'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2779 OF 2022
(Arising out of SLP (C)No. 3587 of 2018)

GOA PUBLIC SERVICE COMMISSION **Appellant(s)**

VERSUS

PANKAJ RANE & ORS. **Respondent(s)**

J U D G M E N T

K. M. JOSEPH, J.

Leave granted.

(1) By Advertisement No. 14/16 published by the appellant, applications were invited for filling up of six posts of unreserved category and three posts in the reserved category under the Goa Civil Service Rules, 2016 (hereinafter referred to as 'the Rules'). Pursuant to the advertisement, 1866 candidates appeared in the Computer Based screening Test (CBRT) held on 05.03.2017. When the results were declared, only seven candidates including respondent Nos. 1 to 3 before this Court were found to have cleared the test. In terms of the advertisement and the Rules, the written test came to be conducted on 10.04.2017 and 11.04.2017. In the results which came to be declared, out of the seven,

only four candidates were found qualified. Respondent Nos. 1 to 3 were among them. There is one Mr. Vivek Krishna Naik who, no doubt, stood first. On 16.05.2017, the appellant decided to fix the cut off marks with respect to the interview. The total marks fixed for the interview was 40. The appellant fixed cut off marks at 26. The final interview took place on 24.05.2017. Mr. Vivek Krishna Naik was declared successful. The results of respondent Nos. 1 to 3 were not declared. Respondents took up the matter before the Chairman of the appellant pointing out the irregularities besides moving the Chief Secretary. Applications were made under the Right to Information Act seeking the information as to why results were not published. This was done by respondent No. 1. We cut the long story short by indicating that on 21.07.2017, a fresh advertisement came to be issued inviting applications for 10 posts of Junior Scale officer of Goa Civil Services.

(2) Respondent Nos. 1 to 3 filed writ petition on 22.07.2017. By the impugned judgment, the High Court has allowed the writ petition and has ordered as follows:

> **"24. We note that in the affidavit in reply, not obtaining minimum qualifying marks in oral interview pursuant to the decision in the meeting dated 16 May 2017 is the sole reason not to send the names of the Petitioners to the Respondent-State. No other reason than the qualifying marks at the interview is shown to us.**
>
> **25. In these circumstances, we hold that the action of the Respondent No. 1-Commission is not recommending the names of the Petitioners to the post of Junior**

Scale Officer of the Goa Civil Services on the ground that they have not secured 65% minimum qualifying marks in the oral interview, is illegal and beyond the powers of the Respondent No. 1-Commission. The decision taken by Respondent No. 1-Commission in the meeting dated 16 May 2017 introducing criteria of 65% minimum qualifying marks at the interview for the post of Junior Scale Officer in the Goa Civil Service, therefore, cannot be sustained and it is quashed and set aside. The Respondent No. 1-Commission will take necessary steps as per Rule 12 of the Rules of 2016 on the basis of the consolidated marks of the Petitioners in the written examination and oral interview without attaching any qualifying criteria to the marks obtained at the oral interview. The Respondent No. 1-Commission will take necessary steps within eight weeks from the date the order is uploaded to the server."

(3) In the appeal, we have heard Shri Pratap Venugopal, learned counsel appearing on behalf of the appellant, Mr. Devadatt Kamat learned senior counsel appearing for respondent No. 1, Mr. Siddharth Dave, learned senior counsel for respondent No. 2, and Mr. Vinay Navare, learned senior counsel appearing for respondent No. 3.

(4) Learned counsel for the appellant would complain that the High Court has erred in placing reliance on the judgments which the High Court has indeed placed reliance on. The case of the appellant is built around the failure of the respondents to obtain the minimum marks as prescribed by the Commission which, according to the Constitution, it has the power to do. The Commission is tasked with the job of conducting the recruitment of candidates and to recommend their names. There is nothing illegal with the Commission in such an event, at fixing a bar and a fairly high bar with

which alone, the Commission would be in a position to procure services of the best candidates for appointment in the State service. This is part of its constitutional imperative flowing from Article 320 of the Constitution. The marks for the examination and interview were indicated in the Advertisement. It is pointed out that the decision of this Court in *K. Manjusree* v. *State of A.P. & Anr.* (2008) 3 SCC 512 is distinguishable with reference to the facts which actually arose for consideration in the said case. Learned counsel also drew our attention to the judgment of this Court in *Yogesh Yadav* v. *UOI & Ors.* (2013) 14 SCC 623. We notice that the attempt made by the appellant based on the said judgment before the High Court did not yield success. The learned counsel also drew our attention to the judgment of this Court in *M.P. Public Service Commission* v. *Navnit Kumar Potdar* (1994) 6 SCC 293. Finally, Shri Pratap Venugopal also pointed out that three learned Judges in *Tej Prakash Pathak and Others* v. *Rajasthan High Court and Others* (2013) 4 SCC 540 have referred the issue relating to the correctness of the judgment in *K. Manjusree* (supra) to a larger Bench. The matter is pending consideration before the larger Bench. Number of cases have been referred.

