

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11742 of 2011

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1. Durgesh Kumar Prasad S/O Om Prakash Prasad R/O Vill.- Gajadhar Tola, P.O. And P.S.- Thawe, Distt.- Gopalganj

.... Petitioner.

Versus

1. The National Institute Of Technology Patna Thru Its Registrar, National Institute Of Technology, Patna
2. Director-Cum-Chairman Selection Committee, National Institute Of Technology, Patna
3. The Board Of Governors Thru Its Chairman, Sri R.P. Singh S/O Not Known National Institute Of Technology, Patna
4. Dr. Suresh Kant Verma, Professor, Department Of Mechanical Engineering, N.I.T. Patna
5. Dr. Dharmendra Kr. Singh, Professor, Department Of Electronics And Communication Engineering, N.I.T., Patna
6. Dr. Vijoy Kr. Sharma, Professor Department Of Electronics And Communication Engineering, Nit, Patna, R/O M.P. Sinha Road, Kadam Kuan, P.S.- Kadam Kuan, Distt.- Patna
7. Prof. Ajoy Kumar Sinha Null Department Of Civil Engineering, N.I.T., Patna
8. Dr. Nitya Nand Singh Mourya, Asso. Professor Department Of Civil Engineering, N.I.T., Patna
9. Dr. Prakash Chandra, Asso. Professor Department Of Mechanical Engineering, N.I.T., Patna
10. Sri Jyoti Prakash Singh (Ur) Asst. Professor, Department Of Information And Technology, N.I.T., Patna
11. Sri Anand Shankar Tiwari, Asst. Professor Department Of Information And Technology, N.I.T., Patna
12. Sri Abhay Kumar (Obc) Asst. Professor, Department Of Information And Technology, N.I.T., Patna
13. Sri Anil Kumar Dudyala (Sc) Asst. Professor, Department Of Information And Technology, N.I.T., Patna
14. Sri Kovuro Vijaya Kumar (S.T.) Assistant Professor, Department Of Information Technology, N.I.T., Patna
15. Sri Kumar Abishek (Ur), Assistant Professor, Department Of Computer Science And Engineering, N.I.T., Patna
16. Sri Rajib Ghosh (Ur) Assistant Professor, Department Of Computer Science And Technology, N.I.T., Patna
17. Sri Asim Gopal Barman (Sc) Assistant And Professor, Department Of Mechanical Engineering, N.I.T., Patna
18. Sri Naresh Kumar (Obc) Assistant Professor, Department Of Mechanical Engineering, N.I.T., Patna
19. Sri Rajib Kumar Mandal (Sc) Assistant Professor, Department Of Electrical Engineering, N.I.T., Patna
20. Sri Ashiwani Kumar (Obc) Assistant Professor, Department Of Electrical Engineering, N.I.T., Patna
21. Sri Abdur Rahman Quaff (Obc) Assistant Professor, Department Of Civil Engineering, N.I.T., Patna

22. Sri Jayanta Ghosh (Ur) Assistant Professor, Department Of Electronics And Communication Engineering, N.I.T., Patna
23. Dr. Pramod Kumar Yadav (Obc) Assistant Professor, Department Of Mathematics N.I.T., Patna
24. Ms. Tasneem Parvin (Obc) Assistant Professor, Department Of Chemistry, N.I.T. Patna
25. Dr. Mukesh Choudhary (Sc) Assistant Professor, Department Of Chemistry, N.I.T. Patna

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. SIYA RAM SHAHI, Adv.
For the Respondent/s : Mr. SHASHI BHUSHAN PRASAD, Adv.
For the NIT : Mr. Y.V.Giri, Sr. Advocate.
Mr. Raju Giri, Adv.
Mr. S.K.Giri, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
CAV JUDGMENT
Date: 08.09. 2015

Heard counsel for the petitioner and the State.

In this case, petitioner is challenging the entire selection process in pursuance of advertisement NITP/APP./ (Faculty)/02/08 issued by the Registrar, National Institute of Technology, Patna (hereinafter, for short, referred to as 'NIT'). Further prayer has been made to command the respondents of NIT, Patna to produced the selection list of the candidates of different faculties in pursuance of aforesaid advertisement.

