

(2009) 12 GUJ CK 0009

In the Gujarat High Court

Case No : Letters Patent Appeal No. 1586 of 2009 in Special Civil Application No. 7699 of 2009

Modh Vinaykumar Dasrathlal and Others

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 10-12-2009

Acts Referred:

Constitution of India, 1950 — Article 335

Citation : (2010) 1 GLH 331 : (2010) 2 GLR 915

Hon'ble Judges : Bhagwati Prasad, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : Mihir Joshi and PS Chaudhary, Nos. 1 - 25, for the Appellant; Kamal Trivedi, Ld. A.G. and Sangita Vishan, AGP and DG Shukla, for the Respondent

Final Decision : Allowed

Judgement

Bhagwati Prasad, J.—In this appeal, judgement of learned Single Judge is under question which was given in relation to a selection for the post of Assistant Public Prosecutors ("APP" for short) Class-II as conducted by the Gujarat Public Service Commission ("Commission" for short). It was prayed before learned Single Judge that the select list which was prepared by GPSC on 16.7.2009 be declared to be illegal because it had infringed the scheme which was laid down for the selection. The case of the appellant is that the examination was to be conducted for the post of APP Class- II in terms of Rules known as "The Assistant Public Prosecutor, Gujarat General State Service, Class-II, Recruitment (Examination) Rules, 2008.

2. According to the appellants, what was required to be done was that in terms of Rule 12, the qualifying marks were required to be fixed at the time when the Notification was to be issued. In the Notification so issued for the selection, minimum marks were delineated. In Part-I examination i.e. the written examination to be 105 marks but as far as viva voce i.e. oral examination is concerned, no minimum qualifying marks were delineated. Therefore, everybody understood that there was no qualifying marks required for the purpose of viva

voce examination but what happened was at the time when those qualified in the written examination were to appear in viva voce examination, they were made to sign an undertaking that 10 minimum marks are required to be obtained in viva voce examination which was made subsequent to the issuance of the Notification which was issued on 17.10.2008 which is filed at Annexure-B on page 31 of the paper book.

3. Learned Counsel for the appellants urged that this prescription of 10 marks which was made at the time when the candidates were to enter into the interview hall is de hors the Rules. Sub-rule (3) of Rule 12 though prescribes that the Commission shall fix the qualifying marks to be obtained by a candidate in the viva voce examination but this fixing was required to be done prior to the process of selection started. In this case, the process of selection started with the issuance of the Notification at Annexure-B dated 17.10.2008. Thus, any subsequent providence could not have been made and Sub-rule (3) of Rule 12 cannot be read to give an effect in the manner in which the Commission has sought to give effect to it.

4. In this relation the argument of learned Counsel for the appellant is that such providence can have an opportunity of manipulation as has been contended in the writ petition which reads as under:

(C) The petitioners further submit that the aim of the Commission for suddenly adding this new rule is that after the written examinations, some of the petitioners were in such a position that even if they do not obtain a single mark in the oral examination, they were standing at a good merit level and they cannot be excluded even if desired by the Commission. So, its effect or result is, the candidates who are desired by the Commission could not have been included unless the undesired candidates are excluded anyhow. The petitioners state that this situation compelled the Commission to add this new rule of 10 marks at the stage of interview itself and the Commission has done accordingly to fulfill its aim i.e. to include the candidates desired by the Commission. The petitioners further submit that if we give a look at the selected candidate list for the said posts, we find that not 5 or 10 or 20 selected candidates but 81 candidates out of 203 selected candidates get the minimum marks prescribed by the Commission and take place in the final selection list. The petitioners further submit that if we look at the final selection list from other angle, not 5 or 10 or 20 candidates but 190 candidates have been excluded by the Commission by giving them either 8 or 9 marks in the oral examinations. The petitioners further submit that if we look at the selection list for the said posts from the third angle, the candidates who are selected by obtaining 10 marks in oral examination if these marks are excluded from their marks obtained in the written examination, they even do not possess the cut off marks prescribed by the Commission. The petitioners further submit that if we look at the selection list for the said posts from the fourth angle, we find that out of 790 total candidates who were called for the oral examinations, 503 candidates have obtained less than 10 marks in the oral examinations and

become excluded from the said selection list for the said posts. The petitioners further submit that in view of all these above stated circumstances, the Commission to fulfill its illegal aims has successfully added the new rule of 10 marks at the stage of interview even not at the stage of issuing call letters for the said posts so the act of the Commission doing so has amounted in the arbitrariness in treating the candidates fairly and legally. So the final selection list for the said posts dated 16th July, 2009 is prepared on the base of the newly added rule of 10 marks at the stage of the interview by Commission. So having it prepared arbitrarily and illegally it requires to be quashed and set aside.

