

(2013) 10 RAJ CK 0013

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 698 of 2013, Civil Special Appeal (Writ) No. 638 of 2013, Civil Special Appeal (Writ) No. 699 of 2013 and Civil Special Appeal (Writ) No. 780 of 2013

State of Rajasthan

APPELLANT

Vs

Kamlesh Kumar Sharma and Others
 Mukesh Nagar
and Others Vs State of Rajasthan and Others
 RPSC Vs
Gajendra Singh Rathore and Others
 Neelam and
Others Vs RPSC and Another

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2014) 1 WLN 138

Hon'ble Judges : Amitava Roy, C.J;Veerendr Singh Siradhana, J

Bench : Division Bench

Advocate : G.S. Bapna, A.G. assisted by Mr. V. Garg for State and Mr. S.N. Kumawat for RPSC and Mr. A.K. Sharma, assisted by Mr. V.K. Sharma, Mr. Surendra Singh Shekhawat and Mr. Pankaj Sharma, for the Appellant; Sanjeev Prakash Sharma, assisted by Mr. Gaurav Sharma, Girraj P. Sharma and Mr. K.N. Sharma, for the Respondent

Judgement

Veerendr Singh Siradhana, J.—The subject matter of the intra-court appeals is the common judgment and order passed by the learned Single Judge dated 31st May, 2013; whereby the learned Single Judge allowing a bunch of writ applications made the following directions:--

(1) that RPSC shall make fresh evaluation of the answer-sheets of the candidates by deleting questions No. 13, 18, 25 and 43 and changing answer to question No. 77, by taking option (1) as correct, all of C-series, and corresponding questions in A-series, B-series and D-series and on that basis prepare fresh merit list;

(2) that RPSC shall on that basis prepare a list of candidates, who fall within three times the number of vacancies plus applying the bunching principle;

(3) that RPSC shall thereafter conduct interviews of such candidates in that list, who have already not been interviewed;

(4) that RPSC shall thereafter prepare a combined select list of the candidates, who were already interviewed and those who are interviewed pursuant to this judgment in the order of merit, and forward the same to the government for appointment;

(5) that such exercise shall be undertaken and completed by RPSC within three months from the date copy of this order is received by them.

The essential facts in brief for appreciation of the controversy are that an advertisement No. 6/11-12 dated 26.05.2011 was issued by the Rajasthan Public Service Commission (hereinafter referred to as "RPSC, for short); inviting applications from the eligible candidates for consideration of their candidature for appointment to the post of Assistant Public Prosecutor Grade II (hereinafter referred to as "the APP Gr. II", for short) against 159 vacancies. The advertisement was responded by 15,776 applications. The Rajasthan Public Subordinate Service Rules, 1978 (hereinafter referred to as "the Rules of 1978", for short) contemplates an interview as a sole criterion for selection and appointment on the post of APP Gr. II. The RPSC is vested with the discretion to conduct screening test for shortlisting of the candidates and accordingly, a written examination was conducted on 1st December, 2011, for the candidates intending consideration of their candidature. However, only 9,191 candidates appeared in the screening test conducted through a written examination.

2. The written examination consisted of 100 objective type questions covering relevant subjects to test the knowledge of law of the candidates. Each question was provided with four options as answer and the candidate was to tick mark the one answer as correct of the four options. The question booklet supplied to the candidates was divided into different series as A, B, C and D wherein though the questions were the same but in the changed order. Negative marking to the extent of 1/3rd from the mark of each correct question for each wrong answer, was a condition specifically stipulated in the instructions; for any ambiguity/ mistake the English version was to be treated as standard.

3. Soon after the written examination, RPSC received number of representations disputing the framing of 19 questions. The representations were subjected to the scrutiny by an expert committee, which in turn recommended deletion of 9 questions; being questions No. 6, 22, 23, 27, 25, 64, 73, 78 and 80 of Series-A. As a consequence of deletion of 9 questions, 100 marks were equally distributed for remaining 91 questions and thus, value of each question increased from 1 mark to 1.09 marks. Result of the screening/written test was declared by the RPSC on 3rd February, 2013 (for short, "the first result), wherein 502 candidates were declared successful for

4. Three writ applications were preferred before this Court at the Principal Seat, Jodhpur, alleging irregularities and illegalities with some details, in the written

examination and further assailing the framing of the question paper as 40 questions out of 100 were picked up from the notes prepared by one Professor J.K. Malik, Department of Law, University of Rajasthan, Jaipur, who has been rendering coaching services to a Commercial Coaching Institute i.e., Swami Vivekanand Coaching Centre, Bapu Nagar, Jaipur. Professor J.K. Malik was teaching the subjects of Indian Penal Code, Criminal Procedure Code and Evidence Act; to the candidates, who participated in the written examination, for consideration of their candidature for appointment to services like Assistant Public Prosecutor and Rajasthan Judicial Service etc., as alleged. The appellant - RPSC in those writ applications repelled the contentions stating that multiple paper-setters were consulted including Professor J.K. Malik for Screening/Written Examination in dispute. However, only 25 questions were picked up from the question paper that was proposed by professor J.K. Malik, for the screening/written examination in dispute. Moreover, a written undertaking was obtained from all the paper-setters including Professor J.K. Malik, to the effect that they were not working with any coaching institute. An affidavit sworn in by Professor J.K. Malik, is on record, who denied the allegations. The argument that the process of examination was vitiated in view of the allegations levelled against the Professor J.K. Malik was rejected and the writ applications were dismissed. However, the learned Single Judge while dismissing the writ applications, directed the writ petitioners to make a representation with reference to the dispute as to the correctness of answer key or if any question was out of syllabus and in that event, the RPSC may examine the same as per the procedure. Appointments, if made in the meantime, were left open to judicial review, if any illegality is found with the question paper in consequence of consideration of the representation of the petitioners.