The NIT, Patna issued an advertisement No. NITP/APPT. (Faculty)/02 /08 for appointment to the post Professor, Assistant Professor and Lecturer to different faculties under the NIT, Patna. The last date for reception of application was fixed on



22nd January 2010. The said advertisement was revised in 2009 published in different News-papers, including Employment News, (14 – 20 Feb. 2009) as also on the web site. Last date for receipt of application was 22nd January 2010. By the 2nd advertisement, there was a slight change, with regard to nomenclature of the post, as per the earlier advertisement the posts were of Professors, Assistant Professor and Lecturer which were redesignated as Professor, Associate Professor and Assistants Professor.

Petitioner, a Scheduled Tribe candidate being M.Tech. in Mechanical Engineering, applied for the post of Assistant Professor (Thermal Engineering) within time. As per the advertisement, under the Mechanical Engineering, number of posts were four, break up was two posts for OBC, one for Scheduled Caste and one for Scheduled Tribe. The petitioner had applied under the Scheduled Tribe category for the post of Assistant Professor(Mechanical Engineering). The reservation was confined to the post of Assistant Professor and no reservation was earmarked for the post of Associate Professor and Professor.

As Clause 23.5 of the 1st Statute, framed under subsection 1 of Section 26 of the NIT Act, the Selection Committee for recruitment of Academic Staff should be comprising of six members but in the present case, the Selection Committee was

constituted comprising seven members. As per the statute, the constitution of 6-Member Selection Committee should be in the following manner:

(1) The Director, NIT, Patna ...Chairman -1

(2) The visitors nominees ..Member -1

(3) Two nominees of the Board, one being expert but other than a member of the Board

.. Member -2

(4) One Expert nominee of syndicate from outside the Institute .. Member -1

(5) Head of Department, Faculty wise

..Member -1

On 25th November 2010, vide letter No. NIE/3P75/10 issued by the Registrar, NIT, Patna whereby the petitioner was directed to appear in the interview on 14th December 2012 at 3:00 P.M. at NIT, House, Sabdarganj, New Delhi. In the interview, 16 candidates from OBC category, 8 candidates from SC category and only one from the S.T. category, i.e. the petitioner appeared in the interview for the post Assistant Professor. The interview was conducted for the candidates of other Faculties, i.e. Civil Engineering, Electrical Engineering, Computer Science, National Technology, Physics, Chemistry, Mathematics and Humanity and

Social Science for the post of Assistant Professor, the interview was conducted for the post of Assistant Professor from 14th to 16th December 2010 and for the post of Professor the interview was conducted on 12th January 2011 and 13th January 2011.

The Selection Committee fixed 40 per cent for the Academic Achievement and 60 marks for interview, this fixation of marks was never made public either by notice or corrigendum. As per the claim of petitioner, he could know the said criteria at the time of interview. The Selection Committee did not publish the criterion for selection through any notice at any point of time. The Selection Committee did not prepare even a chart to show how much marks were allotted under the head of "Academic Achievement and under Interview" to the respective candidates, including the petitioner. Claim has been made by the petitioner, the selection has been made behind the back, at the sweet will of the Selection Committee, selection process was not transparent, violates the principles of Articles 14 and 16 of the Constitution of India as no panel was prepared or published nor the list of selected candidates was published and, as such, so much so the Selection Committee was not constituted in terms of Clause 23 of the Statute, as in place of 6-Member Committee, it was made 7-Member Committee.

In the Selection Committee, Two nominees of Board of

Governor were not nominated as per the Statute is apparent from the following facts:

In the 16th meeting of the Board of Governor dated 8th March 2011 in agenda no.16.8 was for ratification of list of experts appointed for interview for the post of Assistant Professors, Associate Professors and Professors which was deferred for the next meeting. In the said meeting Dr. T. Prasad, one of the members of the BOG gave a dissenting note. It was pointed out the defect in the meeting that the Selection Committees was not constituted in terms of Clause 23.5(a) of 1st Statute under the NIT Act, 2007. This renders the entire selection process followed the appointment of Assistant Professors and others, illegal.

