

**(1989) 07 OHC CK 0021**

**In the Orissa High Court**

**Case No :** OJC No"s. 848, 1359, 1360 and 1366 of 1989 etc. etc.

Rama Sankar Mishra and Others

APPELLANT

Vs

Orissa Public Service Commission and Another etc.

RESPONDENT

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**Date of Decision :** 10-07-1989

**Acts Referred:**

Constitution of India, 1950 — Article 226, 234, 309, 311

Orissa Judicial Service Rules, 1964 — Rule 16, 17, 18, 19, 5

**Citation :** AIR 1990 Ori 57 : (1990) 2 LLJ 262

**Hon'ble Judges :** H.L. Agrawal, C.J;R.C. Patnaik, J;P.C. Misra, J

**Bench :** Full Bench

**Advocate :** Bijan Ray, Sashi Das, C.R. Nanda and B.B. Ratho, R.K. Mohapatra, for the Appellant; Ashok Mukherjee, Government Advocate, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Agrawal, C.J.—All these writ applications have been heard together as they arise out of the same transaction and are being disposed of herewith.

2. In all of them, challenge has been made to the select list (Annexure I) prepared by the Orissa Public Service Commission (shortly stated, "the Commission") for appointment to the posts of Probationary Munsifs in Class II of the Orissa Judicial Service. The main ground of challenge by the petitioners is that the Commission not only did not award any marks to the petitioners in the viva voce test but altogether dropped them from further consideration erroneously holding them "unfit" for recommending their names.

3. At the time of admission, sitting in Division, I referred it to a larger Bench for hearing in view of the importance of the questions raised in the cases.

4. The facts :

I am stating the facts, which are identical in all the cases, with reference to O.J.C. No. 848/89, the first case in the list. Advertisement No. 20 of 1986-87 was issued by the Commission inviting applications for competitive examination

for recruitment of Probationary Munsifs in Class II of the Orissa Judicial Service, the vacancies being 20. In response to the advertisement, a large number of applications were received. Out of them, 483 candidates appeared in the written test held in the months of September and October, 1987. But only 35 of them obtained the minimum qualifying marks of 40% prescribed under Rule 16 of the Orissa Judicial Service Rules, 1964 (for short, "the Rules").

The said rule enjoins upon the Commission to summon for the viva voce test all the candidates who have secured at the written examination not less than 40% marks in all subjects taken together, and in case of scheduled caste and scheduled tribe candidates, the minimum qualifying mark is only 30%. It may be mentioned that earlier to the amendment on 26-12-1986, the minimum qualifying mark for all-categories of candidates was only 30%.

Accordingly, all those 35 candidates were called for the viva voce test which was conducted on different dates in the month of Jan. 1989 and after the viva voce test, the impugned select list was prepared on 2-2-1989. The Commission also issued the result sheets to the petitioners vide Annexure 5. From the result sheets, it is evident that no mark has been awarded to any of the petitioners out of the 200 marks reserved for the viva voce test. It is this action of the Commission which is under challenge. The statements made in the counter affidavit which I would refer later on would show that in the opinion of the expert as the petitioners were not found fit for the judicial service, they were altogether left out from further consideration and, therefore, their names did not find place in the select list prepared by the Commission.

5. In order to answer the issue, which is of wide importance, it would be necessary to refer to the relevant provisions of the Rules, which have been framed under Article 309 read with Article 234 of the Constitution.

6. Rule 5 lays down the method of recruitment to the Orissa Judicial Service, Class II. Sub-rule (2) thereof provides that all such recruitments shall be made by competitive examination consisting of two parts, namely, written and viva voce, to be held in accordance with the provisions contained in the; subsequent rules.

For better appreciation, Rules 17, 18 and 19 may be extracted :--

"17. Representative of the High Court at the viva voce test: -- The Chief Justice or any of the other Judges of the High Court nominated by the Chief Justice shall represent the High Court and be present at the viva voce test and advise the Commission on the fitness of candidates at the viva voce test from the point of view of their possession of the special qualities required in the Judicial Service, but shall not be responsible for selection of candidates.