5. The writ petitioners of those writ applications made representation disputing correctness of as many as 27 questions and/or options and also alleging some of them to be out of syllabus. All the representations received, with reference to those disputed questions were referred to an expert committee consisting of Mrs. Vijay Sharma, Professor (Retired), Faculty of Law, J.N.U. University, Jodhpur, Shri Radheyshyam Agarwal, Assistant Principal (Retired), Government Law College, Ajmer, and Dr. M. Tariq, Lecturer (Selection Grade), N.M. Law P.G. College, Hanumangarh. The expert committee, after a detailed scrutiny of the matter, made the following recommendations:--

1. (Question No. 34 in A-series) There is a mistake in Hindi version of "Abhivak" for plea bargaining, which word has been indicated as "Abhibhavak".
2. Hindi version of Choice 4 of Question 34 is incomplete.
3. Citations mentioned in the options against questions No. 23, 27, 29, 44, and 45 are incomplete.
6. The RPSC did not accept the report of the expert Committee rather referred the same to yet another expert committee consisting of two senior Professors,

and on the recommendations of the subsequent expert committee, decided to delete question No. 98 of Series-A. Thereafter, revised result (for short, second result) was declared. However, the RPSC decided not to exclude any of the candidates passed/declared successful earlier, and thus, declared 74 candidates as successful, in addition, who secured equal or more marks than the last of 502 candidates originally declared successful and thus, the number of total successful candidates increased to 576 (502 + 74). Now, the value of each question also got enhanced to 1.10 marks.

7. A third writ application was preferred by one Kaushal Singh being S.B. Civil Writ Petition No. 18845/2012 before this Court, decided vide judgment and order dated 24th November, 2012, allowing liberty to the petitioner to make further representation to the RPSC with reference to questions with wrong answers and the RPSC was directed to decide the representation by constituting an independent committee, in the event of representation, if any. On receipt of the representation, the expert committee examined the same with reference to question Nos. 4, 21, 26, 50, 59 and 70 of Series-A and recommended for deletion of question Nos. 21 and 26, again leading to revision of the number of question as 89 for the purpose of assessment. Be that as it may, the RPSC in consequence thereof again declared the result on 30th October, 2012 (for short, "the third result") without disturbing the candidates, who were declared successful earlier. Thus, in all the number of successful candidates to be called for interview got enhanced to 672 (502 + 74 + 96).

8. The process for selection to the post of APP Gr. II was again subjected to yet another round of litigation, wherein interim orders were made directing the RPSC, to provisionally permit such petitioner (s), to appear at interview and in this process, 96 candidates participated in the interview process, which continued upto 16th January, 2013. Thereafter, 273 candidates approached the RPSC with interim orders in their favour to participate in the interview, however, they were not interviewed and the RPSC declared the result of the selection publishing the merit list in newspaper on 3rd February, 2013. The result declared was provisional and subject to various writ petitions pending before this Court. A note was also appended to this effect and therefore, the result was subject to revision in accordance with the directions, that may be issued by this Court on the pending writ applications. The RPSC did not declare the result of the candidates, who provisionally appeared at the interview, under the orders of the High Court and in accordance with the stipulations as contained in the orders made.

9. The process of shortlisting, was assailed by the petitioners stating it to be vitiated since in the first scrutiny, the RPSC deleted 9 questions as recommended by the expert committee and declared 502 candidates as successful. As a result objections received by the RPSC, the committee of three experts pointed out errors in options in five questions as incomplete, which were ignored and declared the first result deleting only question No. 98 of Series-A whereas six

questions ought to have been deleted. Be that as it may, deletion of question No. 98 led to inclusion of 74 additional candidates for interview. In the third exercise, two more questions i.e. question Nos. 21 and 23 of Series-A, were deleted, which led to inclusion of 96 additional candidates for interview. As per the original selection procedure of the RPSC, candidates three times of number of vacancies were to be called for interview, therefore, in the first instance, it declared only 502 candidates as successful, but eventually 672 candidates were called to appear in the interview, as against 159 advertised vacancies. The RPSC selected 148 candidates out of those 672 (502 + 74 + 96) whereas 19 of the selected candidates, were neither included in the list declared by the RPSC at the time of declaration of the first result on 3rd February, 2013 nor in the second result declared on 3rd October, 2012. Moreover, 12 candidates were selected out of 74 candidates in the second result.

10. The learned Single Judge on the basis of the pleadings of the parties and submissions made at bar as well as in the light of the law declared by the Hon'ble Apex Court of the land and by High Courts, examined the controversy in a great detail with reference to the allegations of wrong framing of 21 questions, and concluded that four questions should be deleted and answer key in respect of one should be changed as indicated above.

11. From the facts, circumstances and material available on record, it is evident that as a result of first revision of the list of the successful candidates, on account of deletion of one question i.e. second result, 74 additional candidates became eligible to be called for interview, the sole criterion for selection to the post in question, and were called for interview and as a consequence 12 candidates out of those 74 additional candidates, were finally selected. Second revision of the result of the successful candidates, in view of the deletion of two questions i.e., third result, 96 additional candidates became available as qualified and for inclusion in the selection process for interview, the sole criterion for selection, as a consequence 19 candidates, out of those 96 additional candidates, have been selected finally. Thus, 31 candidates were selected out of 170 additional candidates, who were called to face the interview, on account of revision of the result twice over. According to the RPSC, if a simultaneous exclusion was made at the time of first revision of the result, 9 candidates were liable to be excluded and at the time of second revision, 31 candidates were entitled for exclusion. Further, application of ratio of three times of the available vacancies plus bunching principle would have resulted into 544 candidates as entitled to be called for interview as against 672 candidates and three of whom were found ineligible. Thus, out of 669, who were interviewed, 125 Candidates were those who did not deserve to be interviewed on that criterion. Thus, it is an admitted position that out of 125 aforesaid candidates, 23 candidates have been selected as against total 159 vacancies. According to the finding of the learned Single Judge these figures have been furnished by none else but the RPSC itself.

12. Moreover, it is an admitted fact that since the RPSC did not exclude any of

the candidates interviewed, whose number being 125, a surplus number, contrary to the rules and practice in vogue, to be called for interview. In this backdrop of the peculiar facts and circumstances, as detailed out in the foregoing paragraphs, the moot question that emerges for determination is:--

Whether the respondent RPSC maintained the purity of selection process, ensuring that no candidate earned an undeserved advantage over the deserving candidates, in spite of revision of the result twice over; without revising the original result?