The 17th meeting of the Board of Governors was held on 20th May 2011 agenda nos.17.8 and 17.9 were for ratification of names of experts appointed for interview for the post of Assistant Professor, Associate Professor and Professor was approved in the following manner: The list of experts approved by the Chairman, BOG on 2nd December 2010 for conducting interview for recruitment to the posts of Assistant Professor, Associate Professor and Professor in exercise of his powers under Section 14, clause (iv) of the First Statutes for all National Institutes of Technology is confirmed and ratified but with the note of dissent

was also recorded as follows:

“Constitution of the Selection Committees which conducted the interviews for various posts was flawed as they did not have two nominees of the Board and one nominee of the Senate as per clause 5(a) of the Statutes. For this reason, I do not ratify the list of experts for the irregularly constituted Selection Committees which has already conducted interviews more than 4 months ago.”

In Item No.17.9 was for approval of Selection Committee, recommendation for recruitment to the post of Assistant Professor, Associate Professor and Professor for different Engineering Departments and allied Departments of the Institute. The resolution was in the following manner:

The recommendation of the selection committees for recruitment to the posts of Assistant Professor, Associate Professor and Professor for different engineering departments and for allied departments are approved. BOG directed the Institute to issue the appointment letter immediately. This approval was attached with the notes of dissent as follows:

(i) As the constitution of the Selection Committees was itself flawed as per the abovementioned point:

(1) their recommendations stand vitiated on

that account and must be rejected.

(ii) Change of the Minimum Qualification and Experience required for various posts for “Humanities and Science” in the Second Advertisement done in December 2009 from those in the first Advertisement done in January 2009 for the same posts as done without any necessary sanction and justification for such a change and hence is arbitrary and possibly mala fide.

(iii) Procedures and actions adopted for pre-Selection Committee screenings show distinct arbitrariness, bias and favoritism, which have already come to light in a High Court case against the selection procedures in the case of Dr. L.B.Roy, an applicant for the post of Professor of Civil Engineering and Dr. D.K.Singh for the post of Professor of Electronics and Communications Engineering.

My notes of dissent for the two agenda items due to the abovementioned points may please be noted in the Minutes.”



In the 17th meeting of the Board of Governors, one of the agenda vide no.17.12 was with respect to approval for verification in the Faculty of appointment as per AICTE guidelines for Engineering and Architecture and as per UGC guidelines for Humanities, and Science and Math. The agenda was passed “Recruitment rules for faculty are being framed at MHRD level. Qualification will be accordingly adopted for faculty recruitment when these rules are approved by the MHRD.

So the rule for recruitment was not finalized by the NIT, as the rule was under consideration at the MHRD level. On that basis it has been claimed by the petitioner that the BOG Members who were in the Selection Committee, their names have not been approved prior to selection process started which is apparent from 16th and 17th meeting of the BOG, apart from dissent note of Dr. T. Prasad. Similar position with regard to senate nominee was objected by Dr. N.R. Lal, HOD of Physics Department, one of the Members of the Senate vide letter dated 2nd May 2011, addressed to the Registrar and Secretary to NIT, Patna.

In that view of the matter, counsel for the petitioner has submitted that in view of illegal constitution, whole selection is bad nor the selection is transparent, violates the provisions of Article 14 and 16 of the Constitution of India is substantiated from the

judgment of Dr. Bimal Kumar v. The State of Bihar & ors, 2011(1)PLJR 1134 which has been affirmed by the Division Bench in LPA reported 2011(2) PLJR 787 as well as the Hon'ble Supreme Court has taken the same view in the case of Renu and others v. District and Sessions Judge, Tishazari, AIR 2014 SC 2175 (P-16).

The Selection Committee was not properly constituted as per Clause 23.5 of the Statute from the fact the constitution of the Selection Committee should have been 6-Member Selection Committee, was of 7-Members, as has been claimed, as no such ordinance has been issued by NIT giving power to Chairman of Board of Governors to constitute the Selection Committee.

