with the select list prepared by it taking into consideration the qualifying marks secured in each subject without taking into consideration the aggregate marks secured by a candidate.

11.4. The further stand of learned Senior Advocate is that the sole contention of the petitioners in the writ petition, that as OPSC was earlier conducting the written examination by taking the total aggregate marks this time also the said procedure should be adopted, cannot be sustained in the eye of law, as because the OPSC is the examining body and it has to conduct the examinations in conformity with the provisions of the Rules, Guidelines and Instructions issued from time to time. It is further contended that even though the advertisement contains Clause 6 (c), the writ petitioners in W.P.(C) No. 32174 of 2022 had not assailed the vires of such clause, rather participated in the selection and when the select list was prepared and the same was published, being unsuccessful in the process of selection, they assailed the same. Therefore, at their instance, the writ petition cannot be sustained. Thereby, the judgment passed by the learned Single Judge is to be quashed.

11.5. It is further contended that employer can decide the additional or desirable qualification, including any grant of preference. Therefore, the learned Single Judge has committed a gross error apparent on the face of the record in the passing the impugned judgments, which cannot be sustained in the eye of law.

11.6. To substantiate his contentions, learned Senior Advocate has placed reliance on the following decisions:-

1. Prabodh Verma and others v. State of Uttar Pradesh and others, (1984) 4 SCC 251.
2. Arunachal Pradesh Public Service Commission and others v. Tage Habung and others, (2013) 7 SCC 737
3. The Maharashtra Public Service Commission through its Secretary v Sandeep Shriram Warade and others, Civil Appeal No. 4597 of 2019 disposed of on 03.05.2019.
4. Jharkhand Public Service Commission v. Manoj Kumar Gupta and others, 2020 (I) OLR 216.
5. Tajvir Singh Sodhi and others v. The State of Jammu and Kashmir and others, AIR 2023 SC 2014.

6. All India SC & ST Employees Assn. and others v. A. Arthur Jeen and others, (2001) 6 SCC 380: AIR 2001 SC 1851.

7. Odisha Public Service Commission v. Priyambada Das, 2015 (I) OLR 510 : 2015 (I) ILR-CUT 455.

8. Srinivas Samant v. The Chairman, OPSC & another, OJC No. 8080 of 1997 disposed of on 15.05.1998.

9. Ramesh Kumar v. High Court of Delhi, (2010) 3 SCC 104.

10. Municipal Corporation of Delhi v. Surender Singh and others, (2019) 8 SCC 67.

12. In W.A No. 1561 of 2023, learned counsel Mr. B.S. Tripathy-1 has appeared for the appellants, who were not made parties to the writ petition nor filed any application for impletion, nor filed any petition for review, even though their names found place in the select list, but have filed this writ appeal directly. Mr. Tripathy has supported the contention raised by Mr. B. Routray, learned Senior Advocate appearing in W.A. No. 1822 of 2023. He further contended without being made a party to the writ petition or without filing an application for impletion of party, one can file a writ appeal after seeking leave seeking leave to approach the learned Single Judge. To substantiate his contention, he has placed reliance on the decisions in Pranav Verma & others v. Registrar General of the High Court of Punjab and Haryana, at Chandigarh & another, (2020) 15 SCC 377; and Moreshwar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedi (D) Thr. Lrs. and others, 2022 LiveLaw (SC) 802.

13. Mr. P.K. Mohanty, learned Senior Advocate appearing along with Mr. Pranoy Kumar Mohanty, learned counsel for the OPSC, i.e., appellants in W.A. No. 2539 of 2023 also adopted the argument advanced by Mr. B. Routray, learned Senior Advocate appearing for the appellants in W.A. No. 1822 of 2023, so far as merits of the case is concerned, and contended that discretion is left to the OPSC, in view of Clause 6 (c) of the advertisement, to calculate the marks secured by a candidate taking into account the qualifying marks in any or all the subjects of the examination. Therefore, the contention raised, that in the previous examinations aggregate mark was taken into consideration and this time mark secured in each subject has been taken into consideration and thereby the OPSC has acted arbitrarily, cannot be sustained in the eye of law. Once the discretion has been given to the OPSC to select the candidates as per said Clause 6(c) of the advertisement, validity of which has not been challenged, the respondents, having participated in the said process of selection and having come out unsuccessful, cannot turn around and challenge the same by filing writ petition. As such, at their instance, the writ petition is not maintainable and the same cannot be sustained in the eye of law. As a result, the learned Single Judge could have dismissed the writ petition in limini, instead of quashing the select list prepared by the authority in terms of Clause-6 of the advertisement issued.

14. Mr. M.K. Mishra, learned Senior Counsel appearing for the respondents contended that Rules-4, 6 and 10 of the 2016 Rules are relevant for the recruitment examination of ASO and preparation of merit/select list. On conjoint reading of the aforesaid rules, it is clear that the merit/select list is to be prepared on the basis of "marks in the aggregate" in the written examination, which has been followed in all the previous recruitment examinations of ASO. The further stage of examination was skill test, in which the candidates have to secure 40%. Rule-23 speaks that with regard to interpretation of 2016 Rules, if any question arises, the same shall be referred to the Government in G.A. Department whose decision thereon shall be final. Therefore, without taking any consent from the G.A. Department, any steps taken by the Odisha Public Service Commission cannot be sustained in the eye of law. At the outset, it is contended that when the written examination result was published on 07.11.2022, the same was challenged by the respondents. By virtue of interim order passed by the learned Single Judge on 02.12.2022, no final merit/select list has been published. Therefore, no right has been accrued in favour of the appellants in W.A. Nos. 1822 and 1561 of 2023 and they are not necessary parties, as has been held by the learned Single Judge in paragraphs 31-36 of the judgment. It is further contended that much reliance has been placed on *Odisha Public Service Commission v. Priyambada Das & Ors.*, 2015(1) ILR-CUT-455, but the rules dealt with therein are different. But, in the instant case, the 2016 Rules clearly provide that select list shall only be prepared as per Rules 10(3) and 10(4). Therefore, in absence of any select list prepared as per Rules, the appellants are not necessary parties and the present case is distinguishable on facts. Learned Single Judge, relying upon the judgments rendered in *Udit Narayan Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another*, AIR 1963 SC 786, *All India SC & ST Employees Association and another v. A. Arthur Jeen & Ors.*, (2001) 6 SCC 380 and other judgments, has passed the impugned judgments. It is contended that in *Udit Narayan Singh Malpaharia (supra)*, it has been decided who is a necessary party in a certiorari proceedings. Therein, the apex Court held that the person, who was a party before the lower authority or Tribunal, is a necessary party before the higher authority, i.e., next forum. It is contended that in all other cases relied upon, it has been decided that the candidates named in final merit/select list are necessary parties, if the select list is challenged. This Court, while deciding the case of *Priyambada Das (supra)*, considered the merit/select list that had been challenged as the provisional merit/select list, even though actually it was a final select list. It is further contended that in *H.C. Kulwant Singh & Ors. v. H.C. Daya Ram & Ors.*, AIR 2014 SC 3083, final merit/select list was challenged. In *Prashant Ramesh Chakkarwar v. Union Public Service Commission and Others*, (2013) 12 SCC 489, challenge was made after the final select list and appointment was given. In *All India SC & ST Employees Association (supra)*, the selection was made through viva voce only. Thus, the select list is final merit/select list not provisional, even though it is mentioned as provisional in the judgment. Thereby, it is contended that *Priyambada Das (supra)* cannot be treated as precedent, since the cases relying upon which the

learned Single Judge has passed the judgment speaks otherwise. In *K.H. Siraj v. High Court of Kerala*, (2006) 6 SCC 395, final/select list was challenged; and in *Pravati Nayak v. State of Odisha* [W.P.(C) No. 21022 of 2016 disposed of on 27.07.2017], final merit list was challenged; whereas in *Satyajit Sahoo v. State of Odisha*, 2016 (1) OLR 325, the subject-matter of consideration was the legality of termination of a person and appointment of another person against terminated vacancy, who had not been impleaded as a party. Thereby, the apex Court reversed the said judgment in *Satyajit Sahoo* (supra), reported in (2018) 17 SCC 621. In *Purusottam Behera v. State of Odisha & Ors.*, 2019 (II) ILR-CUT-380, final merit/select list was challenged; and *Moreswar Yadaorao Mahajan v. Vyanktesh Sitaram Bhedi (D) through LR's & Ors.*, 2022 (2) LIVE LAW 802, was a case arising out of a civil suit. Thereby, the law decided in the above cases is not applicable to the present nature of case and the appellants in W.A. Nos. 1822 and 1561 of 2023 are not necessary parties to the writ petition filed by the respondents. Consequentially, the finding of the learned Single Judge that the appellants are not necessary parties is well justified and does not require interference of this Court. It is further contended that learned Single Judge in paragraphs 35 and 37 of the impugned judgment had directed not to finalize the selection process, as a result of which the selection could not be finalized for several months. The shortlisted candidates were all aware of the pendency of the earlier writ petition, as the selection for appointment to the post of ASO was hanging for quite some time, but no effort whatsoever was made by them to implead themselves as parties to the earlier writ petition. On the contrary, they preferred to wait and watch as fence-sitters. After the final judgment was delivered by holding that the selection process adopted by the OPSC is de hors the relevant rules, the review petitioners approached the learned Single by filing the review petition as well as connected writ appeals only with the intention to delay the selection further. This proposition of law has been decided in the case of *Secretary, Tamil Nadu Public Service Commission v. A.B. Natrajan and others*, (2014) 14 SCC 95. Thereby, there is no substance in the allegation of non-joinder of selected candidates. Therefore, the appellants in W.A. Nos. 1822 and 1561 of 2023 are not necessary parties to the writ petition filed by the respondents.