18. Arrangement of names of candidates in order of merit by the Commission :-- The marks obtained at the viva voce test shall be added to the marks obtained in the written examination. The names of candidates will then be arranged by the

Commission in order of merit. If two or more candidates obtain equal marks in the aggregate the order shall be determined in accordance with the marks secured at the written examination. Should the marks secured at the written examination of the candidates concerned be also equal then the order shall be decided in accordance with the total number of marks obtained in the optional papers.

19. Forwarding the list of candidates to the Law Department:-- (1) The Commission shall then forward to the Government in the Law Department the list of candidates prepared in accordance with Rule 18 indicating therein whether a candidate belongs to Scheduled Castes or Scheduled Tribes. The list shall be accompanied by the application and attestation forms of the concerned candidates.

(2) The list so prepared shall be published by the Commission for general information.

(3) The list, unless the Governor in consultation with the High Court otherwise decides, shall ordinarily be in force for one year from the date of its preparation by the Commission."

(Underlinings are mine)

7. Rule 17 provides that the representative of the High Court would advise the Commission at the viva voce test on the "fitness" of the candidates from the point of view of their possession of the special qualities required for the Judicial Service. It is this naughty expression (if I may say so) "fitness" which is the bone of serious controversy in these cases and its magnitude has to be laid down precisely.

8. Counter affidavits have been filed by opposite party Nos. 1 and 2, i. e., the Commission and the State.

With respect to the main point indicated above, the stand taken by both the opposite parties in their counter affidavits is that the performance of the petitioners at the viva voce test, was poor and that they were found unfit for the posts by the Interview Board and as such, no mark had been awarded to them in the viva voce test.

Mr. R. K. Mohapatra, learned counsel appearing for the intervenors, namely, the candidates included in the Select List vehemently contended on the basis of the following observations of the Supreme Court in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, .

"....When selections to the Judicial Service are being made, a sitting Judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting Judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the

advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and member of the Public Service Commission. We are giving this direction to the Public Service Commission in every "State because we are anxious that the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advice constitutes a determinative factor in the selection process."

that the opinion of the Expert Member, i.e., the representative of the High Court, at the viva voce test regarding the fitness of the candidate was conclusive. In other words, it was submitted that in spite of the brilliant performance of a candidate in the written examination, if the Expert did not find him possessing the special qualities required for the Judicial Service, the case of such a candidate for his onward journey has to be rejected forthwith and therefore, awarding any mark at the viva voce, test to such a candidate would be futile, It was further submitted that unless the conclusion and opinion of the Expert was not allowed to prevail and the question regarding the competence of the candidate was decided by the members of the Commission, the purpose of nominating a Judge to sit in the Interview Board would be redundant embarrassing for him. The Commission, therefore, committed no mistake in omitting the names of the petitioners from the Select List and rather in so doing, it only followed the spirit and in the of Rule 17. In keeping with the above stand, the opposite parties have further stated that a candidate securing high mark in the written examination could not claim fitness as a matter of right unless he she was found fit for appointment on the advice of the Judge in terms of Rule 17 which was the most relevant and mandatory condition.

9. Ashok Kumar Yadav and Others Vs. State of Haryana and Others, was also noticed by the Supreme Court in Durgacharan Misra v. State of Orissa AIR f987 SC 2267 in which the petitioner had directly gone to the Supreme Court in a similar situation. The apex Court had the occasion to consider the rules in question and since we have now got the advantage of the above authority, the answer to the question need not detain me much. But before adverting to Durgacharan Misra's case (supra), if the rules are examined closely. then, in my considered opinion, the procedure followed by the commission and the stand taken in support thereof in the counter affidavit as well as the submissions made by the respective counsel, do not justify the taking of such a view.

