

Supreme Court of India

*Before: Justice Ashok Bhushan, Justice S. Ravindra Bhat*

**RAMJIT SINGH KARDAM & ORS - APPELLANT**

**Versus**

**SANJEEV KUMAR & ORS. - RESPONDENT.**

CIVIL APPEAL NO.2103 OF 2020 (Arising out of SLP(C) No. 35373 of 2013) WITH Civil Appeal No.2104 of 2020[@ SLP(C)No.35471/2013], Civil Appeal No.2105 of 2020[@ SLP(C)No.35466/2013], Civil Appeal No.2107 of 2020[@ SLP(C)No.35857/2013], Civil Appeal No.2106 of 2020[@SLP(C)No.35811/2013], Civil Appeal No.2108 of 2020[@ SLP(C)No.39466/2013], Civil Appeal Nos.2164-2166 of 2020 [ @SLP(C)Nos.5275-5277/2014], Civil Appeal Nos.2168-2169 of 2020 [ @SLP(C)Nos.12403-12404/2014], and Civil Appeal No.2167 of 2020[ @ SLP(C)No.10647/2014].

08.04.2020

Judgment

**ASHOK BHUSHAN, J.** - . These appeals have been filed against the common judgment dated 30.09.2013 of High Court of Punjab and Haryana dismissing LPA filed by the appellants affirming the judgment of learned Single Judge dated 11.09.2012 by which the Selection dated 10.04.2010 selecting appellants on the post of Physical Training Instructor (PTI) was set aside. All the appeals having been filed against the common judgment involving common facts and questions of law, for deciding the batch of appeals, it shall be sufficient to refer pleadings in Civil Appeal No.2103/2020, Ramjit Singh Kardam and others versus Sanjeev Kumar and others.

2. The brief facts necessary to be noted for deciding these appeals are: -

2.1. The Haryana Staff Selection Commission (hereinafter referred to as Commission) vide Advertisement No.6 of 2006 dated 20.07.2006 invited applications for various posts enumerated in different category numbers in the Advertisement. Under category No.23, 1,983 posts of PTI (Physical Training Instructor) were advertised. The Advertisement mentioned the educational qualifications for the post. Advertisement contained a special instruction in following words: -

*"SPECIAL INSTRUCTIONS:*

*The prescribed essential qualification does not entitle a candidate to be called for interview. The Commission may short list the candidates for interview by holding a written examination or on the basis of a rational criteria to be adopted by the Commission. The*

*decision of the Commission in all matters relating to acceptance or rejection of an application, eligibility/suitability of the candidates, mode of and criteria for selection etc. will be final and binding on the candidates. No inquiry or correspondence will be entertained in this regard.”*

2.2. In pursuance of advertisement for the posts of PTI, 20,836 applications were received by the Commission. The notification dated 28.12.2006 was published by the Commission to the effect that the Commission has decided to hold the written examination on 21.01.2007. Notification further mentioned there shall be 100 objective type Multiple Choice Questions, 60 Questions relating to Academic Knowledge of the respective subject for which a candidate is appearing in the test and 40 Questions related to General Knowledge, General English and Hindi upto Matric Standard. Each question was to carry two marks. The candidates were required to secure minimum qualifying marks in written test i.e. 50% for General Category and 45% for SC/BC. Notification further mentioned that Viva-voice will be of 25 marks. The notification further provided that candidates equal to three times of the vacancies will be called for interview based on their performance in the written test. The written examination was held on 21.02.2007.

2.3. A public notice was issued on 01.02.2007 by the Commission that due to several complaints/reports with regard to malpractices and cheating committed in written examination held on 21.01.2007, Commission has decided to cancel the aforesaid examination.

2.4. Another notice dated 11.06.2008 was issued by the Commission re-notifying the written examination for the PTI on 20.07.2008. However, before the written examination could take place on 20.07.2008, another notice dated 30.06.2008 was issued by the Commission cancelling the written examination to be held on 20.07.2008. Another notice dated 11.07.2008 was published by the Commission to shortlist the candidates for interview. The notice mentioned that keeping in view the large number of applications, Commission has decided to shortlist eight times candidates of the advertised post in the respective category for interview on the basis of essential academic advertised qualification. Notice also mentioned the minimum weighted score of each category.

2.5. On 18.07.2008, the interview schedule was published by the Commission which provided that Interview was notified from 02.09.2008 to 17.10.2008. 15,582 candidates appeared in the interview. One member of the Commission and one expert member headed each Interview Committee from A to H. Although the interview was completed in the year 2008 itself, the Commission could declare the result of the selection after one and half years only on 10.04.2010 which was published on 11.04.2010. At the end of the result as published in the newspaper, criteria adopted for selection was also mentioned to the following effect: -

*“CRITERIA ADOPTED FOR SELECTION:*

*The criteria adopted by the Commission for making selection is given below: -*

*1) Academic marks.....60 Marks*

2) Marks obtained in the Viva voice out of .....30 Marks

Total: 90- Marks”

3. Challenging the Select list dated 10.04.2010, large number of writ petitions were filed in the Punjab and Haryana High Court including CWP No.15656 of 2010, Sanjeev Kumar and others versus State of Haryana and others. The writ petitioners before filing writ petitions had obtained information under Right to Information Act details of which information were mentioned in the writ petition. Various grounds were taken in the writ petition to challenge the selection. The writ petitioners pleaded in the writ petition that some of the candidates have been awarded more than 25 marks in viva-voice. Further, some of the candidates have been selected and appointed who did not possess the requisite qualification of certificate in Physical Education conducted by Haryana Education Department or an equivalent qualification recognized by Haryana Education Department. The petitioners further pleaded that once the criteria was laid down by the Commission, the same was required to be followed strictly while making the selection and it was not proper to change the criteria. The petitioners pleaded that criteria has been changed by the respondent authority to get the desired result and in order to bring the candidates within the zone of selection in order to grant them undue benefits for the reasons best known to the respondent authorities.

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 viva- voice due to which they could not be included in the Select list.

5. On an application given under RTI asking for a copy of the criteria, it was only on 17.06.2010 the criteria was supplied. The writ petitioners further pleaded that authorities while making selection neither adopted any rationale criteria nor selected the candidates on the basis of merit. The criteria was changed from time to time in order to select some favourites. Entire selection appears to be a fraud played upon the general public. 25 marks were mentioned for viva-voice but when the result was finalized the candidates were awarded marks more than 25 marks. Paragraph 51 of the W.P.No.15656 of 2010 enumerated the main points involved in the writ petition.

