

(2015) 01 OHC CK 0031

In the Orissa High Court

Case No : Writ Petition (C) No. 16601 of 2014

Odisha Public Service Commission

APPELLANT

Vs

Priyambada Das

RESPONDENT

Date of Decision : 16-01-2015

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19, 22, 22(1), 5(6)
Constitution of India, 1950 — Article 309

Citation : (2015) 120 CLT 102 : (2015) 1 ILR Ori 455 : (2015) 1 OLR 510

Hon'ble Judges : Biswajit Mohanty, J.; P. Mohanty, J.

Bench : Division Bench

Advocate : Rajat Kumar Rath, Senior Advocate, Pradipta Kumar Mohanty, D.N. Mohapatra, J. Mohanty, P.K. Nayak, S.N. Dash and A. Das, for the Appellant; Ashok Kumar Mohapatra, Alok Kumar Mohapatra, Asit Kumar Dash, B. Panda, S. Mohapatra, S.P. Mangaraj, S. Mohanty, T.

Final Decision : Allowed

Judgement

Biswajit Mohanty, J.—This writ application has been filed by the petitioner-Odisha Public Service Commission, for short, "the OPSC" with a prayer to quash the order dated 26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2146(C) of 2014 under Annexure-5.

2. Shorn of unnecessary details, the facts of the case are as follows;

"On 17.11.2011, Advertisement No. 5 of 2011-12 was issued by the OPSC inviting applications in prescribed Short Form from the candidates for admission to the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the Posts and Services coming under Odisha Civil Services (Category-I and Category-II) as mentioned therein. In the said advertisement, it was made clear that the Examination should be conducted in accordance with the provisions of the Odisha Civil Services (Combined Competitive Recruitment Examination) Rules, 1991, for short, "1991 Rules". It was made clear that the relevant portion of the said Rules was available in the website of the Commission. At Paragraph-15, advertisement

also referred to the Website of the Commission and informed the candidates to visit the Website of the Commission for detailed information about programme of examinations, etc. On 16.12.2011, a corrigendum to the above noted advertisement was issued revising the number of vacancies. On 22.2.2012, vide Notice No. 1138/P.S.C., the petitioner informed all concerned that it (OPSC) had decided to implement a uniform Negative Marking System in all competitive examinations having objective type (multiple choice) questions where Answer Sheets were to be evaluated through Computer (O.M.R. System). On 19.1.2014, the Preliminary Examination was conducted. On 18.2.2014, vide Notice No. 779/P.S.C., the petitioner published model answers to question papers in the Website of OPSC inviting observations/comments from candidates/general public online by 28.2.2014. On 1.5.2014, the petitioner published correct model answers in respect of the subjects in which observations/comments were received. It also published the procedure for valuation of answer sheets in the Website of the Commission. On the same date, i.e., 1.5.2014 vide Notice No. 1838/PSC, the petitioner published the results of Preliminary Examination. The said notice made it clear that 5823 candidates have been provisionally qualified/selected for admission to Odisha Civil Services (Main) Examination and roll numbers of these candidates were available in the Website of the OPSC. It also made clear that the selected candidates were required to furnish the applications online through proforma application form for the Main Examination. Vide Notice No. 2052/P.S.C. dated 14.5.2014, it was notified by the petitioner that online applications for applying to sit in the Odisha Civil Services Examination, 2011 would be available till 20.6.2014. The last date for receipt of print-out/hard-copy of online applications along with copy of specified documents/certificate was on 30.6.2014. It was also made clear that the petitioner had decided to conduct the Odisha Civil Services Main Examination during September, 2014. Vide Notice No. 3349/P.S.C. dated 4.7.2014, the petitioner, in consideration of difficulties faced by some candidates in remote rural areas extended the last date for submission online application form for admission to Odisha Civil Services Examination, 2011. Vide Notice No. 3605/P.S.C. dated 10.7.2014, the petitioner notified that it was going to conduct the Odisha Civil Services Examination (Main Examination), 2011 from 6.9.2014 to 30.9.2014 at five zones of the State." 3. It is at this juncture on 30.7.2014, one Priyambada Das (opposite party No. 1) filed O.A. No. 2146(C) of 2014 before the learned Tribunal with prayer that the learned Tribunal should set aside the grace marks awarded by the OPSC in the Preliminary Examination and accordingly, set aside the results of Preliminary Examination and OPSC be directed to publish the result as per law by conducting fresh and lawful evaluation. The present writ application arises out of the final order dated 26.8.2014 passed by the learned Tribunal in O.A. No. 2146(C) of 2014.

4. In O.A. No. 2146(C) of 2014, opposite party No. 1 took the plea that the evaluation of answer scripts in the Preliminary Examination has been done by following an illegal practice of awarding grace marks in order to favour a few candidates. According to opposite party No. 1 while in some optional subjects the

grace marks have been given but in optional subjects like, Psychology, Philosophy, Law, Anthropology and Civil Engineering, no grace marks have been awarded. Further, according to opposite party No. 1 awarding of grace marks was not provided under law. Thus, evaluation of answer scripts in the Preliminary Examination was opposed to law and therefore, the results of Preliminary Examination was illegal and void. Opposing the said prayer, the petitioner filed its counter on 18.8.2014. In the said counter, the petitioner inter alia took the stand since the candidates, who have qualified in the Preliminary Examination to appear at the Main Examination have not been impleaded as parties, the Original Application be dismissed. The petitioner also submitted that for printing mistakes or wrong questions, a candidate should not be burdened with negative marking as he/she was not at fault. Accordingly, full marks have been awarded to all the candidates for wrong questions or questions having printing mistakes. The petitioner also took a stand that as per the opinion of the Expert Committee, full marks and equal marks were awarded against wrong questions uniformly. This system should not be treated as award of grace marks as alleged by opposite party No. 1. The petitioner also took the stand that opposite party No. 1 having participated in the selection process cannot challenge the authority of the Commission in formulating the procedure of evaluation as per the principles evolved by it, which is its inherent prerogative. In its counter, the petitioner also made it clear that opposite party No. 1 herself had also obtained full marks for the wrong questions in General studies and also in Public Administration Paper. So, she was in no way prejudiced by this. Thus, according to the petitioner, the Original Application was without any merit and should be dismissed.

