

(2005) 09 OHC CK 0049

In the Orissa High Court

Case No : Writ Petition (C) No. 2780 of 2004

Mrs. Madhumita Das and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 233(2), 234, 275
Orissa Judicial Service (Special Scheme) Rules, 2001 — Rule 2, 5, 5(2)
Orissa Superior Judicial Service Rules, 1963 — Rule 13, 8, 8(4)

Citation : (2005) 100 CLT 465

Hon'ble Judges : N. Prusty, J; I.M. Qudussi, J

Bench : Division Bench

Advocate : A.K. Mohapatra, R.K. Mohanty, N.C. Rout, A.K. Pati and S. Lal, for the Appellant; Additional Government Advocate for O.P. Nos. 1 to 3, B.M. Patnaik, P.K. Majhi and A. Panda for O.P. No. 4, G. Das and A.K. Biswal for O.P. No. 5, K.K. Jena, for O.P. No. 5 and 14, S.N. Mohapatra, K.R. Mohapatra and I. Mohanty for O.P. No. 6, J. Pal, M.R. Patra and M.K. Sarangi for O.P. No. 7, Sk. Aziz, A.K. Mohanty and G.B. Jena for O.P. No. 8, A.K. Rath and A.K. Panda for O.P. No. 10, D. Ray, for O.P. No. 11 and 18, B.P. Ray, S.J. Pradhan, P.K. Pattnaik and A. Tripathy for O.P. No. 12, B. Mishra and K.K. Jena for O.P. No. 14, S.K. Patnaik, K.C. Mohanty, D.P. Das and D. Patnaik for O.P. No. 16, D. Nayak, M. Mohanty and B. Rout for O.P. No. 17, J. Patnaik, T.K. Patnaik, S. Das and A. Patnaik for O.P. No. 18, for the Respondent

Judgement

I.M. Qudussi, J.—By means of this Writ Petition, the petitioners have challenged the selection made for recruitment of Ad hoc Additional District Judges under the Orissa Judicial Service (Special Scheme) Rules, 2001 in pursuance of the advertisement issued by the High Court of Judicature, Orissa, Cuttack being Advertisement No. 1 of 2003 as contained in Annexure-1. The prayer made in the Writ Petition is reproduced as under:

"Prayer

The petitioners therefore pray that your Lordships graciously be pleased to admit

the Writ Application and issue a Rule Nisi to the opposite parties to show cause as to :

(a) Why the selection violating stipulation of Annexure-1 will not be declared as illegal and void;

(b) Why the opposite parties will not be directed to select and appoint as per advertisement vide Annexure-1 and to remove disqualified candidates from service i.e., opposite party Nos. 4 to 18.

(c) Why the opposite parties will not be directed to appoint the petitioners as they have qualified in written and viva voce and to stop/set aside appointment of disqualified persons having less than 50% in written test and;

(d) Why the opposite parties will not be directed to reserve for women as the vacancies are more than three;"

2. The brief facts of the case are that the Eleventh Finance Commission allocated Rs. 502.90 crores under Article 275 of the Constitution of India for the purpose of setting up of 1734 Courts in various States in India to deal with long pending cases particularly, Sessions Cases. As allocation of funds was made by the Finance Commission stipulating time-bound utilization i.e., within a period of five years, various State Governments were required to take necessary steps to establish the aforesaid Courts in their respective States. It appears that the Finance Commission suggested that the States may consider re-employment of the retired Judges for a limited period for disposal of pending cases. Challenge was made to the Scheme known as the "Fast Track" Court in different High Courts primarily on the ground that there was no constitutional sanction for employment of retired Judges and effective guidelines were not in operation. Infrastructural facilities to make the scheme functional were not available. A plea was also raised therein that instead of retired judicial officers, eligible members of the bar should be considered for appointment.

3. The matter was considered by the Hon"ble Supreme Court and was decided vide judgment/order dated 6th May 2002, after getting the cases pending in various High Courts transferred in T.C. (C) No. 22 of 2001 reported in Brij Mohan Lal Vs. Union of India (UOI) and Others, in which several directions were given. The said directions are at Sl.s. 1 to 5 thereof which are reproduced below :

"1. The first preference for appointment of Judges of the Fast Track Courts is to be given by ad hoc promotions from amongst eligible judicial officers. While giving such promotion, the High Court shall follow the procedures in force in the matter of promotion to such posts in Superior/Higher Judicial Services.

2. The second preference in appointments to Fast Track Courts shall be given to retired judges who have good service records with no adverse comments in their ACPs, so far as judicial acumen, reputation regarding honesty, integrity and character are concerned. Those who were not given the benefit of two years extension of the age of superannuation, shall not be considered for appointment.

It should be ensured that they satisfy the conditions laid down in Articles 233 and 309 of the Constitution. The concerned High Court shall take a decision with regard to the minimum or maximum age of eligibility to ensure that they are physically fit for the work in Fast Track Courts.

3. No Judicial officer who was dismissed or removed or compulsorily retired or made to seek retirement shall be considered for appointment under the Scheme. Judicial officers who have sought voluntary retirement after initiation of Department Proceedings/inquiry shall not be considered for appointment.

4. The third preference shall be given to the members of the Bar for direct appointment in these Courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on their performance. They may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Service.

5. Overall preference for appointment in Fast Track Courts shall be given to eligible officers who are on the verge of retirement subject to they being physically fit."

4. It is pertinent to mention here that the Governor of Orissa after consultation with the High Court of Orissa made the Rules to regulate the recruitment of Judicial Officers in the State on ad hoc and purely on temporary basis exclusively for implementation of the recommendation of Eleventh Finance Commission for upgradation of judicial administration under upgradation grant for elimination of old pending cases, namely, "The Orissa Judicial Service (Special Scheme) Rules, 2001, (hereinafter referred to as the Rules, 2001)" which came into force on the date of its publication in the Orissa Gazettee, i.e., on 7.4.2001. Later on some amendments were made to the said Rules by "the Orissa Judicial Service (Special Scheme) (Amendment) Rules, 2003" which was deemed to have come into force with effect from 22nd February, 2003. The relevant parts of the Rules, 2001 for the purpose of this case as amended are reproduced hereunder:

Definitions :

(2) In these rules, unless the context otherwise requires :

(a) "Committee" means the Committee of the Judges of the High Court constituted by the Chief Justice.

*** **

Eligibility :

5 (1)*** ** (2)*** **

(3) The selection of such candidate for ad hoc appointment shall be made by a Committee.

(4) The method of selection of members from the Bar as direct recruits shall be adopted by the High Court as are normally followed for selection of members of the Bar as direct recruits to Orissa Superior Judicial Service.

A Committee was constituted comprising of three Hon'ble judges of this Court for framing of questions and evaluation of answer papers. But no selection committee under Rule 2(a) of the Rules, 2001 was constituted by the Chief Justice and as such all the Judges of the Court i.e., Full Court formed the Committee and held the selection.

