

(2020) 09 RAJ CK 0035

In the Rajasthan High Court

Case No : Civil Writ Petition No. 20163 Of 2019, 1629, 1241, 1242, 1244, 1408, 1427, 1577, 1656, 1775, 1804, 1837, 1854, 1928, 1941, 1980, 2007, 2096, 2147, 2260, 2357, 2362, 2363, 2367, 2403, 2404, 2818, 3202, 3662, 6271, 7015, 7355, 7367, 7370, 7371, 7377, 7397,

Vishwas Sinsinwar And Ors

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 03-09-2020

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 316

Citation : (2020) 09 RAJ CK 0035

Hon'ble Judges : Inderjeet Singh, J

Bench : Single Bench

Advocate : Vigyan Shah, Hanuman Choudhary, Rajaram Choudhary, Akshit Gupta, Kamallesh Sharma, Harendar Neel, Yash Joshi, Arpit Jain, Pukhraj Chawla, Padam Singh Gurjar, Sheetal Gurjar, R.K. Gouttam, Jai Singh Rathore, Poonam Chand Sharma, Neeraj Kumar Sharma, Koslesh Kumar Bairwa, Ram Pratap Saini, Raghu Nandan Sharma, Dheeraj Kumar Palia, Sunil Kumar Sharma, Sunil Kumar Saini, Suresh Kumar, S.L. Sharma, Dr. T.N. Sharma, Santosh Singh Shekhawat, R.D. Meena, Sandeep Garssa, Kailash Kumawat, Tanuj Gupta, Prakhar Gupta, Dr. V.B. Sharma, Gaurav Bhardwaj, Tushar Pareek, Avinash Choudhary, M.F. Baig, P.S. Naruka, Rupin Kala

Final Decision : Dismissed

Judgement

1. Since in the present batch of writ petitions, the grievance raised by the petitioners is common & pertain to the self same selection process, hence these petitions have been heard together and are being decided by the present common order.

2. To examine the controversy raised in the present batch of writ petitions, at the joint statement made by the counsels for the parties, the facts contained in S.B. Civil Writ Petition No.1629/2020 are being taken into consideration.

3. An advertisement dated 05.10.2016 was issued by the respondents for holding

selection for the post of Sub-Inspector (AP), (IB) (RAC) (MBC) under the Rajasthan Police Subordinate Service Rules, 1989 and by corrigendums dated 19.11.2018 & 23.08.2019, the number of advertised vacancies were revised. As per the criteria of selection, three stages were prescribed i.e. (i) Written Examination (ii) Physical Efficiency Test (iii) Interview. The written examination was conducted on 07.10.2018 and the result thereof was declared on 26.08.2019 in which the petitioners were declared qualified for stage-II i.e. Physical Efficiency Test (hereinafter to be referred as 'PET') and were called for appearing in the PET which was conducted from 23.09.2019 to 27.09.2019 at different places for which respective Boards were constituted by the respondents to have fairness and transparency in the selection process. In all 9259 candidates appeared in the PET, out of which 1926 candidates qualified in the PET and result of PET was declared on 08.01.2020 in which the petitioners were declared failed and being unsuccessful in the PET have approached this Court by filing the present writ petitions.

4. Counsels appearing on behalf of the petitioners submitted that after conducting the PET the petitioners were orally told that they have qualified in the PET. Counsels further submitted that the respondents in a malafide manner have declared the petitioners failed on the pretext that they have not secured minimum qualifying marks i.e. 50 out of 100. Counsels further submitted that action of the respondents is arbitrary in nature as they have declared the petitioners failed only to accommodate the persons who are already serving in the department as Constable. Counsels further submitted that in the present circumstances, the videography of PET is required to be summoned & perused by this Court for examining the error committed by the respondents in holding the PET. Counsels further submitted that Article 316 of the Constitution of India mandates the recruiting agency to have fairness in the process of selection. Counsel further submitted that the respondents should have used the chip to maintain transparency in the process of selection and lastly prayed that this Court under Article 226 may examine the videography of the PET conducted by the respondents or in the alternate direct the respondents to conduct the PET for the petitioners afresh within the stipulated period which this Court may deem proper. In support of the contentions, counsels for the petitioners relied upon certain judgments of this Court as well as of the Hon'ble Supreme Court :-

5. A Co-ordinate Bench of this Court in the matter of Bablu Saini & Anr. Vs. State of Raj. & Ors., (CWP-18445/2012) & connected petitions, decided on 11.11.2013, held as under :-

"I have considered submissions of learned counsel for the parties and perused the record.

It is a case where two sets of petitioners/ candidates exist. One set of petitioners are those who appeared in the physical test and declared fail. The allegation of manipulation in the record so as the result has been made. Other set of petitioners are those who have been declared pass in the physical test but were

not given appointment. Serious allegations have been made in regard to the result inasmuch as candidates did not complete sit-ups have been declared pass. The allegation of manipulation has not been denied by Dr MS Kachhawa, Addl Government Counsel.