5. Opposite party No. 1 filed an affidavit on 20.8.2014 before the learned Tribunal stating therein that the petitioner was under legal obligation to conduct examination as per "1991 Rules" and that giving grace marks/extra marks/excess marks was not provided under the Rules and as per opposite party No. 1, the petitioner could not have acted in violation of law and it should have acted only in accordance with law. Thus, for acting beyond its jurisdiction Preliminary Examination results were/are vitiated. It is important to note here that despite the plea taken by the petitioner in its counter before the learned Tribunal relating to non-joinder of successful candidates as parties, opposite party No. 1 did not implead the successful candidates or some of them before the learned Tribunal. In such background, the order was reserved in O.A. No. 2146(C) of 2014 on 20.8.2014 and final order which has been impugned in the present writ application was pronounced on 26.8.2014.

6. The learned Tribunal while pronouncing the final order in O.A. No. 2146(C) of 2014, framed the following three issues;

"(i) Whether OPSC is acting as per law and procedures in allotting grace marks to candidates in case of wrong/ambiguous/no option available/Double Answer questions?

(ii) Whether candidates, having gone through the OCS (Preliminary)

Examination, 2011 and surrendered to the terms and conditions of the same, could challenge the selection list of Preliminary Examination after being unsuccessful therein?

(iii) Whether the case suffers from the defect of non-joinder of parties, since all successful candidates of OCS (Preliminary) Examination, 2011 are affected and have not been made parties?"

7. On issue No. (i), the learned Tribunal came to hold that OCS Examination was not like a school and college examination, where grace marks were given for faulty questions in order not to jeopardize careers of the students. But in OCS Examination, OPSC is trying to select candidates based on their knowledge, power of analysis, reasoning and competency in the subjects, he has selected. By awarding grace marks to candidates for such faulty questions, OPSC is rewarding candidates for faults of the question setters/printers/proof readers. Hence, grace marks provided is not to judge candidate's competence, but to compensate him for the incompetencies of those, who are part of this process of conduct of the OCS Examination. This, according to the learned Tribunal distorts measurement of relative competencies of all candidates. Here candidates have to be judged based on material that shows their knowledge, their power of analysis and reasoning and analytical ability and not on other's incompetencies. Hence, the evaluation of OPSC by granting grace marks to candidates for faulty question is definitely not as per law as the statute never anticipated such cases will ever arise. According to the learned Tribunal only option available to OPSC was to proceed as per the ratio of judgment of Hon'ble Supreme Court in the case of Andhra Pradesh Public Service Commission v. K. Prasad and another (decided on 7.10.2013 in Special Leave to Appeal (Civil) No. 25157 of 2013), i.e., to delete the faulty questions and prorate the marks to the maximum marks to enable comparison among all candidates.

8. With regard to Issue No. (ii) the learned Tribunal held that there was no estoppel against law and since awarding of grace marks for faulty questions had not been declared in advance of the conduct of Preliminary Examination by the OPSC, it could not be held that opposite party No. 1 have surrendered to the terms and conditions of the advertisement and she could not question basis of the evaluation of papers.

9. On Issue No. (iii), the learned Tribunal held that since the basis of evaluation, i.e., grace marks for faulty questions has been challenged here as a point of law and that could not prejudice the selected candidates as the list based on faulty evaluation could not be treated as a final list. Moreover only roll numbers of selected candidates have been published and not names. Accordingly, the learned Tribunal quashed Annexure-3 of O.A. No. 2146(C) of 2014 and consequential action taken on that basis. In other words the learned Tribunal set aside the results of Preliminary Examination and further directed P.S.C. to calculate marks of candidates by eliminating the faulty questions and negative marking and the marks be prorated to full marks and prepare select list of

candidates on that basis for appearing at the Main Examination.

10 Challenging the above noted order of the learned Tribunal, the petitioner has filed the instant writ application.

11. Heard Mr. Rajat Kumar Rath, learned Senior Advocate for the petitioner-OPSC, Dr. Ashok Kumar Mohapatra, learned Senior Advocate for opposite party No. 1, Mr. S.P. Mishra, learned Advocate General for opposite party No. 2, Mr. H.S. Mishra, learned counsel for opposite party Nos. 4 and 5 (interveners), Mr. B.B. Mohanty, learned counsel for opposite party No. 7 (intervener), Mr. J. Pattnaik, learned Senior Advocate for opposite party Nos. 8 and 9 (interveners), Mr. S.K. Padhi, learned Senior Advocate for opposite party No. 10 (intervener), Mr. Dhuliram Pattanayak, learned counsel for opposite party No. 11 (intervener) Mr. Sameer Kumar Das, learned counsel for opposite party Nos. 12 to 22 (interveners) and Mr. B. Routrary, learned Senior Advocate for opposite party Nos. 23 and 24 (interveners).