14.1. It is further contended that Clause-6(c) of the advertisement is contrary to the Rules, as the specific procedure provided in Rule-10 has not been followed. It is settled law that anything done contrary to law is *none est* in the eye of law. Learned Single Judge has specifically dealt with the said aspect in paragraphs 49, 55, 58-59 & 61 referring to judgments of the apex Court. It is further contended that in *Krishna Rai (Dead) through Legal Representatives and others v. Banaras Hindu University through Registrar and Others*, (2022) 8 SCC 713, the apex Court, relying on *Krushna Chandra Sahu v. State of Orissa*, 1995 SUPP. (3) SCR 419, discarded all the case laws on estoppel and held that the selection board has no jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection. Thereby, the action taken in the aid of

Clause-6(c) of the advertisement is not sustainable in the eye of law, as the said clause itself is contrary to 1916 Ruled and also not in consonance with Articles 162 and 166 of the Constitution of India, Rule-11 of Rules of Business and Rul-23 of the relevant 2016 Rules. It is further contended that in Goa Public Service Commission v. Pankaj Rane and Ors, (2022) 11 SCC 742, the apex Court held that the Commission or Board has no jurisdiction to fix minimum qualifying marks in absence of power conferred therefor by the Rules. As such, the case laws decided are distinguishable and more particularly, Arunchal Pradesh Public Service Commission v. Tange Habung and Ors, (2013) 7 SCC 737 has no application to the present case. It is contended that in the said case, the Commission was authorized by the Rules to fix criteria, which is not here in the present 2016 Rules. Therefore, the said judgment has no application.

14.2. In Jharkhand Public Service Commission v. Manoj Kumar Gupta & Ors., 2020 (I) OLR 216, there were no Rules in operation. In Maharastra Public Service Commission v. Sandeep Shriram Warade & Ors. (Civil Appeal No.4597 of 2019), it has been decided that the employer has the power not the Commission but in accordance with law. In the case at hand, Commission has exercised power which it did not have under 2016 Rules. So far as Municipal Corporation of Delhi v. Surender Singh & Ors., (2019) 8 SCC 67 is concerned, it is contended that the facts of the case reveal that there were no Rules at all and power was given to the Board. It is completely different from the present case, as here 2016 Rules are guiding the recruitment. Even in Pranav Verma & Ors. v. Registrar General, High Court of P & H and Another, (2020) 15 SCC 377, the issues were completely different. There was no allegation of violation of any Rules. The ratio decided in Tajvir Singh Sodhi & Ors. v. The State of J & K and Ors., AIR 2023 SC 2014 is completely on different context. There was no allegation of violation of any Rules and Authority of the Commission. Thus, it is contended that the case laws decided in the above cases and relied on by the appellants have no application to the present case, since in the instant case all the procedures have been provided in 2016 Rules.

14.3. To substantiate his contentions, Mr. Mishra, learned Senior Counsel has relied upon the judgments rendered in Krishna Rai (Dead) through legal representative and others v. Banaras Hindu

University, (2022) 8 SCC 713; Goa Public Service Commission v. Pankaj Rane and others, (2022) 11 SCC 742; Jharkhand Public Service Commission v. Manoj Kumar Gupta, 2021 OLR 216 : 2019 (20) SCC 178; Municipal Corporation of Delhi v. Surender Singh, (2019) 8 SCC 67; Pranav Verma v. Registrar General of the High Court of Punjab and Haryana at Chandigarh, (2020) 15 SCC 377; Tajvri Singh Sodhi and others v. The State of Jammu and Kashmir, AIR 2023 SC 2014; K. Manjushree v. State of Andhra Pradesh, (2008) 3 SCC 512; Ramjit Singh Kardam v. Sanjeev Kumar and others, (2020) 20 SCC 209; Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and another, AIR 1963 SC 786 : 1963 (Supp.1) SCR 676; Prashant Ramesh Chakkarwar v. Union Public

Service Commission and others, (2013) 12 SCC 489; All India SC & ST Employees' Association and another v. A. Arthur Jeen & Ors., (2001) 6 SCC 380; Prabodh Verma and others v. State of Uttar Pradesh, (1984) 4 SCC 251; K.H. Siraj v. High Court of Kerala, (2006) 6 SCC 395; Pravati Nayak v. State of Odisha and another, W.P.(C) No. 21022 of 2016 disposed of on 27.07.2017; Satyajit Sahoo v. State of Odisha, 2015 SCC OnLine Ori 398; Swapna Mohanty v. State of Odisha and others, 2018 17 SCC 621; and Secretary Tamil Nadu Public Service Commission v. A.B. Natarajan and others, (2014) 14 SCC 95.

15. Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. Pronoy Mohanty, learned counsel appearing for the appellants in W.A. No. 2539 of 2023 for the Secretary, Odisha Public Service Commission adopted the arguments advanced by Mr. B. Routray, learned Senior Counsel appearing for the appellants in W.A. No. 1822 of 2023 and in addition to that it is contended that as per Clause-6(c) of the advertisement discretion is left to the OPSC to calculate marks taking into account mark secured in any subject for preparation of the select list dated 07.11.2022. To substantiate his contention, he has relied upon the judgment of the apex Court in Municipal Commissioner of Delhi v. Surender Singh and others, (2019) 8 SCC 67.

16. This Court heard Mr. B. Routray, learned Senior Counsel appearing along with Mr. S.D. Routray, learned counsel for the appellants in W.A. No. 1822 of 2023; Mr. B.S. Tripathy-1, learned counsel appearing for the appellants in W.A. No. 1561 of 2023; Mr. P.K. Mohanty, learned Senior Counsel appearing along with Mr. Pronoy Mohanty, learned counsel for the appellants in W.A. No. 2539 of 2023; Mr. J.P. Pattnaik, learned Government Advocate appearing for the State-respondents and Mr. Manoj Mishra, learned Senior Counsel appearing along with Mr. S. Senapati, learned counsel appearing for the private respondents in virtual mode, and perused the records. Since pleadings have been exchanged between the parties with the consent of learned counsel appearing for the parties, these writ appeals are being disposed of finally at the stage of admission.

17. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Secretariat Service (Method of Recruitment and Conditions of Service of Assistant Section Officers) Rules, 2010, the Odisha Secretariat Service (Junior) Rules, 1981, the Odisha Secretariat Service (Group-B) Rules, 1986 and the Odisha Secretariat Service Rules, 1980 except as respect things done or omitted to be done before such supersession, the Governor of Odisha makes the rules regulating the method of recruitment and conditions of service of the persons appointed to the Odisha Secretariat Service called "The Odisha Secretariat Service (Method of Recruitment and Conditions of Service) Rules, 2016", which has been notified in the official gazette on 9th January, 2017. The relevant parts of the rules are quoted hereunder:-

"2. Definitions:-

(1) In these rules, unless the context otherwise requires

(a) "Commission" means the Odisha Public Service Commission:

(b) "Committee" means the Selection Committee constituted under rule13

xxx xxx xxx

(j) "Select list" means the list finally approved by the Government under rule 16.

xxx xxx xxx

3. Constitution of the Service:- The Service shall consist of the following posts, namely:-

(a) Assistant Section Officer, Group-B;

xxx xxx xxx

Part- III

DIRECT RECRUITMENT

6. Competitive Examination:-

1) The direct recruitment to the post of Assistant Section Officer through competitive examination shall be conducted by the Commission.

2) Subject to the provisions of rule 11, the Home Department shall communicate the total number of vacancies, that is , the existing vacancies, if any, and the anticipated vacancies likely to arise during the recruitment year to be filled up by direct recruitment to the commission in the first week of December indicating the posts to be reserved for candidates belonging to different reserved categories.

3) The Commission shall, on receipt of the vacancies from the Government in Home Department, publish the advertisement at the latest by the last week of December in the Odisha Gazette and two widely circulated Odia Dailies, inviting applications from the candidates eligible to appear at the written examination.

4) The date and the place of the written examination shall be as may be decided and notified by the Commission.

5) The scheme and subjects for the written examination and the syllabus shall be specified in the Schedule.

6) Only those candidates who have been short listed after the written test shall be called for the skill test in computer as provided in the schedule which shall be of qualifying nature. One has to secure at least forty percent of the total marks in the skill test to qualify.

xxxxxxxxx

10.Preparation of Merit List:-

1) On the basis of the results of the examination, the Commission shall prepare a common list of successful candidates found suitable for appointment in order of merit, subject to reservations for different categories and forward the list to the Government. The list shall also be published by the Commission for general information.

2) The list so prepared under sub-rule (1) shall include the names of successful candidates and shall be equal to the number of vacancies notified by the Commission.

3) Final ranking of the candidates shall be soon the basis of marks obtained in the written examination.

4) In case of candidates securing same marks in the aggregate the candidate securing higher marks in General Knowledge shall rank above others.

5) In case the marks secured in General knowledge is also the same, final ranking shall be determined on the basis of age i.e. the person older in age shall be placed above the younger.

xxx xxx xxx

23. Interpretation:- If any question arises relating to interpretation of these rules, the same shall be referred to the Government in General Administration Department whose decision thereon shall be final.

SCHEDULE

Scheme and Syllabus of the Examination

[See sub rule (5) of Rule -6]

SCHEME

Papers

Subject

Marks

No. of Questions

Duration

I

General Awareness

100

100

1 ½ hrs

II

(A) Test of Reasoning &

Mental Ability

50

50

1 1/2 hrs

(B)

Mathematics (10th Standard Level)

50

50

III

Language

(a) English

100

100

2 hrs.