It has been submitted by the counsel for the petitioner that in terms of clause 23.5 in the Selection Committee there should be two nominees of the Board, one being an Expert but other than the Member of the Board and further one Expert Member of the senate from outside the institute. Claim has been made that the Selection Committee was not constituted in terms of Clause 23.4 and 23.5. In such view of the matter, the whole selection process goes. Reliance has been placed on 2011(4) PLJR 170 (P-9) (Navin Kumar and others v. The State of Bihar & others). It has been submitted that the said judgment was affirmed in Division Bench in

2013(2) PLJR 673 (Para-6).

The 3rd point that has been raised by the petitioner is that the Selection Committee has no jurisdiction to determine the criterion for selection, submitted, the power to fix the bench mark for Academic and Interview either lies with the Board of Governor or the State Government. The selection of candidates on such fixation by the Selection Committee leads to wrong selection. In such view of the matter, the entire selection process is illegal and not sustainable in law. The said fact is apparently clear from Para-12 of the counter affidavit of NIT.

Further it has been submitted that as per the 1st Statute there is no rule/instruction about the procedure of selection fixing minimum bench mark which can only be fixed under Rule which can be framed under Section 309 of the Constitution of India, is the State Government maximum Board of Governor and, as such, the members of the Selection Board or that of the Selection Committee do not have jurisdiction to lay down criteria for selection unless they are authorized specifically in this behalf. Reliance has been placed on AIR 1981 SC 561 and AIR 1996 SC 352 (Krushna Chandra Sahu v. State of Orissa)

The 4th point of law that has been taken is that the criteria of selection providing 40 marks for academic career and 60



marks for interview is a faulty fixation of bench mark, fixation should be inverse resulted into legal and factual mala fides, which itself vitiates the whole selection process, as such, selection of respondents is illegal and arbitrary, reliance has been placed on AIR 1993 SC 796 (P-8), AIR 1991 SC 1607 (Munindra Kumar and others v. Rajiv Govil and others) and 2011(1) PLJR 1134 Dr. Bimal Prasad Singh (supra).

Counsel for the petitioner has also submitted that the challenge of maintainability of this proceeding on the ground of estoppel will not survive as the ground of challenge is based on violation of Articles 14 and 16 of the Constitution of India, the and as such question of estoppels does not apply. Reliance has been placed on the following judgments:

AIR 1993 SC 796 (P-8) (Union Territory of Chandigarh, v. Dilbagh Singh and others)

AIR 1991 SC 1607 (Munindra Kumar and others v. Rajiv Govil and others).

2011(1) PLJR 1134 Dr. Bimal Prasad Singh (supra)

Counsel for the respondents has challenged the maintainability of the writ petition on the ground that the petitioner has not sought any relief in his favour for his appointment itself, a strong ground for dismissal of this petition. In his category



petitioner was the sole candidate having no competitor with any rival candidates and as such, the question, he is the best candidate and his claim has wrongly been ignored does not arise as he was to compete with himself, non-selection will not entitle him, to challenge the selection of candidates of other categories. The relief which has been sought by the petitioner is misdirected and not sustainable. No person from the Scheduled Tribe has been appointed and, as such, petitioner cannot assail the appointment of others apart from other category i.e. Mechanical stream, specially in S.T. category.

Elaborating his submission counsel for the respondents submitted that when the petitioner applied in the category of ST in one subject, he does not have jurisdiction to challenge the appointment of general category or other candidates and also of other faculty which has no relation with the present petitioner. Reliance has been placed on (2006)11 SCC 731 (B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association) (Para- 78). As no appointment has been made in the category of ST nor the petitioner has claimed for his appointment other than the post of Assistant Professor, as such, the writ petition itself cannot survive. Reliance has been placed on AIR 1981 SC 588 : (1981)1 SCC 397 (S.S.Sharma v. Union of India).

Apart from the preliminary objection, counsel for the respondents stated that the argument laid by the petitioner is without any foundational fact and submitting that in absence of pleading of foundational fact mentioned in the writ petition, any oral submission is of no use, requires to be ignored.