Mr. Rajat Kumar Rath, learned Senior Advocate for the petitioner submitted that though the result of Preliminary Examination was passed on 1.5.2014, opposite party No. 1 never objected to the same though she had failed in the Examination and filed O.A. No. 2146(C) of 2014 after about three months on 30.7.2014 at a belated stage when date for OCS Main Examination has already been announced, in order to create problems for large number of candidates, who were successful in OCS Preliminary Examination. In this context, Mr. Rath submitted that the conduct of opposite party No. 1 would show that she had waived her rights. In this context, Mr. Rath relied on a decision of the Hon"ble Supreme Court in the case of B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others, . In this background, the learned Tribunal should not have entertained the Original Application filed by opposite party No. 1. Secondly, Mr. Rath submitted that though opposite party No. 1 has filed O.A. No. 2146(C) of 2014 with a prayer to quash Annexure-3 and also to set aside the result of Preliminary Examination issued on the basis of Annexure-3 she never cared to implead the successful candidates of OCS Preliminary Examination as parties. On this ground alone, the learned Tribunal should have thrown out the Original Application instead of deciding the same hurriedly in absence of necessary parties like selected candidates. He submitted that opposite party No. 1 filed the Original Application on 30.7.2014 and the same was disposed of on 26.8.2014. In this context, he relied on the decisions of the Hon"ble Supreme Court in the cases of H.C. Kulwant Singh Vs. H.C. Daya Ram, , Sadananda Halo and Others Vs. Momtaz Ali Sheikh and Others, , R. Sulochana Devi Vs. D.M. Sujatha and Others, , Prashant Ramesh Chakkarwar Vs. Union Public Service Commission and Others, and Suresh Vs. Yeotmal Dist. Central Co-op. Bank Ltd. and Another, . Mr. Rath further submitted that though there was a gap of about three months between publication of results and filing of O.A. No. 2146(C) of 2014 by opposite party No. 1, she never attempted to get the names of the successful candidates from the petitioner. According to Mr. Rath, the candidates, who were successful in the

Preliminary Examination, result of which was published on 1.5.2014, were necessary parties and reiterated that the learned Tribunal has gone wrong in adjudicating the matter in absence of necessary parties. Accordingly, Mr. Rath prayed for interference by this Court in the final order dated 26.8.2014 passed by the learned Tribunal in O.A. No. 2146(C) of 2014. Thirdly, Mr. Rath pointed out that pursuant to Notice No. 779/P.S.C. dated 18.2.2014 by which P.S.C. published model answers to the questions inviting observations/comments from candidates of general public, opposite party No. 1 never objected to that. She also never submitted any objection to publication of correct model answers and procedure for evaluation of answer sheets published in the Website of OPSC on 1.5.2014. Even after result of Preliminary Examination was published on 1.5.2014, she never made any objection. Thus, on this basis also O.A. No. 2146(C) of 2014 filed by opposite party No. 1 mainly attacking the select list on the ground of giving of grace marks was also not maintainable. Fourthly, Mr. Rath with regard to merits of the case submitted that as per settled principle of law, the petitioner could adopt any reasonable method and according to him the procedure adopted by OPSC in awarding full marks to the candidates in case of wrong questions or faulty questions in an uniform manner was reasonable and the same could not be faulted. In this context, Mr. Rath relied on Prashant Ramesh Chakkarwar's case (supra). Lastly, Mr. Rath submitted that since the order passed by the learned Tribunal in O.A. No. 2555(C) of 2014 was entirely based on the order passed in O.A. No. 2146(C) of 2014 and in case W.P.(C) No. 16601 of 2014 was allowed the basis for passing of the final order in O.A. No. 2555(C) of 2014 would go and for that reason no separate writ application has been preferred by OPSC against the final order passed in O.A. No. 2555(C) of 2014. In this context, Mr. Rath relied on the decision in the case of Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, .

12. Dr. Ashok Kumar Mohapatra, learned Senior Advocate for opposite party No. 1 submitted that as per Schedule-II of "1991 Rules", the marks obtained in the Preliminary Examination were not counted for ranking and further candidates selected in the Preliminary Examination have no right to be appointed as they were yet to clear the Main Examination and Personality Tests. Further, according to Dr. Mohapatra as per Note (ii) attached to Schedule-III of "1991 Rules" Preliminary Examination was only a scrutiny test. In such background according to him the candidates selected in Preliminary Examination, who would sit in the Main Examination were not necessary parties to the case. Secondly, Dr. Mohapatra submitted that moreover opposite party No. 1 has mainly challenged the illegalities committed by the OPSC in granting grace marks. In such background, there was no need to implead those candidates, who were successful in the Preliminary Examination. In this context, Dr. Mohapatra relied on the decisions of the Hon'ble Supreme Court in the cases of B. Prabhakar Rao and Others Vs. State of Andhra Pradesh and Others, and Rajesh Kumar and Others etc. Vs. State of Bihar and Others etc., . Thirdly, Dr. Mohapatra submitted that the judgments cited by Mr. Rath were all factually distinguishable.

Thus, they have no application to the present case. Lastly, with regard to direction for fresh evaluation on pro rata basis given by the learned Tribunal, Dr. Mohapatra supported the same and relied on the decision of Punjab and Haryana High Court in the case of Jitender Kumar and another v. Haryana Public Service Commission decided on 30.8.2012 in C.W.P. No. 10309 of 2012 and the decision of the Hon'ble Supreme Court rendered in Andhra Pradesh Public Service Commission v. K. Prasad and another decided on 7.10.2013 in Special Leave to Appeal (Civil) No. 25157 of 2013 and Pankaj Sharma Vs. State of Jammu and Kashmir and Others, .