*“51. That the main law points involved in the writ petition are: -*

*i) Whether the respondent - authorities have adopted pick and choose policy while selecting the private respondents?*

*ii) Whether the marks allocated for the interview as per the advertisement could be changed subsequently after the commencement of the selection procedure at the whims of the respondent authorities?*

*iii) Whether any rational criteria was adopted by the respondent - authorities while*

awarding the marks for the viva-voce?

iv) Whether the marks for the viva- voice were required to be bifurcated under various heads?

v) Whether the persons who did not possess even the requisite educational qualification could be selected for the post?

vi) Whether the selection conducted by the respondent – authorities is fair transparent and sustainable in the eyes of law?

vii) Whether while making the selection Articles 14 and 16 of the Constitution of India have been violated?

viii) Whether the action of the respondent-authorities is arbitrary, discriminatory and unsustainable in the eyes of law?

ix) Whether the petitioners should be allowed to suffer for no fault on their part especially when the petitioners possess better academic record as compared to the selected candidates?”

6. In the writ petition No.15656 of 2010, following prayers were made:-

“ i. relevant records of the case be summoned;

ii. to issue a writ in the nature of Certiorari quashing the selection list Annexure P-9 dated 10.04.2010 and to issue a writ in the nature of Mandamus directing the respondent authorities to select and appoint the petitioners as PTI's and it is further prayed that during the pendency of the writ petition the respondents may kindly be restrained from appointing the selected candidates to the posts of PTI's.

iii. To issue any other appropriate writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;

iv. To dispense with from filing the certified copies of the Annexures;

v. Prior notices to the respondents may kindly be dispensed with;

vi. To allow the petitioners to file photostat copies of the Annexures;

vii. Costs of the writ petition be awarded in favour of the petitioners and against the respondents,

Any other order which this Hon'ble Court may deem fit may kindly be passed.”

7. The selected candidates were also subsequently impleaded as parties in most of the writ petitions and repeated efforts were made to serve them. Hundreds of selected candidates were duly served. Written statements were also filed by selected candidates in the writ

petitions. The High Court noticed that several respondents have not been served due to various reasons. Rest of candidates were served through substituted service for which public notice was published in the daily "The Tribune" on 21.03.2012.

8. A counter affidavit was also filed by the Commission opposing the writ petition. Learned Single Judge had also called for the original record from the Commission which were produced by the Commission before the Court.

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.*

(AUGUSTINE GEORGE MASH)

JUDGE

11.09.2012"

10. LPA No.1594 of 2012 and several other LPAs were filed before the Division Bench challenging the judgment dated 11.09.2012. Apart from LPAs filed by selected candidates, few of the LPAs were also filed by some of the writ petitioners they being partly dissatisfied by the order of the Single Judge as the issue of ineligibility and disqualification of selected candidates expressly raised by them have not been gone into by learned Single Judge.

11. The State of Haryana as well as Haryana Staff Selection Commission had also filed LPA challenging the judgment of the learned Single Judge. All the LPAs were heard and decided by the Division Bench vide its judgment dated 30.09.2013. The Division Bench upheld the order of learned Single Judge. Operative portion of the judgment of the Division Bench dated 30.09.2013 is as follows: -

*"54) For the reasons afore-stated, we uphold the decision of the learned Single Judge and consequently: -*

*i) LPA Nos. 1841 and 1903 of 2012 filed by the Haryana Staff Selection Commission are*

*dismissed with cost of Rs.50,000/- each to be deposited with the High Court Legal Services Committee within a period of one month;*

*ii) LPA No.1562, 1831 to 1839, 1842 to 1855, 1879 to 1902, 1904 to 1917, 1997, 2002, 2028 of 2012; 248 & 262 of 2013 jointly filed by the State of Haryana and the Haryana Staff Selection Commission are dismissed with cost of Rs. 10,000/-in each case to be deposited with the High Court Legal Services Committee within one month;*

*iii) LPA Nos. 1555,1557,1592,1594, 1856 to 1860, 1870 to 1878, 1918 to 1920, 1950 of 2012; 529 of 2013 filed by the selected candidates are dismissed with cost of Rs.10,000/- each to be deposited in the High Court Lawyer Welfare Fund within one month;*

*iv) LPA Nos. 1595, 1760,1967,2194 of 2012; and 303 of 2013 filed by the writ petitioners are disposed of in the light of the observations made in para- 53 of this Court;*

*55) Photostat copies of the four files containing original notings and decisions taken by the Commission or its Chairman from time to time, the decision dated 03.08.2008 have been retained and shall be kept as a part of the judicial record. The original record be returned to the Commission under receipt.*

*56) Ordered accordingly. Dasti."*

12. These appeals have been filed by the selected candidates whose selection had been set aside by learned Single Judge and affirmed by the Division Bench. The State of Haryana as well as Haryana Staff Selection Commission had also filed Special Leave to Appeal being SLP(Civil) No. 11143-11210 of 2014 which was disposed of by this Court by following order dated 30.07.2014: -

*"Delay condoned.*

*The issue arising in this group of special leave petitions is pending before this Court in SLP(C) No.35373 of 2013 etc. filed at the instance of selected candidates. All the questions raised herein would be open to the petitioner State to be urged in SLP(C) No. 35373 of 2013. In that view of the matter, we do not consider it necessary to issue formal notice in these special leave petitions. Accordingly, they are not being entertained. The special leave petitions are disposed in terms of the above."*

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.”*

16. Matter was further heard by this Court on 29.01.2020 when following order was passed:-

*“We have heard learned counsel for the parties.*

*Learned counsel appearing for the Commission has placed before us further original records i.e. File No.1 containing correspondence and another original file. On the earlier occasion learned counsel for the Commission has produced the original records which we have noticed in our order dated 23.01.2020. The register containing marking by expert member of the Commission were produced from which it appears that the expert member has graded the candidates in A, B and C category whereas the member of the Commission has given marks out of 30. On our query as to whether there was any guidelines to reflect the evaluation by the Commission member or how both were to be correlated, learned counsel for the Commission could not give any reply.*

*Learned counsel for the petitioners has further submitted that in above facts situation, Commission be directed to file an affidavit explaining the relevant procedure and the guidelines, if any, with regard to selection in question and other selection at the relevant time. With regard to letter dated 03.08.2008, which was produced in an envelope on the last occasion, learned counsel for the Commission submitted that the said letter as well as the proceeding sheets are not on the original records which have been produced today.*

*Learned counsel for the respondents, who were writ petitioners, submits that the State Government may also be directed to give details of the vacancies, existing as on date in*

*the relevant PTI Cadre.*

*We allow two weeks time to the learned counsel for the Commission to file an affidavit giving details as indicated above after serving the same on the learned counsel for the petitioners, who may also file response thereof within a week thereafter.*

*List on 26.02.2020."*

17. In pursuance of the order of this Court dated 29.01.2020, an affidavit dated 11.02.2020 sworn by Isha Kamboz, Secretary, Haryana Staff Selection Commission, has been filed.