(b) Odia

100

100

IV

Skill Test in Computer Application

(practical)

50

05

1 hr.

NOTE:

1

Except the Skill Test in Computer Application (Practical), the questions in all other subjects shall be of multiple choice type and all questions will carry equal marks i.e. 01

2

For each wrong answer 0.25 marks shall be deducted from the marks awarded for correct answers.

3

The candidates shall answer the questions in English except Odia language paper or otherwise specified in the question paper itself.

4

Only those candidates who have been shortlisted after the Written Test shall be called for Skill Test in Computer by the Commission which shall be of qualifying nature.

18. On the basis of the requisition made by the Home Department for recruitment of 796 posts of ASO in Group-B cadre in the Odisha Secretariat Service, OPSC issued advertisement no.26 of 2021-22 indicating the vacancies position to the following effect:-

Sl.

Category

No. of Posts

1

2

3

1

Unreserved

447 (149-w)

2

SEBC

62 (21-w)

3

Scheduled Caste

109 (36-w)

4

Scheduled Tribe

178 (59-w)

Total

796 (265-w)

Educational qualification has been prescribed under Clause-4 of the advertisement to the following effect:-

"4. EDUCATIONAL QUALIFICATION

A candidate must possess a Bachelor's Degree in any discipline from a recognized University or possess such other qualification equivalent there to and must have adequate knowledge in Computer Application as specified in the Appendix-I."

Appendix-1 of the advertisement states about the scheme and syllabus of the examination to the following effect:-

Scheme and Syllabus of the Examination

SCHEME

Papers

Subject

Marks

No. of

Questions

Duration

I

General

Awareness

100

100

1 ½ hrs

II

(A) Test of Reasoning &

Mental Ability

50

50

1 1/2 hrs

(B)

Mathematics (10th Standard Level)

50

50

III

Language

(a) English

100

100

2 hrs.

(b) Odia

100

100

IV

Skill Test in Computer Application

(practical)

50

05

1 hr.

NOTE:

1

Except the Skill Test in Computer Application (Practical), the questions in all other subjects shall be of multiple choice type and all questions will carry equal marks i.e. 01

2

For each wrong answer 0.25 marks shall be deducted from the marks awarded for correct answers.

3

The candidates shall answer the questions in English except Odia language paper or otherwise specified in the question paper itself.

4

Only those candidates who have been shortlisted after the Written Test shall be called for Skill Test in Computer by the Commission which shall be of

qualifying nature.

Clause-6 of the advertisement deals with method of Section to the following effect:-

"6. METHOD OF SELECTION:

a) The Competitive Examination for recruitment to the posts of Assistant Section Officers will be conducted in the following successive stages:

i. Written Examination (Objective Type — Multiple Choice Questions)

ii. Skill Test in Computer (Practical- Qualifying)

The details of the Scheme and Syllabus of the Examination are mentioned in the Appendix — I

b) Only those candidates who have been short listed after the Written Test shall be called for the Skill Test in Computer (Practical) by the Commission as provided at Appendix — I, which shall be of qualifying nature. One has to secure at least forty percent (40%) of the total marks in the Skill Test to qualify it.

c) The Commission shall be competent to fix up the qualifying marks in any or all the subjects of the examination.

d) Final ranking of the candidates shall be on the basis of marks obtained in the written 1 examination.

e) In case of candidates securing same marks in the aggregate the candidate securing higher marks in General Knowledge shall rank above others.

f) In case the marks secured in General Knowledge is also the same, final ranking shall be determined on the basis of age i.e., the person older in age shall be placed above the younger."

19. In view of the statutory provisions contained in Part-III, direct recruitment to the post of ASO shall be made through competitive examination conducted by the Commission. As per Sub-clause (2) of Clause-6, subject to the provisions of Rule-11, the Home Department shall communicate the total number of vacancies, that is, the existing vacancies, if any, and the anticipated vacancies likely to arise during the recruitment year to be filled up by direct recruitment to Commission in the first week of December, indicating the posts to be reserved for candidates belonging to different reserved categories. As per Sub-clause (3), the Commission shall, on receipt of the vacancies from the Government in Home Department, publish the advertisement at the latest by the last week of December in the Odisha Gazette and two widely circulated Odia dailies, inviting applications from the candidates eligible to appear at the written examination. As

per Sub-rule (4) of Rule-6, the date and place of the written examination shall be decided and notified by the Commission. As per sub-rule (5), the scheme and subjects for the written test and the syllabus shall be specified in the schedule. Sub-rule (6) provides that only those candidates who have been shortlisted, after the written test, shall be called for the skill test in computer as provided in the schedule, which shall be of qualifying nature, and one has to secure at least forty percent of the total marks in the skill test to qualify. The Commission, who is competent to issue advertisement as per Sub-rule (3) of Rule-6, issued the advertisement indicating the number of vacancies of different categories and also reservation of different categories and also examination fees as per Clause-5 of the advertisement. Clause-6 of the advertisement provides method of selection. As per Sub-clause (a) of Clause-6, the competitive examination for recruitment to the posts of ASO will be conducted in two successive stages, i.e, (i) written examination (objective type-multiple choice questions); and (ii) skill test in computer (practical-qualifying). The details of the scheme and syllabus of the examination are mentioned in the Appendix-I. Sub-clause (b) of Clause-6 of the advertisement provides that only those candidates who have been shortlisted, after the written test, shall be called for the skill test in computer (practical) by the Commission, as provided at Appendix-1, which shall be of qualifying nature and one has to secure at least forty percent (40%) of the total marks in the skill test to qualify it. Sub-clause (b) of Clause-6 of the advertisement is in consonance with the provisions contained in Sub-rule (6) of Rules 6 and Sub-clause (a) of the advertisement is in consonance with Sub-rule (5) of Rule-6 of the 2016 Rules. Clause 6(c) of the method of selection specifically mentioned that the Commission shall be competent to fix up the qualifying marks in any or all the subjects of the examination. Thereby, discretion is left to the Commission to fix the qualifying marks in any or all the subjects. As such, the competitive examination for recruitment to the posts of ASO will be conducted in two successive stages, i.e., (i) written examination (objective type-multiple choice questions); and (ii) skill test in computer (practical-qualifying). Therefore, the Commission is competent to fix up the qualifying marks in any or all the subjects in the examination. Meaning thereby, in the written examination, in any, or all the subjects. The skill test in computer being practical and qualifying in nature, as per sub-clause (c) read with sub-clause (b) of Clause-(6), one has to secure at least 40% mark in total in the skill test to qualify. As such, a candidate will be called for the skill test in computer (practical) by the Commission, only if he/she is shortlisted after the written test. This is the procedure envisaged under the 2016 Rules read with the advertisement issued by the Odisha Public Service Commission. The date of examination was fixed to 21.08.2022 for written test and subsequently the same was postponed to 27.08.2022, vide notification dated 20.08.2022. As per the advertisement for recruitment to the post of ASO in Group-B of Odisha Secretariat Service under Home Department, online applications were invited from the prospective candidates through the proforma application to be made available on the website. The link for registration/re-registration and payment of examination fee was available from 20.01.2022 to

19.02.2022 for recruitment to 796 posts of ASO in Group-B in the scale of pay of Rs.35,400/- in Level-9 Cell-1 as per the Pay matrix provided under Rule-3 of ORSP Rules, 2017 with usual dearness and other allowances, as may be sanctioned by the Government of Odisha from time to time. As such, the posts are permanent in nature. Further, the last date for submission of registered online application was fixed to 25.02.2022. Adhering to the advertisement, the candidates applied for the same and appeared in the written test conducted on 27.08.2022. As per Sub-rule (5) of Rule-6, the scheme and subjects of the written examination and syllabus were to be specified in the schedule and, as such, the questions were to be in multiple choice carrying equal mark, i.e., (01). The subjects are general awareness 100 marks, test of reasoning and mental ability 50 marks, mathematics 50 marks, English 100 marks and Odia language 100 marks. As such, for each wrong answer 0.25 mark was to be deducted from the marks awarded for correct answers. Sub-rule (6) of Rule-6 provides that only those candidates, who are short listed after the written test, shall be called for the skill test, for which one has to secure at least 40% of the total marks to qualify it. The written test was conducted on 27.08.2022 through off-line mode as per the schedule. After the written test was conducted, the result was published on 07.11.2022 and on the basis of the shortlisted candidates, a select list was prepared and candidates were called for documents verification and skill test on 27.11.2022. The name of the candidates, who were not found in the select list, approached this Court by filing W.P.(C) No.32174 of 2022, without impleading the candidates whose name found place in the select list. In the process of hearing in W.P.(C) No. 32174 of 2022, objections were raised with regard to non-joinder of parties. Meaning thereby, the candidates, whose name found place in the select list, were not made parties to the writ petition. As such, contention was raised that the writ petition filed by unsuccessful candidates should be dismissed. This fact has been noted by the learned Single Judge in paragraph-14 of the judgment to the following effect:-

"14. The next question that was raised in the counter affidavit is non-joinder of necessary party. In the said context, it is stated in the counter affidavit that the Petitioners essentially seek for a direction to redraw the select list already prepared and published by the OPSC, however, none of the candidates from the select list dated 07.11.2022 have been arrayed as party even though their selection is under challenge. As such, the writ petition deserves to be dismissed at the threshold for non-joinder of necessary parties."

In paragraph-15 of the judgment, while dealing with the merits of the case, the learned Single Judge has noted as follows:-

"15. On merits of the matter, it has been stated in the counter affidavit that the writ petition is liable to be dismissed on the following grounds:-

(a) Rule-6(6) of the Rules, 2016 mandates the OPSC to short list candidates on the basis of the written test.