It may be noted here that pursuant to this Court's order dated 3.9.2014 some successful candidates of Preliminary Examination intervened in this writ petition. While some of them supported the result of Preliminary Examination published by the PSC and strangely, others (opposite party Nos. 7, 8, 9 and 10) supported the impugned order passed by the learned Tribunal without ever challenging the results of Preliminary Examination.

13. Mr. J. Patnaik, learned Senior Advocate for opposite party Nos. 8 and 9 (interveners), who were successful candidates defended the impugned order without ever challenging the OPSC Preliminary merit list. Mr. Patnaik tried to distinguish the judgments cited by Mr. Rath on facts and contended that the selected candidates were not required to be impleaded before the learned Tribunal. In this context, Mr. Patnaik relied on the decisions of the Hon'ble Supreme Court in the cases of A. Janardhana Vs. Union of India (UOI) and Others, , Post-Graduate Institute of Medical Education and Research and Another Vs. A.P. Wasan and Others, and The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others, . With regard to the direction of the learned Tribunal for evaluation of pro rata basis, he relied on the decisions of the Hon'ble Supreme Court in Vikas Pratap Singh's case (supra) and in Pankaj Sharma's case (supra).

14. Mr. S.K. Padhi, learned Senior Advocate for opposite party No. 10, who is one of successful candidates, like Mr. Patnaik supported the impugned final order and submitted that the selected candidates like opposite party No. 10 were not required to be impleaded before the learned Tribunal as they could at best be described as proper parties and not necessary parties. In this context, Mr. Padhi relied on the decisions in Govt. of A.P.'s case (supra), in the cases of Joseph Leon v. Nidheesh B. of Karnataka High Court decided on 8.8.2014 in OP (KAT) No. 112 of 2014 (z) and Mr. S.K. Jain v. Mr. P.S. Gupta and others of Delhi High Court decided on 14.3.2002, The General Manager, South Central Railway, Secunderabad's case (supra) and Rajesh Kumar's case (supra). In support of the direction of the learned Tribunal for pro rata evaluation, Mr. Padhi relied on the decisions in Kanpur University's (supra), Pankaj Sharma (supra), Vikas Pratap Singh's case (supra) and in the case of Guru Nanak Dev University v. Saumil Garg and others reported in (2005) 13 SCC 749 the decision of the Hon'ble Supreme Court rendered in Andhra Pradesh Public Service Commission's case

(supra) and RPSC, Ajmer v. Santosh Kumar Sharma of Rajasthan High Court as decided on 25.10.2013. Further, he contended that even assuming that the order of the learned Tribunal was bad in law and therefore, was liable to be quashed, still by quashing the judgment of the learned Tribunal, the illegal decision of OPSC in awarding full marks would be revived. Such a course was not open in view of the decision rendered in the cases of Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, , Chandra Singh Vs. State of Rajasthan and Another, and State of Uttranchal through Collector, Dehradun and Another Vs. Ajit Singh Bhola and Another, . According to Mr. Padhi even as per parameters laid down by the Hon'ble Supreme Court in the case of Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, the selected candidates can only be described as proper parties not necessary parties. With regard to the proper evaluation he relied on the decisions reported in the case of Manish Ujwal and Others Vs. Maharishi Dayanand Saraswati University and Others, and Guru Nanak Dev University (supra). Mr. Padhi further submitted that when the quantum of wrong questions differ from paper to paper the direction of the learned Tribunal for pro rata evaluation was rational, reasonable, legal and valid.

15. Mr. B.B. Mohanty, learned counsel for opposite party No. 7, who is one of the successful candidates, supported the final order passed by the learned Tribunal like Mr. J. Patnaik and Mr. S.K. Padhi learned Senior Advocates. Mr. Mohanty invited our attention to Clause-1, Clause-8(ii), Note No. 4 to Clause-11 and Note No. 2 of Clause-14 of the Advertisement and contended that the candidates selected in the Preliminary Examination were provisionally selected and were thus not necessary parties as Preliminary Examination was only a qualifying Examination and their admission at all stages of Examination were purely provisional. Thus, according to Mr. Mohanty no fault could be found in the final order passed by the learned Tribunal. He relied on a decision in the case of Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, and tried to distinguish the judgments cited by Mr. Rath, learned Senior Advocate for the petitioner, by relying on Paragraph-59 of the said judgment as to how the judgments are to be read. He also relied on the decision in the case of Shankarsan Dash Vs. Union of India, and contended that the selected candidates did not have any right to the post and inclusion of candidates in the merit list did not confer any right of appointment on them. In such background, he contended that the selected candidates of Preliminary Examination could not be described as necessary parties and while answering Issue No. iii, the learned Tribunal has rightly held that since it was deciding a point of law and selected candidates can in no way be prejudiced as the list was based on faulty evaluation.

16. Mr. H.S. Mishra, learned counsel appearing for opposite party Nos. 4 and 5 (interveners) supported the 1st part of the direction of the learned Tribunal and attacked the second part. Mr. D.R. Patnaik, learned counsel for opposite party No. 11 made general submission.