5. A meeting of the Full Court of this Court was held on 7.11.2003 in which it was held that recruitment from the bar to some of the vacancies in the Fast Track Courts might be made by advertisement inviting applications. The Chief Justice had approved the draft advertisement.

6. Pursuant to the aforesaid decision of the Full Court and after approval of the draft advertisement the advertisement was issued on 14.11.2003 inviting applications from the eligible candidates for recruitment of Ad hoc Additional District Judges under the Orissa Judicial Service (Special Scheme) Rules, 2001. The said advertisement was published in two Newspapers, one in Oriya Daily newspaper "The Samaj" dated 14.11.2003 and other in English Daily Newspaper "The New Indian Express" dated 15th November, 2003 as advertisement No. 1 of 2003. The relevant part of the advertisement is reproduced as under:

"(1) Applications in prescribed form are invited from eligible candidates for recruitment of ad hoc Additional District Judge under the Orissa Judicial Service (Special Scheme) Rules, 2001 as per the directions of the Supreme Court in T.C. (Civil) No. 22 of 2001 (Brij Mohan Lal v. Union of India and Ors.). For this purpose a competitive examination will be held (the place and the date of examination will be intimated later).

(2) Age : A candidate must not be under 35 and over 45 years of age as on 1st August, 2003.

(3) Eligibility: (1) A candidate shall be a graduate in Law of a University recognized by the Govt. or a Bar-at-Law or a Member of the Faculty of Advocates in Scotland.

(2) Be of atleast seven years standing experience at the Bar by the 1st August, 2003.

(3) Be able to speak, read and write Oriya and have passed a test in Oriya Language, equivalent to M.E. Standard.

(4) (a) No person who has more than one wife living shall be eligible for appointment to the service.

(b) No woman who is married to any person, who has a wife living shall be eligible for appointment to the service.

(4) Scale of Pay: The pay of the Ad hoc Additional District Judges shall be fixed at such stage in the time scale of pay as admissible to direct recruits to the cadre from time to time.

(5) No. of vacancies : Some

(6)*** ***(7)*** ***(8)*** ***(9)

(9) Examination : (a) There shall be a written examination consisting of two papers and carrying 100 marks each having duration of two hours.

Paper-I: Criminal Procedure Code-30, Indian Penal Code-30, Indian Evidence Act-30 and Special Acts-10, such as N.D.P.S. Act, Prevention of Food Adulteration Act, Prevention of Corruption Act and Essential Commodities Act.

Paper-II: *** ***(b) Viva voce : The minimum qualifying marks for viva voce test is 50% in each paper in the written test. Viva voce test shall carry thirty marks.

(10) Medical Board: The selected candidates shall be physically fit and shall be required to appear before the medical Board before final appointment.

(11) Note:

(1) the term of appointment shall be initially for a period of one year subject to extension as per the Orissa Judicial Service (Special Scheme) Rules, 2001.

(2) No T.A. will be allowed to the candidates.

(3) At the time of viva voce test, they are required to produce the original certificates, failing which they shall be debarred from the interview;

(4) The applications received incomplete in any respect or after the last date fixed, are liable to be summarily rejected.

(5) Canvassing in any form will be a disqualification.

(6) Candidates must properly arrange and attach enclosures to their applications.

(7) Applications should reach the undersigned within 10 days from the date of publication of this advertisement."

The term of appointment was initially for a period of one year subject to extension as per Rules, 2001.

7. Several persons including the petitioners and opposite party Nos. 4 to 18 submitted their applications and participated in the written examination which was held on 14.12.2003. A total number of candidates appeared in the examination in Paper-I was 777 and in Paper-II was 774. But only 27 candidates secured 50% or more marks in Paper-I and 43 candidates in Paper-II. Only those

candidates who had secured 50% marks or more in both the papers were eligible to be called for viva voce test. On verification, 8 candidates were found qualified to appear in viva voce test, 25 answer books i.e., 16 in Paper-I and 9 in Paper-II, has not been evaluated as found defective. On 7.1.2004 Hon"ble the Chief Justice had approved the note of the Registrar (Administration) to place the result before the Full Court.

8. Needless to mention here that the petitioners' names found place in the list of those fortunate 8 candidates who had secured 50% or more marks in each paper. The result was placed before the Committee/Full Court in its meeting held on 8.1.2004 with the agenda "fixing the date of viva voce for the post of Additional Ad hoc District Judges in the Fast Track Courts". In that meeting the Full Court changed the norms mentioned in the advertisement and lowered down the eligibility criteria for being called for viva voce test, from 50% to that of 35% in each paper and 40% in the aggregate in the written examination. Therefore, besides those candidates who had secured more than 50% marks, other candidates who had secured minimum 35% marks in each of the papers and 40% marks in aggregate were also called for viva voce test.

The item of agenda and the decisions taken by the Full Court in its meeting held on 8.1.2004 at 4.15 P.M. are reproduced as under:

"Sl. Items of Agenda Decisions taken No. to consider: 1. Fixing a date for viva voce Resolved to issue interview test for selection of candidate letters to those who have from the bar for appointment secured 35% of marks in each to the post of Ad hoc paper and minimum 40% of Additional District Judge marks aggregate in the written in the Fast Track Courts examination held for direct (XIX-15/2003) recruitment of Ad hoc Addl. District Judge under Orissa Judicial Service (Special Scheme) Rules, 2001 Resolved further that the date of interview of the candidates would be 7th February, 2004 and 8th February 2004 (Saturday and Sunday) and the interview shall commence at 10.00 A.M. on both dates."

Apart from the 8 candidates who had secured 50% marks or more in each paper, 31 other candidates were called for interview i.e., the total number of candidates called for interview was 39, out of which 20 candidates were called on 7th February, 2004 and the remaining 19 candidates on 8th February 2004 at 10.00 A.M.

9. The proceedings of the Full Court meetings held on 7.2.2004 and 8.2.2004 at 10.30 A.M. were prepared and signed by the Hon"ble Judges present in viva voce test held on those days. They being relevant for this case are reproduced as under.