(b) Rule-6 does not prescribe any method of short listing of candidates. It is within the discretion of the OPSC to choose the method of short listing.

(c) The method of short listing is a policy decision of the employer. The prescription of minimum qualifying marks in each of the subjects in the written test is a fair, reasonable and universally accepted method of short listing.

(d) Even otherwise, the Home Department vide its letter No.30965 dated 02.09.2021, which is in the nature of executive instructions, under Article 162 of the Constitution of India, empowers the OPSC to prescribe the minimum qualifying marks in all or any of the subject of the written test."

Even though objections were raised with regard to non-joinder of parties, the learned Single Judge has not framed any issue to that extent. Furthermore, though in course of hearing, learned Advocate General, relying upon various judgments, argued on merits and also non-joinder of parties, the same has not been taken into consideration. Paragraph-43 of the judgment, being relevant for the said purpose, is quoted as under:-

"43. Learned Advocate General, on the other hand, relies upon the judgments in K.H. Siraj v. High Court of Kerala and Others, reported in (2006) 6 SCC 395; and Municipal Corporation of Delhi v. Surender Singh and Others, reported in (2019) 8 SCC 67 in the context of cut-off marks and interpretation of rules. He also relied upon the judgment of the Hon'ble Supreme Court in the case of Union of India v. Pushpa Rani and Others, reported in (2008) 9 SCC 242 in the context of manner of recruitment is the discretion of the employer, which according to this Court, is not relevant for the purpose of the issue involved in this case. In the context of the executive instruction that can be issued by the Government to fill up the gaps in law, learned Advocate General relied upon the judgment in the case of SK Nausad Rahaman & Ors. v. Union of India and Ors. in Civil Appeal No.1243 of 2022. On estoppel, learned Advocate General also relied upon a judgment in the case of Dhananjay Malik and Others v. State of Utteranchal and Others, reported in (2008) 4 SCC 171. Furthermore, in the context of non-joinder of necessary party, learned Advocate General also relied upon on the judgment in K.H. Siraj's case (supra)."

20. Even though question of non-joinder of parties was raised, the learned Single Judge has not answered the same, rather proceeded to answer on merits, as would be evident from paragraphs 49 to 63 of the judgment. In paragraphs 53, 54 and 55 of the judgment, the learned Single Judge has made discussions with regard to fixation of minimum qualifying mark by the Commission. As such, the learned Single Judge has come to a finding that the fixation of minimum qualifying marks by the Commission may be 'good', but, however, the same is bad on two counts. First, it is not supported by the rules, and second, no prior intimation was given to the candidates who appeared in the written test. As such, the learned Single Judge observed that admittedly the eligibility on the basis of minimum qualifying mark on each subject was declared only after the

written test was conducted. Therefore, the Court felt that when the candidates appear in the recruitment test or written test they come prepared as per the scheme of the examination and sometimes they also plan or strategize so that they can secure maximum marks in some subjects ignoring other subjects. The ultimate objective of the candidates is to perform in the best possible manner and to try to secure the highest possible mark so that they can be shortlisted for the next stage. As such, the learned Single Judge came to a conclusion that the OPSC admittedly introduced the subject-wise qualifying mark, after the written test was over. The learned Single Judge has further come to a finding that there was no provision in the rules with regard to fixation of minimum qualifying mark for each subject. Sub-rule(6) of Rule-6 gives impression that only those candidates, who have been shortlisted after the written test, shall be called for the skill test in computer, as provided in the schedule, which shall be of qualifying nature. Even though reliance has been placed on Clause(6)(c) of the advertisement that the Commission is competent to fix the qualifying mark in any or all subjects of the examination, but the learned Single Judge has come to a conclusion by observing that merely because the OPSC published the advertisement, the same would not become sacrosanct per se. Finally, the learned Single Judge in paragraphs 62 and 63 of the judgment held as under:-

"62. In view of the aforesaid analysis of fact as well as the legal position as narrated by the Hon'ble Supreme Court in a catena of judgments, this Court is persuaded to come to a conclusion that the OPSC had no authority to fix the minimum qualifying mark subjectwise after the written test was over. Moreover, in the light of aforesaid Supreme Court judgments, this Court is also of the clear view that the Petitioners are not estopped by the fact that they had appeared in the recruitment test, therefore, they would be debarred to challenge the illegal conduct of the Opposite Parties.

63. Accordingly, the writ petition stands allowed. The merit/select (short listed) list published vide Notice dated 07.11.2022 by the OPSC for document verification and skill test under Annexure-5 is hereby quashed. Consequential, Press Notice dated 10.11.2022 and 22.11.2022 are also hereby quashed. It is further directed that the OPSC shall redraw the select /merit (short listed) list strictly in terms of the Rule-6(5) and Rule-6(6) as well as the schedule appended to the Rules, 2016 on the basis of the aggregate marks secured by the candidates. Accordingly, the candidates shall be called for verification of document and to participate in the skill test on the basis of redrawn merit/select (short listed) within a period of two months from today. Further it is directed that both the State Government as well as the OPSC shall ensure that the selection process continues strictly in terms of the Rules, 2016. There shall be no order as to cost."

21. After the judgment was rendered by the learned Single Judge on 19.05.2023, the appellants in W.A. No. 1822 of 2023 filed review petition bearing RVWPET No. 257 of 2023 and, as such, some of the selected candidates have also approached

this Court by filing W.P.(C) No. 19402 of 2023 against the respondents no.1 to 16, who are writ petitioners in W.P.(C) No.32174 of 2022. The learned Single Judge, while considering the review petition and the writ petition, has taken note of the fact that the review petitioners, who are the shortlisted candidates after conclusion of the first phase of selection process and were supposed to appear in the second phase of the selection, i.e., document verification and skill test, approached the Court with a prayer to review/recall the judgment dated 19.05.2023. Similarly, W.P.(C) No. 19402 of 2023 was filed by some of the candidates, with almost identical pleadings and prayer made in the review petition, as they were not arrayed as parties in W.P.(C) No. 32174 of 2022 apprehending that the review petition may not be maintainable at their instance since they were not parties to the earlier writ petition. Therefore, for abundant caution, they filed the writ petition by invoking jurisdiction of this Court under Articles 226 and 227 of the Constitution of India seeking review/recall of the judgment dated 19.05.2023 passed in W.P.(C) No. 32174 of 2022. The grounds of challenge are indicated in paragraphs 7 to 12 of the judgment in the review petition and in paragraph-15, the learned Single Judge has formulated three questions to the following effect:-

"15. Keeping in view the argument advanced by the learned Senior Counsel appearing for the Petitioners and the grounds taken in both the review petition as well as the writ petition, this Court is of the opinion that the present review application involves the following questions of law for adjudication:-

(i) Whether the grounds taken in the review petition are good grounds to come to a conclusion that there exists an error apparent on the face of the record and, accordingly, the same calls for interference in judgment dated 19.05.2023 by this Court in exercise of its review jurisdiction?

(ii) Whether the writ petition which is in the shape of a review/recall application by the parties, who were not arrayed as Opposite Parties to the original writ petition, is maintainable in law?

(iii) Whether the review petition at the instance of the present Petitioners is entertainable within the parameters of law laid down for entertaining a review/recall application, particularly keeping in view the factual background of the present case?"

In paragraph-16 of the judgment, the learned Single Judge held as under:-

"16. Before advertent to answer the aforesaid questions, this Court would like to clarify, at the outset, that in course of his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioners led much emphasis on the ground that the judgment dated 19.05.2023 is unsustainable on the ground that the Petitioners, who are necessary parties to the earlier litigation were not arrayed as Opposite Parties and they were not given an opportunity of hearing in violation of the principles of natural justice. So far other grounds taken in the writ petition are concerned, not much emphasis was led on such grounds by the learned Senior

Counsel appearing on behalf of the Petitioners. Therefore, this Court would proceed to adjudicate the review petition as well as the writ petition keeping in view the factual background of the present case as well as the fact that the learned Senior Counsel for the Petitioners assailed the judgment dated 19.05.2023 on the ground that the said judgment is required to be reviewed on the ground that the Petitioners were not added as Opposite Parties and, as such, they were not heard before delivering the judgment dated 19.05.2023. On a analysis of the ground other than the nonjoinder of necessary parties as taken in the review as well as in the writ petition, this Court is of the considered view that such grounds are based on merits of the matter which can only be challenged by filing an intra-court appeal as provided in law.”

Having prima facie taken a view that the dispute to be considered by the intra-Court appeal as per the underlying principles enumerated in Order 47 Rule-1 of the CPC, the learned Single, in paragraph-21 of the judgment held as under:-

“21. In view of the aforesaid analysis of the legal position with regard to entertaining an application for review/recall of an order/judgment, this Court is required to analyze the facts of the present case as well as the grounds taken by the Petitioners in their application and in the event this Court comes to a conclusion that the grounds taken by the Petitioners in both review as well as the writ petition falls within the parameters as prescribed and elaborated by various judgments, then this Court would certainly review the judgment dated 19.05.2023, otherwise not.”

In paragraphs-30 and 31 of the judgment, the learned Single Judge has observed as follows:-

“30. Learned Senior Counsel appearing for the Petitioners argued that this Court in judgment dated 19.05.2023 although has referred to the issue of nonjoinder of necessary party in paragraph-14 of the judgment, however, the same has not been answered while delivering the final judgment. In this context, this Court would like to observe that a bare reading of the paragraph-14 of the judgment would reveals that the same has been mentioned with reference to the pleading in the counter affidavit of the Opposite Party. It is further clarified that in course of final hearing of the matter, none of the counsels appearing for the Opposite Parties neither raised the said question nor led any emphasis on such aspect of the matter. Therefore, the contention that the issue was although raised but the same has not been answered would not be a fair argument in the factual background of the present case. Moreover, the learned Senior Counsel appearing for the Review Petitioners was not the counsel in the matter in which the judgment delivered by this Court is being sought to be reviewed. Since such a question of nonjoinder of necessary party has been raised in the review as well as in the connected writ petition, this Court would discuss the same in this judgment.