13. We have heard the learned counsel for the parties and with their assistance perused the material available on record.

14. A bare perusal of the impugned judgment and order dated 31 May, 2013 would reveal that the learned Single Judge has made a threadbare analysis of the objections raised with regard to 21 questions and arrived at the conclusion that question Nos. 13, 18, 25 and 43 as well as option No. (3) of question No. 77 of Series-C, are clearly demonstrated to be wrong, which no reasonable body of men well versed" in the subject of law would regard as correct. With regard to question No. 13 of C-Series (Question No. 40 of A-series), the learned Single Judge held thus:--

Question No. 13 of C-series (Question No. 40 of A-series):--

Q. While exercising inherent powers u/s 482 of the Code of Criminal Procedure 1973, even the High Court cannot do which of the following things:

- (1) To give police-custody from judicial custody.
- (2) To convert itself into a court of appeal when legislature has not authorized it expressly or indirectly.
- (3) To review its own judgment or order
- (4) All the above things.

Objection about this question is that the very framing of question is contrary to the provisions of Section 482 Cr.P.C., and the options given are also incorrect. Similar question given in the competitive examination conducted for Rajasthan Judicial Services, 2011 was deleted by this court. According to RPSC, this question was though similarly worded as question No. 56 in A-series of the preliminary examination of RJS but option No. 4 of this question was given as option No. 2 in that examination paper, option No. 1 was mentioned as option No. 4 and option No. 2 as also option No. 3 and option No. 3 as option No. 1. Thus, the options in RJS preliminary examination were arranged in entirely different order. Fourth option of the question herein was mentioned as option No. 2 in that examination. Therefore, RPSC on its own deleted it and Division Bench of this court upheld. This court has to analyze the question in the light of the provisions of Cr.P.C. Section 362 of the Cr.P.C. provides that no court shall alter or review its judgment or final order disposing of a case except to correct a

clerical or arithmetical error. Though this Section in its saving clause provides that "Save as otherwise provide by this Code or by any other law for the time being in force,...", the Supreme Court in *Smt. Sooraj Devi Vs. Pyare Lal and Another*, held that the inherent power of the Court is not contemplated by the saving provision contained in section 362. The Supreme Court in *Hari Singh Mann Vs. Harbhajan Singh Bajwa and Others*, and *State of Punjab Vs. Davinder Pal Singh Bhullar and Others etc.*, also held that inherent power u/s 482 Cr.P.C. cannot be exercised to review a judgment or final order in a criminal case which is expressly barred by the Code of Criminal Procedure. Second option that Section 482 Cr.P.C. empowers the High Court to convert itself into a court of appeal, whereas legislature has not authorized it expressly or indirectly, also does not appear to be legally sound. Section 482 Cr.P.C. empowers the High Court to exercise its inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of law or otherwise, to secure the ends of justice. It is trite that such power has to be exercised sparingly and with caution. The High Court can exercise power on application as also suo-motu but only when there is no remedy available to litigant within the parameters of the Code. But to say that this provision even entitles the High Court to convert itself into the court of appeal whereas legislature has not provided so, may not be legally correct. There is no specific provision contained in Section 167 Cr.P.C. but in exceptional circumstances the High Court, if approached even by the State, may give police custody of an accused from judicial custody {See *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni*, . However, since two of the options in this question are apparently incorrect and demonstrably erroneous, wrong and misleading, which no reasonable law knowing person would accept to be correct, therefore this question deserves to be deleted.

15. While examining the objections with reference to framing of question No. 18 of C-Series, the learned Single Judge observed as under:--

Question No. 18 of C-series which Question No. 45 of A-series:--

Q. Which of the following case was decided on the basis of "tears from eyes" evidence of a women, namely?

- (1) *State of Rajasthan v. Smt. Kanuri Devi*, 1998 Rajasthan
- (2) *Shamim Rehamni v. State of U.P.*, 1975 S.C.
- (3) *K.M. Nanawati v. State of Maharashtra*, 1961 S.C.
- (4) *Palvinder Koer v. State of Punjab*, 1952 S.C.

Objection of the petitioners about this question is that it has not been properly framed inasmuch as there is no decision delivered on the basis of "tears from eyes". Evidence of a woman on the basis of "tears from eyes" is not envisaged in law. The correct option accepted by RPSC is option No. 1. *State of Rajasthan Vs. Kanoori*, , was a case in which accused Kanoori was charged for offence of

murder of her husband. In Para 16 of the judgment, the court made reference to number of witnesses in whose presence she confessed having committed murder of her husband. Statement of Poona Ram (PW-7) was to the effect that initially the accused had shown her ignorance about the murder of Gumana Ram but when she was asked twice or thrice, she confessed her guilt. He further stated that when two Sarpanchas Amana Ram and Bhoma Ram asked the accused about foot prints, she told that she had killed her husband and she had committed mistake. This witness further stated that accused did not weep and there were no tears in her eyes. There are three Head Notes of the judgment given in the said report, none of which refers to "tears from eyes". The court only intended to indicate demeanour of the accused with reference to the statement of witnesses, who rather stated that there were "no tears in her eyes", that means that she had no repentance.

The objection of the petitioners is that the case was not decided on the basis of "tears from eyes" evidence of a woman, which implies presence of "tears in the eyes" of the women, whereas the judgment refers to absence of "tears in the eyes". In the question, reference is made "women" thus suggesting multiple number of woman, whereas the judgment which has been taken as the correct option refers to conviction of single accused, who was a "woman". Therefore even if one does not go into the wisdom of the paper setter in giving such a strange question, this question is liable to be deleted for these factual errors.

16. Examining the challenge to question No. 25 of C-series, the finding of the learned Single Judge reads thus:--

Question No. 25 of C-series (Question No. 52 of A-series):--

Q. Which of the following section is considered as the spinal cord of the civil litigation in India:

- (1) Section 105 of the Indian Evidence Act, 1872
- (2) Section 91 of the Indian Evidence Act, 1872
- (3) Section 92 provision 1 to 6 of the Indian Evidence Act, 1872
- (4) Section 104 of the Indian Evidence Act, 1872.