The Supreme Court itself considered the observations, made in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, just extracted above in the later decision, and has tried to explain the said observations with reference to Rule 17. I shall proceed to refer to those observations shortly hereinafter.

10. We have seen that Rule 18 of the Rules prescribes the procedure for arrangement of names of candidates in order of merit by the Commission and specifically directs that the marks obtained at the viva voce test have to be added to the marks obtained in the written examination and the names of the

candidates have to be arranged only thereafter. What is submitted on behalf of the opposite parties in support of their conducting the interview amounts to completely defying the mandate of Rule 18. It is equally well settled that the Commission is bound by the Rules of recruitment and cannot lay down its own procedure to the contrary, a principle which is firmly established in (1) an unreported decision of this Court in O.J. C. No. 77 of 1989 Section 3 other writ applications (Anadi Kumar Mohapatra and Ors. v. State of Orissa and Anr.) disposed of on 11-5-1989, (2) P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, and (3) Umesh Chandra Shukla Vs. Union of India (UOI) and Others, .

According to Rule 19, a list of candidates prepared in accordance with Rule 18 has to be forwarded to the Law Department, Submissions were made on behalf of the petitioners on the basis of these rules. It was submitted that it was open to the Commission to award a very low mark in the viva voce test, say even "zero", but the Commission had no discretion not to allot any mark at all, or for the matter of that, reject any candidate altogether who even without allotment of any mark, on the basis of the marks obtained in the written examination, is qualified to be included in the Select List.

The Supreme Court in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, . while discussing the case of Liladhar v. State of Rajasthan AIR 1981 SC 1777 has observed as follows (at p. 473 of AIR):

"...the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised ? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. ...."

I am tempted to quote another observation of the Supreme Court made in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, in paragraph 24 :--

"It is now admitted on all hands that while a written examination assesses the candidate's knowledge and intellectual ability, a viva voce test seeks to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the viva voce test, there are yet no written tests which can evaluate a Candidate's initiatives-alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities can be evaluated perhaps

with some degree of error, by a viva voce test, much depending on the constitution of the interview Board."

11. Reliance was placed on behalf of, the petitioners on the following observations of the Supreme Court in P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, :-

".....On a combined reading of Rules 13 and 14, two things emerge. It is open to the Board to prescribe minimum marks which the candidates must obtain at the written test before becoming eligible for viva voce test. After the candidate obtains minimum marks or more at the written test and he becomes eligible for being called for viva voce test, he has to appear at the viva voce test. Neither Rule 13 nor Rule 14 nor any other rule enables the ASRB (Agricultural Scientists Recruitment Board) to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test, on the contrary, the language of Rule 14 clearly negatives any such power in the ASRB when it provides that after the written test if the candidate has obtained minimum marks, he is eligible for being called for viva voce test and the final merit list would be, drawn up according to the aggregate of marks obtained by the candidate in written test plus viva voce examination. The additional qualification which ASRB prescribed to itself namely, that the candidate must have a further qualification of obtaining minimum marks in the viva voce test does not find place in Rules 13 and 14, it amounts virtually to a modification of the Rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications. ...."

and it was submitted that the power to assess the "fitness" of a candidate under Rule 17 did not empower the Commission to reject him altogether for consideration by the appropriate authority and the rejection of the petitioners amounted to modification of the rules or supplying its own meaning.

I may also usefully refer to an earlier case of the Supreme Court in Ajay Hasia v. Khalid Mujib AIR 1981 SC 487, where prescribing a high percentage of marks for the personality test during the viva voce was deprecated as being plainly arbitrary and unreasonable.