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 Viva- voice 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.

24. Shri Manoj Swarup, learned senior counsel appearing for the respondent writ petitioners submits that the writ petitioners were unaware of the criteria which was to be applied by the Commission in the Selection and they came to know about the criteria of 60 marks for Academics Qualifications and 30 marks for Interview only by final result dated 10.04.2010 when it was mentioned in the final result.

25. The Commission could not have held any selection without declaring the criteria beforehand. The written examination which was re-notified on 11.06.2008 was not proceeded with without any valid reason. Written examination is sure mode of finding out merit in the candidates and looking to number of the candidates which was more than 20,000, the Commission has rightly taken a decision to hold a written test of 200 marks and interview of 25 marks which ought to have adhered by the Commission.

26. The Commission never informed the candidates that no written examination shall be held. The High Court had summoned the original records and found out from the original records that those candidates who were meritorious as per the qualification and academic marks were deliberately given marks ranging from 7 to 13 so that they may go out of the Select list. Those candidates who had poor academic records were given marks in interview ranging from 18 to 28 so that they may get selected.

27. The Commission after taking a decision on 30.06.2008 not to hold the written examination, decided to shortlist the candidates for interview on the basis of marks obtained by them in the academics and educational qualification and called the candidates 8 times of the number of vacancies. Minimum marks were also prescribed for candidates to be called in the interview. The Commission subsequently did not even adhere to their notification dated 11.07.2008 and decided to call all eligible candidates for interview with intend to help those who could not have come in the criteria of 8 times of the number of vacancies on the basis of Academic record.

28. The Commission from the very beginning has proceeded in a manner which indicate that the merit criteria was deliberately given up to accommodate favourites. The entire selection has rightly been set aside by learned Single Judge and affirmed by the Division Bench. The respondent writ petitioners were meritorious and deserved selection in event the Commission could have proceeded to examine the candidates on merit and as per the criteria of holding written examination or screen the candidates 8 times of the number of vacancies. The petitioner after coming to know about the criteria from the result dated 10.04.2010 immediately filed writ petition in May, 2010 challenging the criteria. The undue delay in declaring the result i.e. one and a half year creates doubt about the fairness of the Commission in declaring the result.

29. Shri Swarup submits that entire selection having scrapped by the High Court, this Court

may direct for holding of fresh selection enabling the petitioners to participate and get selected on their merit. It is submitted that continuance of appellants on the basis of interim order should not be given any credence. The Commission in conducting the selection on the post of PTI has not acted as per norms and requirement of law. Decision to scrap the written test and further not to hold the written test and all the subsequent steps having taking by Chairman, who alone was not competent to take decision, were without authority of law. It is submitted that decision dated 03.08.2008 on which the reliance has been placed by the Commission was never taken on 03.08.2008 and when the learned Single Judge asked for the criteria, the letter dated 03.08.2008 was prepared and got signed by all the members and submitted in the High Court. The High Court has rightly refused to believe that criteria was formulated on 03.08.2008 by the Commission.

30. Learned counsel for the Commission as well as State of Haryana submits that criteria which was applied of 60 marks and 30 marks was the criteria which was earlier applied also in 2003. It was submitted that insofar allocation of marks by member and expert there are no guidelines or materials to indicate how the marks were awarded in the viva-voce. He further submits that in view of the Haryana School Education (Group-C) State Cadre Service Rules, 2012, the post of PTI is converted as TGT and PTI have become a dying cadre. He submits that at present there are no vacancies on the post of PTI which has been declared as dying cadre. Fresh selection can only be held for the post of TGT (Physical Education) for which qualifications have also been changed.

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 viva- voce? 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 viva-voce 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?"*

33. Before we proceed to consider the submissions of the learned counsel for the parties and the points formulated as above, we need to notice the constitution of Haryana Staff Selection Commission, relevant notifications and orders governing its powers and procedures. By notification dated 28.01.1970, the Governor of Haryana, in exercise of power conferred by Article 309 of the Constitution of India constituted the Subordinate Services Selection Board. All appointments to non-gazetted class-III posts under the Haryana Government except appointments of officers and employees of Punjab & Haryana High Court provided for in accordance with Article 229 of the Constitution of India were mandated to be made on the advice of the Board. Vide notification dated 09.12.1997, the words "Subordinate Services Selection Board" were substituted by "Haryana Staff Selection Commission". Vide notification dated 28.07.1998, sub-para (d) of para 6 was substituted, according to which the Commission was empowered to devise the mode of selection and fix the criteria for selection of post for which requisition is sent to it by a Department or an office, as it may deem appropriate and the criteria for selection of posts fixed earlier by the Board/Commission shall be deemed to have been fixed under this sub-paragraph. Vide notification dated 21.06.2007, paragraph 1 was substituted with effect from 20.04.2007, according to which the Commission shall consist of nine members including the Chairman, out of whom a minimum of two members would be such as have held office for at least ten years either under the Government of India or under the Government of the State. In this notification sub-para 4 reads as follows:-

*"(iv) in paragraph 6, for clause (d), the following clause shall be substituted and shall be deemed to have been substituted with effect from 10 th January, 2006, namely:-*

*"(d) methods of recruitment and the principles to be followed in making appointments to the*

*Group B, Group C and Group D posts under the State Government. The Commission shall devise the mode of selection and fix the criteria for selection of posts for which requisition is sent to it by a department of an office, as it may deem appropriate and the criteria for the selection of posts fixed earlier by the Board/Commission shall be deemed to have been fixed under the clause.”*

34. As per notifications mentioned above, the Commission was empowered to devise the mode of selection and fix the criteria for selection of posts for which request was sent to it by department or an office. Sub-paragraph 4 of the notification dated 20.04.2007 as extracted above, which was substituted w.e.f. 10.01.2006 empowered the Commission providing that Commission shall devise the mode of selection and fix the criteria for selection of posts and for which request is sent by a department or an office. The selection on various posts was to be conducted as per the criteria fixed by the Commission. There are no separate statutory rules providing for criteria for recruitment for different posts including the post of PTI with which we are concerned in these appeals.

35. We having noticed that the power is vested in the Commission to fix the criteria for selection, we now proceed to consider points for determination.

#### **Point Nos.1 and 2**

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.