(5) Mr. Pratap Venugopal, learned counsel, also contends that as far as respondent No. 3 is concerned, there is an additional factor which would weigh against him. It is pointed out that under the Rules formulated, knowledge of

Konkani **language is an essential qualification. This requirement is reiterated in the advertisement. It is pointed out that a counter affidavit was filed in the High Court and in the counter affidavit, the proceedings of the Board which took the interview have been produced which clearly brings out the fact that respondent No. 3 was not found proficient in the Konkani language which proficiency was an inflexible requirement in the Rules and the advertisement.**

(6) ***Per contra*****, Mr. Devadatt Kamat, learned senior counsel for respondent No. 1, would point out that on the facts obtaining in this case, the case on all fours is covered by a catena of judgments beginning with the decision in** ***P. K. Ramachandra Iyer*** **v.** ***UOI*** **(1984) 2 SCC 141. In other words, it is pointed out that with reference to the statutory rules in question which governed the destiny of the respondents, this Court would have to discountenance the case of the appellant Commission. The rules in question according to respondent No. 1 are similar to the rules which was considered in** ***P. K. Ramachandra Iyer'***s **case (supra). What is more, the same line of argument appealed to a later Bench in the decision reported in** ***Durgacharan Misra*** **v.** ***State of Orissa*** **(1987) 4 SCC 646. It is pointed out by Mr. Kamat, learned senior counsel, that the decision of this Court in** ***State of Haryana*** **v.** ***Subhash Chander Marwaha*** **(1974) 3 SCC 220 which apparently forms the basis for the view taken in** ***Tej***

Prakash Pathak and Others **(supra) did not involve the Rule similar to Rule 12 of the Rules obtaining in the facts of this case. The facts in *Tej Prakash Pathak and Others* (supra) also did not involve a statutory injunction as is contained in Rule 12 of the Rules applicable in the facts of this case. He would submit that it is not the law that when the matter is referred to a larger Bench, the decision which is under a cloud ceases to possess its binding nature. What is more, having regard to the distinction in facts and the similarity which the facts of this case bears with the facts in *P. K. Ramachandra Iyer'*s case and *Durgacharan Misra'*s case (supra), etc., this case can be dealt with by this Court without having to refer the same to the larger Bench.**

(7) Shri Siddartha Dave, learned senior counsel appearing on behalf of the respondent No. 2, would also adopt the same line of reasoning.

He would, in fact, firmly contend that there is no power with Public Service Commission to dilute the mandate of the Rules. This is not a case he points out where there were a large number of candidates who have been found eligible after the conduct of the written examination and as part of the need to trim the number of candidates to be finally considered, the Commission took a decision to resort to a separate minimum in the interview in this regard. He drew support from the judgment which is reported in *State of Punjab and Others* v. *Manjit Singh and Others* (2003) (11) SCC

559.

(8) Mr. Vinay Navare, learned senior counsel, drew our attention to Article 309 of the Constitution. He drew our attention to the word "recruitment". He proceeded to further refer to Article 320 and he pointed out that the role of Commission is to be appreciated with reference to Article 320(3)(a) and 320(3)(b). In other words, he would ascribe a limited role to the Commission viz., to conduct examination under Article 320 (1) which, no doubt, he agrees would also include right to conduct interview. He would, therefore, adopt the arguments of the other senior counsel and submit that a careful perusal of the Rule which is made under Article 309 of the Constitution would show that the impugned judgment is only to be supported.

