A ARUNACHAL PRADESH PUBLIC SERVICE COMMISSION & ANR.

v.

TAGE HABUNG & ORS.

(Civil Appeal No. 4168 of 2013)

B MAY 1, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

ARUNACHAL PRADESH PUBLIC SERVICE
C *COMBINED COMPETITIVE EXAMINATION RULES, 2001:*

r.11 read with r. 12 - Fixing of minimum qualifying marks subsequent to the advertisement - Held: Rule does not mandate the Commission to fix and to disclose minimum
D *qualifying marks in Preliminary Examination and Main Examination either in the advertisement or before conducting the examination - After the two examinations, Commission is empowered to shortlist the candidates and to summon them for an interview for personality and other tests - Power*
E *exercised by the Commission under r.11 fixing the qualifying marks in the written examination in the process of conducting the recruitment test cannot be interfered with by the Court - However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been*
F *done by it.*

The appellant State Public Service Commission issued an advertisement dated 25.7.2006 inviting applications through Combined Competitive Examination to various Group A and Group B posts under the State
G **Government. Prior to completion of main examination, the State by O.M. dated 7.1.2008 declared the cut-off marks as 33% or more for all subjects in each written examination. The Commission adopted the OM by its**

H

decision/Notification dated 16.4.2008. The Division Bench of the High Court, held that OM dated 7.1.2008 and the Notification dated 16.4.2008 could not be made operative in the midst of continuation of the selection process which was initiated pursuant to advertisement dated 25.7.2006.

In the instant appeal filed by the Commission, the question for consideration before the Court was: whether after commencement of recruitment process, the appellants were justified in fixing the minimum 33% qualifying marks in all the subjects in order to appear in the viva voce test.

Allowing the appeal, the Court

HELD: 1.1 On perusal of r. 11 of Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001, it is manifest that the Commission reserves its right to fix at its discretion the minimum qualifying marks both in the Preliminary Examination and the Main Written Examination. It empowers the Commission to fix minimum qualifying marks for the purpose of shortlisting the candidates for interview. The Rule does not mandate the Commission to fix and to disclose the minimum qualifying marks in the Preliminary Examination and Main Examination either in the advertisement or before conducting the examination. After the two examinations, the Commission is empowered to shortlist the candidates and to summon them for an interview for personality and other tests. However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been done by it. As per r. 12, after the interview the candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate in the main examination (written examination and interview put

A together). [para 14 and 29] [1148-F-H; 1149-A-B; 1159-F-G]

1.2 It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some B criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview. [para 28] [1159-D-E]

C *A.A. Calton vs. The Director of Education & Anr.* (2) SCR 598 = AIR 1983 SC 1143; *K.H. Siraj vs. High Court of Kerala & Ors.*, 2006 (2) Suppl. SCR 790 =(2006) 6 SCC 395; *Hemani Malhotra Etc. vs. High Court of Delhi*, 2008 (5) SCR 1066 = (2008) 7 SCC 11; and *Union of India & Ors. vs.* D *S. Vinodh Kumar & Ors.*, 2007 (10) SCR 41 = (2007) 8 SCC 100 - referred to.

Sushil Kumar Ghosh vs. State of Assam & Others 1993 I1) GLR 315 - held inapplicable.

E 1.3 Fixation of qualifying marks as 33% in the written examination cannot be held to be an illegal or arbitrary action of the Commission merely because it was notified in the process of conducting recruitment tests. It was stated on behalf of the appellant-Commission that it has F in the past conducted written examination fixing the cut-off marks in exercise of power under r. 11 of 2001 Rules. The High Court has lost sight of the fact that pursuant to the directions of the Single Judge in his order dated 30.9.2008, the result was declared applying the qualifying G marks as notified in O.M. dated 7.1.2008 and the same was adopted by the Commission. [para 29] [1160-A-C]

1.4 In the considered opinion of the Court, the power exercised by the Commission under r.11 of 2001 Rules, fixing the qualifying marks in the written examination in H

the process of conducting the recruitment test cannot be interfered with by the Court. It is reiterated that there must be some yardstick to be followed by the Commission for the purpose of shortlisting the candidates after the written examination. [para 29] [1159-G-H; 1160-A]