(D) The petitioners submit that it is stated in Clause 4 of the final selection list declared by the Commission:

22 SEBC & 17 S.T. Posts have remained vacant due to non-availability of suitable candidates and also due to the fact that 15 SEBC candidates and 1 S.T. Candidate are selected against the post of General category.

In this respect, the petitioners submit that if we look at the selection list from the angle that in total 42 candidates of SEBC category have been made fail by not giving them minimum required 10 marks in view of newly added rule at the stage of the interview. Otherwise, some of candidates take place even in general category only on the strength of the marks obtaining (sic) the written examination. So the petitioners submit that the Commission by adding this new rule at the stage of interview, have even failed the constitutional object for maintaining social balance among the various classes of the country by providing them reservation in the public services. So the petitioners submit that the act which the Commission could not have done directly, have done indirectly by adding the rule of minimum 10 marks in the oral examination for the final selection. So, the petitioners submit that the Commission has acted against the constitutional provisions relating to the reservation for bringing the equality among the unequal classes of the Society. So, the petitioners submit that the selection list for the said posts is based on the newly added rule of 10 marks in the oral examination which is a minimum requirement for taking place in the final selection list, is required to be quashed and set aside.

5. Thus, the element of bias according to learned Counsel for the appellants was germane to the whole process and if there is a possibility of bias in the selection that selection has got to be struck down in accordance with law.

6. Learned Counsel for the appellants further submits that the Hon"ble Supreme Court in its judgement in the matter of K. Manjusree Vs. State of A.P. and Another, has deprecated such practice of providing marks for Viva Voce after the selection process has started and has placed reliance at paragraph No. 33 which reads as under:

Para 33 - The Resolution dated 30.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written

examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.

7. Learned Counsel for the appellants has further relied on another case decided by the Hon'ble Supreme Court in the case of Hemani Malhotra Vs. High Court of Delhi, and has emphasised that the Hon'ble Supreme Court has taken note of the case decided in the matter of K. Manjusree v. State of A.P. (supra) and has emphasised that law has been laid down by the Hon'ble Supreme Court in paragraph No. 15 of the said judgement which is quoted herein below:

para 15 - There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.

8. On the strength of the aforesaid cases, learned Counsel for the appellant urged that such prescription of minimum 10 marks at viva voce should be excluded and new merit list should be prepared including the marks of viva voce and cut off marks as obtained and prescribed in the written examination.

9. Learned Counsel appearing for the Commission was of the opinion that the cases cited by learned Counsel for the appellants have no application in the present matter because they were not governed by the Rules. In the case of K. Manjusree v. State of A.P. (supra) the marks were fixed by the Selection Committee but in the case in hand the Rules are there and they are mandatory in character and they mandate the Commission to fix the qualifying marks even for viva voce. Since it was not done at the time when the advertisement was issued, marks were fixed before the selection process was completed and were

notified on notice board before the viva voce started and individual candidates were intimated before viva voce was to start. The different and distinct feature according to learned Counsel for the Commission was that if the Rules require it to be fixed then the Commission is under obligation and if the Rules do not require then it is for the Selection Committee. In the instant case, since the Rules require the fixing of qualifying marks the Commission did it and it did bona fide. There was no element of bias and the allegation of bias as raised by learned Counsel for the appellants is just imaginary and it has no factual basis for it. In this regard, learned Counsel for the Commission drew attention of the Court towards the affidavit filed by the Commission which is quoted herein below:

As per the said Rule, it is mandatory for the respondent Commission to fix the qualifying marks to be obtained by candidate in Viva Voce and Personality Test. I say that accordingly, respondent Commission had fixed 10 marks as qualifying marks out of 30 marks.

10.. Learned Counsel for the Commission further emphasized that the appellants having taken a chance before the Selection Committee and having appeared at the interview, now cannot be permitted to turn around and say that the process of selection was bad in the eye of law. They are just estopped from challenging the selection process and to support his contention learned Counsel for the Commission placed reliance on a case decided by the Hon'ble Supreme Court in the matter of *Sadananda Halo and Others Vs. Momtaz Ali Sheikh and Others*, at paragraph No. 59 which is quoted herein below:

para 59 - It is also settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgement in *Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others*, where one of us (Sinha, J) was a party. This was a case where different cut off marks were fixed for the unreserved candidates and the Scheduled Caste and Scheduled Tribe candidates. This Court in para 10 of its judgement endorsed the action and recorded a finding that there was a power in the employer to fix the cut-off marks which power was neither denied nor disputed and further that the cut-off marks were fixed on a rational basis and, therefore, no exception could be taken. The Court also referred to the judgement in *Om Prakash Shukla v. Akhilesh Kumar Shukla* 1986. SCC Supp 285 where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise. The Court further made observations in para 34 of the judgement (*Ed. Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others*, to the effect: (*Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others*,

para 19 -` 34. There is thus no doubt that while question of estoppel by conduct would not arise in the contextual facts but the law seems to be well settled that in the event a candidate appears at the interview and participates therein, 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 there was some lacuna in the process"