37. The proposition that a candidate, who participates in a selection without a demur taking a calculated chance to get selected cannot turn around and challenge the criteria of selection and the constitution of the selection committee is well settled. The appellants have placed reliance on judgment of this Court in *Madan Lal and Others Vs. State of J&K and Others*, (1995) 3 SCC 486 ; *K.A. Nagamani Vs. Indian Airlines and Others*, (2009) 5 SCC 515 ; *Manish Kumar Shahi Vs. State of Bihar and Others*, (2010) 12 SCC 576 ; *Madras Institute of Development Studies and Another Vs. K. Sivasubramaniyan and Others*, (2016) 1 SCC 454 and *Ashok Kumar and Another Vs. State of Bihar and Others*, (2017) 4 SCC 357.

38. In *Madan Lal and Others*(supra), this Court laid down following in paragraph 9:-

*“9. ....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, 1986 Supp SCC 285, 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.”*

39. The above proposition has been reiterated in other judgments of this Court noted above. In the present case, whether the respondents-writ petitioners are estopped from challenging the selection? While noticing the facts of the case, we have noted above that both appellants and the respondents had submitted applications in pursuance of advertisement dated 28.07.2006 No.6/2006. In advertisement, it was provided that the Commission may shortlist the candidates for interview by holding a written examination or on the basis of a rational criteria to be adopted by the Commission. The Commission on 28.12.2006 published the criteria for calling the candidates for interview. Notice dated 28.12.2006 provided that written examination shall be held for post of PTI on 21.01.2007, on 100 objective type multiple choice questions, each question carrying two marks. The notification also prescribed the minimum qualifying marks- 50% for General category, SC BC and ESM 45% and 25% marks was assigned to the viva voce. The above criteria was implemented and written examination was conducted on 21.01.2007, which examination was cancelled citing complaints regarding malpractices in the written examination. Further notice dated 11.06.2008 was published fixing 20.07.2008 for written examination as per criteria earlier notified. Before the above examination could take place, by public notice dated 30.06.2008, it was cancelled. Another public notice dated 11.07.2008 was published where Commission decided to shortlist eight times the candidates of the advertised post with minimum weightage secured in each category. The said shortlisting was also given up by notice dated 31.07.2009 when it was decided to call all eligible candidates for interview. Commission did not publish any criteria or marks on the basis of which interview was to be held. The criteria, which was published by the Commission on 28.12.2006, 11.06.2008 and 11.07.2008 were given up step by step and no criteria was published for interview, which was scheduled to take place in from 2 nd September to 17 th October, 2008. When Commission had not published any criteria on the basis of which candidates were going to be subjected for selection process and the candidates participated in the selection without knowing the criteria of selection, they cannot be shut out from challenging the process of selection when ultimately they came to know that Commission step by step has diluted the merit in selection. When candidate is not aware of the criteria of selection under which he was subjected in the process and the said criteria for the first time is published along with final result dated 10.04.2010, he cannot be estopped from challenging the criteria of selection and the entire process of selection. Further when the written examination as notified earlier was scrapped and every eligible candidate was called for interview giving a go bye to a fair and reasonable process for shortlisting the candidates for interview, that too only by Chairman of the Commission whereas decision regarding criteria of selection has to be taken by Commission, the candidates have every right to challenge the entire selection process so conducted. This Court in *Raj Kumar and Others Vs. Shakti Raj and Others*, (1997) 9 SCC 527 held that when glaring illegalities have been committed in the procedure to get the candidates for examination, the principle of estoppel by conduct or acquiescence has no application. Referring to judgment of this Court's judgment in *Madan Lal* (supra), this Court laid down following in paragraph 16:-

*“16. ....The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in Madan Lal v. State of J&K, (1995) 3 SCC 486 and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the Selection Board or the method of selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action taken by the Government are not correct in law.”*

40. One more judgment of this Court which supports the view taken by the High Court is Bishnu Biswas and others Union of India and others, (2014) 5 SCC 774. An advertisement was published calling applications for appointment to the post of Group D staff. The Recruitment Rules only provided for a written examination having 50 maximum marks. After holding written examination notice was issued calling the successful candidates for interview. Although such interview was not part of the recruitment process, a select list was published which was challenged in the Tribunal. The Tribunal returned a finding that the manner in which marks have been awarded in the interview to the candidates indicated lack of transparency. The High Court upheld the reasoning of the Tribunal but modified the order to the extent of continuing the recruitment process from the point it stood vitiated. This Court laid down following in paragraphs 19 and 20:

*“19. In the instant case, the rules of the game had been changed after conducting the written test and admittedly not at the stage of initiation of the selection process. The marks allocated for the oral interview had been the same as for written test i.e. 50% for each. The manner in which marks have been awarded in the interview to the candidates indicated lack of transparency. The candidate who secured 47 marks out of 50 in the written test had been given only 20 marks in the interview while a large number of candidates got equal marks in the interview as in the written examination. Candidate who secured 34 marks in the written examination was given 45 marks in the interview. Similarly, another candidate who secured 36 marks in the written examination was awarded 45 marks in the interview. The fact that today the so-called selected candidates are not in employment, is also a relevant factor to decide the case finally. If the whole selection is scrapped most of the candidates would be ineligible at least in respect of age as the advertisement was issued more than six years ago.*

*20. Thus, in the facts of this case the direction of the High Court to continue with the selection process from the point it stood vitiated does not require interference. In view of the above, the appeals are devoid of merit and are accordingly dismissed. No costs.”*

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.”*

### **POINT NOS.3, 4 AND 5**

42. The selection and appointment on post borne on the State establishment provides an opportunity to citizens of public employment. The personnel who man the civil posts in State apart from carrying out objectives and policies of State also serve as source of sustenance for their families. The selection and appointment on post in the State have to conform to the fundamental rights guaranteed to the citizens under Articles 14 and 16. The objective of a State in selecting persons into public service has always been to select the best and most suitable person. Justice O. Chinnappa Reddy, J. speaking for this Court in *Lila Dhar vs. State of Rajasthan and others*, (1981) 4 SCC 159, had laid down that open competition has been accepted universally as the gateway to public services. In paragraphs 4 and 5 following has been laid down:

*“ 4. The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.*

*“The ideal in recruitment is to do away with unfairness.*

*Competitive examinations were the answer to the twin problems represented by democracy and the requirements of good administration. They were the means by which equality of opportunity was to be united with efficiency.... By this means favouritism was to be excluded and the goal of securing the best man for every job was to be achieved.*