He would further rely on the judgment of this Court in *Durgacharan Misra*'s case (supra). As far as respondent No. 3 not possessing the essential qualification is concerned, he would submit that no such case was set up in the High Court. When queried about the production of the proceedings of the Selection Board which took the interview, he would submit that it may not suffice as a careful perusal of the counter affidavit filed in the High Court which is produced along with an affidavit filed in this Court in January 2022 by the appellant, would not show that the appellant has taken any specific contention denying the right of the respondent No. 3 to be placed in the select list on the

score that he did not possess the essential qualification as alleged. He would further contend that even in the special leave petition, there is no ground taken that respondent No. 3 was not qualified on the said score. He would point out that allowing such a contention to be urged at this stage would cause grave miscarriage of justice as far as respondent No. 3 is concerned. He is taken by surprise and had it been raised before the High Court as such, it could have been dealt with at that stage he complains. This is besides pointing out that a perusal of the impugned judgment does not show that the appellant attempted to engage the High Court on this question which is sought to be raised. It is not a pure question of law which could be raised for the first time.

ANALYSIS

(9) The High Court has proceeded with this matter on the basis of a conspectus of the Rules. The Rules in question, in turn, are the Rules made under Article 309 and they are the Goa Civil Service Rules, 2016.

If we notice Rule 10 to begin with, Rule 10 reads as follows:

> **"10. Competitive examination for direct recruitment. - (1) The Competitive Examination for direct recruitment shall comprise a written examination and an Oral Interview. The Competitive Examination shall be conducted by the Commission, in the manner notified by the Government, from time to time:**
>
> **Provided whenever the Goa Public Service Commission is of opinion of conducting screening test required for shortlisting of candidates, the same**

should be conducted by the Commission in a manner decided by the Commission from time to time.

(2) Whenever Competitive written examination for the direct recruitment to the Junior Scale post of Service is conducted by the Commission, the results of such written examination shall be declared by the Commission by displaying the same prominently on the notice board and website of the Commission.

(3) The minimum passing percentage for competitive written examination shall be 65 percent of the total marks, the passing percentage for candidates belonging to Scheduled Castes and Scheduled Tribes shall be minimum 55 percent of the total marks and Other Backward Class, Differently Abled Persons and for Children of Freedom Fighters, it shall be minimum 60 percent of the total marks.

(4) The Commission shall invite five times the number of candidates as against the number of vacancies advertised, for the oral interview purely on merit with due regard to the policy on reservation. In case there are more candidates securing the same number of marks as the last candidate, all such candidates shall also be called for the oral interview.

(5) Marks to be allotted for written examination and oral interview shall be notified in advance in the advertisement inviting applications by the Commission.

(6) Such oral interview shall be conducted under CCTV surveillance or videography and the proceedings thereof shall also be videorecorded and such recording shall form a permanent record of the Commission.

We may also advert to Rule 12:

"12. List of successful candidates. - (1) The Commission shall forward to the Government a select list, arranged in the order of merit of the candidates which shall be determined in accordance with the aggregate marks obtained by each candidate at the competitive written examination and oral interview:

Provided that if two or more candidates have secured equal number of marks in the aggregate, their order of merit shall be in the order of the marks secured by the candidates in the written examination and if the candidates have secured equal marks in the written

examination then order of merit shall be as per their date of birth and if in case the date of birth is also the same then the candidate possessing higher educational qualifications will be placed higher in the merit list.

(2) The Commission while drawing the list of selected candidates shall restrict the select list of candidates to the extent of declared number of vacancies.

(3) The select list drawn by the Commission shall be valid for a period of one year from the date of receipt of the same by the Government.

(4) The Commission shall, in addition to the select list, also prepare a separate wait list up to 10 % of the vacancies based on the merit of the candidates in their respective category:

Provided further that the candidates from the wait list may be recommended to the Government only on requisition being made by the Government if the candidates recommended earlier are unablne to accept the offer of appointment for any reason. Such wait list shall not be operative for any additional number of posts, other than those advertised. The wait list shall lapse on the declaration of the date of a subsequent examination for the same category or after a period of one year from the date of preparation of such wait list, whichever is earlier."

(10) Rule 10 contemplates the holding of a competitive examination and oral interview. The competitive examination is to be conducted by the appellant in the manner notified by the Government from time to time as pointed out by Mr. Vinay Navare, learned senior counsel. The proviso provides the appellant with the power to hold a screening test required for shortlisting of candidates. The manner in which it is to be held is a matter to be decided by the Commission from time to time. It is most pertinent to note

that Rule 10(3) specifically declares that a candidate must obtain a minimum passing percentage in the competitive written examination. It is pegged at 65 per cent of the total marks. The percentage is purportedly reduced in the case of certain categories.