Objection about this question is that each single provision referred to in all four options has equal importance in civil litigation in India. The respondents have sought to justify framing of this question by producing the question paper of Law of Evidence (First Paper of LL.B. (Part III) Examination, 2012, conducted by the University of Rajasthan, Jaipur. Question No. 7 in that paper was "Why exceptions of Section 92 of Indian Evidence Act, 1872 are considered as spinal cord of civil litigation? Explain the statement and mention its exception." Similarly worded question is also mentioned as Question No. 16 at page 67 of the Babel Law Series (25 Question & Answer on the Law of Evidence) written by Dr. Basanti Lal Babel. This question and the question in Examination Paper of

LL.B. Third year, were worded entirely differently. But here, this question in the Examination was rather framed in a strange way by asking the candidates as to which Sections in of the options, is considered as the spinal cord of Civil Litigation in India. In law, there is no concept like spinal cord. It is only a way of expression to underline importance of a given thing. This would be a subjective opinion of each student of law. One may be entitled to hold the opinion that Sections 91 (about evidence of terms of contracts, grants and other dispositions of property reduced to form of documents), or 104 (about burden of proving fact to be proved to make evidence admissible) or 105 (burden of proving that case of accused comes within exceptions) of the Indian evidence Act, 1872, are as much important as Section 92 (about exclusion of evidence of oral agreement), of the Indian Evidence Act for civil litigation in India. The question, therefore, was highly misleading and confusing and the option No. 3 given in response to this question therefore cannot be saved even on the analogy that it was "most appropriate" and "more correct out of the alternative options". Therefore, this question is also liable to be deleted.

17. Commenting upon the correctness of the answer as treated correct by the RPSC with reference to question No. 43 of C-Series, the learned Single Judge recorded the following reasoning for its deletion, which reads thus:--

Question No. 43 of C-series (Question No. 70 of A-series):--

Q. When any person is injured or property of a third party is damaged as a result of an accident the duty of the driver, according to Section 134 of Motor Vehicle Act, 1988 is

- (1) firstly to inform to the police about the accident
- (2) To take the injured person to nearest hospital for medical treatment
- (3) To inform to the family members or relative of the victim of accident
- (4) To take injured immediately for medical help to nearest hospital or registered medical practitioner and then inform to police about the accident

RPSC has, for this question, treated option No. 2 as the correct answer, whereas, according to the petitioners, option No. 4 is also the correct answer. Sub-section (b) of Section 134 of the Motor Vehicles Act provides that when any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall give on demand by a police officer any information required by him, or, if no police officer is present, report the circumstances of the occurrence, including the circumstances, if any, for not taking reasonable steps to secure medical attention as required under clause (a), at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence, and as per sub-section (c) give the required information in writing to the insurer. A perusal of Section 134 therefore makes it clear that option No. 1, which inter-alia, provides that firstly the driver shall inform to the police about

the incident, may not be the only correct answer, but the option No. 2 as well as option No. 4 would be both correct. Question is not thus as to what should be the first duty of the driver in the event of an accident resulting into injury to any person or damage to any property of a third party, but is rather simple and is based on the provision of Section 134, supra. Had the paper setter used the "firstly" in the body of question itself {when is used in option (1)}, then perhaps what RPSC is contending would be correct. Therefore, this objection is liable to be upheld and the question is liable to be deleted.

18. The option which ought to have been treated as correct answer to question No. 77 of C-Series, the analysis of the learned Single Judge reads thus:--

Question No. 77 of C-series (Question No. 4 of A-series):--

Q. "A" soldier fires on the silent mob, by order of his superior officer in conformity with the commands of the law, due to which "C" dies. Here "A".

- (1) Will not be liable according to Section 76 of the Indian Penal Code 1860
- (2) Will not to be liable according to Section 79 of the Indian Penal Code 1860
- (3) Will be liable u/s 304 of the Indian Penal Code 1860
- (4) Will be liable u/s 307 of the Indian Penal Code 1860

Objection about this question is that it has not been properly framed and the given instance would not constitute offence of Section 304 IPC. According to Section 76, option No. 1 should be the correct answer. According to RPSC, however, in the case of soldiers, the IPC does not recognize the duty of blind obedience for orders of superiors as sufficient to protect him from the penal consequences of his act. However, the act done by such soldier in the illustrations will fall in exception (3) to Section 300 IPC and therefore, he would be liable to punishment u/s 304 IPC. Illustration (a) given below Section 76 of the IPC reads as under, "(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence."

The question thus appears to have been straightway lifted from the illustration with insertion of word "silent" immediately before the word "mob". The illustration given in question can hardly fall within the Exception. 3 to Section 300 IPC, which inter-alia provides that culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. What is missing in Exception. 3 is the command by a superior officer and this Exception refers to either a public servant or an offender aiding a public servant, both, acting for advancement of public justice; then postulates that one of them exceeds the powers given to him by law and thereby causes death in good faith believing it to be lawful and

necessary for the due discharge of his duty.

Section 76 segregates such exception to fall in two categories, namely (i) nothing is the offence which is done by a person bound, or by mistake of fact believing himself bound, by law; (ii) nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it. What is significant is that "A", the soldier, in the given illustration believes in good faith that he has to follow the command of his superior officer, asking him to fire on the mob. Question postulates that he fires on the mob by the orders of his superior officer in conformity with the command of law. This will squarely fall in the exceptions carved out in Section 76. Such exception would also extend to the firing by a soldier on a silent mob on the order of his superior officer, which is in conformity with the commands of law because in that event also this would be covered by later part of Section 76, namely, "who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it." Objection with regard to this question is therefore upheld. Option (1) alone should be treated as correct answer.

19. The challenge as to the correctness of rest of the questions has also been examined and rightly repelled for the reasons detailed out leading to the conclusions thereof.

20. Shri G.S. Bapna, the learned Advocate General, assailing the impugned judgment and order passed by the learned Single Judge urged that the learned Single Judge erred in sitting as an expert in respect of academic issues, which was not permissible for the learned Single Judge under the law. The learned Single Judge ought not have acted as the appellate body and decide on the correctness of the answers since the subject matter is within the domain of the RPSC or the experts, who evaluated the answer books. Further, the learned Single Judge committed serious error while interpreting the verdict of the Hon'ble Supreme Court in case of Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others, wherein the Hon'ble Supreme Court observed thus:--

while there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies. But university organs, for that matter any authority in our system, is bound by the rule of law and cannot be a law unto itself. If the Chancellor or any other authority lesser in level decides an academic matter or an educational question, the Court keeps its hands off, but where a provision of law has to be read and understood, it is not fair to keep the court out.