1.5 Although it is desirable that the Commission should fix the minimum qualifying marks in each written examination, but in the instant case the power exercised by the Commission in recruiting the candidates to secure qualifying marks cannot be interfered with. [para 30] [1160-D]

Inder Parkash Gupta vs. State of J&K & Others, **2004 (1) Suppl. SCR 453 = 2004 (6) SCC 786 - referred to.**

Case Law Reference:

1983 (2) SCR 598	**referred to**	**para 5**
1993 I1) GLR 315	**held inapplicable**	**para 20**
2006 (2) Suppl. SCR 790	**referred to**	**para 24**
2008 (5) SCR 1066	**referred to**	**para 25**
2004 (1) Suppl. SCR 453	**referred to**	**para 26**
2007 (10) SCR 41	**referred to**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4168 of 2013.

From the Judgment and order dated 07.01.2009 of the High Court of Guwahati, Assam in WPC No. 4902 of 2008.

Ginny J. Rautray, Kanchan Kaur Dhodi, Chetna Bhardwaj, Avijit Bhattacharjee, Sarbani Kar, Anil Srivastav, Rituraj Biswas for the appearing parties.

The Judgment of the Court was delivered by

A **M.Y. EQBAL, J.** 1. Leave granted.

2. This appeal is directed against the judgment and order dated 7th January, 2009 passed by a Division Bench of the Gauhati High Court on a reference made to it by the Hon'ble Chief Justice pursuant to the order dated 19th November, 2008 of a learned Single Judge to answer the question as to whether the Office Memorandum dated 7th January, 2008 issued by the Government of Arunachal Pradesh and adopted by the Arunachal Pradesh Public Service Commission on 16th April, 2008 prescribing cut-off marks of 33% or more to be secured in each written examination papers in the Arunachal Pradesh Public Service Combined Competitive Examination (Main) 2006-07 (in short, "the Main Examination") conducted by the Arunachal Pradesh Public Service Commission for recruitment into various posts in Grade-A and Grade-B under the Government of Arunachal Pradesh, is permissible after commencement of the recruitment process and applicable to the candidates who already took the Main Examination initiated in pursuance of the advertisement dated 25th July, 2006 for such recruitment.

3. The facts of the case are that the Arunchal Pradesh Public Service Commission (in short, "the Commission") issued an advertisement dated 25th July, 2006 inviting applications for admission to the Arunachal Pradesh Public Service Combined Competitive Examination (Preliminary) 2006-07 for recruitment to Group-A and Group-B posts under the Government of Arunachal Pradesh. A decision was taken by the Commission on 13th June, 2007 fixing a minimum cut-off marks at 40% in English as qualifying marks or as would be decided by the Commission in every written examination for recruitment to the posts and a notification to that effect was issued on 2nd July, 2007. The Main Examination commenced on 26th December, 2007 and the Commission vide its Notification dated 11th July, 2008 published a list of candidates who had qualified in General English by securing 40% marks.

However, prior to the completion of the Main Examination, an Office Memorandum dated 7th January, 2008 (in short, "the O.M.") had been issued by the State Government declaring the cut-off marks as 33% or more for all subjects in each written examination.

4. The unqualified candidates filed a writ petition being W.P. No. 271 (AP) of 2008 on 25th July, 2008 challenging the decision dated 13th June, 2007 of the Commission and the Notification dated 11th July, 2008 publishing the list of candidates who had qualified in General English by securing 40% marks. The learned Single Judge of the High Court vide order dated 30th September, 2008 while allowing the writ petition held that the power for fixing the minimum qualifying marks both in Preliminary Examination and Main Examination is in respect of all the subjects/papers and no power has been given under the provision of Rule 11 of Arunachal Pradesh Public Service Combined Civil Service Examination Rules, 2001 to the Commission to fix a minimum qualifying marks in respect of a particular subject/paper. It was directed by the learned Single Judge that the Commission shall evaluate the marks secured by the candidates in all the papers/subjects of Main Examination on the basis of cut-off marks fixed by the State Government by way of policy decision reflected in the aforesaid O.M. and on the basis of evaluation of answer scripts of all the papers/subjects, shall call the candidates for the viva voce test on merit and prepare a final seniority list on merit on the basis of marks secured in the Main Examination consisting written and viva voce tests. In para 12 of the order, the learned Judge observed:-