Next, we must notice that Rule 10(5) declares the marks to be allotted for written examination and oral interview is to be notified in the advertisement inviting the applications by the Commission. Here, as Mr. Pratap Venugopal, learned counsel, rightly points out the Commission cannot be found to have acted contrary to the Rules insofar as, the Commission has, in the advertisement, declared the marks to be alloted for the written examination and oral interview. What is conspicuous by its absence in Rule 10 is any minimum to be obtained by any candidate in the interview. The matter does not end here.

(11) Bearing considerable resemblance as we shall presently see with the law in the facts is the decision of this Court starting with *P. K. Ramachandra Iyer* (supra), Rule 12 declares that the Commission is duty bound to forward to the Government the select list. The select list is to be arranged in the order of merit of the candidates. The select list is to be sent arranged in the order of merit which, in turn, is to be determined in accordance with the aggregate marks obtained by each candidate at the competitive written examination and oral interview. The

rule maker was conscious of the fact that it has prescribed a separate minimum to be obtained by candidate in the written examination. It also contemplated the holding of an interview but as regards the interview a separate minimum was not stipulated. But at the same time, the law giver has contemplated that the Commission is to prepare a select list wherein merit would dictate the order in which the select list is to be prepared and all that it is to do is to total up the marks obtained by the candidate in the competitive written examination and the oral interview. In other words, the merit list would be dictated by the performance in the competitive examination and interview subject only, no doubt, to the qualification that only those candidates who have obtained 65 marks in the written examination would be qualified. We need not be detained by the proviso to Rule 12.

(12) Rule 12(2) further provides that in drawing the list of selected candidates it shall limit itself to the declared number of vacancies. Wait list is also contemplated. It is on a consideration of the statutory Rules that the High Court has taken the view that the case must be decided in terms of *P. K. Ramachandra Iyer* (supra) and *Durgacharan Misra* (supra) apart from *K. Manjusree* (supra).

(13) We may notice in *P. K. Ramachandra Iyer* (supra), the following:

> **"43. The relevant rules are Rules 13 and 14 of the**

1977 Rules, which may be extracted:

"13.Candidates who obtain such minimum marks in the written examination as may be fixed by the Board in their discretion shall be summoned by them for viva voce.

14. After the examination, the candidates will be arranged by the Board in the order of merit in each category (professional subjectwise) as disclosed by the aggregate marks finally awarded to such candidates and such candidates as are found by the Board to be qualified by the examination shall be recommended for appointment upto the number of unreserved vacancies decided to be filled on the result of the examination."

44. Mr Ramachandran, learned counsel for the petitioner contended that Rule 13 does not envisage obtaining of minimum marks at the viva voce test even though it contemplates obtaining minimum marks at the written test so as to be eligible for being called for viva voce test. It was further urged that Rule 14 specified the manner in which merit list is to be arranged. Rule 14 provides that after both written and viva voce tests are held, the candidates will be arranged by the Board in the order of merit in each category (professional subjectwise) as disclosed by the aggregate marks finally awarded to each candidate and such candidates as are found by the Board to be qualified by the examination shall be recommended for appointment upto the number of unreserved vacancies decided to be filled on the result of the examination. On a combined reading of Rules 13 and 14, two things emerge. It is open to the Board to prescribe minimum marks which the candidates must obtain at the written test before becoming eligible for viva voce test. After the candidate obtains minimum marks or more at the written test and he becomes eligible for being called for viva voce test, he has to appear at the viva voce test. Neither Rule 13 nor Rule 14 nor any other rule enables the ASRB to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. On the contrary, the language of Rule 14 clearly negatives any such power in the ASRB when it provides that after the written test if the candidate has obtained minimum marks, he is eligible for being called for viva voce test and final merit list would be drawn up according to the aggregate of marks obtained by the candidate in written test plus viva voce examination. The additional qualification