After the direction of this court, a report has been submitted by the Chief Conservator of Forest. In view of the report, result of the test cannot be trusted rather involvement of PTI for manipulation of the record is coming out. Even for Govind Ballabh Sharma, allegation exist for non-completion of sit-ups so as throw of ball. In the background aforesaid and to avoid complications and to have fair selection, respondents are directed to hold physical test afresh for the candidates against whom allegations exist and one of such persons is party in the representative character. It is keeping in mind that allegation against the PTI are not denied by the official respondents. The aforesaid would not otherwise affect any one because if one has performed well in the physical test, there is no reason not to perform it again. I am cautious of the fact that some of the selected candidates are not party other than few in the representative capacity. The fact, however, remains that having seen the CD by none else but the Chief Conservator of Forest, clear picture thereof could not be made out. It becomes clear that even the CD was taken in such a manner which may not visualise clear picture. In the background aforesaid, physical test needs to be conducted afresh. It is required for fair and proper selection.

The respondents are further directed to take action against those who have manipulated the result or were part of misdeeds, if the action has not already been initiated.

After declaration of the result of the physical test, appointment would be given to the successful candidates. The compliance of the order may be made within a period of one month from the date of receipt of copy of this order.

In view of directions/observations above, all the writ petitions so as the stay applications are disposed of."

6. A Co-ordinate Bench of this Court in the matter of Murli Manohar Chhangani Vs. State of Rajasthan, S.B. Civil Writ Petition No.690/2012, decided on 03.01.2014, held as under :-

"6. Having heard the learned counsels for the parties and particularly after perusal of the aforesaid CD having Video Recording of physical test, this Court is satisfied that the rejection of petitioner's candidature was improper and not sustainable and particularly looking to his high merit having secured 93% of marks in the written test. The prescribed number of 26 sit-ups were completed by the petitioner before the prescribed time of 43 seconds. In the Video Recording produced before this Court, there is only one minor jerk the petitioner suffered towards the end of the said round of sit-ups, which he immediately recouped and completed in next moment and thus, he completed all the 26 sit-ups. The said minor jerk suffered by him in the process cannot result into the

rejection of his candidature altogether. The respondents were always at liberty to ask him to repeat such exercise even if they were not satisfied, on the spot. Having not done that, the respondent's claim that rejection on the said ground was proper is not sustainable. Therefore this Court is of the opinion that the present writ petition deserves to be allowed. Accordingly, the present writ petition is allowed and quashing the impugned order and the subsequent orders justifying the same, this Court directs the respondents to offer appointment to the petitioner on the post of Forest Guard by creating a supernumary, post if necessary, if existing vacancies of Forest Guard are not available. The said process may be completed within a period of three months from today. No order as to costs. A copy of this order be sent to the parties concerned forthwith."

7. A Co-ordinate Bench of this Court in the matter of Ashutosh Sharma & Ors. Vs. RPSC Ajmer & Anr., S.B. Civil Writ Petition No.4650/2017 & other connected petitions, decided on 10.04.2017, held as under :-

"I have heard counsel for the parties. In the present case, time is essence as the process of selection and issuance of appointment letters is near conclusion.

Therefore, after hearing counsel for the parties, present writ petitions are disposed of by issuing following directions:-

(a) That Secretary of Rajasthan Public Service Commission in respect of the complaint of the petitioners and taking averments in the present writ petitions, shall constitute a fact finding inquiry Committee within three days from receipt of the certified copy of this order. The fact finding inquiry Committee so constituted, after taking help of video- graphy of the examination centre, by examining the Superintendent of Examination Centre and other staff shall decide whether petitioners could not undertake examination because defective keyboards were provided to them or not.

(b) That petitioners shall appear before the Secretary of Rajasthan Public Service Commission for constitution of fact finding inquiry Committee after receipt of certified copy of this order.

(c) That the fact finding inquiry Committee after hearing petitioners shall pass a detailed reasoned speaking order, whether the grievances of the petitioners are to be redressed or not.

(d) That upon receipt of the report of the fact finding inquiry Committee, the Secretary, RPSC shall pass appropriate orders within three days, thereafter, whether in case of petitioners fresh type test is to be conducted or not.

Counsel for the petitioners are granted liberty to reapproach this court, in case, they are not satisfied with the decision of the RPSC.

Copy of this order be handed over to Mr. Anand Sharma, under the seal and signature of Court Master for onward transmission and necessary compliance."

8. A Division Bench of Madras High Court at Madurai Bench in the matter of

Malarkodi Vs. The Member Secretary, Tamil Nadu Uniformed Services Recruitment Board, Chennai & Ors., W.A. [M.D.] No.1656 of 2018, decided on 29.01.2019, held as under :-

"The Writ Petition preferred by the petitioner was dismissed by the learned Single Judge. When the appeal came up for hearing, taking into account the report submitted by the respondents, we have passed the following order on 18 December, 2018.

"The appellant challenged the result of the Physical Efficiency Test on the ground that though she completed 100 meters running race within the prescribed time, it was wrongly recorded as 18.03 seconds. She was disqualified only on the ground that she finished the 100 meters running race only after the cut-off time.

2. When it was pointed out to the Learned Additional Advocate General as to whether it is possible to see the videograph of the events taken, it was submitted that the videograph is available. Accordingly, we directed the respondents to produce the video clipping and other documents relating to the Test conducted for Physical Efficiency at Virudhunagar Centre on 06.09.2018.

3. The third respondent produced the video clipping and the Lap Slip for Physical Efficiency Test signed by the Sports Official.