17. Mr. Rath, learned Senior Advocate for the petitioner in reply to the submissions made by Dr. Mohapatra, learned Senior Advocate for opposite party No. 1, Mr. J. Pattnaik, learned Senior Advocate for opposite party Nos. 8 and 9, Mr. S.K. Padhi, learned Senior Advocate for opposite party No. 10 and Mr. B.B. Mohanty, learned counsel for opposite party No. 7 and Mr. H.S. Mishra, learned counsel for opposite party Nos. 4 and 5 submitted that as per Schedule-II of "1991 Rules", the competitive examination has three stages and each stage consisted of process of selection and elimination. Inviting our attention to Rule 12(1) and Paragraph-2 of Schedule-II of "1991 Rules", Mr. Rath contended that as per the provisions made therein a person clearing the Preliminary Examination acquired a right to appear in the Main Examination. According to him, here what was at stake was not right to be appointed but a right to sit in the Main Examination. Therefore, all the selected candidates, who have been selected in the Preliminary Examination have this right to sit in the Main Examination. Thus they were necessary parties, who should have been heard by the learned Tribunal. In this context, Mr. Rath relied on five decisions of the Hon'ble Supreme Court as indicated earlier. He contended that it has been made clear by the Hon'ble Supreme Court that if a party is likely to suffer from order of the Court, he is a necessary party and such parties should be impleaded in the petition and notice be served on them. According to him it has been made clear by the Hon'ble Supreme Court that the parties who are interested in a proceeding and would be affected thereby are not only proper but are necessary parties. Thus, the persons, who are interested in maintaining the regularity of the proceeding, are necessary parties. He further stated that such decisions make it clear that all the parties in whose favour the impugned order or notification has been passed were/are necessary parties. According to him quashing of the Preliminary Examination result without hearing the selected candidates, who were necessary parties thus vitiated the entire proceeding before the learned Tribunal. Secondly, he contended that opposite party No. 1 moved the learned Tribunal as her right to sit in the Main Examination got affected by her failure in the Preliminary Examination. Therefore, before the learned Tribunal she prayed that the result of Preliminary Examination be set aside and results be published afresh by fair and lawful evaluation with the hope that fresh evaluation would get back her right to sit in the Main Examination. If opposite party No. 1 has/had no such right, she could not be described as a person aggrieved under Section 19 of the Administrative Tribunals Act, 1985. Thus, Original Application at her behest would not be maintainable. This right to sit in the Main Examination of selected candidates have been affected by passing of the impugned order without hearing them and this violated the principles of natural justice. Further, according to Mr. Rath as per Section 22(1) of the Administrative Tribunals Act, 1985, it is clear that the learned Tribunal while discharging its functions should be guided by the principles of natural justice. This has been violated as selected candidates were not before the learned Tribunal to have their say. Further, he submitted that though pursuant to the order dated 3.9.2014 passed by this Court some successful candidates have

intervened defending the merit list of Preliminary Examination, however, as per settled principles of law the same was not enough. In this context, he relied on the decision in *Sadananda Halo's* case (supra). According to Mr. Rath, the selected candidates of Preliminary Examination who were necessary parties should have got an opportunity at the stage of the learned Tribunal itself. With regard to four successful candidates (opposite party Nos. 7 to 10) out of 5823 selected candidates, who have intervened here and were being represented by Mr. Pattnaik, Mr. Padhi and Mr. Mohanty, Mr. Rath submitted that their pleas in defending the impugned order should be ignored as they had never challenged the results of the Preliminary Examination. Further 4 out of 5823 successful candidates could not be said to represent the majority of the selected candidates. Further he submitted that violation of principles of natural justice by itself is a prejudice. Therefore, the learned Tribunal has gone wrong in saying that the selected candidates would in no way suffer prejudice. With regard to that he relied on the decisions in the cases of *Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc.,* , *Mysore Urban Development Authority by its Commissioner Vs. Veer Kumar Jain and Others,* . Relying on the case of *Jayendra Vishnu Thakur Vs. State of Maharashtra and Another,* , and, *Rajasthan State Road Transport Corporation and Another Vs. Bal Mukund Bairwa,* , Mr. Rath submitted that once principles of natural justice have been violated the order becomes a nullity. He also tried to distinguish the judgments cited by Mr. Pattnaik, Mr. Padhi and Mr. Mohanty saying that those judgments are factually distinguishable. He also submitted that none has challenged the notice dated 22.2.2012 issued by the petitioner relating to coming into force of awarding of negative marks. Lastly, he pointed out that despite liberty granted by this Court opposite party No. 1 did not sit in the Main Examination.

18. Supporting the contentions of Mr. Rath, Mr. B. Routrary, learned Senior Advocate for opposite party Nos. 23 to 25 (interveners) submitted that since they were successful in the Preliminary Examination, they had a right to sit in the Main Examination as per Rule-12 and Clause-2 of Schedule-II of 1991 Rules. He heavily relied on the decision in *Udit Narain Singh Malpaharia's* case (supra) and contended that his clients were/are necessary parties as they had been directly affected by the impugned order. Further, he relied on the decision in the case of *All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen and Others etc.,* and contended that even a person who had got his name included in the provisional merit list/selection list had a substantive right and such a right could not be tampered without hearing him. His clients have a vital interest in defending the select list of Preliminary Examination, from which their right to sit in the Main Examination flowed. In this context, he relied on the decisions in the case of *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others,* , *Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others,* and *J.S. Yadav Vs. State of U.P. and Another,* .