Sl. No. Items of Agenda Decisions taken 2. Holding of viva-voce/inter- Only candidates who had view for selection of secured 40% in the aggregate candidates from the Bar in the written test with pass for appointment as Ad hoc mark of 35% in each paper were Addl. District Judges in called for viva voce test/

interview. the Fast Track Courts. Resolved to fix 40% that is, 12 out of 30 as the qualifying marks in the viva voce/interview. The marks in the viva voce/ interview were given to the candidates on consensus. After the viva- voce/ interview, the following candidates arranged in order of merit have been selected for appointment as Ad hoc Addl. District Judges, Fast Track Courts taking into consideration their performance in the written test, their academic career and their performance in the viva voce/ interview. Roll Nos. Name of the Candidates Aggregate marks secured 616 Sri Chittaranjan Dash, Advocate, Rourkela 137-1/2 029 Sri Ananda Chandra Behera Advocate, Balasore 135-1/2 023 Sri Shyam Sundar Dash, Advocate, Sambalpur 129 650 Sri Raj Kumar Sahu Advocate, Keonjhar 124-1/2 311 Sri Santosh Kumar Jena Advocate, Cuttack 124 308 Sri Devi Prasad Mohapatra Advocate, Balasore 116 542 Sri Rabindra Ku. Patnaik Advocate, Balasore 111 883 Sri Samarendra Ku. Das Advocate, Jajpur 110 073 Sri Bijoy Ku. Purohit Advocate, Sambalpur 108 880 Sri Biswajit Mohapatra Advocate, Cuttack 106 401 Sri Pradip Ku. Mohanta Advocate, Keonjhar 104 543 Sri Bijay Ku. Panigrahi Advocate, Balasore 103-1/2 571 Sri Badal Bihari Patnaik Advocate, Dhenkanal 102 527 Sri Puma Chandra Panda Advocate, Balasore 97-1/2 693 Sri Bijoy Ku. Jena Advocate, Jajpur 95

On the basis of recommendation of the High Court, the Government of Orissa, in Home Department vide notification dated 26.7.2004 issued appointment order, of the above 15 candidates as Ad hoc Addl. District Judge.

10. Since combined minutes of the proceedings held on 7.2.2004 and 8.2.2004 were issued as mentioned above, it is not known whether the decision fixing cut off marks in viva voce test was taken before holding the viva voce or after its completion. However, as mentioned in the Resolution of Full Court, performance in the written test and viva voce test was taken into consideration. But it was never decided by the Full Court nor mentioned at any place in the advertisement or subsequent thereto that the academic career of the candidates would also be taken into consideration. The result shows that apart from maximum 200 marks allotted for written examination and 30 marks for the viva voce test i.e., total 230 marks, 10 marks were added out of which 5 marks were allocated for length of practice and 5 marks for career. In the result only 15 candidates were selected who are impleaded as opposite parties No. 4 to 18 in the instant Writ Petition. The names of the petitioners did not find place in the select list although they had secured more than 50% marks in the written examination.

11. The result sheet was approved by the Full Court and the following columns were made which are necessary for perusal

Marks secured by the candidates in the written examination for the post of Ad hoc Addl. District and Sessions Judges by way of Direct Recruitment from the bar held on 14.12.2003.

Roll Name of Marks Career Mark secured Marks Total Rema- No. the awarded

marking 1st 2nd secured Marks rks candidate, for length Full paper paper in viva Year of of marks-5 (Full (Full voce joining practice. (LL.B. 1st Marks-Marks- test. practice Full Class-1, 100 100 (Full at the Bar Marks-5 LLM. 2nd marks- (1 mark Class-2. 30) for each LLM. 1st block Class-2, period Ph.D./ of 3 yrs. LL.D.-2 beyond 7 years. 1 2 3 4 5 6 7 8 9

12. Although it was nowhere mentioned that the marks in-viva voce test or other marks awarded, as appeared from the result sheets, i.e., marks for length of practice and career marking will not be counted towards aggregate, they were in fact not counted in aggregate in respect of those candidates who did not secure minimum cut off marks fixed by the Full Court on the date of interview

i.e., 12 marks. However, in the case of the candidates who had secured 12 marks or more in viva voce test their aggregate marks were counted and the merit list was prepared according to the total marks obtained by them. Two candidates who had got 95 and 97 1/2 marks in aggregate were declared selected and those whose aggregate was not counted although they had got more marks were not selected.

13. This Court feels it necessary to mention the marks in aggregate obtained by the candidates who were selected having obtained 95 and 97 1/2 marks and of those candidates who had secured more marks in aggregate but were not selected. The are as under;

Roll Names Marks secured Selected/ No. in aggregate not selected 693 Sri Bijay Ku. Jena 95 Selected 527 Sri Purna Chandra Panda 97 1/2 = 98 - do - 103 Sri Kashinath Rout 109 Not selected 257 Smt. Madhumita Das 118 - do - 309 Sri Ashok Kumar Panda 107 - do - 459 Sri Anandrup Jaideep Devsharma 110 1/2 = 111 - do - 492 Sri Pradyumna Kumar Nayak 119 - do - 37 Sri Gopal Chandra Behera 106 1/2 = 107 - do - 44 Sri Ashok Kumar Swain 97 - do - 626 Sri Ramesh Chandra Pradhan 99 - do - 237 Sri Pradeepta Kumar Sahoo 105 - do - 288 Sri Radha Kanta Mohakur 98 1/2 = 99 - do - 328 Sri Lakshman Mishra 106 - do - 380 Sri Prasanta Kumar Rout 99 - do - 754 Sri Nigamananda Das 104 - do -

14. The following candidates who have secured more than 50% or more marks in the written examination are not selected.

"Roll Nos. Names of the candidates 103 Sri Kashinath Rout 257 Smt. Madhumita Das 309 Sri Ashok Kumar Panda 459 Sri Anandrup Jaideep Devsharma 492 Sri Pradyumna Kumar Nayak."

15. Being aggrieved, the petitioners have filed the instant Writ Petition, inter alia, challenging the selection process with the prayer already quoted at the very outset.

We have heard Learned Counsel for the parties. Learned Counsel for the petitioners has raised the following contentions :

"(i) Once the selection process was started, the Selection Committee or the Full

Court could not have changed the norms without making publication thereof in the like manner in which the publication was made for recruitment to fill up the posts of Ad hoc Addl. District Judges in Fast Track Courts.

(ii) The Selection Committee/Full Court has committed illegality in changing the norms published in the advertisement inasmuch as lowering down the minimum qualifying marks in each paper and in the aggregate in the written test for being called for viva voce test after finalization of the written test.

(iii) Since no minimum qualifying marks was fixed for viva voce test in the advertisement, the Committee/ Full Court could not have fixed the cut off marks at the stage when the interview/viva voce test was being held. The method of instant selection was not adopted by the Committee/Full Court as is normally followed for selection of member of the Bar for direct recruitment to the Orissa Superior Judicial Service. Therefore, the authorities-opposite parties 1 to 3 have violated the statutory provision of Sub-rule (4) of Rule 5 of the 2001 Rules. There was no mention in the condition of recruitment given in the advertisement that marks obtained in the viva voce test would not be added in the marks obtained in the written test.

(iv) Changing the norms after starting the process of selection by lowering down the minimum qualifying marks in the written test after the result was placed before the Committee/Full Court, for being called for the viva Voce test without providing the information to the candidates/prospective candidates through corrigendum of the advertisement amounts to violation of Article 16 of the Constitution.

16. This Court has perused the records from which it was revealed that both the petitioners had secured more than 50% marks in the written examination. Besides, so many facts have also appeared which are as follows :

"(1) It is correct that in the advertisement it was shown that the written examination would be held consisting of two papers carrying 100 marks each and viva voce test would carry 30 marks.