> "The impugned decision was taken by the commission on 13.06.2007, i.e. after about 4(four) months from the date of conducting the preliminary examination on 02.02.2007 and respondent commission claimed that it has the power to do so under the provision of rule 11 of the rules of 2001. Rule 11 of the aforesaid rules is quoted below:-

A "Candidates who obtain such minimum qualifying marks in the preliminary examination as may be fixed by the commission at their discretion shall be admitted to the main examination and candidates who obtain such minimum marks in the main
B (written) examination as may be fixed by the commission at their discretion shall be summoned by them for an interview for personality and others tests"

The rule contemplates that the commission has to fix
C minimum qualifying marks in the preliminary examination and those candidates who secure the minimum qualifying marks shall be admitted to the main examination. The commission under the aforesaid rule is also required to fix the minimum qualifying marks in the mains (written)
D examination and the candidates who secure such marks shall be called for in the interview for personality and other tests (viva-voce test). The power for fixing the minimum qualifying marks both in the preliminary examination and main examination is in respect of all the subject/papers.
E No power has been given under the provision of the aforesaid rule to the commission to fix a minimum qualifying mark in respect of a particular subject/paper. This rule contemplates that the commission is required to fix the minimum qualifying marks before it holds the
F preliminary examination. In this case, the commission took the decision admittedly after the preliminary examination was conducted which is not at all contemplated under the said rule. In my considered view, the commission is not authorized to take the impugned decision after the
G preliminary examination was conducted i.e. long after the recruitment process had already been set in motion. It is immaterial whether or not the petitioners appeared in the main examination are fully aware of about the decision of the commission requiring the candidates to secure minimum 40% marks in General English paper, the
H

principle of estoppel sought to be applied by the commission to the petitioners is not tenable under the law as the commission sought to implement the decision which is not authorized under the rules." A

5. At this stage, it is worth to mention here that another writ petition being W.P. No. 101 of 2008 had been filed relating to the appointment on the post of Veterinary Officer pursuant to the advertisement dated 19th December, 2006 published by the Commission. The candidates appeared in the written test held in the month of June 2007. However, before declaring the result of the written test, the Government came with a Memorandum dated 7th January, 2008 prescribing that the candidate must secure minimum 33% marks in each written examination and 45% marks in aggregate to be eligible for viva voce test. As the petitioners failed to secure 33% marks in English subject, they were not selected for the oral interview. The main contention of the petitioners' counsel was that the selection criteria cannot be made applicable with retrospective effect. The petitioners relied upon the decision of this Court in *A.A. Calton vs. The Director of Education & Anr.,* AIR 1983 SC 1143. The question that came up for consideration before the High Court was whether the O.M. dated 7th January, 2008 can at all be applied. The High Court vide order dated 24th June, 2008 held that:- B C D E

"9. Be that as it may, the established legal position is that the amendment is always prospective. On the basis of this settled legal position, I hold that the additional criteria evolved under O.M. dated 07.01.2008 shall not be applicable for calling the present Writ Petitioners for viva voce test provided they are otherwise eligible for the interview as per the guidelines and criteria of selection prevailing as on the date of advertisement, i.e. 19.12.2006. F G

10. In the result, the Writ Petition stands allowed. The Respondents more particularly, Respondent No.2, Secretary, APPSC is directed to declare the result of the H

A Writ Petitioners taking into consideration the criteria of selection that was applicable on or before 19.12.2006 and if they fulfill the criteria, they should be called for viva voce test."

B 6. However, in compliance of Court's order dated 30th September, 2008 passed in W.P. No. 271 of 2008, the Commission vide Notification dated 14th October, 2008 published the list of candidates who had secured a minimum of 33% marks in each written examination paper and who had secured 45% marks out of the aggregate total marks in the C written examination papers. Thereafter, the respondents herein filed a writ petition being No. 417 of 2008 (renumbered at Principal Seat as Writ Petition (C) No. 4902 of 2008) challenging the O.M. dated 7th January, 2008. Meanwhile, the Commission completed the selection process and declared the D results of viva voce test vide Notification dated 17th January, 2009 pursuant to which 100 candidates were selected for the posts.