19. Mr. Samir Kumar Das, learned counsel appearing for 11 interveners, who have been arrayed as opposite party Nos. 12 to 22 submitted that his clients

were all selected candidates of Preliminary Examination. He invited our attention to the prayer made in O.A. No. 2146(C) of 2014. Thus, the prayer was made to set aside the select list of Preliminary Examination. This being the prayer, the opposite party Nos. 12 to 22 being the selected candidates were directly interested in the out come of such a case and had there been a notice to them they would have defended their position and the right flowing from Preliminary Examination, i.e., to sit in the Main Examination. If pro rata evaluation be allowed to be followed, his clients might lose their position in the merit list. Therefore, they ought to have been heard and since the final order has been passed behind their back, they have been greatly prejudiced. In such background, like Mr. B. Routrary appearing for opposite party Nos. 23 to 25, Mr. Das submitted that the writ application filed by the OPSC deserved to be allowed. Secondly, he submitted that the present matter revolves around the subject of recruitment to Odisha Civil Services. As per the Notification issued by the Chairman under Section 5(6) of the Administrative Tribunals Act, 1985 such subject matter has been assigned to a Division Bench. Therefore, the acting Chairman sitting singly should not have disposed of the matter hurriedly. For this reason, the matter should be remanded to the learned Tribunal for disposal afresh in accordance with law. Thirdly, he submitted that as per the decision reported in the case of Dr Mahabal Ram Vs. Indian Council of Agricultural Research and Others, , it had been made clear by the Hon'ble Supreme Court that where questions of law were involved, the matter should be assigned to a Division Bench of the learned Tribunal. A perusal of the impugned final order, with regard to Issue No. iii would show that the learned Tribunal at Paragraph-13 has recorded that the basis of valuation has been challenged here as a point of law. In such background, the acting Chairman should have referred the matter to a Division Bench. He further submitted that the decision of the Hon'ble Supreme Court relied by the learned Tribunal, i.e., Andhra Pradesh Public Service Commission v. K. Prasad and another is factually distinguishable. Therefore, according to him direction for prorated evaluation might not be proper. He further submitted that had his clients been made parties, they would have pointed out all these things so that the matter could have been decided by a learned Division Bench. In any case he submitted that great prejudice had been caused to his clients by their non-impletion and accordingly, the writ application deserves to be allowed.

20. In order to appreciate the contention raised by Mr. Das, learned counsel for opposite party Nos. 12 to 22 vide order dated 22.12.2014, this Court directed the Deputy Registrar, Orissa Administrative Tribunal, Cuttack Bench, Cuttack and Registrar, Orissa Administrative Tribunal, Principal Bench, Bhubaneswar to produce Office Order, if any, issued before 26.8.2014 by the Chairman under Section 5(6) of the Administrative Tribunals Act. Pursuant to the said order Mrs. Mishra, Registrar, Orissa Administrative Tribunal, Bhubaneswar appeared in person before this Court on 24.12.2014 and filed the relevant Office Orders. As per the documents, it is clear that prior to passing of the impugned order on

26.8.2014 by the learned Tribunal, the last notification was issued by the order of Chairman on 28.9.2013. In fact on 28.9.2013 two office orders have been issued by order of the Chairman. While one of the office order relates to categories of case to be heard by a single Member Bench and the other one relates to the categories of case to be heard by a Division Bench. This later order covering Division Bench matters at Sl. 29 includes recruitment as a Division Bench matter.

21. In reply to Mr. Das's contention based on Dr. Mahabala Ram's case and Notification issued by the Hon'ble Chairman of the learned Tribunal referred to above, Dr. Mohapatra submitted that a Single Bench of the learned Tribunal can decide any illegality. In this context, he relied on the decision in the case of Indermani Kirtipal Vs. Union of India and others, of Karnatak High Court, R. Bhaskara Rao and Another Vs. Hyderabad Metropolitan Water Supply and Sewerage Board, Hyd. and Others, of Andhra Pradesh High Court, The Government of Tamil Nadu and Others Vs. The Tamil Nadu Co-operative Subordinate Officers' Association and Others, of Madras High Court.

22. Mr. S.P. Mishra, learned Advocate General appearing for opposite party No. 2 supported the contention of the petitioner. He further highlighted the problem of large number of vacancies.

23. Upon hearing the parties and on perusing the documents including L.C.R., the following issues arise for consideration in this case.

"1. Whether selected candidates of the Preliminary Examination were required to be made parties before the learned Tribunal?

2. Whether in view of office order dated 28.9.2013, a Single Member Bench has/had authority to hear a matter relating to recruitment when vide said office order, the Hon'ble Chairman has clearly categorized, the same as a Division Bench matter? In other words whether the learned Single Member has exceeded his jurisdiction in entertaining a matter outside his province?

3. Whether a person, who failed in the preliminary Examination and who never objected to the said results and who never objected to model answers published inviting observations/comments, who never objected to procedure of evaluation, can file an Original Application after three months of the declaration of the result in the background of principles of waiver and acquiescence?

4. Whether the learned Tribunal has passed a proper order on merits directing evaluation on pro rata basis?"

24. Coming to Issue No. 1, let us scan the various averments and prayer made by opposite party No. 1 in the Original Application. At Paragraph-3 of the Original Application opposite party No. 1 makes it clear that she challenges the illegal selection made in the Preliminary Examination, 2011 by the OPSC by adopting wrong and illegal marking procedure. At Paragraph-6.8 of the Original Application in the middle portion opposite party No. 1 clearly averred that the result of

preliminary examination of Orissa Civil Services Examination is illegal and void as the OPSC has acted beyond jurisdiction in giving grace marks in the answer scripts as evident from Annexure-3 by differential treatment which is discriminatory and unconstitutional. Further, in the said Paragraph it is averred that the approach of OPSC in giving grace mark is per se illegal and nonest in the eye of law. If the root goes the super structure falls. So the result of preliminary examination has been vitiated, which is liable to be set aside. At Paragraph-6.9 opposite party No. 1 says she has a very good prima facie case to come out successful as per her expectation, if fair evaluation will be made as per law. At Paragraph-7 opposite party No. 1 has made following prayer;