(2) The minimum qualifying marks for appearing in the viva voce test would be 50% in each paper in the written test. No minimum qualifying marks for the viva voce test were fixed. In the advertisement it was not mentioned that the marks obtained in the written examination would not be added to the marks obtained in the viva voce test and the merit would be based on total marks obtained in the written examination and viva voce test only when a candidate obtains 12 marks in viva voce test....

(3) In the advertisement in question it was mentioned that written examination in two papers carrying 100 marks each paper and viva voce test carrying 30 marks would be held meaning thereby that whoever would secure 50% or more marks in each of the two papers in written examination would be called for interview/viva voce carrying 30 marks. Thus, the written test and viva voce test

carried a total of 230 marks. But on perusal of the records it was revealed that the committee/Full Court prepared the merit list of the selected candidates on the basis of the total 240 marks instead of 230 marks. Surprisingly, without mentioning anywhere, 5 marks were kept for length of practice (1 mark of each block period of 3 years, beyond 7 years and 5 marks for career marking i.e., 1 mark for LL.B. 1st Class, 1 mark for LL.M. Second Class, 2 marks for LL.M. 1st Class, 2 Marks for Ph.D./LL.D.).

17. Learned Addl. Govt. Advocate has submitted that since the committee constituted under the Rules 2001, had not taken any decision regarding the minimum qualifying marks, for which the modalities of the previous year fixed by the committee held good on the date of publication of the advertisement in question. Further, the Addl. Govt. Advocate submitted that in the Full Court meeting dated 7.11.2003, it was resolved to issue advertisement inviting applications for recruitment from Bar against some vacancies in the Fast Track Courts At that point of time, as the selection of Ad hoc Addl. District Judges from among the retired District Judges, Addl. District Judges and sitting Chief Judicial magistrate was not complete, exact vacancy position was not known for which it was resolved to make advertisement to fill up "some posts". But no modalities had been fixed in the Full Court meeting held on 7.11.2003. He has given written note in which the very relevant portion for consideration is reproduced below ;

"Accordingly the Registrar (Admn.) of Orissa High Court had issued an advertisement in Annexure-1. But the stipulation in Annexure-1 to the effect that minimum qualifying marks for viva voce test was 50 per cent in each paper in written test was not in accordance with the resolution of the Full Court meeting dated 7.11.2003. The committee constituted under Rules, 2001 have not taken any decision regarding the minimum qualifying marks for which the modalities of the previous year fixed by the committee holds good on the date of publication of advertisement in Annexure-1."

18. The submissions made by Learned Addl. Govt. Advocate are contrary to the facts as before issuing advertisement, the draft advertisement was got approved by the Registrar (Administration) from the Chief Justice. Further, the advertisement was placed before the Full Court in its meeting held on 21.11.2003 and decision was taken thereon by the Court to hold the written examination on 14.12.2003 from 10.30 A.M. to 12.30 P.M. and from 2 P.M. to 4 P.M. Therefore, it cannot be said that the conditions mentioned in the advertisement were not in accordance with the Resolution of the Full Court Meeting held on 7.11.2003. There was no Resolution of the Full Court that the modalities of the selection of the previous year could be fixed. Therefore, in the absence of any decision of the Full Court, the modalities of the previous years could not have been fixed. It is also to be noticed that the modalities of the previous year were also not strictly followed in the instant selection.

19. In Sub-rule (4) of Rule 5 of 2001 Rules quoted above, it was provided that the method of selection of members from the bar as direct recruits shall be

adopted by the High Court as are normally followed for selection of members of the bar for direct recruitment to Orissa Superior Judicial Service. It would not be out of place to mention here that as in the Orissa Superior Judicial Service Rules, no norms or criteria were fixed for holding the selection to Orissa Superior Judicial Service, therefore, the Court had constituted a Committee comprising of Hon"ble Shri Justice A. Deb and Hon"ble Shri Justice P. K. Mishra (as they then were) for examining the procedure for selection of candidates by direct recruitment from Bar for appointment to Orissa Superior Judicial Service (Senior Branch). In the year 1997, the said Committee had submitted its report to the following effect:

"There may be a composite test consisting of a written examination followed by a viva voce test and career marking comprising of 250 marks to ensure proper screening of direct recruits.

200 marks may be set apart for written test which shall consist of two papers, each of two hours duration and carrying 100 marks. The 1st paper may consist of Cr.P.C. (30), IPC (30), Indian Evidence Act (30) and Special Act (10) such as N.D. & P.S. Act, Prevention of Food Adulteration Act, Prevention of Corruption Act and Essential Commodities Act.

The 2nd paper may consist of C.P.C. (30), Personal laws (30) and other Acts such as Transfer of Property Act, Specific Relief Act, Limitation Act, Law of Contract, O.E.A. Act, Consolidation of Holdings Act and Orissa Land Reforms Act (40).

Candidates shall be called for interview for viva voce test in the proportion 1:10 provided such candidates have obtained at least 50% of marks in each of the papers. 10 marks shall be awarded for the interview. 5 marks shall be set apart for length of practice beyond seven years. The marks being awarded for each block of three years in excess of seven years as is followed hitherto. 5 marks shall be awarded for academic career relating to law degrees. A first class graduate may be awarded one mark. A candidate holding second class LL.M. Degree may be awarded one mark, a candidate holding first class LL.M. Degree may be awarded two marks and a candidate having Ph.D. in Law/LL.D. may be awarded two marks. The final selection should be made on the basis of marks obtained in the written test, interview as well as taking into account the career and length of practice beyond seven years.

A Sub-Committee may be constituted for the purpose of framing questions and another committee may be delegated with the work of evaluating the papers. The marks awarded and final selection shall be subject to approval of the Full Court."

The above report was placed before the Full Court in its meeting held on 15.3.1997 which was accepted with some modification. The decision of the Full Court along with the agenda is quoted hereunder:

"Items of agenda :

8(a) Direct Recruitment from O.S.J.S. (Sr. Branch) (XIX-14/96) and

(b) Amendment O.S.J.S. Rules, 1963, (IX-13/96). -Report of the Committee-

Decision taken

The report submitted by the Sub-Committee consisting of Justice Shri A. Deb and Justice Shri P. K. Mishra with regard to the procedure for selection of direct recruits from the Bar for appointment to the Orissa Superior Judicial Service (Senior Branch) is accepted with the modification that the total marks for selection will be 240, out of which 200 marks shall be for written test, 30 marks for viva voce test, 5 marks for length of practice and 5 marks for career in Law.

Resolved that in view of Sub-rule (4) of Rule 8 of Orissa Superior Judicial Service Rules, 1963, no amendment to the said Rules is necessary, since it is for the High Court to decide the procedure for selection of direct recruits.

Further resolved that selection of direct recruits from the Bar for appointment to the Orissa Superior Judicial Service (Senior Branch) shall be made in accordance with the above report of the Sub-Committee. This decision of the Full Court supersedes all previous decisions/resolutions regarding screening before the viva voce test on the basis of career marking.