(emphasis supplied).

21. Learned Advocate General assailing the impugned judgment and order dated 31st May, 2013, further submitted that whenever there is a dispute with regard to the academic matters, the court should refrain to interfere in the matter and

the same should be subjected to scrutiny only by the experts in the subject and therefore, the learned Single Judge committed an error while assessing the correctness of the questions vis-à-vis options provided in the answers. The proposition advanced is not disputed, but in case of multiple choice in objective test, the authorities have to be very careful for a wrong answer key, which may result in merit being made a casualty. In *Praveen Singh Vs. State of Punjab and Others*, the Hon'ble Supreme Court observed that interview as such is not bad but polluting it to attain illegitimate ends is bad.

22. Shri A.K. Sharma, learned Senior Advocate, representing the selected candidates, reiterating the stand before the learned Single Judge, argued that the purpose of written examination was only to shortlist the number of candidates and the RPSC undertook exercise thrice to weed out the questions with multiple options as answers for the inaccuracies or for incorrect framing of questions or the questions which were stated to be out of syllabus and therefore, there is no element of arbitrariness or malafide. Further, no such allegations were made. The increase in the number of candidates in addition being 170 (74 + 96) was the result of compliance of the directions issued by the Court and therefore, same could not be termed as arbitrary or malafide by any stretch of imagination, even if, the number of candidates called for interview increased to four-and-a-half times. The law declared by the Hon'ble Supreme Court in case of *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, was cited in support of the arguments. Moreover, the writ petitioners having participated in the selection process without any demur or protest were estopped from questioning the correctness of the selection process as to the criterion, being interview alone, illustrating the cases of *Kamlesh Kumar & Ors.*, *Anjani Kumar Sharma & Ors.* and *Harphool Singh Devenda & Ors.*

23. The learned Additional Advocate General, Mr. S.N. Kumawat, submitted that since the Rules of 1978 were not assailed in the writ petitions, therefore, it was not open for the writ petitioners to question the selection criterion being "interview" as the sole basis. Moreover, the challenge to the validity of the Rules of 1978 though was made in one writ application being S.B. Civil Writ Petition No. 8723 of 2012 (*Dilip Singh Yadav & Ors. Versus State & Ors.*), but the challenge was given up later. According to the learned counsel, the learned Single Judge was in error in making the directions impugned since the courts cannot take upon the task of an "Examiner" or the "Selection Board" and examine the discrepancies and inconsistencies in question paper for evaluation thereof. Confusion or controversial nature of questions, if any, without appointing any expert body and obtaining its opinion, the intervention of the High Court is not justified and placed reliance on the verdict of the Hon'ble Supreme Court in *H.P. Public Service Commission Vs. Mukesh Thakur and Another*, Further, fortifying his submissions from the verdict of the Full Bench in case of *Lalit Mohan Sharma & Ors. Versus RPSC & Ors.*, Writ Petition No. 1042 of 2005, decided vide judgment and order dated 18th November, 2005, urged that decision of the RPSC based on the advice of the expert committee, constituted for that purpose, is not open to

challenge.

24. The learned standing counsel for the RPSC, Shri S.N. Kumawat, further submitted that the impugned judgment and order is contrary to the law declared by the Hon'ble Supreme Court and judicial restraint ought to have been exercised and the learned Single Judge ought not to have acted as an appellate authority. Moreover, Rule 21 of the Rules of 1978, vests the RPSC with the discretion to invite the candidates for interview, to the extent of desirable number and as such, the action of the RPSC could not be construed to be violative of any of the provisions of law.

25. Shri S.P. Sharma, learned Senior Advocate, on behalf of the writ petitioners reiterating the contents of the writ applications and the stand before the learned Single Judge, pointed out that soon after the written examination and before declaration of the result, number of representations were addressed to the RPSC disputing correctness of 19 questions and on a scrutiny by the expert committee, 9 questions were deleted and the result of the written examination, for the first time was declared on 3rd February, 2013. Moreover, the irregularities in the written examination were further challenged with reference to 40 questions out of total 100 before the Principal Seat at Jodhpur including one of the allegations for having picked up 25 questions from the paper set by one Professor Mr. J.K. Malik, who rendered coaching services to a Commercial Coaching Institute and therefore, the entire process of selection was vitiated, however, the writ applications were disposed of with a direction to the petitioners to submit representation to the RPSC, which resulted into dispute to the correctness of as many as 27 questions and/or options and also allegations that some of the questions were out of syllabus. The representations were scrutinized by a committee consisting of three members and the committee in turn making the recommendations, which reads thus:--

1. (Question No. 34 in A-series) There is a mistake in Hindi version of "Abhivak" for plea argaining, which word has been indicated as "Abhibhavak".

2. Hindi version of Choice 4 of Question 34 is incomplete.

3. Citations mentioned in the options against questions No. 23, 27, 29, 44, and 45 are incomplete.

26. However, all the members of the RPSC in the "Full Commission" on 30th October, 2012 declined to accept the report of the expert committee, rather referred the matter to yet another committee consisting of two members, who recommended for deletion of question No. 98 (A-Series). The learned counsel further pointed out that on a representation to the RPSC, in compliance of the directions issued by this Court, correctness of options to six questions of A-Series was again put to scrutiny of the expert committee, who in turn recommended deletion of two questions and thus, remained only 89 questions for evaluation. Since 170 (74 + 96) additional candidates became available on account of deletion of questions and revision of the results twice over, without revising the

original result of 502 candidates, vitiated the whole selection process. Moreover, number of writ applications were preferred in the meantime and 96 candidates were permitted to appear at the interview in compliance of the interim direction(s) issued by this Court, which makes the entire process of selection bad in the eye of law.