4. The video was witnessed by the Appellant in the presence of the officials of the third respondent and the learned Special Government Pleader. We have also requested Mr.N.Dilip Kumar, a learned member of the Bar, who is present in Court to witness the video and assist the Court. It was found that the Appellant completed 100 meters race and she fell down. However, the time was not recorded in the video.

5. There is no mechanism evolved by the Selection Committee for automatic recording of the time taken by a particular candidate for completing the Physical Efficiency Test, including the running race. We are informed by the officials that Sports Officer, who was present used a Stop Watch to record the time taken by the candidates. According to the officials of the third respondent, there were seven Sports Officials and each official recorded the timings in relation to each of the candidate. There were seven candidates. However, the Lap Slip for Physical Efficiency Test dated 06.09.2018 indicates that the very same Sport Official signed in all the columns relating to seven candidates, which is an indication that the time was recorded only by one official.

6. Since there are no documents with the third respondent to show the actual time taken by the appellant, we have once again played the video, it was found that the appellant has finished the race within 17 seconds. This process was witnessed by the officials. We have arrived at 17 seconds by calculating the time in the video clippings, meaning thereby the starting point and the ending point, which took 17 seconds.

7. It is now clear that time was recorded only manually. The authorities should

adopt scientific manner of recording timings. We are very clear on the basis of the video that the appellant has taken only 17 second to complete the 100 meter race.

8. The Chairman, Sub-Committee, Tamil Nadu Uniformed Services Recruitment Board, Virudhunagar District is directed to take a decision in view of our finding that the appellant completed 100 meters running race in 17 second. The orders to that effect shall be produced during the morning session on 19 December, 2018, failing which, the Deputy Inspector General of Police, Madurai Range, who is the Chairman of the Recruitment Committee, shall appear before this Court at 2.15 p.m., on 19 December, 2018, along with the records.

9. Post on 19 December, 2018.

2. Subsequently, the respondents initiated the proceedings for appointment and the same resulted in giving an appointment order to the appellant on 25 January, 2019. We are informed by the learned Counsel for the parties that the appellant joined service on 26 January, 2019 and she was deputed to training.

3. In view of the subsequent events relating to the appointment of the appellant and her joining in service, nothing survives for adjudication in this Writ Appeal.

4. The Writ Appeal is disposed of, with the above observation. No costs."

9. Counsel further relied upon the judgment passed by the Hon'ble Supreme Court in the matter of Ramjit Singh Kardam & Ors. Vs. Sanjeev Kumar & Ors., reported in 2020 SCC Online SC 448, wherein it has been held as under :-

"4. The Petitioner No.1 of CWP No.15656 of 2010 pleaded that out of 62 Candidates who have been appointed in district Yamuna Nagar, 61 are less meritorious as compared to petitioner No.1. The petitioner No.1 although secured 41.68 marks in academic qualifications but could get only 8 marks in the interview. Petitioner further pleaded that all other petitioners secured good marks in academic qualifications but they received less marks in vivavoce due to which they could not be included in the Select list.

9. Learned Single Judge after hearing the counsel for the parties and after perusing the record allowed all the writ petitions by judgment and order dated 11.09.2012. Operative portion of the judgment of the learned Single Judge is as follows: -

"...These writ petitions are thus allowed. The purported selection made by the Haryana Staff Selection Commission in pursuance to the advertisement No.6/2006, result whereof was published on 11.04.2010 relating to category No.23 for the posts of PTIs, is hereby quashed. A direction is issued to the Haryana Staff Selection Commission to hold a fresh selection, in accordance with law, within a period of five months from the date of receipt of certified copy of this order.

Photocopies of the original noting files produced in Court as also the purported

criteria laid down by the Commission dated 03.08.2008 have been got prepared, kept in a sealed cover and placed on the records of CWP No.15656 of 2010 to be opened only on Court orders. Produced original records be handed over to Mr. Harish Rathee, learned Senior Deputy Advocate General, Haryana.

13. While entertaining the SLP No.35373 of 2013, Ramjit Singh Kardam and others versus Sanjeev Kumar and others, and other special leave petitions, this Court passed following order on 29.11.2013: -

"Issue Notice.

Returnable in three weeks.

Status Quo, as on today shall be maintained in the meantime."

14. These appeals were heard on various dates by this Court. On 22.01.2020, this Court passed following order: -

"Hearing to continue tomorrow (23.01.2020). "Learned counsel for the State may produce the original record of selection."

15. Further, when the matter was heard on 23.01.2020, learned counsel for the State as well as Commission produced certain original records on which date following order was passed: -

"Learned counsel for the State today placed before this Court an original tabulation register of the result sheet, selection list register, interview marks register of the member as well as of expert, which indicate that marking have been done separately. The letter dated 03.08.2008, in original, has also been placed before the Court, which was also placed before the High Court.

Heard in part.

List for continuation of arguments on 29.01.2020.

Learned counsel for the State shall produce rest of the original records on the next date of hearing i.e. 29.01.2020."

18. For the appellants, we have heard Shri Kapil Sibal, learned senior counsel, Shri V.Giri, learned senior counsel, Shri Ravindra Srivastava, learned senior counsel, Shri Navneeti Prasad Singh, learned senior counsel, Shri Rameswar Malik, learned senior counsel and other learned counsel. Shri Manoj Swarup has appeared for the respondent writ petitioners. We have also heard other counsel appearing for respondent writ petitioners. Shri A.K. Sinha and other counsels for intervenors. We have heard Shri Anil Grover, Additional Advocate General for State of Haryana as well as Haryana State Selection Commission.