Registry to take follow up action."

20. It may be mentioned here that in pursuance of the Advertisement issued earlier on 14.1.2000, direct recruitment was made to fill up two posts of District & Sessions Judges under the Orissa Superior Judicial Service Rules, 1963 in which two candidates were selected and other two candidates were kept in the waiting list. The Full Court had decided to appoint from amongst those candidates from the list of the candidates who had participated in the written examination as Ad hoc Addl. District Judges. The candidates who were not selected against those two posts of Orissa Superior Judicial Service were given appointment as Ad hoc Addl. District Judges by reducing the percentage of marks in the written examination. Though, no advertisement was issued for appointment of Ad hoc Addl. District Judges resulting which nine candidates were appointed as Ad hoc Addl. District Judge vide decision of the Full Court dated 9.10.2003. But, as those appointments are not under challenge before us, we are not inclined to consider the validity of the same.

21. A perusal of the above quoted decisions of the Full Court dated 15.3.1997 would show that the report of the committee was modified to the extent that the total marks for selection will be 240, out of which 200 marks will be for written test, 30 marks for viva voce test, 5 marks for length of practice and 5 marks for the career in law and it was also resolved that there was no need to make any amendment of Rule 8(4) of the Orissa Superior Judicial Service Rules, 1963, since it was for the High Court to decide the procedure for selection of direct recruits and it was also decided that the above decision of the Full Court superseded all previous decisions/resolutions regarding screening before the viva

voce test on the basis of career marking and the Registry was directed to take follow up action.

But in the instant matter, as mentioned above neither the above norms were published anywhere in the advertisement in question nor it was known to general public that the above norms would be adopted while making selection. Rather, after initiating process of selection and finalization of the result of the written examination the norms were changed by the Full Court gradually, meaning thereby that the condition of minimum 50% marks in each paper was lowered down to that of 35% in each paper and 40% in aggregate, vide Resolution dated 8.1.2004 quoted above for the first time and thereafter, vide Resolution dated 7.2.2004 and 8.2.2004, the cut off marks in the viva voce test were also fixed and on finalization of the result, 10 more marks were added i.e., 5 marks for length of practice beyond 7 years and 5 marks for academic career relating to the Law Degree. In the advertisement in question, the total marks for the written examination and viva voce test were given as 230 while the final result was prepared on the basis of 240 marks instead of 230. Learned counsel for the opposite parties further submitted that the Full Court has jurisdiction to lower down the norms at any stage/ time, even after issuance of process of selection after finalization of the result of the written examination and there was no illegality in doing so. Further, it has been contended that fixing cut off marks in viva voce test as given for the written examination cannot be said to be an illegality.

22. A number of case laws have been cited from both the sides. The petitioners have relied upon the decisions in the case of Durgacharan Misra Vs. State of Orissa and Others, . In that case the question for consideration before the Apex Court in a Writ Petition filed under Article 32 of the Constitution was whether in the selection of candidates for Subordinate Judicial Service which was governed by the Orissa Judicial Service Rules, 1964 fixing the minimum marks prescribed by the Orissa Public Service Commission at viva voce test was justified and the selection list prepared by the Commission was in accordance with the Rules. The Apex Court held that the decision of the Commission to prescribe the minimum marks to be secured at the viva voce test was illegal and without authority. In the instant case, no minimum qualifying marks were initially fixed by the Committee/Full Court for viva voce test and on the day when the viva voce test was conducted i.e., 7.2.2004 and 8.2.2004, the Full Court passed the resolution to fix the minimum qualifying marks in the viva voce test.

Further, reliance has been placed on a case decided by a Division Bench of Gujarat High Court reported in All India Services Law Journal 1985 (2) L.V 83 . Ashara v. Gujarat Public Service Commission in which it has been held that the action of the Commission in fixing the qualifying marks in viva voce test was arbitrary, unreasonable and unjustified. The Commission ought to have, in the circumstances disclosed on the facts of the case, prepared the merit list on the basis of aggregate marks obtained by each candidate at the written test as well

as viva voce test.

In the case of *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, , cited by the Learned Counsel for the petitioner is related to recruitment to Haryana Civil Service (Executive) and other allied services by the Haryana Public Service Commission, in which the Apex Court held that the percentage of marks allocated by Union Public Service Commission in viva voce test was 12.2% and that was found fair and just striking proper balance between written and the viva voce tests and it was directed that every Public Service Commission should follow the same criteria that the marks allotted in viva voce test should not exceed 12.2% in case of candidates belonging to general category and 25% in the case of ex-service officers. The ratio laid down by the Apex Court is not applicable to the instant selection as the selection has not been made through Public Service Commission and the point of consideration in the instant case is a different one.

23. In the Full Bench decision of this Court reported in *Rama Sankar Mishra and Others Vs. Orissa Public Service Commission and Another etc.*, relating to selection of Probationary Munsifs in Class-II Judicial Service under the Orissa Judicial Service Rules, 1964, relied upon by the Learned Counsel for the petitioner, it was held that the omission of the names of the petitioners from the select list on the advice of the expert opinion of High Court that they were unfit without awarding any marks in viva voce test was contrary to procedure and was illegal. However, this principle is also not applicable to the instant matter as it is not the case of the petitioners that they were not awarded any mark in the viva voce test.

In a leading case of *State of U.P. Vs. Rafiquddin and Others*, , the Apex Court has held that once the Commission determines the norms and makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the Government, it should not reopen the selection by lowering down the norms at the instance of Government. If the practice of revising the result of competitive examination by changing norms is followed, there will be confusion and the people will lose faith in the institution of Public Service Commission and the authenticity of selection.

In the case of *Umesh Chandra Shukla v. Union of India and Ors.*, reported in *All India Service Law Journal* 1985 (2) (SC) 412 selection for the post of Subordinate Judge, Delhi Judicial Service was challenged and it was held by the Apex Court that the High Court had no power to include the names of candidates who had not initially secured the minimum qualifying marks by resorting to the device of moderation, particularly when there was no complaint either about the question papers or about the mode of evaluation. Exercise of such power of moderation was likely to create a feeling of distrust in the process of selection to public appointments, which was intended to be fair and impartial. It might also result in the violation of the principle of equality and might lead to arbitrariness. The cases pointed out by the High Court were no doubt hard cases, but hard cases cannot be allowed to make bad law. The list prepared by the High Court

after adding the moderation marks was struck down.