which ASRB prescribed to itself namely, that the candidate must have a further qualification of obtaining minimum marks in the viva voce test does not find place in Rules 13 and 14, it amounts virtually to a modification of the rules. By necessary inference, there was no such power in the ASRB to add to the required qualifications If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the rules is likely to cause irreparable and irreversible harm. It however does not appear in the facts of the case before us that because of an allocation of 100 marks for viva voce test, the result has been unduly affected. We say so for want of adequate material on the record. In this background we are not inclined to hold that 100 marks for viva voce test was unduly high compared to 600 marks allocated for the written test. But the ASRB in prescribing minimum 40 marks for being qualified for viva voce test contravened Rule 14 inasmuch as there was no such power in the ASRB to prescribe this additional qualification, and this prescription of an impermissible additional qualification has a direct impact on the merit list because the merit list was to be prepared according to the aggregate marks obtained by the candidate at written test plus viva voce test. Once an additional qualification of obtaining minimum marks at the viva voce test is adhered to, a candidate who may figure high up in the merit list was likely to be rejected on the ground that he has not obtained minimum qualifying marks at viva voce test. To illustrate, a candidate who has obtained 400 marks at the written test and obtained 38 marks at the viva voce test, if considered on the aggregate of marks being 438 was likely to come within the zone of selection, but would be eliminated by the ASRB on the ground that he has not obtained qualifying marks at viva voce test. This was impermissible and contrary to rules and the merit list prepared in contravention of rules cannot be sustained.

(14) We must next notice *Durgacharan Misra* (supra):

“6. Rules 16, 17, 18 and 19 are the relevant rules which have a material bearing on the question that falls for determination. These rules read as under:

“16. The Commission shall summon for the viva voce test all candidates who have secured at the written examination not less than the minimum qualifying marks

obtained in all subjects taken together which shall be 30 per cent of the total marks in all the papers:

Provided that government may after consultation with the High Court and Commission fix higher qualifying marks in any or all of the subjects in the written examination in respect of any particular recruitment.

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

18. The marks obtained at the viva voce test shall be added to the marks obtained in the written examination. The names of candidates will then be arranged by the Commission in order of merit. If two or more candidates obtain equal marks in the aggregate, the order shall be determined in accordance with the marks, secured at the written examination. Should the marks secured at the written examination of the candidate concerned be also equal, then the order shall be decided in accordance with the total number of marks obtained in the optional papers.

19. (1) The Commission shall then forward to the government in the Law Department the list of candidates prepared in accordance with Rule 18 indicating therein whether a candidate belongs to Scheduled Caste or Scheduled Tribes.

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

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

7. The rule-making authorities have provided a scheme for selection of candidates for appointment to judicial posts. Rules 16 prescribes the minimum qualifying marks to be secured by candidates in the written examination. It is 30 per cent of the total marks in all the papers. The candidates who have secured more than that minimum would alone be called for viva voce test. The Rules do not prescribe any

such minimum marks to be secured at the viva voce test. After the viva voce test, the Commission shall add the marks of the viva voce test to the marks in the written examination. There then, Rule 18 states:

"The names of candidates will then be arranged by the Commission in the order of merit".

11. In the light of these decisions the conclusion is inevitable that the Commission in the instant case also has no power to prescribe the minimum standard at viva voce test for determining the suitability of candidates for appointment as Munsifs.

15. The Rules have been framed under the proviso to Article 309 read with the Article 234 of the Constitution. Article 234 requires that the appointment of persons other than District Judge to the Judicial Service of State shall be made by the Governor of the State. It shall be in accordance with the Rules made by the Governor in that behalf after consultation with the State Service Commission and with the State High Court. The Rules in question have been made after consultation with the Commission and the State High Court. The Commission which has been constituted under the Rules must, therefore faithfully follow the Rules. It must select candidates in accordance with the Rules. It cannot prescribe additional requirements for selection either as to eligibility or as to suitability. The decision of the Commission to prescribe the minimum marks to be secured at the viva voce test would, therefore, be illegal and without authority.

(15) A question may arise whether the Public Service Commission can depart from the Rules in this regard. Light is shed by the views expressed by this Court in *Manjit Singh and Others* (supra). We may refer to the following exposition made by this Court.

"9.
……
…….
Where no special qualification or any prescribed standard of efficiency over and above the eligibility criteria is provided by the Rules or the State, it would not be for the Commission to impose any extra

qualification/standard supposedly for maintaining minimum efficiency which, it thinks, may be necessary.

……

……..

10. As observed earlier, for the purpose of shortlisting it would not at all be necessary to provide cut-off marks. Any number of given candidates could be taken out from the top of the list up to the number of the candidates required in order of merit. For example, there may be a situation where more than the required number of candidates may obtain marks above the cut-off marks, say for example, out of 10,000 if 8000 or 6000 candidates obtain 45% marks then all of them may have to be called for further tests and interview etc. It would in that event not serve the purpose of shortlisting by this method to obtain the given ratio of candidates, and the vacancy available. For 100 vacancies at the most 500 candidates need be called. If that is so, any candidate who is otherwise eligible up to the 500th position, whatever be the percentage above or below the fixed percentage would be eligible to be called for further tests. Thus the purpose of shortlisting would be achieved without prescribing any minimum cut-off marks.