In para 20 this Court further observed that there are certain exceptions to the aforementioned rule. However, the Court did not go into those exceptions since the same were not material.

11. He further placed reliance on a case decided by the Hon"ble Supreme Court in the matter of Amlan Jyoti Borooah Vs. State of Assam and Others, particularly paragraph Nos. 32, 35 and 36 which read as under:

Para 32 - The appellant, in our opinion, having accepted the change in the selection procedure, sub silentio, by not questioning the appointment of the 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so.

Para 35 - In Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others, this Court held (SCC p. 107, para 18)

"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."

Para 36 - The matter again came up for consideration before this Bench in Sadananda Halo and Others Vs. Momtaz Ali Sheikh and Others, wherein this Bench held: (SCC 645, para 59)

"Para 59 - It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule.

(See also: H.V. Nirmala v. Karnataka State Financial Corpon. (2008) 7 SCC 639)

12. He has further placed reliance on a case decided by the Hon"ble Supreme Court in the matter of A.P. Public Service Commission Vs. Balaji Badhavath and Others, paragraph Nos. 23 & 25 which read as under:

para 23 ...It is, however, free to evolve procedure for conduct of examination. While conducting the examination in a fair and transparent manner as also following known principles of fair play, it cannot completely shut its eyes to a constitutional requirements of Article 335 of the Constitution of India.

Para 25. - How the Commission would judge the merit of the candidates is its function. Unless the procedure adopted by it is held to be arbitrary or against the known principles of fair play, the superior courts would not ordinarily interfere therewith.

13. Learned Counsel for the Commission has further urged that in this writ petition there is non-joinder of the parties because those who have been selected

have not been impleaded as parties and the result of this petition is going to be affected their career and without hearing them no effective judgement can be rendered by this Court and in this regard learned Counsel has relied on a case decided by the Hon''ble Supreme Court in the case of *Sadananda Halo v. Momtaz Ali Sheikh* (supra).

14. In reply to the argument of learned Counsel for the Commission, learned Counsel appearing for the appellants submitted that the question of waiver cannot be raised by the respondents because they have not adhered to the Rules. The State itself before this Court in the case of *The State of Gujarat v. Haribhai Mangalbhai Zala* decided on 8.10.2008 in Criminal Misc. Application No. 13937 of 2007 have unequivocally undertaken before this Court that minimum qualifying marks will be prescribed and the aforesaid will also be reflected and/or notified in the advertisement. Thus, they were not only aware that minimum prescribed marks are required to be reflected in advertisement which they claim that they were under obligation to prescribe. What was required to be declared in the advertisement and having not done so they have turned around from the statement made before this Court for oblique purpose and that is because no specific answer has been given in their pleadings for the allegations made by the appellants regarding bias which have been brought to the notice of this Court as quoted above. Thus, the prescription of qualifying marks in viva voce cannot be claimed to be bona fide and it has been done in the colourable exercise of power.

15. Further learned Counsel appearing for the appellants submitted that the question of waiver cannot be held against the appellants because the prescription was made at the time when the interviews were to start and those who have been offered employment are always in such fiduciary position that they can be dictated to the terms and it was not open to a candidate who is seeking employment at that time to resist and to say that you may not now fix minimum marks in Viva Voce examination. Therefore, it was under pressure that the candidates who are at that time not clear about their legal rights and participated in the interview and in this regard he placed reliance on a case decided by the Hon''ble Supreme Court in the matter of *C. Tulasi Priya Vs. A.P. State Council of Higher Education and Others*, paragraph No. 10 which is quoted as under:

It is unrealistic to expect a young and, no doubt, nervous student in the midst of an important examination to think of submitting written protests there and then. The refusal of the High Court to interfere on this ground has regrettably, compounded the injustice done to the appellant. As for the ground of disputed questions of fact, all that the High Court needed to see was the wrong answer-paper first given to the appellant. The number of questions that she had marked thereon would have indicated whether she was right when she said that she had worked on it for about 20 minutes. If this answer-paper could not be produced even at that stage, the High Court should have drawn the appropriate adverse inference against the authorities.