In the above case there was a Full Court resolution. For this purpose paragraphs 9, 10 and 11 of the judgment of the Apex Court are reproduced as hereunder:

"It is seen from the extract of the counter affidavit filed in Writ Petition No. 3085 of 1985 that the results at the written examination were placed before the Full Court Meeting of the Delhi High Court for its approval on January, 25 1985. The true copy of the minutes of the Full Court Meeting held on January 25, 1985 is produced before us. It reads :

Agenda Minutes To consider the question The Full Court considered whether High Court has the question and decided the power to re-check and as follows : revalue the answer book (i) Re-checking is always of an examinee of the possible. Delhi Judicial Service. (ii) If there is to be re-valuation it must be by the same examiner. (iii) Revaluation may be ordered by the Hon"ble the Chief Justice where he thinks it is a deserving case for sufficient reasons. (iv) Moderation of 2 marks in each paper to every candidate of the 1984 Delhi Judicial Service Examination be done."

"10. It is seen from the above minutes that the subject for consideration at the meeting was whether the "High Court has the power to re-check and revalue the answer book of an examinee of the Delhi Judicial Service". It may be stated here that one of the candidates had submitted a petition to the High Court requesting it to get some of his answer books revalued before the above Full Court Meeting was held. Resolutions (i) to (iii) passed at the Full Court Meeting relate to the said petition for revaluation. We are not concerned in these cases with the question whether the High Court has the power to get the answer books revalued since the case of the candidate who had prayed for revaluation of his answer books has already been disposed of by a separate order on July 26, 1985 made in Writ Petition No. 3805 of 1985 by which he was permitted to withdraw from the contest. We are concerned, therefore only with Resolution No. (iv) passed at the Full Court Meeting deciding to add two marks to the marks obtained by the candidate in each paper. On this question the Deputy Registrar has stated in the course of his counter affidavit thus :

"The Full Court approved the initial list of 27 candidates who qualified at the said written test. However, the Hon"ble Judges of the High Court having appreciated that a few candidates who had otherwise scored very high marks would have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed for the particular paper, decided that "moderation of two marks in each paper to every candidate of the 1984 Delhi Judicial Service be done. Moderation has been done on several occasions in the past also."

11. The question for consideration is whether the High Court in the circumstances of this case had the power to add two marks to the marks obtained in each paper by way of moderation. It is no doubt, true that the High

Court is entrusted with the duty of conducting the competitive examination under Rule 13 of the Rules. It is argued on behalf of the High Court that the power to conduct an examination includes the power to add marks either by way of moderation or by way of grace marks if it feels that it is necessary to do so, and reliance is placed by the High Court on its own past practice, and the practice prevailing in a number of universities in India, where marks are awarded either as moderation marks or as grace marks. It is true that in some educational institutions marks are awarded by way of moderation at an examination if the examining body finds any defect in the examination conducted by it such as inclusion of question in the question papers which are outside the syllabus, extremely stiff valuation of the answer books by an examiner or any other reason relevant to the question papers or the valuation of the answer books. The reason given by the High Court for adding the moderation marks has nothing to do either with the question papers or with the mode of valuation. The High Court approved the list of 27 candidates who had secured the required qualifying marks which would enable them to appear at viva voce test as prescribed in the Appendix. Thereafter, the High Court resolved to add two marks to the marks obtained in each paper by way of moderation on the ground that a few candidates who had otherwise secured very high marks may have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed in the particular paper. The resolution does not show the names of the particular candidates considered at the meeting in whose case such a concession had to be shown. The affidavit filed on behalf of the High Court of course, refers to certain hard cases which persuaded the High Court to add additional marks by way of moderation. The question for decision is whether such a resolution can be passed by the High Court, which is entrusted with the duty of conducting the examination. The High Court had not found any defect in question paper or any irregularities in the valuation of the answer books. It may be that some candidates had obtained high marks in some papers and by reason of their not obtaining the required marks in the other papers or 60% and above in the aggregate, they may not have become qualified for the viva voce test. In our opinion this alone would not be sufficient to add any marks by way of moderation. It is relevant to note the mandatory character of Clause (6) in the Appendix to the Rules which says only such candidates will be called for viva voce who have obtained 50% marks in each written paper and 60% in the aggregate, except in the case of candidates belonging to the Scheduled Castes/Tribes in whose case the qualifying marks will be 40% in each written paper and 50% in the aggregate. Addition of any marks by way of moderation to the marks obtained in any written paper or to the aggregate of the marks in order to make a candidate eligible to appear in the viva voce test would indirectly amount to an amendment of Clause (6) of the Appendix. Such amendment to the Rules can be made under Article 234 only by the Lt. Governor; (Administrator) after consulting the High Court in that regard. In the instant case by resolving to add two marks obtained in each answer book by a candidate has virtually amended the Rules by

substituting 48% in the place of 50% which is required to be secured in each written paper and 58% in the place of 60% which is required to be secured in the aggregate in the case of candidates not belonging to Scheduled Castes/Tribes and 38% in the place of 40% in each written paper and 48% in the place of 50% in the aggregate in the case of candidates belonging to Scheduled Castes/Tribes.

The adverse effect of the moderation on the candidates who had secured the required qualifying marks at the examination in question is quite obvious, since four candidates whose names were not in the list of 27 candidates published on the first occasion have been included in the first list of candidates chosen for appointment from out of final list of successful candidates in preference to some of the candidates who had obtained the qualifying marks in the written papers and they would have been appointed as Sub-Judges but for the interim order made by this Court. These four candidates were able to test into the list of persons to be appointed as Sub-Judges because of the high marks they were able to secure at the viva voce test for which they were not eligible but for the moderation marks. The area of the competition, which the 27 candidates who had been declared as candidates eligible to appear at the viva voce examination before such moderation had to face, became enlarged, as they had to compete also against those who had not been so qualified according to the Rules. The candidates who appear at the examination under the Delhi Judicial Service Rules acquire a right immediately after their names are included in the list prepared under Rule 16 of the Rules which limits the scope of competition and that right cannot be defeated by enlarging the said list by inclusion of certain other candidates who were otherwise ineligible, by adding extra marks by way of moderation. In a competitive examination of this nature the aggregate of the marks obtained in the written papers and at the viva voce test should be the basis for selection. On reading Rule 16 of the Rules which merely lays down that after the written test the High Court shall arrange the names in order of merit and these names shall be sent to the selection committee, we are of the view that the High Court has no power to include the names of candidates who had not initially secured the minimum qualifying marks by resorting to the device of moderation, particularly when there was not complaint either about the question papers or about the mode of valuation. Exercise of such power of moderation is likely to create a feeling of destruct in the process of selection to public appointments, which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad laws. In the circumstances we lean in favour of a strict construction of the Rules and hold that the High Court has no such power under the Rules. We are of the opinion that the list prepared by the High Court after adding the moderation marks is liable to be struck down. The first contention urged on behalf of the petitioners has, therefore, to be upheld. We, however, make it clear that the error committed by the High Court in this case following its past practice is a bona fide one and is not prompted by any sinister

consideration."

24. In the instant case also, the percentage of minimum qualifying marks in the written examination mentioned in the advertisement in question, i.e., 50%, was reduced by the selection committee/Full Court by its resolution dated 8.1.2004 after going through the result sheet of the candidates who appeared in the written examination and further decision was taken by the Committee/Full Court in its meetings dated 7.2.2004 and 8.2.2004 fixing minimum qualifying marks in the interview/viva voce test at 12 out of 30.