19. Learned counsel for the appellants challenging the judgment and order of both learned Single Judge and Division Bench of the High Court submits that there were no sufficient grounds and materials before the High Court to set aside the entire selection, which was held for 1983 posts of PTI. It is submitted that

the respondent writ petitioners have participated in selection without any demur or protest, hence, they are not entitled to challenge the selection after having been declared unsuccessful. On the principle of estoppel, they are precluded from challenging the selection.

20. It is submitted that criteria for selection was uniformly applied to all the candidates and respondent writ petitioners having not challenged the criteria of selection cannot be allowed to challenge the criteria after declaration of the select list.

21. It is submitted that there are no allegations of any mala fide against the Chairman or any member of the Commission or any candidate. The High Court committed error in accepting the grounds of challenge by the writ petitioners that those candidates who secured good marks in Academics were deliberately given less marks in the viva-voice so that they may go out of select list. Insofar as not holding of the written examination it is submitted that there were grounds for scrapping the written examination which was held on 01.02.2007.

22. The Commission decided not to hold the written examination and proceeded to hold the selection on the basis of criteria which was applied in the earlier selection i.e. 2003 selection i.e. 60 marks for Academics and qualification and 30 marks on the Vivavoice to which no exception can be taken by respondent writ petitioners. The criteria which was applied in the Selection was signed by all members of the Commission on 03.08.2008 to which no exception can be taken by the respondent writ petitioners.

23. The Courts cannot start looking on the marks allocated in Viva-voice nor the same is in the domain of the Court. The appellants are now over age and having worked for 10 about years, at this stage, they cannot be displaced. Increase of marks from 25 to 30 for viva-voice was not violative of any norms. Jurisdiction under Article 226 is not an investigative jurisdiction but it is adjudicatory jurisdiction.

31. Shri Kapil Sibal, learned senior counsel appearing for appellant in his rejoinder submits that even though 1496 candidates got high marks in the academics, they are only 10% of the total number of candidates and only few hundreds got 20-27 marks in the viva-voce. From where High Court got the material to hold that 90 percent candidates who performed poorly in the Academics got higher marks in the vivavoce? The Commission has said that marks of the Academics and qualifications were not before the Interview Board. All 8 members of the Commission cannot be said to have conspired to follow a pattern of work.

32. From the pleadings on the records and submissions made by the learned counsel for the parties, following points arise for consideration: -

i) Whether the respondent writ petitioners who had participated in the selection were estopped from challenging the selection in the facts of the present case?

ii) Whether the respondent writ petitioners could have challenged the criteria of selection applied by Commission for selection after they had participated in the selection?

iii) Whether the decision dated 30.06.2008 to cancel the written examination and the decision dated 11.07.2008 to call the candidates for interview 8 times number of vacancies on minimum percentage of marks as fixed therein and the decision dated 31.07.2008 to call all the eligible candidates for interview were arbitrary decision to change selection criteria published on 28.12.2006, which have effect of downgrading the merit in the Selection?

iv). Whether it was obligatory for the Commission as a body to take all decisions pertaining to Selection on the post of PTI including the decision of not holding written examination, decision to screen on the basis 8 times of vacancies and decision to call all eligible candidates and whether aforesaid decisions were taken by the Chairman alone?

v) Whether on 03.08.2008, a decision was taken by the commission fixing the criteria for the selection on the post of PTI which was signed by all the members on 03.08.2008 as claimed by the Commission?

vi) Whether without there being any specific allegations of mala fide against the Chairman and members of the Commission and without they having been impleaded by name as party respondents, the writ petitioners could have challenged the allocation of marks in vivavoce and High Court was right in accepting the claim that candidates who got highest marks for academic qualifications ranging between 40 to 48.74 marks have been awarded just 7 to 9 marks in the viva-voce and as against it there are hundreds of selected candidates who have been awarded 20 to 27 out of 30 marks in the viva-voce to ensure that they outclass the academically bright candidates?

vii) Whether no fresh selection can be held as directed by learned Single Judge since as per 2012 Rules, the post of PTI has been declared as a dying cadre and the post has merged into the post of TGT Physical Education?

36. Learned counsel for the appellant at very outset contended that the writ petitions filed by the respondent challenging the select list dated 10.04.2001 ought not to have been entertained by the High Court since the respondent having participated in the selection without any demur or protest, they are estopped from challenging the selection. The submission is refuted by the respondent contending that the above principle of estoppel is not applicable in the facts of the present case. The petitioner being not even aware of the criteria, which was to be applied for selection, which they came to know only after select list was published, there was no occasion to make any challenge by the respondents before the above date.

41. The Division Bench of the High Court is right in its conclusion that the selection criteria, which saw the light of the day along with declaration of the

selection result could be assailed by the unsuccessful candidates only after it was published. Similarly, selection process which was notified was never followed and the selection criteria which was followed was never notified till the declaration of final result, hence, the writ petitioners cannot be estopped from challenging the selection. We, thus, hold that the writ petitions filed by the petitioners could not have been thrown on the ground of estoppel and the writ petitioners could very well challenge the criteria of selection applied by the Commission, which was declared by the Commission only at the time of declaration of the final result. We, thus, answer point Nos. 1 and 2 as follows:-

(i) The writ petitioners, who had participated in the selection are not estopped from challenging the selection in the facts of the present case.