16. He also placed reliance on another Hon''ble Supreme Court decision in the

matter of Raj Kumar and Others Vs. Shakti Raj and Others, and placed reliance on paragraph No. 16 which is quoted as under:

para 16 - Yet another circumstance is that the Government had not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 Notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law.

17. Thus, according to learned Counsel for the appellants the question of estoppel cannot be brought against the appellants.

18. As regards the argument of learned Counsel for the Commission that the parties have not been impleaded, his case is that the writ petition was filed at the time when only select was published and according to the Rules governing the selection, they were only selected candidates and have no right to appointment and in this connection he brought attention of this Court to Rules 16(1) and (2) which are quoted herein below:

16. Commission's Decision Final (1) - After the result is so declared, the Commission shall recommend to the Legal Department, the lists of candidates along with necessary particulars for appointment.

(2) The mere success in the examination shall, by itself, not confers any right to appointment and no candidate shall be appointed, unless the Government is satisfied, after making such inquiry (including Police Inquiry) as it may consider necessary that the candidate is in all respect suitable for public service.

19. According to him, the select list candidates have no right of appointment and in fact all the candidates who were in the select list have not even been appointed and subsequently while this Court admitting the Letters Patent Appeal has observed that the impugned selection will be subject to the result of this appeal and therefore have the cloud of sub-judice. Therefore, impleading of the

appointed candidates was not necessary.

20. Learned Advocate General Mr. Kamal Trivedi appearing for the respondent State has canvassed that the facts obtaining in the case of K. Manjusree v. State of A.P. (supra) and Hemani Malhotra v. High Court of Delhi (supra) have a very distinctive feature where the entire selection process was complete and thereafter the lists were changed applying different standards. He then emphasized that if the fact of prescription made subsequently was known to the interviewing persons then their mind sets have been in different shape and interviews could not have been conducted in a fashion which suited the prescribed marks and it would have led to a different conclusion. In the present case the candidates were made aware before the interview. He thereafter emphasized the emphasis that paragraph No. 33 in K. Manjusree's case (supra) cannot be applied without appreciating the facts in that case because the Hon'ble Supreme Court has time and again said that their judgements should not be read as statute and he makes a reference to the case decided by the Hon'ble Supreme Court in the matter of Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. reported in (2002) SCC 496. Therefore, the Hon'ble Supreme Court itself has clarified that their judgement should not be read as a statute. Therefore, paragraph No. 33 in Manjusree's case (supra) does not make a law which could be used to shake up the selection which is in accordance with the Rules of 2008.

21. This has also been emphasized by learned Advocate General that the candidates who were appointed cannot have a fair play and their rights are going to be affected as they have not been impleaded as parties where it will be to their prejudice.

22. Learned Single Judge has found that it cannot be said that the criteria was changed after the selection process is commenced and rejected the arguments by saying that there was a prescription in that matter much ahead of the commencement of the recruitment as it was provided in the Rules and the qualifying marks were required to be prescribed as per Rule 12(3) of the Rules and before the oral interview. The prescription was communicated to the students. Therefore, the arguments of learned Counsel for the appellants was not accepted by learned Single Judge.

23. Learned Single Judge has also found that the respective appellants-petitioners were informed about the commencement about oral viva voce and presented them in respect of 10 marks. Therefore, they had the notice about the prescription and therefore they cannot make any grievance in this behalf.

24. Learned Single Judge has also found that unless and until all those candidates who are likely to be affected are joined as party respondents and are heard, no relief can be granted to the respective petitioners-appellants for non-joinder of necessary parties.