*Open competitive examinations are a peculiarly democratic institution. Any qualified person may come forward. His relative competence for appointment is determined by a neutral, disinterested body on the basis of objective evidence supplied by the candidate himself. No one has ‘pull’; everyone stands on his own feet. The system is not only highly democratic, it is fair and equitable to every competitor. The same rules govern, the same procedures apply, the same yardstick is used to test competence.”*

5. How should the competitive examination be devised? The Kothari Committee on Recruitment Policy and Selection Methods in their report said:

*“A system of recruitment almost totally dependent on assessment of a person’s academic knowledge and skills, as distinct from ability to deal with pressing problems of economic and social development, with people, and with novel situations cannot serve the needs of today, much less of tomorrow.... We venture to suggest that our recruitment procedures should be such that we can select candidates who can not only assimilate knowledge and sift material to understand the ramifications of a situation or a problem but have the potential to develop an original or innovative approach to the solution of problems.”*

*It is now well-recognised that while a written examination assesses a candidate’s knowledge and intellectual ability, an interview-test is valuable to assess a candidate’s overall intellectual and personal qualities. While a written examination has certain distinct advantages over the interview-test there are yet no written tests which can evaluate a candidate’s initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity. Some of these qualities may be evaluated, perhaps with some degree of error, by an interview- test, much depending on the constitution of the Interview Board.”*

43. In the above judgment this Court has elaborately considered the merit of selection of written examination as well as usefulness of interview test. The above observations by this Court were quoted with approval by the Constitution Bench of this Court in Ashok Kumar Yadav and others vs. State of Haryana and others, 1985(4) SCC 417. In paragraph 23 following was laid down:

*“23. This Court speaking through Chinnappa Reddy, J. pointed out in Lila Dhar v. State of Rajasthan that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case.....”*

44. After the advertisement of the vacancies of PTI, the Commission issued a public notice on 28.12.2006 deciding to hold a written examination of 200 marks and viva voce test of 25 marks to select the best suitable candidates for 1983 posts of PTI. The public notice further contemplated minimum qualifying marks 50% for general category and 45% for SC and BC and 40% for ESM. The above criteria evolved by the Commission for selection on the posts was implemented by holding the written examination on 21.01.2007 which examination was cancelled after receiving some complaints and reports regarding malpractices in

examination. Even though examination was cancelled but the Commission continued with the same criteria for completing the selection which was so notified on 11.06.2008 again in which examination on the same pattern was to take place on 20.07.2008. On 30.06.2008 a type note by the Superintendent (Recruitment-I) was prepared mentioning that the Chairman had ordered that written test for the posts of DPE, Art and Craft Teacher and PTI, Education Department, Haryana, scheduled to take place, may be “cancelled on administrative reasons”. The note dated 30.06.2008 was approved by the Chairman and he also approved the notice to be published for cancellation of the proposed written examination, neither the note nor the order of Chairman approving the note give any indication of “administrative reasons” for cancellation of the examination. Another important change which was effected in the criteria for selection was the notification with the approval of a note dated 10.07.2008 which mentioned that the worthy Chairman had issued oral direction that in respect of advertisement No.6 of 2006 Category No.23, candidates are required to be short-listed 8 times of the vacancy and called for interview. Short-listing was to be done on the percentage of the marks of the candidates with minimum percentage mentioned therein. The Chairman on 11.07.2008 approved the notice to be published in the Newspapers with detail regarding short-listing of the candidate’s category wise with minimum percentage. The above criteria was also given up when another note dated 31.07.2008 was approved by the Chairman where the Chairman decided that all the eligible candidates be called for interview changing the earlier criteria. The interview was fixed between 02.09.2008 and 17.10.2008 and the candidates were interviewed by eight Committees.

45. The above sequence of events indicates that in accordance with the “special instruction” extracted above the Commission decided the criteria for calling the candidates for the selection as holding of written examination of 200 marks and interview for 25 marks which was the perfect criteria looking to the number of the candidates i.e. 20836 who had applied in pursuance of the advertisement for the post of PTI. The criteria was implemented by holding a written test on 21.07.2007 which was cancelled due to some complaints. The written test was again notified for 20.07.2008 which was withdrawn by notice published on 30.06.2008, the earlier criterion was given a go bye by another notification dated 11.07.2008. The above indicates that the standard on which candidates are to be screened for selection was downgraded by Chairman of his own. When the number of candidates who applied against certain posts are enormously large, short-listing has always been treated as an accepted mode to correctly value the work and merit of the candidate. The Division Bench of the High court on the alteration of the mode of selection as noticed above has made following observation in paragraph 37 of the judgment:

*“(37) Thus, even accepting the appellants’ plea that ‘selection criteria’ or ‘mode of selection’ can be altered midstream to short-list the candidates with higher merit, here is a case where the alterations have been designed with the sole object of downgrading and not upgrading the standards of selection to public employment.*

*Was the Chairman competent to take policy decisions like ‘selection criteria’ or ‘mode of selection’?”*

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.

47. We may in this context refer to three-Judge Bench judgment of this Court in Tamil Nadu Computer Science BED Graduate Teachers Welfare Society(1) vs. Higher Secondary School Computer Teachers Association and others, 2009(14) SCC 517. In the above case Computer instructors were appointed on [contract](#) basis to various Schools. The Government decided to hold a special test by the Teacher Recruitment Board for selection of computer instructors. On 10.10.2008 the State Government took decision that minimum qualification marks would be 50%. Special Recruitment Test was announced as 12.10.2008. On the night of 12.10.2008 a list of candidates for appointment to the post of computer instructors based on the special recruitment test was put on the Internet. While publishing the said marks of the candidates, it was made clear that all candidates who have secured 35% marks in the test would be called for certificate verification. The State Government reduced the minimum qualifying marks to 35%. This Court did not approve the reduction of *qualifying marks from 50% to 35%. Following was laid down in paragraph 33:*

*“33. We, however, cannot hold that the subsequent decision of the Government thereby changing qualifying norms by reducing the minimum qualifying marks from 50% to 35% after the holding of the examination and at the time when the result of the examination was to be announced and thereby changing the said criteria at the verge of and towards the end of the game as justified, for we find the same as arbitrary and unjustified. This Court in Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 , has held that in recruitment process changing rules of the game during selection process or when it is over are not permissible.”*

48. Learned counsel for the appellant has submitted that judgments of this Court laying down the criteria for selection cannot be changed during the course of selection has been referred to a larger Bench by a judgment of this Court in Tej Prakash Pathak and others vs. Rajasthan High Court and others, 2013(4) SCC 540, hence the judgment of this Court laying down the criteria cannot be changed during the course of the selection is yet to be tested. For the purposes of the present case we proceed on the assumption that even if the criteria can be changed by selecting body from time to time, the said change cannot be affected arbitrarily. The present is a case where change in criteria has been affected and altered arbitrarily with the object of down-grading and not up-grading the standards of selection. The High Court did not commit any error in not upholding the change of criteria effected after start of selection process with which finding we fully concur.