7. In the above-mentioned W.P. No.417 of 2008 as stated E above, the petitioners challenged the O.M. dated 7th January, 2008 on the ground inter alia that the condition to secure 33% in each individual paper to be qualified for the viva voce test unreasonably restricted the right of the petitioners of being tested in the interview. Further case of the petitioners was that while in the advertisement for the Combined Competitive F Examination dated 25th July, 2006 there was no restriction nor there was any restriction in the rule, then such restriction cannot be imposed by the O.M. dated 7th January, 2008. The learned Single Judge, while hearing the writ petition (W.P. No. 417 of 2008) felt that the issue raised can only be resolved after G determining the conflicting views taken in the earlier two writ petitions (W.P. No. 101 of 2008 and W.P. No. 271 of 2008) by the coordinate benches. The learned Single Judge, therefore, requested the Chief Justice to refer the matter to Division Bench. The matter was, accordingly, referred to the H Division Bench.

8. The Division Bench formulated the question as to whether the Office Memorandum dated 7th January, 2008 issued by the Government of Arunachal Pradesh and adopted by the Public Service Commission on 16th April, 2008 prescribing the cut-off marks of 33% or more to be secured in each written examination paper in the Arunachal Pradesh Service Combined Competitive Examination (Main) 2006-07 conducted by the Commission for recruitment into various posts in Grade-A and Grade-B under the Government of Arunachal Pradesh, is permissible after commencement of the recruitment process and applicable to the candidates who already took the Main Examination initiated in pursuance of the advertisement dated 25th July, 2006 for such recruitment. The Division Bench vide impugned judgment and order dated 7th January, 2009 answered the reference as under:-

> "33. From careful consideration of the extensive arguments so advanced on behalf of the parties narrated herein above and also having gone thoroughly the entire material available on record. It is seen that significantly the impugned O.M. dated 07.01.2008 was not published by the APPSC as required under rule 11 of the rules but it was issued by the Government of Arunachal Pradesh itself and the same has also only been adopted by the APPSC vide Notification dated 16.04.2008 and that too after completion of the entire selection process.
>
> 34. Having read and considered both the impugned O.M. dated 07.01.2008 and the notification dated 16.04.2008 which were published after the completion of the main examination and also having regard to the ratio laid down in *A.A. Calton's* case (supra) and *Sushil Kumar Ghosh's* case (supra) we have no hesitation to say that the impugned O.M. dated 07.01.2008 and subsequent adoption of the same vide notification dated 16.04.2008 cannot be made operative in the midst of continuation of selection process which has been initiated pursuant to the advertisement dated 25.072006.

A 35. Situated thus, we do agree with the view expressed in W.P. (C) No. 101(AP) of 2008 disposed of on 24.06.2008 as well as in paragraph 12 of the judgment and order dated 30.09.2008 recorded in W.P. (C) No. 271 (AP) of 2008. We do hold that the impugned O.M. dated B 07.01.2008 shall not come in way of selection of the Writ Petitioners."

9. Before deciding the issue, we would like to refer to the advertisement dated 25th July, 2006, the 2001 Rules, the O.M. dated 7th January, 2008 and the Notification dated 16th April, C 2008.

10. By the advertisement dated 25th July, 2006, applications were invited by Arunachal Pradesh Public Service Commission for admission to the Combined Competitive D Examination (Preliminary) 2006-07 for recruitment to Group A and Group B posts/services of the Government of Arunachal Pradesh. In the said advertisement, the required criteria like eligibility i.e. age limit, educational qualifications, physical standard, physical fitness and other requirements had been E prescribed. Indisputably, there is no mention of minimum marks to be obtained in the Preliminary Examination for being qualified to appear in the Main Examination.

11. In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Arunachal F Pradesh made the Rules regulating the recruitment to certain posts/services, namely, Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001. Rule 2(a) defines the term 'Combined Competitive Examination' which means the examination conducted by the Arunachal Pradesh G Public Service Commission for recruitment to the services and posts mentioned in Schedule-I and includes both the Preliminary Examination and the Main Examination. Rule 3 of the said Rules dealing with Combined Competitive Examination reads as under:-

H

"3(1) Notwithstanding anything contained in the Arunachal Pradesh Civil Service Rules, 1995 the Arunachal Pradesh Police Service Rules, 1989, the Arunachal Pradesh Labour Service Rules, 1991 and any other service Rules relating to services and posts mentioned in Schedule-I, the Commission shall hold Combined Competitive Examination every year for selection of candidate for recruitment to the services in accordance with procedure laid down in the Schedule-II.