(ii) The writ petitioners could have very well challenged the criteria of selection, which was declared by the Commission only in the final result declared on 10.04.2010.

46. As per the notification extracted above it is the Commission, who "shall devise the mode of selection and fix the criteria for selection." The said power has to be exercised in a reasonable and fair manner to advance the purpose and object of selection. Even if it is assumed for the sake of the argument that the Commission can change the criteria of selection from time to time, the said power has to be exercised not in an arbitrary manner.

50. When there are no statutory rules regarding allocation of business of the Commission or delegating its business to members or Committee, the Commission could very well by its resolution devise its own mode of exercising such power or function, which proposition has been laid down by this Court by a Constitution Bench in *Naraindas Indurkha Vs. The State of Madhya Pradesh and Others*, (1974) 4 SCC 788 wherein in paragraph 17 following was stated:-

17. Now we do not dispute the general proposition that when a power or function is given by the statute to a corporate body and no provision is made in the statute as to how such power or function shall be exercised, the corporate body can by a resolution passed at the general meeting devise its own mode of exercising such power or function, such as authorising one or more of the members to exercise it on behalf of the Board....."

57. We having held that change in criteria of selection was never notified by the Commission and about the change in process of selection candidates were kept in total dark and for the first time the criteria applied in selection process was published along with result dated 10.04.2008, the writ petitioners cannot be estopped in challenging the arbitrary criteria so applied. The submission of Shri Sibal cannot be accepted. The petitioners have never questioned the criteria which was published on 28.12.2006 i.e. written test of 200 marks and viva voce of 25 marks, merely because they participated in the process of selection after the change of criteria, their right to challenge the arbitrary change cannot be lost. Estopping the petitioners from challenging the change of criteria will be

giving seal to arbitrary changes affected by Chairman as noted above.

60. There cannot be any dispute to the above preposition of law reiterated by this Court as above. We have noticed from the array of the parties in the writ petition that neither Chairman nor the members of the Commission were personally impleaded nor there are any specific allegations of mala fide against the Chairman or the members of the Commission.

61. The present is not a case of malice in fact. The "malice in fact" and "malice in law" are two wellknown concepts in law. In Ratnagiri Gas and Power Private Limited (supra), this Court has dealt with both the concepts, i.e., "malice in fact" and "malice in law". Dealing with the conceptual difference between "malice in fact" and "malice in law", this Court laid down following in paragraphs 30, 31 and 32:-

"30.The conceptual difference between the two has been succinctly stated in the following paragraph by Lord Haldane in *Shearer v. Shields*, 1914 AC 808 (HL) quoted with approval by this Court in *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521: (SCC p. 641, para 317) "317. ... 'Between "malice in fact" and "malice in law" there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the law and can only act within the law. He may, therefore, be guilty of "malice in law", although, so far as the state of his mind was concerned he acted ignorantly, and in that sense innocently. "Malice in fact" is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act.'" (*Shearer case*, 1914 AC 808 HL, AC pp. 813-14)

31. Reference may also be made to the decision of this Court in *State of A.P. v. Goverdhanlal Pitti*, (2003) 4 SCC 739 where the difference between "malice in fact" and "malice in law" was summed up in the following words: (SCC p. 744, paras 12-13) "12. The legal meaning of 'malice' is 'ill will or spite towards a party and any indirect or improper motive in taking an action'. This is sometimes described as 'malice in fact'. 'Legal malice' or 'malice in law' means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others.' (See *Words and Phrases Legally Defined*, 3rd Edn., London, Butterworths, 1989.)

13. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object." (emphasis supplied)

32. To the same effect is the recent decision of this Court in *Ravi Yashwant Bhoir v. Collector*, (2012) 4 SCC 407 wherein this Court observed: (SCC p. 431, paras

47-48) "Malice in law

47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. 'Legal malice' or 'malice in law' means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for 'purposes foreign to those for which it is in law intended'. It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorised purpose constitutes malice in law. (See *ADM, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521, *Union of India v. V. Ramakrishnan*, (2005) 8 SCC 394 and *Kalabharati Advertising v. Hemant Vimalnath Narichania*, (2010) 9 SCC 437.)"

62. The malice in law has been dealt as "something done without lawful excuse". The malice in law is also mala fide exercise of power, exercise of statutory power for purposes foreign to those for which it is in law intended. In the present case, the power to devise the mode of selection and fix the criteria for selection was entrusted on the Commission to further the object of selection on merit to fill up post in State in consonance with the provisions of Articles 14 and 16 of the Constitution of India. When the alteration of criteria has been made, which has obviously affected the merit selection as we have found above, the allegations which have been made in the writ petition against the Commission in conducting the selection are allegations of malice-in-law and not malice-in-fact.