27. The learned counsel, Shri Girraj Prasad Sharma, on behalf of the writ petitioners vehemently urged that it has been practice of the RPSC to publish the answer key in the newspaper and/or display the same on it's website on the very next day, the examination concluded but, in the instant case at hand, the established practice was dispensed with until the declaration of the second result on 30.10.2012 and simultaneously publishing the answer key. A representation was addressed on 5th November, 2012, raising objections about the number of questions deleted. Further, he emphatically submitted that no decision was taken with reference to question Nos. 1, 5, 7, 12, 13, 16, 25, 30, 38, 42, 43, 58, 66, 74, 75, 77, 78, 83, 90 and 93.

28. The learned counsel also questioned the stand of the RPSC with reference to "cut off marks" in round figure for the reason that such an action was not permissible under the law when the competition is so tough and intense that even a fraction of a mark would decide the inclusion and/or exclusion of a candidate subjected to written examination. The learned counsel further submitted that since the ultimate value of each question rose to 1.12 mark and negative marking became 0.373, in that obtaining fact situation, it was not possible for the RPSC to determine "cut off marks" in round figures. Moreover, in the factual matrix, the merit of the selected candidates could not have been retained the same as declared in the initial result, in view of deletion of questions. The learned counsel further urged that the RPSC appointed as many as four expert committees prior to declaration of the first result and thereafter in view of the representations made, raising objections to the questions, other expert committees were appointed resulting into deletion of 12 questions out of 100. Therefore, in the factual backdrop of the events and challenge to the result declared by the RPSC with reference to the written examination in dispute, the very purity, sanctity, significance and integrity of the selection process is doubtful.

29. From a survey of the judgments cited at bar during the course of arguments, it emerges that inaccuracies in framing of certain questions with multiple correct options in respect of any or some of the questions, the effort of the court is to save the process of selection so that the time and exercise undertaken by the examining body as well as the participating candidates is not wasted, but at the same time purity of the selection process cannot be allowed to be compromised and further, it shall be necessary to see that the process of selection is not arbitrary, that it withstands the test of rationale and the nexus with the object of selecting the best and the excellent, and at the same time it must be ensured that no undeserving candidate had any advantage at the cost of deserving candidates.

30. In the case at hand, it is an admitted position that the RPSC did not exclude any of the candidate in the course of revision of the results twice over, which resulted into addition of 170 (74 + 96) candidates for interview and ultimately 125 undeserving candidates, were called for interview and out of them 23 have been selected as against total 159 vacancies. Keeping in view the analysis made by the learned Single Judge with regard to the correctness of the questions vis-à-vis options and further, concluding with a direction for deletion of question Nos. 13, 8, 25 and 43 of Series-C as well as change in the answer key with respect of question No. 77 of Series-C; the magnitude of likely change in the result can very well be visualized. As submitted on behalf of the RPSC, it is determined not to exclude the candidates, who have already been interviewed and in such a situation, the revision of the result in the light of the directions issued by the learned Single Judge is bound to increase the number of candidates, for the purpose of interview, much more than what is contemplated under the rules and procedure in vogue i.e. three times of the vacancies.

31. Merit of a candidate in a competitive examination is determined by his/her performance at the written examination, but if the candidates are assessed on the basis of wrong answer key, it will invariably result into prejudice at the cost of purity, fairness and significance of the selection process, which ought not be arbitrary and that it withstands the test of rationale as well as in consonance with the nexus to the object of selecting the best and the excellent. In the instant case, it is not in dispute that the selection criterion is interview and interview alone, coupled with the fact that a candidate, who did not secure high merit at the written examination, would have no chance to participate in the interview, which is solely dependent on the merit position, which he/she secures in the merit prepared on the basis of written examination in dispute, stated to be the screening test, for the purpose of shortlisting of the candidates to qualify for interview, the sole criterion for selection to the post of APP Gr. II.

32. Higher the number of candidates appearing for interview, lesser the chances of one getting selected. Therefore, we do not find any fault with the view arrived at by the learned Single Judge to the effect that increase in the number of candidates, to be called for interview, subsequent to the screening/written test did affect the chances of selection and that too, contrary to the very object of shortlisting of the candidates by subjecting them to a screening/written test. The sole criterion of selection in the instant case is interview, therefore, increasing the number of candidates for the purpose of interview, would definitely be a huge concession and leverage to the members of the interview board to eliminate more meritorious candidates as against those with lesser merit at the written/screening test.

33. Hon'ble Supreme Court in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, while dealing with the issue of number of candidates to be called for interview/viva-voce observed that, it would be difficult to carry out a satisfactory interview if a large of unmanageable number of

candidates were to be put to the process of interviewed and in such a situation the interviews, which happens to be sole criteria on in the instant case for selection, would then tend to be casual, superficial and sloppy and the assessment so made may not correctly reflect the true measure of the personality of the candidate. Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the written examination, if he is awarded unduly high marks at the interview. Honourable Supreme Court referring to Kothari Committee's Report on the "Recruitment Policy and Selection Methods for the Civil Services Examination" observed that the written examination, which is definitely more objective in its assessment than the interview will lose all meaning and credibility and the viva-voce test, which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the process of selection and therefore, opined that the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled.

34. In the instant case at hand, we also find that revision of the result on account of deletion of one question resulted into addition of 74 candidates, out of whom 12 candidates have been selected finally, and a second revision of the result on account of deletion of 2 questions, resulted into availability of 96 additional candidates, who were called for interview and out of whom 19 candidates have been finally selected, without revision of the initial result, which included only 502 successful candidates.

35. The Hon'ble Supreme Court in case of Manish Ujwal and Others Vs. Maharishi Dayanand Saraswati University and Others, while dealing with the issue of a wrong and erroneous answer key, held that the students cannot be made to suffer for the fault and negligence of the University. Further, a wrong answer key can result in the merit being made a casualty and since the courts are slow in interfering with the educational matters, it is expected from the authorities to prepare the answer keys with higher responsibility and deprecated the attitude of casual approach in providing wrong and/or erroneous answer keys, as has been noticed by the learned

36. From the facts and material available on record, it is evident that with reference to the screening/written test conducted by the RPSC in response to advertisement dated 26th May, 2011, for the purpose of shortlisting, the list of the candidates for selection to the post of APP Gr. - II against 159 vacancies, a series of representations followed right from the conclusion of the screening/written test and as a result, 9 questions were deleted on the recommendations of the expert committee and result of 502 successful candidates was declared as a result of screening test on 3rd of February, 2012, which was subjected to challenge and as a consequence of the revision of the result; 74 additional candidates became successful on account of deletion of one question. A further

challenge by way of another writ application(s) resulting into deletion of 2 questions whereby 96 additional candidates became entitled for interview in addition to the initial and first result, which was again made subject matter of judicial review by fresh writ application with reference to 21 questions and that has been adjudicated upon in the bunch of writ applications vide judgment and order dated 31 May, 2013 impugned in the instant intra-court appeals.