(2) The Commission shall, after the main examination, prepare a merit list of candidates and forward such list to the Government for appointment to different services under the respective services Rules."

12. Schedule-II of the Rules provides the procedure for holding the Competitive Examination under the Arunachal Pradesh Public Service Commission Examination Rules, 2001. Rules 11 and 12 which are relevant are quoted hereinbelow:-

"11. Candidates who obtain such minimum qualifying marks in the Preliminary Examination as may be fixed by the Commission at their discretion shall be admitted to the Main Examination, and candidates who obtain such minimum marks in the Main (Written) Examination as may be fixed by the Commission at their discretion shall be summoned by them for an interview for personality and other tests.

(emphasis given)

Provided that the candidates belonging to APST may be summoned for an interview for a Test as stated above by the Commission by applying relaxed standard of less marks upto 10% if it is found by the Commission that sufficient number of candidates from these communities are not likely to be summoned for interview on the basis of general standard in order to fill up

A vacancies reserved for them.

It is further provided that if inspite of relaxed standard sufficient number of candidates of APST Communities is not available the Commission may decide to raise the B percentage of relaxation even higher to the extent considered fair by the Commission if the cut-off marks of general standard is 55% or above.

It is further provided that the candidates applying for the post of Arunachal Pradesh Service and called to the C interview shall be required to undergo physical standard test as prescribed in Appendix-III.

12. After the interview the candidates will be arranged by the Commission in order of merit as disclosed by the D aggregate marks finally awarded to each candidate in the Main Examination (Written Examination and the Interview put together) and in that order so many candidates as are found to be qualified by the Commission at the Examination shall be recommended for appointment upto E such number as may be decided by the Commission keeping in view the number of vacancies.

Provided that the candidates belonging to APST shall be recommended in accordance with provision of Govt. Order No.OM-12/20 dated 10/10/2000."

F

13. The O.M. dated 7th January, 2008 which is relevant reads as under:-

"GOVERNMENT OF ARUNACHAL PRADESH
DEPARTMENT OF PERSONNEL, ADMINISTRATIVE G REFORMS & TRAINING.

ADMINISTRATIVE REFORMS

No. OM-54/2006 Dated: Itanagar, the 7th January, 2008.

H

OFFICE MEMORANDUM

Subject:- Selection of candidates for appearing in Viva-Voce test on the basis of Recruitment Examination - procedure thereof.

It has been brought to the notice of the Government that various appointing authorities are selecting candidates for viva-voce test on the basis of one or two subject of written examination ignoring other equally important papers and without following a uniform pattern. As a result, the ratio of candidates selected per vacancy varies from one examination to other without maintaining common practice on prescription of ratio or cut-off marks even the candidates are selected in the ratio of 1:2:3. The issue was under examination of the Administrative Reforms Department and has found that no such procedure had been laid down earlier nor such procedures have been prescribed in the relevant Recruitment Rules.

After careful examination of the issue and in modification of point No. 2 & 3 of the OM dated 28.08.2006, the Government of Arunachal Pradesh has decided to prescribe the following procedures for all direct recruitment examinations for appointment to Group-A, B & C posts/services under the Government of Arunachal Pradesh -

1) For appearing in the viva-voce test, candidates shall be selected in the ratio of 1:3 (meaning 3 candidates shall be selected for each vacancy or 3 times of the number of vacancies) on the basis of written examination papers. However, ratio of 1:3 shall not apply in case of candidates appearing the written examination is less than 3 times of the number of vacancies. In case of the candidates appearing in the written examination is less than 3 times of the number of vacancies, all the candidates securing

33% of marks in each written examination papers shall be eligible for appearing viva-voce test.

2) The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will further mean that selection for viva-voce test shall be based on the aggregate total marks secured in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any written examination paper shall not be eligible for appearing in the viva-voce test.

3) The Selection Committee or Commission may lower 'the cut of marks' of 45% to certain extent, in case of non-availability of Arunachal Pradesh Scheduled Tribes candidates securing the 'cut off marks'.

Therefore, all the appointing authorities are requested to comply with the above guidelines while conducting recruitment examination for appointment to Group 'A' 'B' & 'C' level of posts/services.