11. In the case in hand, it was not for the Commission to have fixed any cut-off marks in respect of the reserved category candidates. The result has evidently been that candidates otherwise qualified for interview stand rejected on the basis of merit say, they do not have up-to-the-mark merit as prescribed by the Commission. The selection was by interview of the eligible candidates. It is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. Independent and fair working of the Commission is of utmost importance. It is also not supposed to function under any pressure of the Government, as submitted on behalf of the appellant Commission. But at the same time it has to conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the

domain of the State Government. It cannot impose its own policy decision in a matter beyond its purview."

(16) In this regard, we must notice that in the facts of this case of the 1866 candidates who appeared in the screening test / computer test, only 7 candidates which included respondent Nos. 1 to 3 cleared the test. The number stood further reduced to 4 and which again included respondents Nos. 1 to 3. Therefore, when the question arose as to how the interview should be conducted, the Commission decided on 16.05.2017 to fix 26 marks out of 40 as cut off marks. It no doubt works out at 60 per cent of the total marks in the interview segment. Rules did not provide for a separate minimum for the interview. The advertisement did not provide for a separate minimum in the interview. It is almost a week before the interview that the Commission took the decision in this regard. We have stated these facts only to highlight that this is not a case where the Commission was faced with the task of having to interview a very large number of candidates. For 6 unreserved posts and 5 reserved posts finally, only 4 emerged as candidates to be dealt with at the final stage viz., the oral interview. This, therefore, is distinguishable, in other words, from the judgment relied upon by Mr. Pratap Venugopal, learned counsel for the appellant viz. *M.P. Public Service Commission* (supra). That was a case where this Court noted that the appellant Commission therein noting the large

number of applications received from the General Category candidates against four posts decided to call only 71 applicants who had 7 $^{1/2}$ years of practice although 188 applicants were eligible, in view of the fact that under Section 8(3)(c) of the provisions applicable in the said case, five years of practice as an Advocate or pleader of Madhya Pradesh was a minimum requirement. It was therefore, a case which though relied upon by the appellant is distinguishable on facts. This is apart from noticing that the appellant has not been able to inform the Court as to whether there was a Rule in the said case similar to Rule 12 as present in this case. As far as *Yogesh Yadav* (supra) is concerned, this again is not a case which involved a Rule resembling Rule 12 of the Rules. We further may also notice that in the said case recruitment was carried out by the employer itself and it was not done by the recruiting body which the appellant is and which is limited by statutory rules made under Article 309 of the constitution.

(17) Para 13 of *Yogesh Yadav* (supra) is extracted hereinbelow:

> **13. The instant case is not a case where no minimum marks are prescribed for viva voce and this is sought to be done after the written test. As noted above, the instructions to the examinees provided that written test will carry 80% marks and 20% marks were assigned for the interview. It was also provided that candidates who secured minimum 50% marks in the general category and minimum 40% marks in the reserved categories in the written test would qualify for the interview. The entire selection was undertaken in accordance with the aforesaid criterion which was laid**

> **down at the time of recruitment process. After conducting the interview, marks of the written test and viva voce were to be added. However, since a benchmark was not stipulated for giving the appointment. What is done in the instant case is that a decision is taken to give appointments only to those persons who have secured 70% marks or above marks in the unreserved category and 65% or above marks in the reserved category. In the absence of any rule on this aspect in the first instance, this does not amount to changing the "rules of the game". The High Court has rightly held that it is not a situation where securing of minimum marks was introduced which was not stipulated in the advertisement, standard was fixed for the purpose of selection. Therefore, it is not a case of changing the rules of the game. On the contrary in the instant case a decision is taken to give appointment to only those who fulfilled the benchmark prescribed. The fixation of such a benchmark is permissible in law. This is an altogether different situation not covered by *Hemani Malhotra case* [*Hemani Malhotra* v. *High Court of Delhi*, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] .**

(18) Though learned counsel for the appellant did emphasise the said observations, we are of the view that it is distinguishable at any rate having regard to Rule 12 which we have already noticed which is applicable to the facts of this case.