49. The notifications issued under proviso to Article 309 of the Constitution of India specifically provides that the Commission shall devise the mode of selection and fix the criteria for selection of posts. The power to devise the mode of selection and fix the criteria was, thus, entrusted to the Commission. Commission is a multi-member body, which acts collectively. The Commission in the counter affidavits filed before High Court or this Court

has not brought any rules or resolution of the Commission by which power of the Commission to devise the mode of selection and fix the criteria have been delegated to any other member including the Chairman. In Principles of Administrative Law, M.P. Jain & S.N. Jain, 6 th Edition, writes in Chapter XXII states:-

*“When power is conferred on a multi-member body, the power ought to be exercised by the concerned body; the power cannot be exercised either by the chairman alone or by one of its members. This can be done only if the body concerned delegates power to the chairman or a single member to discharge certain functions on its behalf.”*

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 Indurkhya 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.....”*

51. The Division Bench of the High Court after pursuing the original records, which was summoned by it from the Commission has returned a finding that the decision of the Commission dated 30.06.2008, 11.07.2008 as well as 31.07.2008 have all been taken by the Chairman alone, which was proved from original records containing the relevant notes and approval by the Chairman. The alteration of criteria, thus, was sole handi-work of the Chairman, which decision was not the decision of the Commission. It is not even claimed in the affidavit filed before the High Court or before this Court that said decisions were decisions taken by the Commission. The conclusion is, thus, inescapable that criteria for conducting selection for the post of PTI as was published on 28.12.2006 was altered by the Chairman step by step completely giving a go bye to the method of merit selection. The statutory notifications when entrust the Commission to devise the mode of selection and fix the criteria and the Commission being multi- member body, Chairman alone was not competent to alter the mode of selection and the criteria, which was fixed and published for conducting the selection for the post of PTI.

52. Now, we come to the decision dated 03.08.2008, which was a decision fixing the criteria for selection signed by all the members of the Commission, the High Court after minutely looking into the original records has held that in the original records, which was produced before the High Court by the Commission, there is no mention of the criteria for making selection dated 03.08.2008 nor the said one page decision was part of the original records. The said one-page decision was separately produced before the High Court and before us. Learned counsel for the Commission have placed that one-page decision in an envelope

before us also which we have also perused. The Division Bench of the High Court in paragraph 42 has dealt with the decision dated 03.08.2008 and has affirmed the findings of the learned Single Judge that the said decision dated 03.08.2008 was prepared only when learned Single Judge directed the Commission to produce the criteria of selection. Division Bench of the High Court has given weighty reasons for not accepting the claim set up by the Commission that criteria was fixed on 03.08.2008 as claimed. The observations of the High Court in paragraphs 41 and 42 are to the following effect:-

*“(41) It is unfortunate that instead of reversing his unlawful decisions, taken by side-tracking eight other Members (as it was a nine-Member body since 21.06.2007), the Chairman involved those other Members in a mock-drill and flashed a surprise on the learned Single Judge by producing the magical ‘single loose sheet’ of their purported decision dated 03.08.2008 laying down the ‘criteria for selection’.*

*(42) We have also perused the decision dated 03.08.2008 produced in a sealed envelope. We firmly affirm the findings returned by the learned Single Judge to discard the same. We say so for the reasons that (i) various administrative decisions whether taken by the Commission as a multi-Member body (only one such decision found in the Files) or by the Chairman contained in the Files produced before us, are preceded by an ‘Office Note’ or ‘proposal’ and are invariably forwarded by the Secretary of the Commission; (ii) the original record of decisions taken by the Chairman in the last week of September, 2008 or in first week of October, 2008 do not even whisper about any meeting of the Commission held on 03.08.2008 or the decision taken therein; and (iii) the unusual manner in which the ‘loose sheet’ has been prepared casts a serious doubt on its genuineness. The so-called decision dated 03.08.2008 was thus apparently contrived to defeat the cause of the writ-petitioners and to mislead the learned Single Judge, who has rightly held that it was only when he directed to produce the criteria of selection that this ‘loose sheet’ “was prepared and produced in Court”.*”

53. We fully concur with the above findings of the High Court with regard to decision dated 03.08.2008. It is, thus, proved that decision dated 03.08.2008 was prepared by the Commission subsequent to declaration of the result and only when the learned Single Judge directed the Commission to produce the criteria under which the selection for the post of PTI was undertaken.

54. As noted above the decision of Chairman of the Commission dated 30.06.2008 not to hold the written examination was claimed to have been taken due to “administrative reasons”, but what were “administrative reasons” have never been disclosed or brought on record by the Commission. The decision to change the selection process as notified on 28.06.2006 was a major decision not only affecting the applicants who had to participate in the selection on the basis of criteria as notified on 28.12.2006 but had adverse effect on merit selection as devised for 1983 posts of PTI.

55. As per advertisement dated 20.07.2006, the Commission had published the criteria for selection on 28.12.2006 which was implemented also, hence, there was no occasion to give up the merit selection in midway. Further, when no reasons are forthcoming to support the

so called 'administrative reasons' in the decision dated 30.06.2008 which was so stated by Chairman for the scrapping the written test, we have to hold the said decision arbitrary and without reason. The written test consisting of 100 objective type of multiple choice questions out of which 60 questions relating to academic knowledge of the respective subjects including skill and method of teaching ability and 40 questions relating to general knowledge, general English and Hindi upto matric standard was well thought screening test, easy to conduct and easy to evaluate. The Commission being recruiting body abdicated its obligation of screening out the best candidates; The competitive examination, are means by which equality of opportunity was to be united with efficiency. By the above method favouritism was to be excluded and the goal of securing the best man for the job was to be achieved. We, thus, conclude that decision dated 30.06.2008 for not holding the written examination and steps taken consequent thereto were all arbitrary decisions, unsustainable in law.

56. At this stage we may note one more submission of Shri Kapil Sibal. Shri Sibal submits that when the Commission published notice dated 30.06.2008 that no written test shall be held, the writ petitioners ought to have challenged the above decision and the petitioners should have insisted that written examination may be held. They having not raised any challenge, at this stage, cannot be permitted to say that written test ought to have been held.

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.

58. In view of the foregoing discussions, we answer point Nos.3,4 and 5 in following manner: -

Ans.3:

The decisions dated 30.06.2008, 11.07.2008 and 31.07.2008 were arbitrary decisions without any reason to change the selection criterion published on 28.12.2006 which have effect of downgrading the merit in the selection.