"7. That in view of the facts mentioned above the applicant therefore prays that the Hon''ble Tribunal should set-aside the grace marks adopted in preliminary examination vide Annexure-3 and also set-aside the result of preliminary examination on the basis of Annexure-3 and direct to publish result as per law by fair and lawfully evaluation and any other order as deem fit be passed." 25. Thus one thing is clear that on one ground or another, opposite party No. 1 has averred that the result of the Preliminary Examination conducted by the petitioner has been vitiated and accordingly, she prayed for setting aside the result of preliminary examination. As indicated earlier about 5823 candidates succeeded in the preliminary examination. As per Rule 12(1) of 1991 Rules read with Clause-II of Schedule-II of 1991 Rules, it is clear that the candidates qualifying the Preliminary Examination shall only be called by the Commission to appear in the Main Examination. Thus, the candidates, who qualified in the Preliminary Examination got the right to appear in the Main Examination. In such background, it is needless to say that the selected 5823 successful candidates have a right to appear in the main examination as per 1991 Rules, which is a rule made under Proviso to Article 309 of the Constitution of India. Since the select list containing roll Nos. of 5823 successful candidates has been set aside by the learned Tribunal, it clearly offends their right to sit in the Main Examination. As per the law laid down by a 4-Judge Bench of the Hon''ble Supreme Court in the decision in Udit Narayan Singh Malpaharia's case (supra), it is clear that persons, who are going to be directly affected or against whom relief is sought are necessary parties and they should be named in the petition. It has also been made clear that the parties in whose favour an order or notification has been issued and when the same order or notification is challenged, the said parties are necessary parties. To the same effect is the judgment of the Hon''ble Supreme Court in H.C. Kulwant Singh's case (supra). Even as per the decision in the case of Prashant Ramesh Chakkarwar's case, where results of the Civil Services Main Examination was under challenge, the Hon''ble Supreme Court has held that non-impletion of candidates selected in the Civil Service Main Examination was fatal. It may be noted here that even though a candidate selected in the Main Examination has no right to be appointed at that stage, but has a right to appear in the interview. In All India SC and ST Employees' Association's case (supra), the Hon''ble Supreme Court has made it

clear that the candidates, whose names are there in the provisional selection even have interest/right in protecting and defending that select list. A reading of decision rendered in Sadananda Halo's case (supra) makes it clear that the Hon''ble Supreme Court was not satisfied with the course of action taken by the High Court in inviting the objections from the selected candidates, who were never bothered to be made parties. In this context the decision cited by Dr. Mohapatra in B. Prabhakar Rao's case (supra) is factually distinguishable. In that case Ordinance was challenged and no relief was claimed against the individuals. So far as the decision in Rajesh Kumar's case (supra) cited by Dr. Mohapatra is concerned, the same is also factually distinguishable. Though the court therein took note of non-impletion of parties, no finding was recorded on its impact on account of the nature of direction given by the Hon''ble Court at Paragraph 19(4) of the judgment.

26. Now coming to the decision cited by Mr. Patnaik, learned Senior Advocate on the point that the selected candidates were not necessary parties, it can be said that those decisions are also factually distinguishable. Mr. Patnaik relied on the decisions in A. Janardhana's case (supra), Post Graduate Institute of Medical Education and Research's case (supra) and The General Manager, South Central Railway, Secunderabad's case (supra). These decisions do not refer to the 4-Judge Bench decision of the Hon''ble Supreme Court in Udit Narayan Singh Malpaharia's case (supra). Further, in A. Janardhana's case (supra), no relief has been claimed against individuals unlike the present case. No seniority was also claimed there. Further, some direct recruits had represented their case before the High Court. Unlike the present case, in Post Graduate Institute of Medical Education and Research's case (supra), Policy of Promotion was under challenge and in The General Manager, South Central Railway, Secunderabad's case (supra) constitutional validity of policy decision was under challenge. Further there was no list/order fixing seniority. It is in such background, it was held that non-joinder of parties, who were likely to be affected not fatal.

27. On this point, Mr. Padhi cited the decision of the Hon''ble Supreme Court in The General Manager, South Central Railway, Secunderabad's case (supra), Gadde Venkateswar Rao's case (supra), Rajesh Kumar's case (supra), Joseph Leon's case of Kerala High Court (supra), S.K. Jain's case of Delhi High Court (supra), which are all factually distinguishable. These above noted decisions do not refer to the 4-Judge Bench decision in Udit Narayan Singh Malpaharia's case (supra). We have already distinguished the decisions reported in The General Manager, South Central Railway, Secunderabad's case (supra) and Rajesh Kumar's case (supra) above. Now coming to the decision in Gadde Venkateswar Roa's case (supra) unlike the present case, in that case validity of rule was under challenge. So impletion was held not to be necessary. In Joseph's case at least paper publication was made. In S.K. Jain's case if not all some were impleaded as parties. So far as the decision in Udit Narayan Singh Malpaharia's case (supra) is concerned, Mr. Padhi tried to distinguish the same by advancing a submission that here no right of the selected candidates have been finalized/

crystallized, therefore, they were not necessary parties. But as we have discussed earlier here the right to sit in the Main Examination of successful candidates of Preliminary Examination stood finalized by the Preliminary Results. As per the decision in All India SC and ST Employees' Association's case (supra) such selected candidates had every right to defend and protect their position even in provisional select list. So far as his reliance on the decision in Gadde Venkateswara Rao's case (supra), Maharaja Chintamani Saran Nath Shahdeo's case (supra), Chandra Singh's case (supra) and State of Uttaranchal through Collector, Dehradun's case (supra) are concerned to buttress his submission that an order should not be quashed to revive an illegal order, it can only be said such arguments lies ill in the mouth of opposite party No. 10, who has not challenged the preliminary examination result himself as illegal. Had opposite party No. 10 been arrayed as a respondent by opposite party No. 1, we doubt whether he would have supported opposite party No. 1 there instead of defending his position in the Preliminary Examination merit list, which he is now attacking.