25. Learned Counsel appearing on behalf of the opposite parties has also cited some cases out of which in the case of *Majeet Singh, UDC and others Vs. Employees' State Insurance Corpn.* and another, , the Apex Court has held that in the absence of any prescription of qualifying marks for the interview test the prescription of 40% as applicable for the written examination seemed to be reasonable.

The point of consideration in the instant case is quite different from the above case as in the instant selection the minimum qualifying marks in the written examination was fixed at 50% as mentioned in the advertisement, but after preparation of result sheet of the written examination the minimum qualifying marks were lowered down. Hence, the main question before this Court for consideration is whether the norms could be lowered down in such circumstances specially when no amendment/modification or corrigendum was published subsequent to the advertisement in question. Further, in the instant matter no cut off marks were fixed for interview/viva voce test before starting of process of selection. If it is presumed that the same prescription was also to be applicable for viva voce test, in such an event, most of the candidates, who were declared selected would have been out of the select list. Moreover, the selection committee had fixed the minimum qualifying marks for interview later on after awarding marks in the written test of the candidates. Therefore, this was not a case where no cut off marks were awarded in the interview. It is the view of the Apex Court that where the result sheet is prepared on the basis of the cut off marks fixed by the selection committee for the interview at a later state i.e., after preparation of the result sheet of marks awarded in the written test the same is likely to be not sustainable in the eye of law. Therefore, the proposition laid down by the Apex Court in the case of *Majeet Singh (supra)* would not be applicable to the instant case.

Further, reliance has been placed on the case of *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, . In this decision, the Apex Court has held that only because the petitioners did not find themselves to have emerged successful in the result of their combined performance both at written test and oral interview, they had filed the petition. It is now well settled that 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. The High Court not have granted any relief to such petitioners.

The above principle is also not applicable to the instant matter. In the case in hand all the petitioners had got more than 50% of the marks in the written examination. According to the advertisement in question they were called for the interview on the basis that they were successful in the written examination. The candidate who had secured less than 50% marks in the written examination could not have been kept at par with the petitioners and further this is not the case of the petitioners that the Selection Committee was not properly constituted or the process of interview was unfair. The ground of challenge in the instant matter is that after fixing norms in the advertisement i.e., 50% in the written examination, the same could not have been lowered down after preparation of result of the written examination, and that too without any further notice of corrigendum or amendment of norms shown in the advertisement. Further, once no cut off marks were fixed for the interview in the advertisement, subsequently the same could not have been fixed without any notice of amendment or corrigendum of the advertisement in question. The last ground of challenge is that the result of the examination should have been based on the basis of the total marks obtained in the written examination and the interview.

26. The next case cited by Learned Counsel for opposite parties is *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, in which similar proposition has been laid down. In that case the petitioner was not granted any relief as he had appeared in the examination without protest. He had filed the petition only after he perhaps realized that he would not succeed in the examination.

The Learned Counsel for the opposite parties has also cited a decision reported in *G. Sarana Vs. University of Lucknow and Others*, . In that case it was observed by the Apex Court that the petitioner did not before appearing in the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seemed to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it was not later on open to him to turn round and question the constitution of the committee.

In the case of *K. Shekar Vs. V. Indiramma and Others*, , the Apex Court held that the post which was advertised was a temporary tenure post and yet by virtue of the corrigendum the posts were made permanent. Although in the advertisement it had indicated the likelihood of some of the posts being made permanent after three years, what it meant was that the posts would remain temporary tenure posts for three years after which there was a possibility of the appointments being made permanent. When the post itself was made permanent from its very inception by the corrigendum issued several months later, the post should have been re-advertised so as to give fair notice to all prospective candidates regarding the nature of the vacancy to be filled. It was not open to NIMHANS to retrospectively and subsequently to the appointment change the nature of the

post advertised by issuing the corrigendum.

In this regard, paragraphs 23, 24 and 25 of the judgment of the Apex Court are quoted as under:

"23. If we start with the "root", there can be no doubt that the appellant's appointment as Lecturer in 1986 was not in terms of the advertisement pursuant to which he had applied. Before any appointment could be made to the post of Lecturer, the post should have been advertised together with the eligibility criteria in respect thereof. The submission of NIMHANS was that since the post of Lecturer was lower than an Assistant Professor's, it was not necessary to be advertised. If this argument was accepted, it would amount to violation of Articles 14 and 16. The absence of an advertisement necessarily deprived persons who could have applied for the post, of the opportunity of applying for the post. The clause in the advertisement which enabled the Selection Committee to recommend the candidate for a lower post if the candidate was not found suitable to fill the post applied for, did not give NIMHANS the power to appoint the recommended candidate against an unadvertised post. Significantly, in the other advertisements on record dated 6.12.1986 and 1.6.1989, the post of Assistant Professor and the post of Lecturer were both advertised.

24. The clause, far from allowing NIMHANS the power to dispense with the advertisement of any lower post as a precondition to appointment, indicates that only eligible persons could be considered for selection. Once the barrier of eligibility was crossed, the Selection Committee could consider the suitability of the candidate for the post advertised. It follows that the appellant should not have been called for interview at all. His application clearly showed that he did not fulfill the requisite eligibility criteria for the post he had applied for, because he lacked any post-decorate experience at all. The power in the Selection Committee to relax the eligibility criteria cannot be read as including the power to do away with the criteria altogether.

25. Then again, the post which was advertised was a temporary tenure post and yet by virtue of the corrigendum, the posts were made permanent. It is true that the advertisement stated that there was a likelihood of some of the advertised posts being made permanent after three years. All that this meant was that the posts would remain temporary tenure posts for three years after which there was a possibility of the appointments being made permanent. When the post itself was made permanent from its very inception by the corrigendum issued several months later, the post should have been readvertised so as to give fair notice to all prospective candidate regarding the nature of the vacancy to be filled. It was not open to NIMHANS to retrospectively and subsequent to the appointment change the nature of post advertised by issuing the corrigendum."

27. Since in the instant matter the constitution of selection Committee is not under challenge, the principle laid down in Dr. G. Saran's case (supra) would not be applicable at all.

The next case cited by the opposite parties is *Sri Sanjay Ku. Choudhury and Others Vs. State of Orissa and Others*, decided by a Division Bench of this Court. In the said case the appointment of Special Judicial Magistrate by the Orissa High Court and the process of recruitment was challenged on the ground that the High Court had no jurisdiction to frame rules for appointing Special Judicial Magistrates in the absence of authorization made under Article 309 of the Constitution read with Article 234, and the candidates should not have been taken into surprise without any prescribed syllabus for written examination and the cut off marks of 30% fixed by the committee which was alleged to be quite arbitrary and the marks obtained in the viva voce test ought to have been added to marks in the written examination. In that case it was held that a Committee constituting of experts formulating modalities cannot be called in question even in absence of prescription to that effect in the Rules itself.