(Y.D. Thongehi)
Secretary (AR)
Government of Arunchal Pradesh"

14. On perusal of Rule 11 of Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001 (in short, "the Rule") it is manifest that the Commission reserve its right to fix at their discretion the minimum qualifying marks both in the Preliminary Examination and the Main Written Examination. The Rule does not mandate the Commission to fix and to disclose the minimum qualifying marks in the Preliminary Examination and Main Examination either in the advertisement or before conducting the examination. After the aforesaid two examinations, the Commission is empowered to

shortlist the candidates and to summon them for an interview for personality and other tests. However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been done by the Commission. As per Rule 12, after the interview the candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate in the main examination (written examination and interview put together).

15. On the basis of the aforesaid O.M. dated 7th January, 2008, a Notification dated 16th April, 2008 was issued by the Commission adopting the said O.M. The said Notification dated 16th April, 2008 is quoted hereinbelow:-

"NOTIFICATION

It is for information of all aspiring candidates that the Govt. Notification No. OM 24-2006 dated 7th January, 2008 under which the criteria for qualifying in any written examination is prescribed as below is accepted and stands enforced for all future examinations to be conducted by this Commission including the written examinations already conducted with immediate effect.

1. For appearing in the viva-voce test candidates shall be selected in the ratio of 1:3 (meaning 3 candidates shall be selected for each vacancy or 3 (three) times of the number of vacancies) on the basis of written examination papers.

   However, ratio of 1:3 shall not apply in case the candidates appearing the written examination is less than 3 times of the number of vacancies. In case of the candidates appearing in the written examination is less than 3 (three) times of the number of vacancies, all the candidates securing 33% of marks in each written examination papers shall be eligible for appearing viva-voce test.

A 2. The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will B further mean that selection for viva voce test shall be based on the aggregate total marks secured in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any of written examination paper shall not C be eligible for appearing in the viva-voce test.

3. The Selection Committee or Commission may lower the 'cut-off marks' of 45% to certain extent, in case of non-availability of Arunachal Pradesh Scheduled Tribe candidates securing the 'cut-off D marks'"

Sd/- (R. Ronya)
Secretary"

E 16. In the meantime, as noticed above, the aforementioned O.M. dated 7th January, 2008 issued by the State Government was challenged in Writ Petition No.101 of 2008 on the ground that the writ petitioners appeared in the written examination held in June 2007 in pursuance of advertisement dated 19th December, 2006 for the post of Veterinary Officers but were F not selected for the interview as they could not obtain the qualifying marks of 33% prescribed in the said O.M. dated 7th January, 2008. The learned Single Judge by judgment dated 24th June, 2008 allowed the writ petition and held that the O.M. dated 7th January, 2008 shall have the prospective effect and G shall not apply to the recruitment process initiated prior to 7th January, 2008.

17. On 11th July, 2008 the Commission after conclusion of the Main Examination published a list of candidates who had H been found qualified in General English paper by securing 40%

marks. The candidates who did not secure 40% marks filed a writ petition being W.P. No.271 of 2008 challenging the result declared on 11th July, 2008 and also the decision of the Commission fixing 40% marks in English subject for the purpose of appearing in the Main Examination. Learned Single Judge in terms of judgment dated 13th September, 2008 allowed the writ petition and quashed the decision dated 13th June, 2007 and directed the Commission to evaluate the marks secured by the candidates in all the papers of Main Examination on the basis of cut-off marks fixed by the State Government in the O.M. dated 7th January, 2008 which subsequently got adopted by the Commission vide Notification dated 16th April, 2008.

18. In compliance of the aforesaid order, result of the Main Examination was declared by the Commission on 14th October, 2008 on the basis of the O.M. dated 7th January, 2008 as per the direction of the Single Judge made in Writ Petition No.271 of 2008.

19. Those candidates who did not even secure 33% marks and whose results were not published filed a writ petition being Writ Petition No.417 of 2008 challenging the O.M. dated 7th January, 2008 on the ground inter alia that the condition to secure 33% in each individual paper to be qualified for the viva voce test unreasonably restricted their right for appearing in the viva voce test. The said writ petition was ultimately referred to the Division Bench for deciding the issue in view of the conflicting decisions taken by the coordinate benches of the High Court in W.P.No.101 of 2008 and W.P. No.271 of 2008. As noticed above, the Division Bench in the impugned order relied upon the decision of this Court in *Calton's* case (supra) and its own decision in *Sushil Kumar Ghosh vs. State of Assam & Others,* 1993 (1) GLR 315 and held that the impugned O.M. dated 7th January, 2008 and its subsequent adoption vide Notification dated 16th April, 2008 cannot be made operative in the midst of the selection process which has

A been initiated pursuant to the advertisement dated 25th July, 2006. The Division Bench consequently held that the impugned O.M. dated 7th January, 2008 shall not come in the way of the writ petitioners.