31. To be impleaded as a party in a proceeding, it is the well established

proposition of law that the person who is taking the plea of nonjoinder of party has to prima facie establish that he is a necessary party to the proceeding and in whose absence the lis could not have been decided. Order-1 of the C.P.C. deals with parties to the suits. Although the substantive provision does not apply, however, as a matter of practice, the Courts in India are guided by the underlying principle of Order-1 of C.P.C. while considering the issue as to who can be added as a party to the suit/proceeding. Further, Order-1 Rule-3 of the C.P.C. provides as to who may be joined as defendant. The same provides all persons may be joined in one suit as defendants where any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally. The aforesaid provision essentially means that a person can be added as defendant/Opposite Party against whom relief is sought for by the Petitioner/Plaintiff.

Therefore, no suit or proceeding can be decided effectively in their absence. They are also otherwise known as necessary parties to the proceeding. A necessary party is a person/party whose presence in the proceeding is necessary and in whose absence the lis cannot be decided as has been held in several judgments delivered by the Hon'ble Supreme Court as well as this Court."

In paragraph-33 of the judgment, the learned Single Judge has observed as follows:-

"33. The analysis of aforesaid factual background of W.P.(C) No.32174 of 2022, this Court found that the final merit list had not been published by the time the writ petition was filed before this Court. Moreover, the Writ Petitioners-present Opposite Parties No.1 to 16 had approached this Court by challenging the method of selection adopted by the OPSC at an interim stage. On a detailed analysis of facts as well as the law, this Court in the earlier writ petition had come to a conclusion that the procedure adopted by the OPSC in short listing the candidates after written examination is dehors the relevant rules. Therefore, this Court had to intervene in the matter by delivering judgment dated 19.05.2023. Moreover, by the time the judgment was delivered on 19.05.2023, no legal right was crystallized in favour of the Review Petitioners as the selection process for recruitment to the post of ASOs was not concluded and, as such, had not attained the finality. Therefore, by no stretch of imagination, it can be concluded that the selection for appointment to the post of ASO by the OPSC was final by mere publication of a Notice dated 07.11.2022 and thus a valuable right has accrued in favour of the Petitioners. Mere reflection of name in the notice of short listed candidates for the next phase of selection does not confer any legal right on the Review Petitioners. Therefore, this Court believes that the learned counsels appearing for the Opposite Parties in the writ petition although raised the ground of nonjoinder of necessary party, however, the same was not pressed into service at the time of final hearing of the matter as no right has accrued in favour of the Petitioners by mere inclusion of their name in the list of short listed

candidates for the next phase of selection. In such view of the matter and in the absence of any legal right to finally claim for appointment, it cannot be said that the Petitioners had acquired a right to be appointed to the post of ASOs for which the selection process was on going. Accordingly, this Court has no hesitation in coming to a conclusion that the Review Petitioners were not necessary parties to the earlier writ petition bearing W.P.(C) No.32174 of 2022."

Consequently, the learned Single Judge has come to a conclusion that the review petitioners were not necessary parties to the earlier writ petition, i.e., W.P. (C) No. 32174 of 2022 and having come to the finding that the review petitioners are not necessary parties, the learned Single Judge, in paragraph-34 of the judgment held as under:-

"34. Even otherwise also, mere inclusion of the name in the select list does not confer any right to claim for appointment. However, the right to get appointment once the final select list is published after completion of the entire selection process cannot just be merely brushed aside. The judgments relied upon by learned Senior Counsel appearing for the Review Petitioners are either based on the fact of final publication of the select list or where the Petitioners were already in service and their promotion/seniority was being questioned without impleading them as parties. Therefore, there is a huge difference between the two scenarios depicted hereinabove. (1) Where the right has not crystallized, i.e, the selection process is not over and a mere list of short listed candidates prepared in violation of rules and the other scenario. (2) After publication of the final select list or while questioning the promotion/seniority vis-à-vis a candidate who have not been added as a party to the writ petition. Under the first scenario, no right of such persons is affected as it was not finalized that they would be considered for being appointment after the entire selection procedure got over."

The learned Single Judge, having come to the finding that the review petitioners have approached the Court by filing the review petition as well as the connected writ petition only with an intention to delay the selection further, categorically held in paragraph 36 of the judgment that the review petitioners were not necessary parties to the previous writ petition. By holding so, the learned Single Judge, in paragraph-37 of the judgment, held as under:-

"37. In the aforesaid background, this Court would now record its finding to the issues formulated in the preceding paragraph. The first ground that was formulated by this Court was as to whether the grounds taken in the review petition are good grounds and, accordingly, a review petition is entertainable on such grounds? In reply to the said ground, this Court is of the considered view that the ground with regard to nonjoinder of necessary party which was emphatically argued by the learned Senior Counsel is definitely a good ground, so far maintainability of the review petition is concerned. With regard to the other grounds taken in the review petition, this Court would like to record that such grounds are based on the merits of the issue which has already been decided by this Court in the earlier writ petition. Therefore, in the event the

Petitioners are aggrieved by the findings of this Court they should have been well advised to challenge the same by filing an intra-court appeal. Thus, the first issue is answered accordingly.”

22. As it appears, the learned Single Judge, while advising that in the event the review petitioners are aggrieved by the findings of the Court, they can challenge the same by filing intra-Court appeal, has come to a definite conclusion in paragraph-39 while answering questions nos.(i) and (ii) that both writ petition as well as review petition at the instance of the petitioners are maintainable. The learned Single Judge has further observed that so far as acceptance of such review petition and writ petition as well as their entertainability is concerned, the Court is required to apply underlying principle of Order 47 Rule 1 of CPC, and by so observing has dismissed the review petition as well as the writ petition.

23. In view of the factual matrix, as deliberated in detail, it is to be seen whether the appellants in W.A. No. 1822 of 2023, who are the successful candidates in the select list published on 07.11.2022 sought for review of the judgment passed by the learned Single Judge on 19.05.2022, are necessary parties and whether for their non-impletion as parties to the proceeding the writ petition is liable to be dismissed or not. At the same time, it is also to be seen whether the writ petition filed by un-successful candidates raising question of non-inclusion of their name in the select list prepared on 07.11.2022 is maintainable or not?

24. The underlying principles of non-joinder of parties emanates from the provisions contained in Order 1 Rule-9 of the CPC. Although Order 1 Rule-9 of the CPC is a rule of procedure not affecting the substantive law, yet when decree can be effective in absence of necessary parties, the suit is liable to be dismissed, in view of the judgment of the apex Court in the case of Udit Narain Singh Malpaharia (supra). In the present case, the issue of non-joinder of parties was raised at the earliest, but the same has not been answered.

25. In Prabodh Verma (supra), in paragraph-30 of the judgment, the apex Court held as under:-

“30. The real question before us, therefore, is the correctness of the decision of the High Court in the Sangh's case. Before we address ourselves to this question, we would like to point out that the writ petition filed by the Sangh suffered from two serious, though not incurable, defects. The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties-not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a

representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

26. In Priyambada Das (supra), the Division Bench of this Court in paragraph-23 of the judgment formulated four issues. Issue no.1 was that whether selected candidates of the preliminary examination were required to be made parties before the Tribunal? Issue no.1 was dealt with in paragraphs 24 to 29. In paragraph 25 of the said judgment, this Court held as under:-

"25. Thus one thing is clear that on one ground or another, opposite party no.1 has averred that the result of the Preliminary Examination conducted by the petitioner has been vitiated and accordingly, she prayed for setting aside the result of preliminary examination. As indicated earlier about 5823 candidates succeeded in the preliminary examination. As per Rule 12(1) of 1991 Rules read with Clause-II of Schedule-II of 1991 Rules, it is clear that the candidates qualifying the Preliminary Examination shall only be called by the Commission to appear in the Main Examination. Thus, the candidates, who qualified in the Preliminary Examination got the right to appear in the Main Examination. In such background, it is needless to say that the selected 5823 successful candidates have a right to appear in the main examination as per 1991 Rules, which is a rule made under Proviso to Article 309 of the Constitution of India. Since the select list containing roll nos. of 5823 successful candidates has been set aside by the learned Tribunal, it clearly offends their right to sit in the Main Examination. As per the law laid down by a 4-Judge Bench of the Hon'ble Supreme Court in the decision in Udit Narayan Singh Malpaharia's case (supra), it is clear that persons, who are going to be directly affected or against whom relief is sought are necessary parties and they should be named in the petition. It has also been made clear that the parties in whose favour an order or notification has been issued and when the same order or notification is challenged, the said parties are necessary parties. To the same effect is the judgment of the Hon'ble Supreme Court in H.C. Kulwant Singh's case (supra). Even as per the decision in the case of Prashant Ramesh Chakkarwar's case, where results of the Civil Services Main Examination was under challenge, the Hon'ble Supreme Court has held that non-impletion of candidates selected in the Civil Service Main Examination was fatal. It may be noted here that even though a candidate selected in the Main Examination has no right to be appointed at that stage, but has a right to appear in the interview. In All India SC & ST Employees' Association's case (supra), the Hon'ble Supreme Court has made it clear that the candidates, whose names are there in the provisional selection even have interest/right in protecting and defending that select list. A reading of decision rendered in Sadananda Halo's case (supra) makes it clear that the Hon'ble Supreme Court was not satisfied with the course of action taken by the High

Court in inviting the objections from the selected candidates, who were never bothered to be made parties. In this context the decision cited by Dr. Mohapatra in B. Prabhakar Rao's case (supra) is factually distinguishable. In that case Ordinance was challenged and no relief was claimed against the individuals. So far as the decision in Rajesh Kumar's case (supra) cited by Dr. Mohapatra is concerned, the same is also factually distinguishable. Though the court therein took note of non-impletion of parties, no finding was recorded on its impact on account of the nature of direction given by the Hon'ble Court at Paragraph 19(4) of the judgment."