In other words, we would think that in the facts of this case, they are closer to the facts of the case in *P. K. Ramachandra Iyer* case and judgment following the same which we have already noted. As far as *Tej Prakash Pathak and Others* case is concerned, it again did not specifically involve a Rule similar to Rule 12.

(19) It is true that there is a distinction in the facts with those of the case in *K. Manjusree* (supra). We

notice that that was a case where the requirement of minimum marks for interview was made after the entire selection process consisting of the written examination and interview was completed and noticing the facts, the Court declared that it would amount to changing the Rules after process is completed. In this case, the stipulation as to the minimum to be obtained in the interview was announced prior to the holding of the interview. However, we would think that this case must fall to be decided on the principle which has been laid down in *P. K. Ramachandra Iyer* (supra) and *Durgacharan Misra* (supra) for the reasons which we have already indicated.

(20) As far as the question relating to the respondent No. 3 not being in possession of the essential qualification, we may notice the following:

It is true that under the Rules, knowledge of K*onkani* is declared as an essential qualification which the advertisement also reiterates. The interview was held. The writ petition was filed by all respondents together. The contention which appears to have engaged the High Court in the impugned judgment related to the power of the appellant to stipulate for a separate minimum in the interview. The impugned judgment does not reflect even in the slightest way any attempt on the part of the appellant to non-suit the third respondent on the ground that apart from there being no merit in the contention of respondents that Commission

did not have the power to stipulate for a separate minimum, respondent No. 3 was even otherwise disqualified. We do not find even a whisper of such a case in the impugned judgment. We further notice that there is no case that the appellant has urged this as a ground in the special leave petition. It is true in objection filed in this case in this Court in January, 2022, the appellant has produced what is described as its pleadings in the High Court. We have perused the pleadings. The appellant has not been able to specifically point out any allegation as such dealing with the ineligibility of respondent no. 3 on the ground that he is not possessed of the essential qualification of the kind complained of. It is true also no doubt that the question as to whether a candidate is qualified, in that, he is having knowledge of the *Konkani* language would appear to be tested in the interview. It is equally true that it is an essential qualification. But as to whether a person would be disqualified on the ground that he was not having particular essential qualification in the facts is a pure question of fact. This is not seen pleaded as such. We reiterate that the impugned judgment does not show that the appellant has urged this before the High Court. Apart from the proceedings of the Selection Board, there is no record produced to show that respondent No. 3 was disqualified on this ground.

We would therefore, think that it may not be

appropriate to permit the appellant to raise this question.

(21) We do think that the respondents are justified in pointing out that the High Court is right in not permitting the appellant to contend that the respondents cannot be treated as entitled to be recommended. The question however may arise as to what is the nature of the relief which can be granted. We notice from the reliefs which have been set out in the writ petition that it is as follows:

> **"(A) This Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, commanding the Respondent No. 1 to prepare a Select List in terms of the Advertisement No. 14/2016 and make recommendations to the Government on the basis of the said Select List in accordance with law;**
>
> **(B) This Hon'ble Court also be pleased to issue an appropriate writ, order or direction, to quash and set aside the Advertisement dated 21.07.2017 bearing No. 7/2017.**
>
> **(C) Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to stay the execution and operation of the entire Selection Process pursuant to the Advertisement No. 7/2017 dated 21.07.2017;**
>
> **(D) Ad-interim relief in terms of prayer clause (C);**
>
> **(E) Any other relief, as deemed fit and proper may please be granted in favour of the Petitioners herein;**
>
> **(F) For costs."**

We have already noticed the relief granted by the High Court.

(22) There is yet another aspect which we must consider. As already noticed, even before the filing of the writ

petition, the Commission commenced fresh proceedings. While there is a stay of the impugned judgment, this Court had made it clear that the appointments will be subject to the outcome of the special leave petition.

Since the appellant fails in its challenge to the impugned order, the respondents must finally obtain redress. Accordingly, while we dismiss the appeal, we reiterate the directions contained in the impugned order and it is for Appointing Authority to take the decision in accordance with law in the matter.

The appeal is dismissed without any orders as to costs.

Appellant will forward the list in terms of the directions by the High Court within a period of four weeks from today. Respondent No. 4 will take a decision on the same in accordance with law within a further period of six weeks from the date of the receipt of the list from the appellant.

……., J.
[K.M. JOSEPH]

……., J.
[HRISHIKESH ROY]

New Delhi;
April 06, 2022.