Ans.4:

The Commission being a multi-member body, all decisions pertaining to mode of selection and criteria was to be taken by the Commission itself, there being no rules or resolution delegating the said power to Chairman or any other member.

The decision of not holding written examination dated 30.06.2008, decision to screen on the basis of eight times of vacancies and percentage of marks dated 11.07.2008 and decision dated 31.07.2008 to call all eligible candidates, were all decisions taken by the Chairman himself, which decisions cannot be said to be decisions of the Commission.

Ans.5:

The decision dated 03.08.2008 was never taken on 03.08.2008 as claimed and the said resolution was prepared subsequent to declaration of the result when the learned Single Judge asked for criteria of the selection, which was produced in a separate loose sheet signed by all members.

Point No.6

59. Shri Kapil Sibal, learned senior counsel has emphatically submitted that in the writ petitions, there are no allegations of mala fide against the Chairman or any member of the Commission and further neither Chairman nor any members being impleaded as party respondent by the writ petitioner, the petitioners could not have challenged the allocation of marks in viva voce and there was no basis for any claim that marks in the viva voce of candidates having high academic qualification were deliberately reduced and those, who had poor academic records were deliberately given marks between 20 to 27 in the viva voce. Shri Kapil Sibal has placed reliance on judgment of this Court in *Ratnagiri Gas and Power Private Limited Vs. RDS Projects Limited and Others*, (2013) 1 SCC 524, where this Court has laid down that the law casts a heavy burden on the person alleging mala fides. This Court has further laid down that when the petitioners alleges malice in fact, it is obligatory for the petitioner to furnish particulars and implead the persons against whom such malice in fact is alleged. In paragraphs 25, 26.1, 26.2 and 27, following has been laid down:-

*" 25. ....The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision-maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity.*

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*26.1. In State of Bihar v. P.P. Sharma, 1992 Supp. (1) SCC 222, this Court summed up the law on the subject in the following words: (SCC p. 260, paras 50-51)*

*"50. 'Mala fides' means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or*

*contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely, (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.*

*51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.”*

*(emphasis supplied)*

*26.2. We may also refer to the decision of this Court in Ajit Kumar Nag v. Indian Oil Corpn. Ltd., (2005) 7 SCC 764 where the Court declared that allegations of mala fides need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The Court observed: (SCC p. 790, para 56)*

*“56. ... It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is ‘very heavy’. (Vide E.P. Royappa v. State of T.N., (1974) 4 SCC 3 ) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800 (SCC p. 802, para 2): ‘It (mala fide) is the last refuge of a losing litigant.’”*

*27. There is yet another aspect which cannot be ignored. As and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him.....”*

60. There cannot be any dispute to the above proposition 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 well- known 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 non- selected 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.

### **Point No.7**

64. The learned Single Judge in the impugned judgment while allowing the writ petition issued following directions: –

“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 11.4.2010 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.”

65. Learned counsel appearing for the Commission and for the State of Haryana submitted that no fresh selection can be conducted on the post of PTI in view of the statutory rules namely, Haryana School Education State Cadre Service Rules, 2012, he submits that in the affidavit, which has been filed by the Commission on 11.02.2020, in paragraph 4, following has been stated:-

*“4. That so far, the details of the vacancies existing as on date in the relevant PTI Cadre, the Haryana Staff Selection Commission wrote a letter to Department of School Education to get the status of existing vacancies in PTI Cadre. In response to above said letter, the Department of School Education provided the following response and the operative part of said response is reproduced as follows:-*

*“In this regard, it is submitted that the Classical & Vernacular (C&V) cadre which includes the appointment of PTI also has been declared diminishing cadre by the Government of Haryana by way of notifying the Haryana School Education (Group-C) State Cadre Service Rule, 2012 vide notification No. GSR- 12/Const./Art.309/2012 dated 11.04.2012. The operative part of these rules, defined in Rule- 9(5) is relevant to be detailed herein:-*

*The present Classical & Vernacular (C&V) cadre consisting of the posts of Sanskrit Teachers, Hindi Teachers, Punjabi Teachers, Physical Training Instructors (PTIs), Art & Craft Teachers (Drawing Teachers), Tailoring Teachers and Tabla Players and governed by the Haryana State Education School Cadre (Group C) Service Rules, 1998 shall be converted to TGT in relevant subject and no further requirement shall be made to these categories when the present incumbent on the notification of these rules vacate the post on his promotion, retirement or any other purpose.*

*Since all the vacancies which were in existence on 11.04.2012 have already been converted in TGT cadre and further the vacancy came into existence due to promotion, retirement or any other ground of a PTI has also got converted in TGT cadre, therefore, there exists no post of PTI now.*

*The latest status of vacancies of PTI is submitted for consideration and further action thereon.”*

66. Elaborating his submission, learned counsel submits that the post of PTI is a dying cadre and now under Rules, 2012, there is post of TGT (Physical Education), which has higher qualifications, i.e., Graduate with Physical Education from a recognised university. He submits that all posts of PTI have been converted into TGT, thus, fresh selection, if any, can be only on the post of TGT (Physical Education). He has also referred to Rule 9(5) of Rules, 2012, which is to the following effect:-

*“9(5). The present Classical & Vernacular (C&V) Cadre consisting of the posts of Sanskrit Teachers, Hindi Teachers, Punjabi Teachers, Physical Training Instructors (PTIs), Art & Craft Teachers (Drawing Teachers), Tailoring Teachers and Tabla Players and governed by the Haryana State Education School Cadre (Group C) Service Rules, 1998 shall be converted to*

*TGT in relevant subject and no further recruitment shall be made to these categories when the present incumbent on the notification of these rules vacate the post on his promotion, retirement or any other purpose.”*

67. Rule 2(h) defines TGT in following words:-

*“(h) “TGT” means Trained Graduate Teacher in the relevant subject appointed after notification of these rules and shall include masters appointed before notification of these rules;”*

68. Rule 9(1) deals with recruitment in the services. Rule 9(1)(j), which is relevant for the present case as follows:-

*“(j) in the case of TGT Physical Education (PT Master),*

*(i) 67% by direct recruitment on contract basis; and*

*(ii) 33% by Promotion from PTIs; or*

*(iii) by transfer or deputation of an official already in service of any State Government, Government of India;”*