In paragraphs-27, 28 and 29 of the said judgment, this Court held as under;-

"27. On this point, Mr. Padhi cited the decision of the Hon'ble Supreme Court in The General Manager, South Central Railway, Secunderabad's case (supra), Gadde Venkateswar Rao's case (supra), Rajesh Kumar's case (supra), Joseph Leon's case of Kerala High Court (supra), S.K. Jain's case of Delhi High Court (supra), which are all factually distinguishable. These above noted decisions do not refer to the 4-Judge Bench decision in Udit Narayan Singh Malpaharia's case (supra). We have already distinguished the decisions reported in The General Manager, South Central Railway, Secunderabad's case (supra) and Rajesh Kumar's case (supra) above. Now coming to the decision in Gadde Venkateswar Rao's case (supra) unlike the present case, in that case validity of rule was under challenge. So impletion was held not to be necessary. In Joseph's case at least paper publication was made. In S.K. Jain's case if not all some were impleaded as parties. So far as the decision in Udit Narayan Singh Malpaharia's case (supra) is concerned, Mr. Padhi tried to distinguish the same by advancing a submission that here no right of the selected candidates have been finalized/crystallized, therefore, they were not necessary parties. But as we have discussed earlier here the right to sit in the Main Examination of successful candidates of Preliminary Examination stood finalized by the Preliminary Results. As per the decision in All India SC & ST Employees' Association's case (supra) such selected candidates had every right to defend and protect their position even in provisional select list. So far as his reliance on the decision in Gadde Venkateswara Rao's case (supra), Maharaja Chintamani Saran Nath Shahdeo's case (supra), Chandra Singh's case (supra) and State of Uttaranchal through Collector, Dehradun's case (supra) are concerned to buttress his submission that an order should not be quashed to revive an illegal order, it can only be said such arguments lies ill in the mouth of opposite party no.10, who has not challenged the preliminary examination result himself as illegal. Had opposite party no.10 been arrayed as a respondent by opposite party no.1, we doubt whether he would have supported opposite party no.1 there instead of defending his position in the Preliminary Examination merit list, which he is now attacking.

28. So far as the decision in Shankarsan Dash's case (supra) as cited by Mr. Mohanty is concerned, in that case the matter related to whether a person has

right of appointment on being selected. Here issue is not right of appointment but a right to sit in the OCS Main Examination. On the principles relating to precedents as laid down in AIR 2011 SC 1989, there exists no dispute as to their applicability.

29. Even otherwise as per Section 22 of the Administrative Tribunals Act, 1985, the learned Tribunal while disposing of a case or adjudicating a matter has to be guided by principles of natural justice. One facet of such principle is that no body should be condemned unheard. Here selected candidates, 5823 in number, have been condemned unheard by setting aside their selection in their absence. For all these reasons, we come to a conclusion that the selected candidates are necessary parties and the learned Tribunal has gone wrong in disposing of the matter without insisting on their presence in tune with the principles of natural justice. As held in Prabodh Verma's case (supra), the learned Tribunal ought not to have proceeded without insisting on impletion of the selected candidates as respondents and/or at least some of them being made parties in a representative capacity and had the opposite party no.1 refused to do so, it would have dismissed the Original Application for non-joinder of necessary parties.

27. The aforesaid findings were arrived at by this Court relying upon the judgments of the apex Court, as discussed therein, and, as such, the appellants have also relied upon those judgments in the present proceeding. Therefore, there is no iota of doubt that the learned Single Judge ought not to have proceeded without insisting upon impletion of selected candidates as opposite parties in the writ petition, i.e., W.P.(C) No. 32174 of 2022.

28. In All India SC & ST Employees Assn.(supra), the apex Court observed that the selected candidates who were seriously affected have every right to challenge the decision of the Tribunal on all the grounds available to them. In the said case, the Tribunal quashed the panel of selected candidates giving the reasons that number of vacancies originally notified were 330 but the panel of selected candidates had been drawn for 917 without earlier notifying the increase in vacancies; only 18 physically handicapped candidates had been selected instead of 27 candidates on the basis of 3% reservation for the entire 917 posts; instead of finding the selection zone, applications of SC/STs were received on inter-State basis and that the marking pattern in the selection in the absence of guidelines to 80% marks had led to wide variations. It was further held that although the candidates included in the panel showing their provisional selection do not get vested right to appointment, they will be surely interested in protecting and defending the select list. It is the admitted position that before the Tribunal the successful candidates whose names were included in the panel of selection were not made parties. In the said case, reliance was also placed on the decision rendered by the apex Court in Prabodh Verma and Ors. v. State of Uttar Pradesh & Ors. [1984 (4) SCC 251], wherein the apex Court held that in writ petitions filed against the State questioning the validity of recruitment of a large number of persons in service could not be proceeded with to hear and take

decision adverse to those affected persons without getting them or their representatives impleaded as parties.

29. In W.A. No. 1561 of 2023, though the candidates were selected and their names were found place in the select list, without impleading them as parties, the learned Single Judge proceeded with the matter and passed the order adverse to the interest of such candidates. As such, neither they have filed any application for recalling of the order passed by the learned Single Judge nor have they any application for review and straightaway come to this Court by filing the Letters Patent Appeal against the order passed by the learned Single Judge. When this Court made a query with regard to their locus standi, it was answered that even if the appellants therein were not made parties to W.P.(C) No. 32174 of 2022 nor made any application for impletion of parties, yet they can file writ appeal seeking leave to approach the learned Single Judge, in view of the judgment of the apex Court in Moreshar Yadaorao Mahajan (supra).

30. The learned Single Judge, while considering the review application, observed in paragraph 35 of the judgment that in course of hearing of the earlier writ petition bearing W.P.(C) No. 32174 of 2022, learned Senior Counsel including the Advocate General appearing for the State-opposite parties took almost all possible grounds to defend the OPSC. The learned Single Judge has also observed that the Court has rendered a detailed judgment by taking note of the contentions of all the appearing parties and has disposed of the said writ petition. One main question of non-joinder of parties was also raised, but the learned Single Judge observed at paragraph-36 of the judgment that the review petitioners were not necessary parties to the previous writ petition and in paragraph-37 of the judgment the learned Single Judge also observed that in the event the review petitioners are aggrieved by the finding of this Court, they could challenge the same by filing intra-court appeal, if advised.

31. Having admitted the fact that the review petitioners were the successful candidates and they, having not been impleaded as parties to the writ petition, have filed the review petition, the learned Single Judge could have allowed their review petition, because their rights have been affected by quashing the select list, where the names of the review petitioners found place. Therefore, dismissal of the review petition filed before the learned Single Judge both on maintainability as well as merits cannot be sustained, as there is gross violation of principle of natural justice and, as such, the review petitioners have not been given opportunity of hearing to defend their case.

32. Needless to mention, if the candidates, whose name found place in the select list, were not made parties to the writ petition filed by the respondents before the learned Single Judge and judgment passed adverse to their interest, there is non-compliance of principle of natural justice.

33. The soul of natural justice is 'fair play in action

"In HK (An Infant) in re, 1967 1 All ER 226 (DC), Lord Parker, CJ, preferred to

describe natural justice as 'a duty to act fairly'.

In *Fairmount Investments Ltd. v. Secy of State for Environment*, 1976 2 All ER 865 (HL), Lord Russell of Killowen somewhat picturesquely described natural justice as 'a fair crack of the whip'

In *R. v. Secy. Of State for Home Affairs, ex p. Hosenball*, Geoffrey Lane, LJ, 1977 3 All ER 452 (DC & CA), preferred the homely phrase 'common fairness' in defining natural justice.

Natural justice, another name of which is common sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "fundamental quality of fairness which being adopted, justice not only be done but also appears to be done".

33.1. In *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818, the meaning of natural justice came up for consideration and the apex Court held as follows:-

"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of cast-iron formula. Historically, "natural justice" has been used in a way, "which implies the existence of moral principles of self evident and unarguable truth", "natural justice" by Paul Jackson, 2nd Ed, page-1, In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice".

33.2. In *Bhagwan v. Ramchand*, AIR 1965 SC 1767, the apex Court held that the rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

33.3. In *Mysore Urban Development Authority by its Commissioner v. Veer Kumar Jain*, (2010) 5 SCC 791, the apex Court held in paragraphs 17, 18 and 19, being relevant are extracted hereunder:-

"17. We may refer to some of the decisions of this Court having a bearing on the issue. In *S.L. Kapoor v. Jagmohan* [(1980) 4 SCC 379] this Court rather rigidly and sternly observed: (SCC p. 395, para 24)

"24. ... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

18. In *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] this Court stated that the aforesaid observation should be understood in the context of the facts of that case and in the light of the subsequent Constitution Bench judgment in *ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and *C.B. Gautam v. Union of India* [(1993) 1 SCC 78] . This Court observed: (*S.K. Sharma* case [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , SCC pp. 385 & 391, paras 28 & 33)

28. The decisions cited above make one thing clear viz. principles of natural justice cannot be reduced to any hard-and-fast formulae. As said in *Russell v. Duke of Norfolk* [(1949) 1 All ER 109 (CA)] way back in 1949, these principles cannot be put in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. (See *Mohinder Singh Gill v. Chief Election Commr.* [(1978) 1 SCC 405] .) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected.