I may also extract some observations made in Ajay Hasia's case (supra) where the Supreme Court has deprecated the fixing of higher percentage of marks for the viva voce test (at p. 501-502 of AIR):

19. ....Now there can be no doubt that, having regard to have drawbacks and deficiencies in the oral interview test and the conditions prevailing in the country, particularly when there is deterioration in moral values and corruption and nepotism are very much on the increase, allocation of a high percentage of marks for the oral interview as compared to the marks allocated for the written test, cannot be accepted by the Court as free from the vice of arbitrariness, xx xx xx xx xx xx xx The chart does not create a strong suspicion in our mind that the marks awarded at the viva voce examination might have been manipulated with a view to favouring the candidates who ultimately came to be

selected, xx xx xx xx xx xx We are of the view that, under the existing circumstances, allocation of more than 15% of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid."

12. In preparing the select list in question, what actually has been done by the Commission amounts to, completely nullifying the result of the written examination of the petitioners and also subjecting them to a peculiar mode of scrutiny during the viva voce test by which not only no mark was given to them but they have also been completely rejected by applying the so-called "fitness test".

As stated earlier, since we have got the advantage of the decision of the apex Court in Durgacharan Misra Vs. State of Orissa and Others, , I do not want to lengthen the judgment any further.

13. A similar contention, as advanced before us, was advanced before the Supreme Court on the basis of Rule 17 which has been noticed in para 13 of the judgment, I would do well to quote that submission which was advanced in that case:--

".....It was also contended that the Judge could advise as to fitness of candidates for judicial appointment and his advice could also relate to the minimum which a candidate should secure in the viva voce test, If such power is not conceded to the Judge, his presence at the interview as provided under Rule 17 would totally be unnecessary."

This was answered in the next paragraph of the judgment as follows:

"We are not persuaded by this argument. That does not mean that we are doubting the purpose of the Rule 17. The purpose is undoubtedly laudable and indeed, it is in accordance with the observations of this Court in Ashok Kumar Yadav and Others Vs. State of Haryana and Others, ....."

and then in para 15 the answer was concluded by holding that:

"But the crux of the matter is whether the Judge present at the viva voce test has the power to add anything to the Rules of recruitment. He may advise the Commission as to the special qualities required for judicial appointments. His advice may be in regard to the range of subjects in respect of which the viva voce shall be conducted. It may also cover the type and standard of questions to be put to candidates; or the acceptance of the answers given thereof. But the advice cannot run counter to the statutory Rules."

The above observations are sufficient to reject the submission made on behalf of the opposite parties as unsustainable. The Expert may advise the Commission to examine the suitability of a candidate during the viva voce test with reference to his aptitude and qualities required for judicial service. It may well be that a candidate may answer the questions of general knowledge or, say. Chemistry or

History, very perfectly, but may fumble or betray his ignorance while answering the questions put to test his suitability for judicial service. In that event, on the advice of the Expert, the Commission even "zero", to such a candidate, but the concept of rejecting him altogether if he is found to be unfit or unsuitable cannot be accepted.

14. The decision of the Supreme Court in Durgacharan Misra Vs. State of Orissa and Others, , in my opinion, clinches the issue and no argument for taking a different view can be admissible.

15. The result on the above discussions is that those writ applications must succeed.

16. Now another question that arises is whether only the petitioners should be directed to be interviewed by the Commission for their personality test or whether all the 35 candidates who have qualified in the written test, i.e., the 30 candidates included in the select list, should also be simultaneously interviewed. In my opinion, since the personality test was done long back, in order to assess the relative performance of the other candidates who were rejected on the so-called ground of being unfit, it is necessary that there should be a fresh viva voce test to enable the Commission to have the advantage of assessing the comparative merit consecutively of all the candidates.

17. As the desirability of filling up the vacancies "as early as possible need not be highlighted and the time for the viva voce test of only 35 candidates should not detain the Commission for long, I direct that the Commission should complete this test as early as possible and preferably within a period of two months from the date of receipt of a copy of this order.

18. In the circumstances, I make no order as to costs.

R.C. Patnaik, J.

19. I agree.

P.C. Misra, J.

20. I agree.