In reply with respect to the constitution of the Selection Committee, it has been submitted that the Committee was constituted in terms of Clause 23.5 of the 1st Statute and the same was approved by the Board of Governor with one person dissenting note will not vitiate the whole selection and selection committee. On account of inclusion of additional member with sole purpose to protect the interest of SC and ST will not vitiate the constitution of the Selection Committee and ultimately selection. In support of his submission, reliance has been placed by the respondents on the Circular dated 28th February 2014. Claim has been made that the Chairman in exercise of power conferred under Clause 23.4 of the Statute has constituted the Selection Committee, Reliance has been placed on Para-22, 23 and 24 of the counter affidavit.

In reply to the argument of counsel for the petitioner that the Selection Committee has no jurisdiction to fix the norms of selection of candidates it has been submitted that rule is to be framed by the Ministry of Human Resources Department,



Government of India, in absence of Rule, institute can go for recruitment of faculty members as per existing norms if there would be no recruitment academic situation of College would deteriorate to shamle state, turned to non-functional. In the interest of institute, the Board of Governor with a view to make the institute of national importance, in exercise of power under Section 13 of National Institute of Technology Act has power to formulate policy and appoint faculty members, exercising such power BOG made appointment of faculty member in absence of rule. Reliance was placed on Para-23 of the counter affidavit. Further submitted, as per the 1st Statute, the Chairman can take such step in emergency of situation under clause 14(iv) read with 23(a) of the first statute. In support of his proposition, relied on the following judgments :

(2013)11 SCC, 309 (Ramesh Chandra Shah and ors v. Anil Joshi & ors) 2012(2) PLJR 18 (Anurag Verma v. State of Bihar and (2008)2 SCC 119 (M.V. THIMMAIAH AND OTHERS v. UPSC).

Counsel for the respondents has submitted that dissent note of Sri T. Prasad and one another cannot cause any harm to the approval, as majority of member voted in favour of motion, the minority view gave way to the majority. Further claim has been made that if there is no rule, the competent authority can fix the

bench mark of selection of candidates. Reliance has been placed on (2010)3 SCC 104 (Ramesh Kumar v. High Court of Delhi) & (2008)3 SCC 512 (K Manjushree v. State of A.P.)

and it was submitted that the judgment reported in AIR 1996 SC 797 and 2011 (1) PLJR 1134 do not apply to the facts of the present case.

He has further submitted that the person who had not applied for another post cannot be allowed to challenge the entire selection process and appointment of others. Reliance has been placed on (2006)11 SCC 731 (B.Srinivasa Reddy v. Karnataka Urban Water Supply and Drainage Board Employees' Association), (2008)2 SCC 119 (M.V.Thimmaiah v. UPSC) and (2008)4 SCC 171 (Dhananjay Malik v. State of Uttaranchal) as also on (2006)9 SCC 90 Ashok Lanka v. Rishi Dikshit and (2000)7 SCC 719 (Kiran Gupta v. State of U.P.).

Counsel for the petitioner has submitted that if the Selection Committee has been constituted illegally, in that circumstance, whole selection will vitiate and not the part. Reliance has been placed on

(2002)3 SCC 146 (Para-8) and further submitted that the Circular dated 20th August 2014 does not apply to the present case, as the advertisement was issued in the year 2008. If any act



has to be taken in particular manner, then that action has to be taken in that manner alone. Anything done de hors to the rule will vitiate the whole selection. He has further submitted that the claim of the respondents that the petitioner has not pleaded specifically about the manner of wrong constitution of the Selection Committee is not sustainable in view of statements made in Para-16, 18 and 19 of the writ petition where elaborate discussion has been made about nature of illegality in constitution of the Selection Committee.

Having heard the contentions of both the parties, before deciding the merit of the case, first step of this Court to examine the maintainability of the writ petition on the issues raised by the respondents.

The petitioner had applied for the post of Assistant Professor, Thermal Engineering only in the category of Scheduled Tribe in one subject and he does not have locus standi to challenge the appointment of candidate of another category as he has to limit his grievance with regard to his own category i.e. Scheduled Tribe. Further it is submitted that as no appointment has been made in the Scheduled Tribe category, nor he has claimed appointment in another category, as such, the writ petition is not maintainable.