33. (6) While applying the rule of *audi alteram partem* (the primary principle of natural justice) the court/tribunal/authority must always bear in mind the ultimate and overriding objective underlying the said rule viz. to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them."

19. Ensuring that there is no failure of justice is as important as ensuring that there is a fair hearing before an adverse order is made. This Court in *Roshan Deen v. Preeti Lal* [(2002) 1 SCC 100 : 2002 SCC (L&S) 97] held: (SCC p. 106, para 12)

"12. ... Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide *State of U.P. v. District Judge, Unnao* [(1984) 2 SCC 673]). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

33.4. In *Jayendra Vishnu Thakur v. State of Maharashtra and another*, (2009) 7 SCC 104, the apex Court in paragraph-57 held as follows:-

"57. Mr Naphade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In *S.L. Kapoor v. Jagmohan*[(1980) 4 SCC 379] this Court clearly held: (SCC p. 395, para 24)

24. ... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

34. It is of relevance to note that the learned Single Judge in the judgment has observed that if the review petitioners are aggrieved by the finding of the Court, they can be well advised to challenge the same in intra-Court appeal. But fact remains, what ultimately the review petitioners will do, the learned Single Judge should not have made an observation to that effect. Therefore, the observation of the learned Single Judge to that effect cannot be sustained. As a consequence thereof, this Court finds gross error apparent on the face of the record by not permitting the review petitioners to be made as parties to the writ petition, in which learned Single Judge has delivered the judgment. When the rights accrued in favour of the selected candidates have been grossly affected, for non-inclusion of their names in the writ petition, the writ petition suffers from non-joinder of parties.

35. The contention raised by the learned counsel for the respondents, that the appellant-selected candidates be considered as fence sitters, is not applicable to the appellant-selected candidates because they had no occasion to know who has approached this Court. The learned Single Judge, during the course of hearing of the writ petition, could have directed for their (appellant-selected candidates') impletion as parties, but, without doing so, the learned Single Judge proceeded to decide the matter on merits ignoring the fact that the writ petition suffers from gross error of law due to non-impletion of proper parties like the appellant-selected candidates whose names find place in the select list.

36. Coming to the merits of the case, as per the factual matrix discussed above, it is not desirable that all the candidates, who would participate in the process of selection, should know the rules applicable to them. More particularly, in the instant case, the advertisement was issued inviting applications from intending candidates to participate in the process of selection. There is no dispute before us that Clause 6(c) of the advertisement has been well considered and, as such, the present respondents have never challenged such condition, i.e. Clause 6 (c) of the advertisement.

37. If Clause 6(c) of the advertisement, as quoted above, is perused and analysed, it would be made clear that the Commission shall be competent to fix up the qualifying marks in any or all subjects of the examination. Therefore, the discretion has been left to the Commission, who is the competent authority to fix qualifying mark in any or all subjects of the examination. It is contended that in the earlier years, the marks obtained in aggregate were taken into consideration for the purpose of preparation of select list, but in the present advertisement there has been gross deviation with regard to the qualifying marks taken into

account in each subjects. Thereby, the earlier principle of aggregate mark has been given a go bye and on the basis of the principle evolved now the select list has been prepared, by which process the present respondents have not come out successful. Therefore, they have challenged the same by filing the writ petition.

38. Much argument has been advanced by learned counsel for the respondents that the provisions contained in Rule 10 of 2016 Rules have not been followed. If the said Rule-10, which has been quoted above, is taken into consideration, it would be clear that the said rule deals with preparation of the merit list. But, admittedly that stage has not yet come. In this case, after written test was conducted, the select list was prepared. In the select list, the names of the present appellant-selected candidates find place, whereas the names of the respondents are not available. At that point of time, respondents filed the writ petition before the learned Single Judge and learned Single Judge proceeded in erroneous footing and quashed the entire select list without giving opportunity of hearing to the selected candidates whose name find place in the select list after written test was conducted. It is contended by learned counsel appearing for the respondents that rule does not prescribe for preparation of the select list, as has been done in the present case. On a conjoint reading of Rule 6 of 2016 Rules read with conditions stipulated in the advertisement, it would be seen that mode has been prescribed for the process of selection. Under Clause 6(a) of the advertisement, it has been specifically mentioned that competitive examination for recruitment to the post of ASO will be conducted in the successive stages, i.e. (i) written examination (Objective Type-Multiple Choice Questions) and (ii) Skill Test in Computer (Practical-Qualifying). Under Clause 6(b) of the advertisement, it has been specifically mentioned that only those candidates who would be short-listed, after the written test, would be called for the skill test in Computer (Practical) by the Commission, as provided at Appendix-I, which shall be qualifying in nature and one has to secure at least forty percent (40%) of the total marks in the skill test to be qualified. Therefore, a candidate has to pass the written test examination for which the select list has to be prepared. After written examination was conducted, the select list was prepared, where the names of the respondents are not available, as they did not qualify in the said examination. It is contended that if the marks secured by the candidates could have been taken into consideration in aggregate, then the respondents would have been selected and their names would have been found place in the select list. But due to adoption of a new methodology for determination of select list, the respondents could not be qualified and their names could not find place in the select list. Therefore, they had approached the writ Court by filing the writ petition.

39. The first and foremost contention raised is that like previous year the qualifying marks should have been determined taking into consideration the aggregate marks secured by the candidates in the written examination. But this time there is a deviation and the authorities have taken into consideration the marks secured in each subjects for selection of qualifying candidates in the

written examination, on the basis of which the select list has been prepared. It is not the argument of any of the parties that the authorities have adopted such principle to deprive the respondents to appear in the next examination. It is contended that qualifying marks so far as written test is concerned has been taken into consideration on the basis of marks secured by a candidate in each subject. Clause 6(c) of the advertisement, having not been challenged either in the writ petition or after the advertisement was published, the respondents cannot take advantage of the decision taken by the writ Court.

40. It is well settled principle of the law laid down by the apex Court in *Om Prakash Shukla v. Akhilesh Kumar Shukla*, AIR 1986 SC 1043, that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

41. Taking into account the aforesaid judgment, the apex Court in *Madan Lal v. State of Jammu and Kashmir*, AIR 1995 SC 1088 held as follows:

".....If a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.*, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

42. In *Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100, the apex Court in para 18 of the judgment held as follows:

"18..... It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."

The same view has also been taken by the apex Court in *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others*, (2011) 1 SCC 150.

43. In *Marripati Nagaraja v. Government of A.P.*, (2007) 11 SCC 522, the apex Court observed as follows:-

"The other contention of Mr. Rao that the candidates had given only seven days time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the

second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."

Similar view has also been taken by this Court in *Sevati Patra (supra)*; *Pradeep Kumar Jena v. State of Odisha*, 2017 (II) OLR 274; *Pravati Nayak v. State of Odisha*, 2018 (Supp-II) OLR 946; and also judgment dated 02.04.2019 rendered in W.P.(C) No. 14047 of 2012 (*Keshari Sahoo v. State of Odisha*).

44. Similar view has also been taken by the apex Court in *Municipal Corporation of Delhi v. Surender Singh & Ors.*, (2019) 8 SCC 67. Paragraphs 16, 17, 20, 21 of the judgment, being relevant, are extracted hereunder:

"16. The learned counsel for the private respondents seeks to sustain the order passed by the Division Bench. In that regard it is pointed out that the Division Bench on the earlier occasion in the same proceedings while considering the matter had observed all these aspects on 18.08.2008 and the same being taken note ultimately while disposing of the appeal on 03.11.2008 has arrived at the conclusion that the private respondents can be accommodated and in that view by not making it as a precedent for others had granted the benefit. The learned counsel would also point out that the Division Bench had taken note of the decision in the case of *U.P. Jal Nigam and Anr. Vs. Jaswant Singh & Anr.* (2006) 11 SCC 464 to indicate that even if the others who had participated in the process of selection and were not selected approaches the Court at this point in view of the relief granted to the private respondents herein, they would not be entitled to claim and as such the benefit granted to the private respondents herein does not call for interference.

17. The position noticed above would indicate that the entire grievance with which the petitioners had approached the High Court was on claiming to be aggrieved by Clause Nos.25 and 26 contained in the Advertisement No.1/2006 issued for recruitment of Assistant Teacher (Primary) for the benefit of the appellant MCD. In order to appreciate the same in its correct perspective, it would be appropriate to take note of the impugned Clause Nos.25 and 26 which read as hereunder:

"25. The Board has full discretion to fix minimum qualifying marks for selection for each category i.e. SC/ST etc. of post in order to achieve qualitative selection and to pick up the best talent available.

26. The marks obtained by the candidate in written examination will not be disclosed in any case."

20. Having taken note of this aspect we further take note that the consideration as made by the Division Bench would indicate that even though no fault was found with the impugned Clause contained in the Advertisement, what has weighed in the mind of the Division Bench is only that even after selecting the last candidate who had obtained 89.25 per cent out of the two papers for the total marks of 200, there still remained vacant 63 posts out of the total notified vacancies and the dossiers of the selected candidates were returned to the appellant herein leaving the said 63 posts unfilled. It is in that circumstance, the Division Bench undertook the exercise of making the further consideration by securing details from the appellant. In that regard the position was clear that the private respondents regarding whom the directions had been issued had secured 88.75 per cent and 87 per cent out of 200 marks respectively and the other candidate, namely, Poonam Bala who had ultimately not pressed the writ appeal had obtained 86.25 per cent out of 200 marks. Based on their percentage, the private respondents herein were at the merit position of 1224 and 1447 respectively. Since they were marginally below the last candidate in the select list the Division Bench has proceeded to direct their selection.