37. The Hon''ble Supreme Court in a recent pronouncement in case of Rajesh Kumar & Ors. Versus State of Bihar & Ors. (Civil Appeal Nos. 2525-2516 of 2013) dealing with the question of application of erroneous "Model Answer Key" for evaluation of answer scripts of candidates appearing in a competitive examination observed that an erroneous "Model Answer Key" is bound to lead to erroneous result and an equally erroneous inter-se merit list of such candidates. Their Lordships in unequivocal terms observed that if the key, which was used for evaluating the answer sheets was itself defective, the result prepared on the basis of the same could be no different. Their Lordships further held that it also goes without saying that if the result was vitiated by the application of a wrong key, any appointment made on the basis thereof would also be rendered unsustainable.

38. In the instant matter at hand, it is an admitted position that the RPSC did not exclude any of the candidates in the course of revision of the result twice over, in view of the deletion of wrong questions, which resulted into addition of 170 candidates for interview and with the result 125 undeserving candidates got an undeserved advantage to appear for the interview, the sole criterion for appointment, and out of whom 23 have been selected as against total 159 vacancies. Further, the RPSC's decision not to exclude the candidates, who have already been interviewed, makes it apparent on the face of record that 23 candidates have been successful in earning an undeserved advantage over the writ petitioners on account of revision of the result twice over in view of deletion of wrong questions and thus, the RPSC has failed to maintain the purity of the selection process.

39. The Hon''ble Supreme Court in case of Manish Ujwal (supra) has held that Universities and examining bodies should not adopt an attitude of casual approach in providing "key answers" as one could very well understand the predicament of a young student at the threshold of his or her career. The Hon''ble Supreme Court under paragraph 10 held thus:--

10. The High Court has committed a serious illegality in coming to the conclusion that "it cannot be said with certainty that answers to the six questions given in the key answers were erroneous and incorrect". As already noticed, the key answers are palpably and demonstrably erroneous. In that view of the matter, the student community, whether the appellants or intervenors or even those who did not approach the High Court or this Court, cannot be made to suffer on account of errors committed by the University. For the present, we say no more because there is nothing on record as to how this error crept up in giving the

erroneous key answers and who was negligent. At the same time, however, it is necessary to note that the University and those who prepare the key answers have to be very careful and abundant caution is necessary in these matters for more than one reason. We mention few of those; first and paramount reason being the welfare of the student as a wrong key answer can result in the merit being made a casualty. One can well understand the predicament of a young student at the threshold of his or her career if despite giving correct answer, the student suffers as a result of wrong and demonstrably erroneous key answer; the second reason is that the courts are slow in interfering in educational matters which, in turn, casts a higher responsibility on the University while preparing the key answers; and thirdly, in cases of doubt, benefit goes in favour of the University and not in favour of the students. If this attitude of casual approach in providing key answers is adopted by the persons concerned, directions may have to be issued for taking appropriate action, including disciplinary action, against those responsible for wrong and demonstrably erroneous key answers, but we refrain from issuing such directions in the present case.

40. As a solution to the problem, a procedure needs to be evolved and adopted by the respondent-RPSC, which will on the one hand give no opportunity to resort to nepotism, favouritism and any unfair practice as well as no candidate gained undeserved advantage at the cost of meritorious and deserving candidates and, on the other hand it is ensured that merit is adopted as the sole criterion for such a selection. It is very unfortunate state of affairs that in spite of the matter being put through the expert hands again and again, as many as on six occasions, as observed by the learned Single Judge, the RPSC has not been able to weed out the questions with multiple wrong answers. Nowadays it has become a common feature to note that most of the selections conducted by RPSC, more often, are being questioned before the judicial forums on one or the other grounds as projected in the present case.

41. The Honourable Supreme Court in the case of *The Director General, Indian Council for Agricultural Research and Others Vs. D. Sundara Raju*, with reference to interview/viva voce test observed that it must be held to be fair, free from the charge of arbitrariness, reasonable and just. It will be beneficial to extract the relevant text of the judgment which reads thus:--

34. In *Nishi Maghu v. State of J&K* the Court observed that 50% marks out of total 150 marks allotted for interview were excessive.

35. In *Mehmood Alam Tariq v. State of Rajasthan* the question involved was regarding the validity of certain provisions of the Rajasthan State and Subordinate Services (Direct Recruitment by Combined Competitive Examinations) Rules, 1962, the Rajasthan Administrative Service Rules, 1954, the Rajasthan Forest Service Rules, 1962 which contained a provision special to the said three Services and not applicable to other Services, that candidates, other than those belonging to the Scheduled Castes and Scheduled Tribes should secure a minimum of 33% marks in the viva voce test. The Rules further

stipulated that the candidates for these Services must also secure 50% marks in the written examination, but that was not in the area of controversy.