B 20. Before appreciating the view taken by the Division Bench, we would like to refer the ratio decided in *Calton's* case and *Sushil Kumar Ghosh's* case (supra).

21. In Calton's case, the validity of the appointment of respondent No.2 as the Principal of a College which was a C minority institution was challenged mainly on the ground that the power of the Director to make an appointment had been taken away by reason of the amendment made in the U.P. Intermediate Education Act. Further, the Director could not have appointed respondent No.2 for the post since his selection D had been disapproved earlier by the Deputy Director. This Court although dismissed the appeal observed as under :-

"5. It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, E 1975 taking away the power of the Director to make an appointment under Section 16-F(4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary F intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection under Section 16-F(4) (as it G stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the legislature may pass laws with

H

retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case."

22. In *Sushil Kumar Ghosh's* Case, the High Court reiterated the principles laid down in Calton's Case holding that after the commencement of selection process if the amendment of the rules was made prospectively changing the eligibility criteria, amending the rules would not affect the selection and appointment as the selection process which had already commenced had to be completed in accordance with law as it stood at the time of commencement of the selection.

A 23. With due respect, in our opinion the ratio decided by this Court in Calton's case and reiterated in Sushil Kumar Ghosh's case will not apply in the facts and circumstances of the present case. At the very outset, we agree with the view taken in the instant case that the decision taken by the B Commission vide Notification dated 13th June, 2007 fixing the cut-off marks as 40% in English as qualifying marks was unreasonable and unjustified. However, the decision dated 13th June, 2007 was not given effect because of the subsequent O.M. issued by the State Government dated 7th January, 2008 C and adopted by the Commission vide Notification dated 16th April, 2008. The only question, therefore, that falls for consideration is as to whether the appellants were justified in fixing the minimum 33% qualifying marks in all the subjects in order to appear in the viva voce test. Indisputably, no separate D qualifying marks were prescribed for qualifying in the viva voce test.

24. In the case of *K.H. Siraj vs. High Court of Kerala & Ors.*, (2006) 6 SCC 395, the High Court of Kerala by its Notification dated 26th March, 2001 invited applications for the E appointment to the post of Munsiff Magistrate in the Kerala Judicial Services. Some of the candidates were not selected as they had not secured the prescribed minimum marks in the interview. They challenged the said selection on the ground that in the absence of specific legislative mandate under Rule 7(i) F of the Kerala Judicial Service Rules, 1991 prescribing cut-off marks in the oral examination, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test was violative of the statute. While answering the question, this Court held:-

G "50. What the High Court has done by the notification dated 26-3-2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner

H

irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26-3-2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in *Union of India v. Kali Dass Batish* (2006) 1 SCC 779, wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper."

25. In the case of *Hemani Malhotra Etc. vs. High Court of Delhi,* (2008) 7 SCC 11, an advertisement was made for appointment in the Higher Judicial Service. The advertisement inter alia prescribed the procedure, specially in the matter of securing 55% marks in the written examination for the general candidates and 50% for the reserved category. The written examination was conducted, but the result was not declared. However, the petitioners received letter for appearing in the

A interview. Since the result of the examination was not declared, no merit list of the successful candidates who had passed the written test was displayed and, therefore, the petitioners' case was that they were not in a position to find out the details about the number of candidates who were declared successful in the
B written examination. Meanwhile, the Selection Committee met and resolved to prescribe minimum marks for the viva voce test and the same was approved by the Full Court. Allowing the writ petitions, this Court held :-

C "15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection
D process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.