28. So far as the decision in Shankarsan Dash's case (supra) as cited by Mr. Mohanty is concerned, in that case the matter related to whether a person has right of appointment on being selected. Here issue is not right of appointment but a right to sit in the OCS Main Examination. On the principles relating to precedents as laid down in Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, , there exists no dispute as to their applicability.

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

30. Coming to the Issue No. 2 relating to hearing of a matter by a learned single Member Bench; as has been indicated earlier as per Notification dated 28.9.2013, the Hon''ble Chairman in tune with the requirement of Section 5(6) of the Administrative Tribunals Act, 1985 has made it clear that matter relating to the recruitment is a Division Bench matter. Secondly, in the impugned order itself while discussing Issue No. iii, the learned Single Member Bench has observed that the matter involves a point of law and in such background in tune with the judgment of the Hon''ble Supreme Court in Dr. Mahabalaram's case (supra), the matter should not have been disposed of by a learned Single Member Bench and

should have gone before a Division Bench. With regard to the decision cited by Dr. Mohapatra, learned counsel for opposite party No. 1 in Indermani Kirtipal's case (supra) it may be noted here that the said case is factually distinguishable. In the present case successful candidates were not made parties before the learned Tribunal. Mr. Das, learned counsel for opposite party Nos. 12 to 22 in his submission made it clear that had they been made parties they would have surely raised these issues and would have drawn the attention of the learned Tribunal to the decision in Dr. Mahabala Ram's case (supra). Further, there is no reference to Dr. Mahabala Ram's case, a 3-Judge Bench decision Indermani Kirtipal's case (supra). Thirdly, from the facts of the said judgment, it is not clear as to whether like in the present case where Hon'ble Chairman has assigned the recruitment matter to a Division Bench, whether in the said case there was any such Notification for taking up promotion matter by a Division Bench. Further as has been submitted by Mr. Das had his clients been made parties, he would have raised that issue before the learned Tribunal. Simply because the petitioners had not raised the issue would not go against his clients as the rights of opposite party Nos. 12 to 22 to protect and defend the select list from which their right to sit in the Main Examination flowed have been taken away behind their back. Section 5(6) of the Administrative Tribunals Act, 1985 provides that a Single Bench can only take up such matters, which have been assigned to it by the Hon'ble Chairman. Here as indicated earlier, the matter relating to recruitment was never assigned to the single Member Bench by the Hon'ble Chairman. For all these reasons we have no hesitation to hold that the order passed by the learned Single Member Bench is wholly without jurisdiction. The decisions cited by opposite party No. 1 reported in 2000 (2) Karnataka Law Journal 341, R. Bhaskara Rao and Another Vs. Hyderabad Metropolitan Water Supply and Sewerage Board, Hyd. and Others, , The Government of Tamil Nadu and Others Vs. The Tamil Nadu Co-operative Subordinate Officers' Association and Others, are factually distinguishable. In (2003) 3 LLJ since there was only one Member, i.e., a Vice Chairman for the entire Tribunal, the High Court observed that the matter can be heard by the said learned Single Member Bench though the matters should have gone before a Division Bench because as per settled principles of law, the Tribunal is the Court of first instance and on the ground of doctrine of necessity. Here, it is nobody's case that on the date of disposal the Odisha Administrative Tribunal was functioning with one Member only. In R. Bhaskara Rao and Another Vs. Hyderabad Metropolitan Water Supply and Sewerage Board, Hyd. and Others, parties directly approached the High Court and accordingly High Court directed to approach the Tribunal first. In 2000 (2) KLJ 341, there is no reference to Dr. Mohabala Ram's case. Further, here the point relating to hearing by Division Bench has been raised by successful candidates, who were deliberately not made parties before the Tribunal. Moreover, here clear cut notification to refer the matter to a Division Bench is there. For all these reasons, we hold that the learned Single Member had no jurisdiction to hear and dispose of the Original Application and by doing so, he exceeded his jurisdiction.

31. In view of our findings above, we do not think it proper to discuss the other issues framed by us and those issues are left open. Accordingly, without expressing any opinion on the merits of the case, we set aside the order dated 26.8.2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack and remit the matter to the learned Tribunal with a request to dispose of O.A. No. 2146(C) of 2014 in accordance with law as expeditiously as possible preferably within a period of three months keeping in mind the observations made by us above. Further, in order to avoid multiplicity of litigation, we direct that till disposal of O.A. No. 2146(C) of 2014, no evaluation should be made of OCS (Main) Examination papers. In order to expedite the matter, we further direct the petitioner-OPSC to supply a sizeable number of names and addresses of successful candidates of Preliminary Examination to opposite party No. 1, if a request is made to that effect, whereupon opposite party No. 1 would be at liberty to implead them in a representative capacity as respondents before the learned Tribunal. Before saying omega, we expect that the State Government and the petitioner should make all endeavours to conduct Odisha Civil Services Combined Competitive Recruitment Examination regularly every year keeping in mind mandatory provision of "1991 Rules" in the background of submission of the learned Advocate General relating to existence of large number of vacancies.

A copy of the judgment be sent to the Chief Secretary, Government of Odisha for his information and immediate necessary action.

32. The writ application is accordingly allowed with the above noted observations. No costs.

LCR be sent back forthwith.

P. Mohanty, J.

I agree.