21. On noticing the manner of consideration made by the Division Bench, we are of the view that the Division Bench has exceeded the jurisdiction while exercising the power of judicial review in the matter of selection process by evolving its own criteria and substituting the same with the criteria adopted by recruiting agency. We are of the said view for the reason that the position of law is well established that the recruiting agency cannot be compelled to fill up all available posts even if the persons of the desired merit are not available. This Court in the case of *Ashwani Kumar Singh vs. U.P. Public Service Commission & Ors.* (2003) 11 SCC 584 relied upon by the learned counsel for the appellant had considered these aspects and held that it is not a rule of universal application that whenever vacancies exist persons who are in the merit list per force have to be appointed. It is held therein that if the employer fixes the cutoff position the same is not to be tinkered with unless it is totally irrational or tainted with malafides. It was further stated therein that the employer in its wisdom may consider the particular range of selection to be appropriate. The decision of the employer to appoint a particular number of candidates cannot be interfered with unless it is irrational or malafide.

45. In *Tajvir Singh Sodhi (supra)*, Rules 9A and 9(iii) of Jammu and Kashmir Subordinate Services Recruitment Rules, 1992 were under consideration. In the said case, recruitment board invited applications for the posts of Drug Inspector and after receipt of application forms, in pursuance of advertisement, authorities issued notification of short-listed candidates. But, by another notification, the authorities recast the criteria of selection. Consequentially, the board published the select list and recommended sixty-four candidates for appointment as Drug Inspectors. Some candidates, who remained unsuccessful in selection process,

filed writ petition before the High Court of Jammu & Kashmir with a prayer to quash the selection process. The learned Single Judge of the said High Court allowed the writ petitions by holding that selection board, while making selection, had given extra weightage to some of the candidates. Thereafter, the Letters Patent Appeals were filed before the High Court and the Division Bench of the High Court upheld the findings of the learned Single Judge. Thereafter, appeal was preferred before the apex Court to answer the question as to whether the High Court erred in quashing and setting aside the selection process conducted for appointment of Drug Inspectors. The apex Court held that having participated in the selection process without any demur or protest, the writ petitioners could not challenge the same as being tainted with mala fides, merely because they were unsuccessful.

46. Thereby, at the instance of the respondents, who were the writ petitioners, the learned Single Judge could not have entertained the writ petition, as because, after participating in the selection process, having not been come out successful, they had approached the writ Court, and thereby, their appearance before the writ Court was hit by the principle decided by the apex Court, as discussed above.

47. May it be noted, under the 2016 Rules there is no qualifying marks fixed for the purpose of preparing select list after the written test examination is over and the select list has been prepared on the basis of Clause-6(c) of the advertisement issued by the authority. If the candidates with eyes wide open and without any protest participated in the process of selection, subsequently, when they could not come out successful, cannot challenge the terms and conditions of the advertisement. In any case, the contention is raised that in view of Clause-6(c) of the advertisement the merit list has been prepared and, as such, OPSC has right to fix the modalities for the purpose of selection of the candidates. If such power has been exercised by the OPSC, in that case the respondents, those who could not come out successful, pursuant to selection list cannot subsequently approach this Court contending that the process of selection is bad. Therefore, the apex Court decision, as discussed above, has made it clear that the candidates participated in the selection process will not have any objection or demur and subsequently they cannot challenge the same, as they could not come out successful in the examination. In any case, the objection raised that the select list has been prepared de hors the rules cannot be sustained in the eye of law.

48. In *Srinivas Samant v. The Chairman, OPSC & another*, OJC No. 8080 of 1997 disposed of on 15.05.1998, this Court observed in paragraphs-3, 7 & 9 of the judgment to the following effect:

"3. It has been pleaded that according to rules, there is no provision for holding preliminary examination and, therefore, it is violate of the said rules. It has been pleaded that normally, codification of examination papers takes place in the office of the Commission in presence of one member and then stamped and kept

in the locker of the chairman. Only when all the papers are returned to the office after valuation that decoding process takes place in the office of the Commission. According to the petitioners, the coding was done by outside agencies like teachers of Ravenshaw College and another College. Person who were entrusted with the coding work were also entrusted with the evaluation of papers. The following allegations have also been made:-

1. Valuation of answer scripts was erratic and examiners were inexperienced.
2. Candidates who did not appear in the examination have been declared qualified. Two roll numbers were mentioned in this regard, namely, roll nos. 1778 and 5385.
3. Publication of result was erroneous because there were large gaps in between the roll numbers published.
4. 500 answer scripts were lost in the Ravenshaw College.
5. There were instances of favoritisms.
6. Policy of reservation for Scheduled Castes and Scheduled Tribes was not applied in the Preliminary examination.
7. The first point to be decided is whether holding of preliminary examination was legal. In view of the number of candidates, we are of the opinion that the Commission has got the power of short-listing. It is settled position of law that short-listing is permissible, which is also being done by the Union Public Service Commission. Therefore, on this point, the Commission cannot be faulted.
9. Regarding other allegations, we are satisfied from the counter affidavit that those allegations have no merit. We may also bear in mind that the Commission is a Constitutional body and this Court cannot sit in appeal against the procedure adopted by it provided the same is not arbitrary, illegal or otherwise invalid."
49. Similarly, in *Ramesh Kumar (supra)*, the apex Court held that if rule is silent about the selection procedure, the competent authority can lay down the norms of selection procedure by specifying minimum base mark for the written examination and viva voce test. Paragraphs-8, 9, 12 & 13 of the said judgment, being relevant, are extracted hereunder:

"8. The aforesaid statutory provision undoubtedly does not fix any particular criteria or minimum Bench Marks either in the written test or in interview for the purpose of selection. Rule 10 provides that the High Court "may hold such tests as may be considered necessary", it impliedly provides for requirement necessary for assessment of suitability of a candidate. There is no challenge to the validity of Rule 10 in these writ petitions. The question does arise as to whether the Rules enabled the High Court to fix the minimum Bench Marks for interview?
9. In *State of U.P. v. Rafiquddin & Ors.*, AIR 1988 SC 162; *Dr. Krishna Chandra*

Sahu & Ors. v. State of Orissa & Ors. AIR 1996 SC 352; Majeet Singh, UDC & Ors. v. Employees' State Insurance Corporation & Anr. AIR 1990 SC 1104; and K.H. Siraj v. High Court of Kerala & Ors. AIR 2006 SC 2339, this Court held that Commission/Board has to satisfy itself that a candidate had obtained such aggregate marks in the written test as to qualify for interview and obtained "sufficient marks in viva voce" which would show his suitability for service. Such a course is permissible for adjudging the qualities/capacities of the candidates. It may be necessary in view of the fact that it is imperative that only persons with a prescribed minimum of said qualities/capacities should be selected as otherwise the standard of judiciary would get diluted and sub-standard stuff may get selected. Interview may also be the best mode of assessing the suitability of a candidate for a particular position as it brings out overall intellectual qualities of the candidates. While the written test will testify the candidate's academic knowledge, the oral test can bring out or disclose overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a Judicial Officer.

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12. Similarly, in K Manjusree v. State of Andhra Pradesh & Anr., AIR 2008 SC 1470, this Court held that selection criteria has to be adopted and declared at the time of commencement of the recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.

13. Thus, law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as well as for viva-voce."

50. In The Maharashtra Public Service Commission through its Secretary v Sandeep Shriram Warade, (2019) 6 SCC 362, the apex Court held that the employer can decide the additional or desirable qualifications, including any grant of preference. Therefore, the power has been vested with the Commission, who is competent to fix up qualifying marks in any or all subjects of the examination. Thereby, a discretionary power has been given to the Commission, herein the OPSC, which is also competent to fix up the qualifying marks in any or all subject of the examination. Therefore, determination of qualifying marks having been left to the discretion of the Commission and on that basis the select list having been prepared, the same cannot be questioned. Furthermore, the candidates, who have been shortlisted after the written test, shall be called for skill test in

the Computer, which shall be qualifying in nature. Therefore, the select list, which has been prepared on 07.11.2022, being based on the marks secured in the written examination and, as such, OPSC being the competent authority to fix up the qualifying marks and on that basis the select list having been prepared, the same cannot be found faulted with so as to cause interference. As such, the learned Single Judge has committed a gross error in interpreting the select list and opining that the same is not in conformity with the terms and conditions of the advertisement issued read with 2016 Rules, even though there is no illegality or irregularity in the select list so as to cause interference. Thus, the finding arrived at by the learned Single Judge, that in consonance with 2016 Rules the select list has not been prepared, is absolutely misconceived one.

51. For the foregoing discussions, the finding of the learned Single Judge, that OPSC has no competency to shortlist the candidates and prepare the select list, has no justification. Therefore, this Court is of the considered view that the select list prepared on the basis of marks secured, being in terms of Clause-6(c) of the advertisement, in absence of any rules governing the field, cannot be found faulted with so as to cause interference of this Court.

52. Accordingly, the judgment dated 19.05.2023 passed in W.P.(C) No.32174 of 2022 and that dated 31.07.2023 passed in RVWPET No.257 of 2023 by the learned Single Judge are liable to be quashed and are hereby quashed. As a consequence thereof, OPSC is directed to proceed from the stage of allowing the candidates to go for skill test in Computer practical, which is qualifying in nature, on the basis of the select list prepared and thereafter prepare the final merit list in terms of Rule-10 of the 2016 Rules.

53. In the result, the writ appeals are allowed. But, however, under the facts and circumstances, there shall be no order as to costs..

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