E

16. The contention raised by the learned counsel for the respondent that the decision rendered in *K. Manjusree* (2008) 3 SCC 512 did not notice the decisions in *Ashok Kumar Yadav v. State of Haryana* (1985) 4 SCC 417 as well as in *K.H. Siraj*
F *v. High Court of Kerala* (2006) 6 SCC 395 and, therefore, should be regarded either as decision per incuriam or should be referred to a larger Bench for reconsideration, cannot be accepted. What is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open
G to the authority making the rules regulating the selection to prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the

H

learned counsel for the respondent. While deciding the case of K. Manjusree the Court noticed the decisions in: (1) *P.K. Ramachandra Iyer v. Union of India;* (1984) 2 SCC 141, (2) *Umesh Chandra Shukla v. Union of India* (1985) 3 SCC 721; and (3) *Durgacharan Misra v. State of Orissa,* (1987) 4 SCC 646 and has thereafter laid down the proposition of law which is quoted above. On the facts and in the circumstances of the case this Court is of the opinion that the decision rendered by this Court in *K. Manjusree* can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

26. In the case of *Inder Parkash Gupta vs. State of J&K & Others* 2004 (6) SCC 786, this Court held as under:-

> "28. The Jammu & Kashmir Medical Education (Gazetted) Services Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the Constitution of India. The said Rules are statutory in nature. The Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of

A shortlisting, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It cannot take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. B Even for the purpose of shortlisting, the Commission cannot fix any kind of cut-off marks. (See *State of Punjab v. Manjit Singh* (2003) 11 SCC 559)."

27. In the case of *Union of India & Ors. vs. S. Vinodh Kumar & Ors.*, (2007) 8 SCC 100, the appellant Railways, C while making recruitment for the post of Gangman fixed cut-off marks separately for general category and reserved category candidates (para 3 of the judgment). However, some of the vacancies remained unfilled because the Railways could not get requisite number of candidates within the cut-off marks. D The competent authority took a specific decision not to lower the cut-off marks because it was not considered to be conducive to general merit of candidates. The question was whether this decision was arbitrary in view of the fact that some of the vacancies remained unfilled. This Court held as under:

E

"10. ... The fact that the Railway administration intended to fix the cut-off marks for the purpose of filling up the vacancies in respect of the general category as also reserved category candidates is evident from the fact that F different cut-off marks were fixed for different categories of candidates. It is therefore not possible to accept the submission that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor G disputed. If the cut-off marks were fixed on a rational basis, no exception thereto can be taken.

11. ... Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary

H

thereof would be that it could not be directed to lower the same. It is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermediate therewith. The jurisdiction of the court in this behalf is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates. "

28. There cannot be any dispute that the merit of a candidate and his suitability is always assessed with reference to his performance at the examination. For the purpose of adjudging the merit and suitability of a candidate, the Commission has to fix minimum qualifying marks in the written examination in order to qualify in the viva voce test. It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview.

29. As noticed above, cut-off marks of 33% fixed as qualifying marks in all subjects for the purpose of interview cannot by any stretch of imagination be held illegal or unjustified merely because such criteria for securing minimum 33% marks was notified for the Preliminary Examination and Main Examination. Rule 11 of Arunachal Pradesh Public Service Combined Civil Service Examination Rules, 2001 empowers the Commission to fix minimum qualifying marks for the purpose of shortlisting the candidates for interview. In our considered opinion, the power exercised by the Commission under Rule 11 of 2001 Rules fixing the qualifying marks in the written examination in the process of conducting the recruitment test cannot be interfered with by this Court. We reiterate that there must be some yardstick to be followed by the Commission for the purpose of shortlisting the candidates after the written

A examination. The fixation of qualifying marks as 33% in the written examination cannot be held to be illegal or arbitrary action of the Commission merely because it was notified in the process of conducting recruitment tests. It was argued from the side of the Appellant-Commission that the Commission has
B in the past conducted written examination fixing the cut-off marks in exercise of power under Rule 11 of 2001 Rules. The High Court has lost sight of the fact that pursuant to the directions of the learned Single Judge in his order dated 30th September, 2008, the result was declared applying the
C qualifying marks as notified in O.M. dated 7th January, 2008 and the same was adopted by the Commission.

30. Although it is desirable that the Commission should fix the minimum qualifying marks in each written examination, but in the instant case the power exercised by the Commission in
D recruiting the candidates to secure qualifying marks cannot be interfered with.

31. For all these reasons, we allow the appeal and set aside the order passed by the Division Bench of the High Court.

E R.P. Appeal allowed.