For deciding the maintainability, it will be relevant to advert to certain material facts for arriving to right conclusion. As it



appears from the advertisement, two posts were advertised under the OBC category one for SC category and one for ST category. No post of general category in the Assistant Professor (Mechanical Engineering) was advertised. The candidates of ST category may compete with the candidates of General Category and in his own category i.e. ST category but he cannot have claim over post of OBC category and SC category. All these categories are separated vertically from the ST category and person who had applied for ST category, cannot make encroachment in OBC and SC categories. The petitioner has challenged as if he has a right to claim appointment in another category and on this notion, challenged the appointment of candidates of other categories on the ground of defect in the Selection Committee which has been constituted in terms of the NIT 1st Statute. In the constitution Selection Committee, if there is prima facie defect the defect will itself have effect in the selection of other categories i.e. appointment in the category of OBC and SC is not sound principle of law unless goes to root of the matter and causes prejudice.

Counsel for the respondents submits that the selection of other category will not vitiate and in support of his contention placed reliance on the judgment reported in (2006)11 SCC Dr. Bimal Prasad Singh



731 (P-78) (B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association) in which the Hon'ble Supreme Court said that discretionary jurisdiction can be exercised only at the instance of person who is qualified and a candidate for the post. The appointment cannot be challenged by one who himself is not qualified for the post. Placing reliance on the earlier two judgments in Kumari Chitra Ghosh v. Union of India (1969)2 SCC 228 (Para-12) endorsed the same view, as stated above. It is relevant to quote Para-12 of the judgment which is as follows:

“Para-12: The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded. The Central



Government is under no obligation to release those seats to the general pool. It may in the larger interest of giving maximum benefit to candidates belonging to the non-reserved seats release them but it cannot be compelled to do so at the instance of students who have applied for admission from out of the categories for whom seats have not been reserved. In our opinion the High Court was in error in going into the question and holding that out of the nine seats filled by nomination two had been filled contrary to the admission rules and these would be converted into the general pool. Since no appeal has been filed against that part of the order, we refrain from making any further observations in the matter.”

In *Umakant Saran v. State of Bihar* (1973)1 SCC 485 the Hon’ble Supreme Court has taken a view that person being not qualified for the post cannot challenge the appointment of other persons. It is relevant to quote Para-15 of the judgment:

Para-15 As between Dr. Saran and respondent no.5 it is true that Respondent no.5 was his junior in service. But he had the requisite minimum teaching experience which the petitioner did not have.



It is not necessary for us to consider in this case whether the Lecturer's posts which were in Class I service were filled by promotion,, as cont ended for the appellant, or by deputation, as contended on behalf of the State. Assuming that the appellant's contention is correct that the Lecturer's posts were filled by promotion, then it will have to be shown that the appellant, though he had the requisite qualification for his promotion, had been disregarded in favour of a junior. The answer made by the State Government is that they had taken the decision to fill the posts on March 31, 1965, and on that day the appellant had not even complete d the minimum period of teaching experience while the other two had done so. In other words, the case is that the appellant was ineligible for appointment when the decision was taken. It is true that the appointment was actually notified on August 19, 1965 when the appellant had also complete d his 3 years of experience. But obviously that is irrelevant. Decisions have to be taken first before appointments are notified. The usual administrative process takes some time. The appellant sought to controvert the

statement of the Government that the decision had been taken to make the appointment on March 31, 1965. But we do not think there is any substance in that contention. It would, thus, follow that while Respondent s 5 and 6 were eligible for appointment as Lecturers on March 31, 1965 the appellant was not and, therefore, he cannot be regarded as aggrieved for the purpose of the relief claimed by him.”