25. In the aforesaid background, we have to judge the merits of the case.

26. Heard learned Counsel for the parties. Perused the records of the case. We have given our thoughtful consideration to the arguments advanced by learned Advocate General. The argument of learned Advocate General that the law laid down in the cases of *K. Manjusree v. State of A.P.* (supra) and *Hemani Malhotra v. High Court of Delhi* (supra) should not be read as law laid down in the light of the facts obtaining in those cases is over simplification of the circumstances arising out of the case. The law laid down by the Hon''ble Supreme Court in the case of *Haryana Financial Corporation v. Jagdamba Oil Mills* (supra) that the judgement of the Hon''ble Supreme Court should not be read as a statute is in the light that they should not determine the effect of the case as statute. But then the binding nature of ratio decidendi of the case decided by the Hon''ble Supreme Court is a fact which is governing the judicial discipline in this country. In that light if we find that there is a statement of law made in these two cases I.e. *K. Manjusree* (supra) and *Hemani Malhotra* (supra) that prescription of minimum marks has to be before the start of the selection process then it cannot be said that they cannot be applied in the facts of the present case. If a conscious reading is made to paragraph No. 33 then apart from the facts obtaining in the case of *K. Manjusree* (supra) there is a statement of law clear and unambiguous where the Hon''ble Supreme Court has stated that where there is prescription by Rules that is permissible and if there is no prescription by Rules then the Selection Committee can prescribe the same bereft of any sanction of the Rules but if any prescription is made then such marks have to be prescribed before commencement of the selection process, it cannot, either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. That appears to be statement of law and applying those statement of law we find that the Rules as framed, though authorized the Commission to prescribe minimum marks to be obtained at viva voce but such prescription was not made when the initiation of the process of selection was made pursuant to the advertisement issued on 17.10.2008.

27. Reading a line from the advertisement it has been emphasized on behalf of the State Government and the Commission that the resulted was to be declared in accordance with Rules. This cannot be accepted by us that this means that the Rules could be applied during the process of selection to prescribe the marks for viva voce. That being the position, the marks having been prescribed after the first part of the examination i.e. the written examination being over, the act of the respondent Commission in prescribing 10 marks cannot be approved more particularly when the Commission was conscious that they have to do it and have to reflect it in the advertisement and such being the statement made before Court was known to the Commission that what is the requirement of law, they cannot be permitted to turn around and now say that they made the statement to count not to honour at a subsequent stage.

28. In view of the aforesaid, the action of the Commission in not prescribing minimum marks as given in Sub-rule (3) of Rule 12 at the inception of the

selection cannot be approved. The Commission appears to have guided by legal mala fide. It is because it reading law to its advantage when it cannot be permitted.

29. Allegation of bias reflected in paragraph of the petition quoted hereinabove of the judgement remains unreplied by the Commission that there can be an element of bias. That having been indicated by the appellants-petitioners and not responded by the Commission shows that it had something else in mind and that is fortified in the background that the statement made before this Court that marks will be reflected in advertisement was not followed by the Commission in prescribing the qualifying marks in the interviews itself.

30. This brings us to the other argument of learned Counsel for the Commission that those who have appeared in the examination cannot be permitted after having failed. In the facts and circumstances of the case, we find that estoppel cannot be put against the students more particularly when the candidates were entering into the interview room, they were informed that there will be minimum marks, that shows at that time the Supervisory position which the Commission had, the incumbents would not have been in a position to counter the same. It has been indicated by learned Counsel for the appellants-petitioners that the candidates entering into the examination hall cannot be expected to know his legal rights and counter the same. We find that this argument has no base.

31. The third argument of learned Counsel for the Commission and the State is that those who have been selected should have been impleaded as parties and their rights would have been affected if their selection is set aside. Suffice it to say that the present petition is filed before any right accrued to the candidates in terms of Rule 16 and when this petition came to this Court, this Court clearly observed that the selection of the candidates will be subject to the result of the appeal. Therefore, if they are not joined as parties, no difference would be made in the light of law which is available to determine such cases. In that view of the matter, the arguments of learned Counsel for the State and the Commission have no force.

32. The appellants-petitioners' grievance is founded by this Court to be in accordance with law and we feel that wrong procedure has been adopted by the Commission in holding the selection and at the intervening stage of the selection process by prescribing the marks for interview in between the selection process. In this light, the select list prepared deserves to be quashed.

33. Therefore, it brings us to a position as to what relief should be granted in the facts and circumstances of the case. Further we quash the select list as prepared by the Commission and appointments made on its basis and direct that a fresh list be drawn without considering the prescription of the cut-off marks in viva voce and declare the result according to the merit list so prepared. We feel that a guidance can be had in this regard from the case of RAJ KUMAR AND SHAKTI RAJ (supra) and in that light the observations made in paragraph No. 17 should be

taken to be guidelines and we would observe that those who have been appointed should be continued to work until a fresh list is prepared by the Commission by considering the marks obtained in the interview adding them in the written examination and then making a fresh list and that fresh list will be prepared on merits for appointment on the basis of written examination marks and the marks obtained at the interview without considering to limit of minimum marks. Fresh list will be drawn and according to that appointment will be made. Until then, the candidates who have already been appointed will continue to serve. After that, if fresh appointment is made then they will have to give way to the newly appointed candidates. This exercise is to be concluded within two months henceforth.

34. With the aforesaid observations, the appeal is allowed.