63. The High Court had summoned the original records of the Commission including the marks awarded to the candidates both on basic qualification as well as essential qualification as well as viva voce. The observations, which have been made by the Division Bench in paragraphs 34 and 36 were inferences drawn by the High Court based on pattern of the marks allocated to some of the selected candidates and nonselected candidates. The observation of the High Court that "it cannot be a mere co-incidence that 90% of the meritorious candidates in academics performed so poorly in viva voce that they could not secure even 10 marks out of the 30 marks or that the brilliance got configured only in the average candidates possessing bare eligibility" where inferences drawn from result sheet and re-affirms the allegations of malice-in-law. The inferences drawn by the High Court, thus, cannot be said to be unfounded nor are based on no material or perverse so as to call for any interference by this Court in these appeals. We, thus, do not find any substance in the submission of Shri Sibal that since no specific allegations against Chairman and members have been made

and they being not impleaded as the parties, the allegations in the writ petition regarding allocation of marks in viva voce cannot be looked into by the High Court. Point No.6 is answered accordingly.

75. In view of the foregoing discussions and conclusions, we dispose of these appeals with the following directions:

(i) The Commission shall conclude the entire selection process initiated by the advertisement No.6 of 2006 as per criterion notified on 28.12.2006 i.e. holding objective type written test of 200 marks and viva voce of 25 marks. All the applicants who had submitted applications in response to the above advertisement including those who were selected shall be permitted to participate in the fresh selection as directed.

(ii) The candidates who have been selected and have worked on the post of PTI shall not be asked to refund any of the salary and other benefits received by them as against their working on the posts. No refund shall also be asked from those candidates who after their selection worked and retired from service.

(iii) The entire process be completed by the Commission within a period of five months from the date Commission starts working after the present lockdown is over, which was the time fixed by the learned Single Judge for completing the process.

(iv) The costs imposed by the Division Bench in paragraph 54 of the judgment of the High Court are deleted except the costs imposed on the Commission.

10. Counsels appearing on behalf of the petitioners further submitted that the respondents should have maintained fairness in the process of selection and in support of submission relied upon the judgment passed by the Hon'ble Supreme Court in the matter of Kanpur University & Ors. Vs., Samir Gupta & Ors., reported in AIR 1983 Supreme Court 1230, wherein it has been held as under :-

"15. The findings of the High Court raise a question of great importance to the student community. Normally, one would be inclined to the view, especially if one has been a paper setter and an examiner, that the key answer furnished by the paper setter and accepted by the University as correct, should not be allowed to be challenged. One way of achieving it is not to publish the key answer at all. If the University had not published the key answer along with the result of the test, no controversy would have arisen in this case. But that is not a correct way of looking at these matters which involved the future of hundreds of students who are aspirants for admission to professional courses. If the key answer were kept secret in this case, the remedy would have been worse than the disease because, so many students would have had to suffer the injustice in silence. The Publication of the key answer has unravelled an un-happy state of affairs to which the University and the State Government must find a solution. Their sense of fairness in publishing the key answer has given them an opportunity to have a closer look at the system of examinations which they conduct. What has failed is

not the computer but the human system.

17. Students who have passed their Intermediate Board Examination are eligible to appear for the entrance Test for admission to the Medical Colleges in U.P. Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text-books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalise the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong."

11. Counsel further referred the order dated 09.09.2019 Annx.AA/1 by which respective Boards were constituted at different places and also referred to the order dated 20.09.2019 which prescribed the detailed instructions for conducting the PET and in particular clause-20 of the said order.

12. Counsel further submitted that the PET has been conducted in an arbitrary manner and the track where the PET was conducted was also muddy.

13. Counsel appearing on behalf of the respondents submitted that the petitioners are estopped to challenge the process of selection since they have participated in the process of selection and they did very well know about the procedure being adopted by the respondents in holding the selection process.

14. Counsel further submitted that though the petitioners have alleged about malafide but no specific allegation has been levelled against any of the person/member of the Board constituted at different places.

15. Counsel further submitted that during pendency of the present writ petitions the respondents have filed the additional affidavit and explained the purpose of videography i.e. (i) to ensure that the police personnel deputed at different test centres would not favour any particular candidate (ii) to avoid impersonation (iii) to keep a vigil on law and order situation if such a situation would arise.

16. Counsel further submitted that during pendency of the writ petitions, a committee was constituted by the respondents vide order dated 06.08.2020 and the said committee examined the marks obtained by the petitioners and found that no irregularity has been committed by the respondents in conducting the PET.

17. In support of the contentions, counsel for the respondents relied upon certain judgments passed by the Hon'ble Supreme Court.

18. In the matter of Madras Institute of Development Studies & Anr. Vs. K. Sivasubramaniyan & Ors., reported in (2016) 1 SCC 454 it has been held as under :-

14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no

longer res integra.

15. In *Dr. G. Sarana vs. University of Lucknow & Ors.*, (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Anthropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held:(SCC p.591, para 15) "15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in *Manak Lal's* case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9) '9. ..."It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

16. In *Madan Lal & Ors. vs. State of J? & Ors.* (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p.493, para 9) "9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla*¹ it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and

when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

17. In *Manish Kumar Shahi vs. State of Bihar*, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p.584, para 16) "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. In the case of *Ramesh Chandra Shah and others vs. Anil Joshi and others*, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p.320, para 24) "24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

19. In the matter of *D. Sarojakumari Vs. R. Helen Thilakom & Ors.*, reported in (2017) 9 SCC 478, it has been held as under:-

"11. As far as the present case is concerned an advertisement was issued by Respondent No.6 inviting applications for the post of Music Teacher in Samuel LMS High School. Respondent No.1 did not raise any objection at that stage that the post could not be filled in by direct recruitment and she should be considered for promotion. Not only that, she in fact, applied for the post and took part in the selection process. After having taken part in the selection process and being found lower in merit to the appellant, she cannot at this stage be permitted to turn around and claim that the post could not be filled in by direct recruitment. The reasoning of the learned Single Judge in rejecting the objection is not in consonance with the law laid down by this Court. In view of this we need not go into the other issues raised."