Counsel for the petitioner to counter the argument has placed reliance on the judgment reported in AIR 2014 SC 2175 (Renu and others v. District & Sessions Judge, Tis Hazari and another) where the Hon’ble Supreme Court while examining the matter under writ of quo warranto said that Article 14 is integral part, each and every state action is to be tested on the touch stone of equality. Any appointment in violation of article 14 and 16 of the Constitution is not only irregular but also illegal, cannot be sustained in view of large number of judgments relied upon. The Court said that any appointment even on temporary or ad hoc basis without inviting application is violative of provisions of the Constitution. Receipt of names from the Employment Exchange, in addition thereto it is mandatory on the part of the authority to invite application from all the eligible candidates from open market,



merely calling names from the Employment Exchange does not meet the requirement of the said Article. The Hon'ble Court is of the view that power under quo warranto is vital power, gives effective weapon to control the executive from making illegal appointment to the public office against the law and to protect a citizen from being deprived of public office to which he has a right. It is relevant to quote Para-15 of the judgment which is as follows:

“Para-15: Were any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect



the public from usurpers of public office who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it.”

In the case of Renu (supra) the Hon’ble Supreme Court was considering the matter relating to illegal appointment and back-door entry and the present case is not related to back door entry rather advertisement was published, petitioner and others had applied, petitioner was lone candidate in the ST category, but he could not secure minimum marks for the appointment which necessitated the petitioner to challenge the whole selection made under different branches and different categories. When the petitioner himself had participated when he could not secure



minimum marks in that circumstance, challenging the whole appointment taking recourse of quo warranto and claiming that the whole selection process was vitiated on account of non-transparency so much so that the Selection Committee was not constituted in terms of the Statute, this Court is of the view that it does not lie in the mouth of the petitioner to challenge the selection of each and every category of post. The post of scheduled tribe remained vacant, as the petitioner (sole person) could not secure minimum qualifying marks, the same will be advertised and filled up by suitable candidate at a later stage, specially in view of the fact that the vacancies for OBC as well as SC has been filled up, has not been challenged by any person of that category raising a grievance of arbitrariness in the appointment. In such view of the matter, the writ petition in my view is not maintainable. Even presuming that the petitioner can challenge the selection of candidate in different categories, even then the petitioner has not made out case for interference, has been discussed hereinbelow:-

The entire selection is bad on account of non-transparency.

As it has been submitted by the counsel for the petitioner that the selection has been made behind the screen, criteria for selection was never made public, even panel of select

list of candidate s for above posts as well as for part of other stream, including higher posts as notified in the advertisement was not published, the Selection Committee has not prepared any chart showing how marks have been allotted under different head, such as the academic achievement and in the interview.

The transparency, no doubt, is important factor in the matter of public appointment. What is required for transparency is that the advertisement must notify the number of posts available for selection, qualification and other eligibility criteria for such posts should expressly mentioned and the schedule of selection process should be published with certainty and clarity. The Advertisement should also specify the rule under which the selection is to be made. In absence of rule, the procedure under which selection is likely to be undertaken. This is necessary to prevent arbitrariness.

The reason is that once the selection process has started there should not be change of rule of the game in the middle to prevent unjust benefit to some one at the cost of others, the player should know the rule of game, in that rule alone the game would be conducted. It is relevant to quote Para-16 of Renu (supra):

Para-16: Another important requirement of public appointment is that of transparency.

Therefore, the advertisement must specify the



number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of requirement process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting some one at the cost of others.”

One thing is important in the present case that the petitioner in the entire pleading of the writ petition, has not alleged that he was wrongly given marks. What he is challenging is the selection of candidate s of different categories with whom he has no concern at all. He was lone candidate in his category was required to compete in his own category. As was single person in his category, so he cannot raise the grievance about the manner marks was given to other candidates. Transparency has to be looked into in its own category having no concern with selection of another



classes of candidates. It cannot be judged in straight jacket formula but has to be decided on relevant facts and circumstances, on the touch stone of Articles 14 and 16 of the Constitution. It is an admitted fact that the petitioner had appeared in the interview, his credential was examined never raised grievance that he was not given interview, letter not providing sufficient time to appear rather he appeared in the interview. The ground for non-transparency has been raised on the ground that the panel of selected candidates was not published. That may be irregularity, cannot be illegality, but this point falls flat in view of the fact that he himself annexed the list of selected candidates along with marks obtained by them, now he cannot raise the grievance that it was not transparent. In such view of the matter, the point raised by the petitioner that the process was not transparent is not sustainable.