In the instant matter, the question before this Court is not that the modalities fixed by the Committee/Full Court were illegal, but the question is that once norms were published in the advertisement for notice of all, whether it could be changed at a later stage without notice to any of the candidates and general public and without issuing any corrigendum of the advertisement in question. In our opinion once an advertisement was issued to fill up a post in any office under the State, it is the duty of the recruiting authority to give necessary information to all in a precise and clear manner.

28. Although under Article 14 of the Constitution of India, right to equality has been guaranteed by providing therein that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India but the Constitution makers have taken special care of the citizens of India in matters relating to employment. Article 14 does not discriminate a non-citizen with a citizen as the word "person" has been used therein, while Fundamental Right enshrined in Article 16 is available only for the citizens. Clause (1) of the Article 16 is available only for the citizens. Clause (1) of the Article 16 provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Therefore, if an advertisement is issued inviting applications to fill up the posts, the citizens should be provided full knowledge of the procedure for selection and the norms fixed for the same. If the norms are changed subsequently, without any notice to them, how can it be said that the citizens have got equality of opportunity in relation to employment? In the instant case, the norms fixed in the advertisement were scaled down to the extent that, instead of 50% minimum qualifying mark in the written test for being called for viva voce test, the same was lowered down to that of 35% marks in each paper and 40% in aggregate. Had the citizens knowledge about the change of norms, there would have been possibility that the prospective candidates, who did not intend to apply for selection just because of the reason that the minimum qualifying marks in the written examination were higher, i.e., 50%, in each paper, and there was uncertainty of number of vacancies also, would have thought that on

liberalisation of norms they would be able to compete and as such they would have applied for the post after the change of norms. Non-providing of knowledge about such change of norms amounted to deprivation of the prospective candidates from participating in the process of selection and was thus violative of Article 16 of the Constitution.

It will be pertinent to mention here that not only the minimum qualifying marks were lowered down, but some other norms were also changed i.e., cut off marks of the viva voce test were fixed on the date of interview/viva voce test and also it was further added that the academic career of the candidates was also to be taken into consideration. On perusal of the result sheet, it was found that apart from 200 marks in the written examination and 30 marks in the interview which was shown in the advertisement, 10 marks more were allocated for length of practice and career marking for which no decision was taken by the Committee/ Full Court and, therefore, instead of total maximum of 230 marks, the selection was made on the basis of maximum 240 marks for which no information was given to the citizens/prospective candidates and, as such the same was violative of Article 16 of the Constitution.

In the recent decision of the Apex Court in the case of Secretary, A.P. Public Service Commission v. B. Swapna and Ors., reported in 2005 (2) Sup 615, the Andhra Pradesh Public Service Commission had initially advertised for recruitment to 8 posts of Asst. Public Relation Officers. Subsequently 7 more vacancies were advertised. Therefore, the recruitment was made for 15 vacancies. The selection was finalized on 2.7.1996. During the currency of the wait list the competent authority again notified 14 more vacancies on 14.4.1997 to be filled up by the candidates from the wait list. In that case, the Apex Court held that there were two principles in service laws, which were indisputable. Firstly, there could not have been appointment beyond the advertised number; and secondly, the norms of selection could not have been altered after the selection process had started. Paragraph 16 of the judgment of the Apex Court is reproduced hereunder:

"The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by Learned Counsel for the applicant-respondent No. 1 it was unamended rule, which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a certain criteria e.g., minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If the Rule is expressed in

a language which is fairly capable of either interpretation it ought to be considered as prospective only."

In the above mentioned facts and circumstances, and the law laid down by the Apex Court, this Court has come to the conclusion that once selection process was started the norms fixed in the advertisement could not have been changed and if they were liable to be changed then the same should have been published in the like manner in which initial advertisement was published. Non-publication of the norms changed subsequently after starting of the selection process was violative of Article 16 of the Constitution and thus is not sustainable in the eye of law. Therefore, this Court is of opinion that the result of selection in respect of those opposite parties who had secured 50% or more marks in the written test and were declared selected should not be disturbed. However, in respect of those opposite parties who had secured less than 50% marks in the written examination, their selection and appointments are liable to be quashed and further a Writ of Mandamus is liable to be issued to the authorities concerned to consider the case of the candidates, who had secured 50% or more marks in the written test and to declare their result after adding viva voce marks to their marks in the written examination, and excluding the marks awarded to them by Selection Committee for length of practice and for academic career since this norm was not their in the advertisement.

29. In the result, the Writ Application is allowed in part. The decision of the Committee/Full Court dated 8.1.2004 lowering down the minimum percentage of qualifying marks in the written examination from 50% to that of 35% in each paper and 40% in aggregate, and the decision dated 7.2.2004, and 8.2.2004 fixing minimum qualifying marks in viva voce test/interview are quashed. Hence, the selection of those opposite parties who had secured less than 50% marks in each paper of the written examination namely, opposite party No. 6-Shyam Sundar Das, opposite party No. 8-Santosh Kumar Jena, opposite party No. 9-Devi Prasad Mohapatra, opposite party No. 10-Rabindra Kumar Pattnayak, opposite party No. 11 -Samarendra Kumar Das, opposite party No. 12-Bijay Kumar Purohit, opposite party No. 13-Biswajit Mohapatra, opposite party No. 14-Pradeep Kumar Mahanta, opposite party No. 15-Bijay Kumar Panigrahi, opposite party No. 16-Badal Bihari Pattanaik, opposite party No. 17-Purna Chandra Panda, opposite party No. 18-Bijay Kumar Jena is quashed. Consequently, their orders of appointment issued by the Government of Orissa, vide notification dated 26.7.2004, as Ad hoc Addl. District Judge, Fast Track Courts are also quashed.

Since opposite party No. 4-Chittaranjan Dash, opposite party No. 5-Ananda Ch. Behera and opposite party No. 7-Rajkumar Sahu had secured more than 50% in each paper in the written examination, their selection and appointments are upheld. Therefore, the Writ Application in respect of those opposite parties stands dismissed.

A Writ of mandamus is also issued commanding opposite party Nos. 1 to 3 to consider the case of the petitioners and other similarly circumstanced candidates

for their appointment to the post of Ad hoc Addl. District Judges, who had secured 50% or more marks in each paper in the written examination after making total of the marks obtained by them in the written examination and viva voce test/ interview if they are otherwise found eligible, but the remaining additional 5 marks for length of practice shall not be counted towards total marks obtained by the candidates, as this criterion was neither mentioned in the advertisement nor there was any decision of the Committee/Full Court in this respect.

30. It goes without saying that opposite party Nos. 1 to 3 will strictly follow the criteria laid down by the Supreme Court in the case of Brij Mohan Lal v. Union of India and Ors. (supra) while making fresh selection for appointment to the posts in question.

No order as to cost.

N. Prusty, J.

31. I agree.