20. In the matter of *Rajneesh Khajuria Vs. Wockhardt Limited & Anr.*, reported in (2020) 3 SCC 86, it has been held as under :-

17. In another judgment reported as *Prabodh Sagar v. Punjab State Electricity Board & Ors.* 7 , it was held by this Court that the mere use of the expression "mala fide" would not by itself make the petition entertainable. The Court held as

under: (SCC p.640, para 13) "13. ... Incidentally, be it noted that the expression "mala fide" is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner has become more of a liability than an asset and in the event of there being such a situation vis-à-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (sic compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is none. Mere user of the word "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion i.e. exactly what the High Court has done and that is the reason why the narration has been noted in this judgment in extenso. ..."

19. In a judgment reported as Union of India & Ors. v. Ashok Kumar & Ors. 10, it has been held that allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. The Court held as under: (SCC p. 770, para 21) "21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to (57 of 64) [CW-1629/2020] establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab [(1964) 4 SCR 733 : AIR 1964 SC 72] .) It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L?) 165 : AIR 1974 SC 555] courts would be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office which

has a high responsibility in the administration. (See Indian Rly. Construction Co. Ltd. v. Ajay Kumar

21. In the matter of M.V. Thimmaiah & Ors., Vs. Union Public Service Commission & Ors., reported in 2008(2) SCC 119, it has been held as under :-

"19. So far as the allegation of mala fide against Shri B.S.Patil is concerned, he was not impleaded as a party. Therefore, the allegation of mala fide could not be entertained by the Tribunal. As such, the allegation of mala fide against Shri B.S.Patil could not be taken into consideration and rightly so, by the High Court as well as by the Tribunal. The allegation of mala fide is very easy to be levelled and it is very difficult to substantiate it, specially in the matter of selection or whoever is involved in the decision making process. People are prone to make such allegation but the (58 of 64) [CW-1629/2020] Courts owe a duty to scrutinize the allegation meticulously because the person who is making the allegation of animus sometimes bona fide or sometimes mala fide due to his non-selection. He has a vested interest. Therefore, unless the allegations are substantiated beyond doubt, till that time the Court cannot draw its conclusion. Therefore, we reject the allegation of mala fide."

22. In the matter of All India State Bank Officers' Federation & Ors. Vs. Union of India & Ors., reported in (1997) 9 SCC 151, it has been held as under :-

"21. In view of the aforesaid explanation of the respondent bank, which we see no reason to disbelieve, it is clear that the petitioners have made baseless and reckless allegations of mala fides. Respondents 4 and 5 obviously had no direct or indirect role to play either in the formulation of the policy or in the memorandum being placed as a table item to be taken up for consideration in the meeting held on 7th March, 1989. The modification was approved by the Chairman and all the Directors who were present in the meeting of the Board. For an allegation of mala fide to succeed it must be conclusively shown that respondents 4 and 5 wielded influence over all the members of the Board who were present in the said meeting. No such allegation has been made. The decision to modify the promotion policy was taken by a competent authority, namely, the Central Board in a duly constituted meeting held on 7th March, 1989 and we are unable to accept that this change in the policy was brought about solely with a view to help respondents 4 and 5.

22. There is yet another reason why this contention of the petitioners must fail. It is now settled law that the person against whom mala fides are alleged must be made a party to the proceeding. The allegation that the policy was amended with a view to benefit respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fide, which allegations, in fact, are without merit."

23. Counsel further relied upon the judgment passed by the Division Bench of this Court at Principal Seat, Jodhpur in the matter of the State of Rajasthan Vs. Maldev Dewasi, reported in 2019 (4) WLC (Raj.) 235, wherein it has been held as under :-

"10. Another reason, which this court has to take note of is that among the 77 odd unsuccessful candidates, only a handful have come forward, claiming prejudice.

Granting the facility of a re-test to these candidates who approached the court, in the opinion of the court would mean at one stroke denying similar treatment to others who have no grievance, and more importantly creating an entirely different set of circumstances, from the one under which the rest of the candidates participated, including those who successfully cleared the PET. This aspect was highlighted recently by this court in the context of recruitment to the post of police constable, where the complaint was that the weather conditions for the 5 km run were not conducive, on account of rain, resulting in the candidates' inability to complete the PET successfully. A Division Bench of this court, held in Shraavan Kumar Choudhary vs. The State of Rajasthan & Ors. (D.B. Spl. Appl. Writ No. 154/2019 Decided On: 22.05.2019) as follows: "7. Quite apart from the ground on which the learned Single Judge dismissed the writ petition, i.e. delay, this Court is not inclined to interfere with the selection process or the impugned order. When a complaint such as the present one with respect to less than ideal conditions or poor conditions in which candidates are made to perform take up PET is confronted by the Court, it needs to carefully analyse the facts since intervention in judicial review has larger repercussions which affect non-parties.