36. While dealing with the above questions a reference was made to cases of Ajay Hasia, Lila Dhar and Ashok Kumar Yadav. It was observed as under: (Mehmood Alam Tariq case, SCC pp. 249-50, para 17)

17. The much desired transformation from patronage to open competition is a later development, to which, now, all civilised governments profess commitment. However, though there is agreement in principle that there should be a search for the best talent particularly in relation to higher posts, however, as to the methods of assessment of efficiency, promise and aptitude, ideas and policies widely vary, though it has now come to be accepted that selection is an informed professional exercise which is best left to agencies independent of the services to which recruitment is made. The "interview" is now an accepted aid to selection and is designed to give the selectors some evidence of the personality and character of the candidates. Macaulay had earlier clearly declared that a young man who in competition with his fellowmen of the same age had shown superiority in studies might well be regarded as having shown character also since he could not have prepared himself for the success attained without showing character in eschewing sensual pleasures. But the interview came to be recognised as an essential part of the process of selection on the belief that some qualities necessary and useful to public servants which cannot be found out in a written test would be revealed in a viva voce examination. In justification of the value and utility of the viva voce, the committee on Class I examinations in Britain said:

... It is sometimes urged that a candidate, otherwise well qualified, may be prevented by nervousness from doing himself justice viva voce. We are not sure that such lack of nervous control is not in itself a serious defect, nor that the presence of mind and nervous equipoise which enables a candidate to marshal all of his resources in such conditions is not a valuable quality. Further, there are undoubtedly some candidates who can never do themselves justice in the written examinations, just as there are others who under the excitement of written competition do better than on ordinary occasions.... We consider that the viva voce can be made a test of the candidate's alertness, intelligence and intellectual outlook, and as such is better than any other...

As to the promise as well as the limitations of the viva voce, Herman Finer says (at p. 779):

If we really care about the efficiency of the civil service as an instrument of government, rather than as a heaven-sent opportunity to find careers for our brilliant students, these principles should be adopted. The interview should last at least half an hour on each of the two separate occasions. It should be also entirely devoted to a discussion ranging over the academic interests of the candidate as shown in his examination syllabus, and a short verbal report could

be required on such a subject, the scope of which would be announced at the interview. As now, the interview should be a supplementary test and not a decisive selective test. The interviewing board should include a business administrator and a university administrator. The interview should come after and not before the written examination, and if this means some inconvenience to candidates and examiners, then they must remember that they are helping to select the government of a great State, and a little inconvenience is not to be weighed against such a public duty....

42. The selection process in the case at hand has been subjected, time and again, to judicial scrutiny and there has been judicial intervention, which further speaks volume about the purity, sanctity and significance of the selection process coupled with the advantage gained by the undeserving candidates, who were otherwise not eligible to face the interview, the sole criterion for selection. It is also not gathered from the stand of the RPSC as to why the recommendations made by the committee consisting of three experts, who in unequivocal terms pointed out errors in question No. 34 in Series-A, Hindi version of choice 4 of question No. 34 and with reference to options against question Nos. 23, 27, 29, 44 and 45, were not accepted while referring the matter to yet another committee consisting of two members, who in turn recommended deletion of question No. 98 of Series-A.

43. The RPSC has also not explained as to how initial result of 502 successful candidates, was not affected in view of the revision of the result twice over in the face of the instructions specifically stipulating negative marking of 1/3rd marks(s) as ultimately the value of each question rose to 1.12 marks and consequently the negative marking became 0.373. Moreover, it is not in dispute that the range of cut-off mark varied from 08 marks to 60 marks for various categories. Therefore, in that factual context the revision of the initial result was all the more necessary in order to maintain purity, transparency and fair play in the matter of Public Employment while making selection to an important category of cadre of posts having bearing on the vital function of judicial courts in dispensation of justice with the indispensable assistance of the incumbents appointed to the post of APP Gr. II, in dispute.

44. For the reasons and discussions above as well as in view of the admitted facts and in the light of the material available on record, we have no hesitation in concluding that the respondent - RPSC, failed to maintain the purity and transparency in the selection process in dispute and also failed to ensure that no undeserving candidates gained advantage over the deserving, including the writ petitioners, on account of errors in the questions/answer key while conducting the screening/written examination for the purpose of shortlisting. Further, the respondent-RPSC committed illegality in not revising the initial result of the selected 502 candidates while declaring the result twice over, in view of the deletion of questions. The respondent-RPSC has decided not to revise the result of 502 candidates declared successful in the initial result, even after deletion of

more questions which increased in the number of candidates who became eligible for interview, the sole criterion for selection.

45. We are satisfied that the 502 candidates, who were found successful in the initial result, did not acquire any indefeasible right to be appointed and this legal position is no more *res integra* in view of settled position in a catena of decisions by the Honourable Supreme Court. We are also in agreement with the observations of the learned single judge for inclusion of the element of written examination, as an essential component in the process of selection with an interview in the Rules of 1978, in consonance with the views expressed by the Hon'ble Apex Court of the land in a catena of judgments. When grave suspicion is created and is allowed to persist, do precipitate into rumours going around which do not appear of any good either to the candidates or to the administration involved in the process.

46. We are informed that no final merit list has been prepared and published in compliance of the directions issued by the learned Single Judge. We have been further informed that no appointment orders have been issued to the candidates in the selection process in dispute. Since the purity, propriety and significance of the selection process has been polluted and at the same time undeserving candidates have gained advantage at the cost of deserving candidates including the writ petitioners. Therefore, in the contextual facts and circumstances of the case at hand; the screening/written test conducted by the respondent-RPSC in response to advertisement dated 26 May 2011 for appointment to the post of APP Gr. II, cannot be sustained in the eye of law and hence, the view taken by the learned single judge in quashing the impugned select list dated 2nd February 2013 (ANNEXURE-5, annexed to the Writ Petition Number 2142 of 2013), cannot be faulted.

47. Defects pointed out by the Registry are hereby overruled. Misc. Application Nos. 528/2013 & 561/2013 seeking condonation of delay are allowed for the reasons detailed out in the applications. D.B. Civil Special Appeal (Writ) No. 638/2013 is hereby closed in view of the judgment and order passed on the identical issue. In the result, the intra-court appeals are adjudicated upon as under:

i) the intra-court appeals preferred by the State of Rajasthan and respondent-RPSC fails and are hereby dismissed.

ii) the intra-court appeals filed by the writ petitioners are allowed and disposed of quashing the entire selection process including the screening/written test conducted by the respondent-RPSC on 1st December, 2011, in response to advertisement dated 26 May 2011, for appointment to the post of APP Gr. II as well as the impugned select list dated 2nd February 2013 (ANNEXURE-5, annexed to the Writ Petition Number 2142 of 2013).

iii) The process of selection shall be conducted afresh.

- iv) The stay applications stand closed.
- v) No order as to costs.