69. When the rule contemplates filling up of the post of TGT (Physical Education) by 33% by promotion from PTI, PTI continues in the establishment, who can be promoted as TGT (Physical Education). The submission cannot be accepted that all PTI in block have been upgraded as TGT (Physical Education). Had the rule contemplated such result, there was no question of filling up TGT (Physical Education) by 33% by promotion from PTI. This court had occasion to examine Rules, 2012 in State of Haryana and Another Vs. Sandeep Singh and Others, (2019) 6 SCC 453. A writ petition was filed in the High Court by a teacher occupying the post of Drawing Teacher, he claimed that Drawing Teacher has been converted into Trained Graduated Teacher (TGT) under Rule 9(5), hence, the writ petitioners were also entitled to be promoted from the day their juniors were promoted as Trained Graduate Teachers. This Court examined the Scheme of Rules, 2012 elaborately and following was laid down in paragraphs 19 and 20:-

*“19. The entire argument of the appellants is based upon the expression used that C&V teachers governed by the 1998 Rules shall be “converted to TGT in relevant subject”. The question is whether such C&V teachers stand upgraded to the post of TGT though, their promotion channel under the 1998 Rules was to the post of Master which alone has been treated as TGT as defined in Rule 2(h) of the 2012 Rules and in view of express language of Rule 7 which mandates that the appointment shall be made to the post of TGT only in accordance with the qualifications prescribed in the 2012 Rules.*

*20. The reading of the Rules would show that C&V teachers are treated to be TGT so as to avoid anomalous situation where the C&V teachers after the commencement of the 2012 Rules would not be governed by any set of Rules. Therefore, the expression that such C&V teachers stand converted to TGT is only to facilitate their service conditions to be governed*

*by the 2012 Rules rather than to upgrade the C&V teachers as members of TGT cadre. The feeder and the promotional cadre cannot be treated on a par by virtue of the expression used in Rule 9(5) of the 2012 Rules that the C&V teachers shall be converted to TGT. Such conversion is only for a limited purpose of the 2012 Rules being extended to them and that such C&V teachers do not become member of the "cadre" eligible for promotion as Elementary School Headmaster. Rule 9(5) of the 2012 Rules does not use the word "cadre". Therefore, such teachers cannot be treated to be part of TGT cadre. Such interpretation is further supported by the fact that C&V Teacher is a dying cadre and no further recruitment is to be made in these categories."*

70. This Court in the above judgment has held that there is no automatic conversion, upgradation of C&V Teachers into TGT and only to facilitate their service conditions, they are to be governed by Rules, 2012.

71. We in the present case are concerned with a selection, which was undertaken in pursuance of advertisement No.6/2006 for 1983 posts of PTI, result of which selection was declared on 10.04.2010. Challenge was made to the said selection in various writ petitions, which writ petitions were allowed by learned Single Judge vide judgment dated 11.09.2012. The selection dated 10.04.2010 was set aside, quashed and the Commission was directed to hold a fresh selection within a period of five months. When the selection was set aside for the post of PTI, the fresh selection ought to be held as per the advertisement No.6/2006 and process of recruitment initiated with the advertisement No.6/2006 has to be brought to its logical end and for the purpose of selection in pursuance of advertisement No.6/2006, Rules, 2012 shall not come into way. We may also notice Rule 20 of Rules, 2012, which is to the following effect:-

*"20. The Haryana State Education School Cadre (Group-C) Service Rules, 1998, amended from time to time in so far as they are applicable to the posts included in the Service are hereby repealed:*

*Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under corresponding provisions of these rules."*

72. The selection on the post of PTI vide advertisement No.6/2006 was under the statutory rules then existing and selection process, which has been initiated under erstwhile rules was to be continued and had not to be scrapped as is clear from the Scheme of Rules, 2012. In any view of the matter, when the selection for 1983 posts of PTI was set aside and the High Court directed to hold a fresh selection, the selection process was to be continued and completed under the orders of the High Court. We, thus, reject the submission of the learned counsel for the Commission and the State that fresh selection cannot be held as per direction of the learned Single Judge affirmed by the Division Bench. We, however, are of the view that selection initiated vide advertisement No.6 of 2006 has to be proceeded further from the stage the criterion was arbitrarily changed by the Chairman. The completion of selection has to be only from amongst the candidates who had applied against post of PTI, including those who were selected.

73. The learned Single Judge after quashing the select list published on 11.04.2010 directed for fresh selection on post of PTI. The learned Single Judge, however, did not issue appropriate consequential directions for holding the fresh selection. There was no defect in the advertisement dated 20.06.2006 and mode of selection as envisaged by public notice dated 28.12.2006. The arbitrariness crept thereafter from the stage of scrapping the written test scheduled to take place on 20.07.2008. The directions ought to have been issued to complete the process from that stage i.e. the stage of holding the written test. All the candidates who had applied for the post of PTI including those selected, ought to have been permitted to take the written test. We need to clarify that in the facts of the present case there was no requirement of fresh advertisement and inviting fresh applications. In the event fresh applications are called, large number of applicants who participated in the selection would have become over age. All the applicants who had applied in response to advertisement No.6 of 2006 had right to participate in selection as per criterion notified on 28.12.2006. The direction of learned Single Judge needs modification and clarification to the above effect.

74. We may also notice one more submission of the learned counsel for the appellant. Learned counsel for the appellant submits that in pursuance of selection dated 10.04.2010, the appellants were appointed and they have now continued for more than nine years and at this juncture, it is not equitable to throw out them from their posts. In the present case, result of the selection dated 10.04.2010 was published on 11.04.2010 and the writ petitions were filed in May, 2010 itself, i.e., immediately. Selection was set aside by learned Single Judge on 11.09.2012. The continuance of the appellants is only by way of interim order. This Court has also passed an order on 29.11.2013 for maintaining status quo, which order has been continued till this date. When the continuance of a person on a post is by virtue of an interim order, the continuance is always subject to outcome of the litigation. The displacement of appellants from their posts is inevitable consequence of upholding of the judgment of the High Court. A Constitution Bench of this Court in C. Channabasavaih Etc. Etc. Vs. State of Mysore and Others, AIR 1965 SC 1293 has made following observations in paragraph 9 in such a situation, which is beneficial to record, is as follows:-

*“9. It is very unfortunate that these persons should be uprooted after they had been appointed but if equality and equal protection before the law have any meaning and if our public institutions are to inspire that confidence which is expected of them we would be failing in our duty if we did not, even at the cost of considerable inconvenience to Government and the selected candidates do the right thing.....”*

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.”*

76. We, thus, while upholding the judgments of the High Court, subject to the modifications as above, dispose of these appeals.

77. Before we close, we record our appreciation to learned counsel for the parties, who have rendered valuable assistance to the Court in deciding these appeals.