8. The state has placed material on record to suggest that whatever be the circumstances, rain moisture or ideal track conditions, of the total number of candidates who participated on the basis of prevailing conditions, 45.42 qualified. The additional affidavit (concededly which is not part of the present appeal record as it is a part of the record in D.B. Civil Appeal No. 228/19) shows that the variation between the days like the one when the appellant was made to participate and other days when there was no rain, was not so significant as to result in arbitrariness. The chart which is produced alongwith the said additional affidavit shows that on an average on the best days - when weather conditions were normal, the number of qualified candidates were in the range of 63-64%; the lowest in such range was about 25%. In between, there were days on which the conditions were not ideal as in many venues it appeared to have rained. Having regard to all these factors, it cannot be said that the conditions under which the present appellant was made to participate in the PET were so poor as to deny him a level playing field. What is a matter of record is that 579 candidates did participate of whom 263 were successful and did qualify. In these circumstances, unless the result shows an extremely startling result where it can be discerned plainly that no candidate or a very insignificant number of candidates could qualify, the Courts should be very circumspect in returning a

finding of arbitrariness.

9. The judgment of the Allahabad High Court, in the opinion of the Court, is not applicable. It is primarily based on the reasoning that change in weather conditions result in the change in the rules of the game i.e. introducing rules later after the commencement of the recruitment process. The judgment of the Allahabad High Court, with respect, in the opinion of the court, does not correctly lay down the law.

10. One more consideration persuades this Court to decline relief. It is that out of the 579 who participates, some were successful and some were not. Yet all of them did participate and accepted the conditions, as it were. Permitting the petitioner/appellant or any other candidate thereafter to take a re-test by directing the State to hold a fresh PET would itself be an unfair procedure as it would not only allow a few candidates who approach the Court to have a second shot or attempt, or a second innings as it were, but also create an unfair advantage inasmuch as the conditions would be entirely different and perhaps favorable to the candidate. This would result in two yardsticks, being injected into (one whereby all others accept participate and are assessed under poor conditions, and the second whereby those who approach the Court are given a second chance, resulting in their competing in favorable conditions), in the same selection process, which is inherently untenable and contrary to Article 14 and cannot be permitted."

24. Counsel further submitted that the judgment passed by the Hon'ble Supreme Court in the matter of Ramjit Singh Kardam (supra) is not applicable in the fact situation of the present matter as in the matter of Ramjit Singh Kardam (supra) the criteria of selection was changed during the process of selection and initially there was written test + interview, lateron the written test was scraped by the recruiting agency and in place of written test new criteria was adopted/changed i.e. marks of the educational as well as of professional qualification and the writ petitioners were kept in dark about the change of criteria and apart from it, in those petitions, the selected candidates were also made party to the proceedings whereas in the present selection process the criteria was not changed and the petitioners were well aware about method being adopted in the present process of selection and there was no change of criteria during the process of selection.

25. Heard counsel for the parties and perused the record.

26. The first argument raised by counsel for the petitioners with regard to malafide in the process of selection is not acceptable as from the material on record including the additional affidavit filed by the respondents it is clear that in as much as 9259 candidates were called for PET out of which 1926 candidates qualified in the PET and that reflects that a number of candidates have been able to participate effectively and remained successful in the PET and only a few candidates about 129 having been unsuccessful have approached this Court and prior thereto the petitioners have not raised any grievance with regard to

malafide to the respondents by submitting representation just after appearing in the PET and also in view of the judgment passed by the Hon'ble Supreme Court in the matter of Rajneesh Khajuria (supra), the contention of the petitioners' counsel regarding malafide is not acceptable.

27. The second argument raised by counsel for the petitioners that they have secured qualifying marks in the PET as informed by the respondents just after completion of PET is also not acceptable as the petitioners nowhere in their writ petitions have given name of any person who has informed them in this regard.

28. The third argument raised by counsel for the petitioners with regard to summoning the videography is also not acceptable as the respondents have disclosed in their additional affidavit the purpose of videography i.e. (i) to ensure that the police personnel deputed at different test centres would not favour any particular candidate (ii) to avoid impersonation (iii) to keep a vigil on law and order situation if such a situation would arise.

29. So far as the judgments passed by the Coordinate Benches of this Court are concerned, the facts of those cases are entire different in nature and therefore the same are not applicable in the facts of the present matter.

30. After the petitioners have participated in the selection process, they cannot be allowed to question the selection process in view of the judgment passed by the Hon'ble Supreme Court in the matter of Madras Institute of Development Studies & Anr. (supra).

31. So far as the judgment referred by counsels for the petitioners, passed by the Hon'ble Supreme Court in the matter of Ramjit Singh Kardam (supra) is concerned, the same is not applicable in the fact situation of the present matter as in those matters the criteria of selection was changed during the process of selection whereas there is no change of criteria in the present process of selection, which has been conducted in accordance with the Scheme of Rules.

32. The another argument raised by counsel for the petitioners with regard to favouring the persons who are already serving in the department is also not acceptable for the reason that some of them who failed in the PET have also approached this Court by filing their writ petitions.

33. The other argument raised by counsel for the petitioners regarding the track being muddy, holds no factual foundation or material in support.

34. In view of the entire discussion made hereinabove, these writ petitions fail and are hereby dismissed.