The Selection Committee not constituted in terms of
Statute and its effect on selection:

For examining this issue, Clause 14 and 23 of the 1st Statute are relevant. It will be relevant to quote the relevant portion of the Statute:

Clause 14(iv) POWERS OF THE CHAIRPERSON,
BOARD OF GOVERNORS: -

In emergent cases, the Chairperson may

exercise the powers of the Board and inform the Board of the action taken by him for confirmation and ratification.

Clause 23. APPOINTMENTS:

- (1) The posts at the Institute shall be filled by advertisement on all India basis:

Provided that the ratio between the Direct Recruitment and Promotion posts for posts other than that of the Director or the Deputy Director shall be as per the recruitment rules.

- (2) The reservation of posts shall be in accordance with the rules of the Central Government.
- (3) For the purposes of appointments, the rules applicable to of the Central Government employees shall apply.
- (4) The Selection Committees for filling posts under the Institute (other than the posts on contract basis) by advertisement or by promotion from amongst the members of staff of the Institute shall be constituted in such manner as laid down by Ministry of

Human Resource Development,
Department of Higher and Secondary
Education Government of India or
Board from time to time by
ordinances.

(5)

Selection Committees for filling up
posts under the Institute (other than
on contract basis) by advertisement or
by promotion from amongst the
members of staff of the Institute shall
be constituted in the following
manner namely

(a) the Selection Committee for recruitment of
Academic Staff (excluding the Director and
the Deputy Director), or for promotion shall
be as under,

(1) Director or Deputy Director—Chairman.

(2) Visitor's Nominee -Member.

(3) Two nominee of the Board one being
an expert, but other than a member of the
Board -Member.

(4) One expert nominee of senate from

outside the institute -Member.

(5) Head of Department concerned

(for other than the post of Professor)-

Member. -Member.

On examination of the provisions of the aforesaid Statute, the Chairman in the emergent cases, may exercise the power of the Board and inform the members of the action taken by him for confirmation and ratification.

Clause 23 deals with constitution of selection committee in the matter of appointment of candidate.

For deciding the issue of illegal constitution of the Selection Committee, the pleading made in the writ petition has to be examined. In Para-18 of the petition, it has been mentioned who would be the member of selection committee. In Para-19 it has been stated that in stead of six members, the Committee was comprising of seven members which has been explained by the National Institute of Technology that the 7th member was inducted to take care and protect the interest of candidates of Scheduled Caste/Scheduled Tribe. The grievance of having 7th person in the selection committee is devastating, obliterate the credibility of selection committee. Further grounds that have been taken that two members have not been appointed by the Board of Governors



as per the Statute as well as the Senate as also not nominated the expert as per the Statute, rather the Chairman of the Board of Governor has appointed the members representing the BOG as well as the Senate. As per Clause 14.4 the Chairman has been conferred the power of Board in emergent situation, explanation has been given by the NIT in its counter affidavit stated that the Chairman of the Board to maintain confidentiality about the members of Board can exercise power conferred under it, appointed the eminent person to avoid the chance of influence to the member of the Selection Committee by candidates. The note of dissent that has been offered by the single member was outnumbered by the other members of the Board of Governor so much so mode of dissent does not disclose the nature of infirmities in the constitution of the Board, merely the objection is there that the Selection Committee was not constituted properly. In the pleading also, except the above, there is no specific allegation so much so that there is no specific averment offered by the petitioner showing illegality in the constitution of the Selection Committee causing any prejudice to the petitioner. Explanation offered by the NIT cleared the air of confusion in the matter of constitution of selection committee. Certain judgments have been relied upon by the counsel for the petitioner. Counsel for the petitioner to substantiate his point of

wrong constitution of selection committee and its effect has placed reliance on 2011(1) PLJR 1134 (Dr. Bimal Prasad Singh v. State of Bihar) (relevant Para-16 and 18) are as follows:

“Para-16: In the present case, no merit list has been produced on record by the respondents and it is not known whether the Selection Committee had at all prepared a final combined merit list or not. This Court notices that Annexure-3, the list available on the record with the signature of members of the Committee, is not a merit list. This list is only a „chart“ with details of marks allotted to all the 351 applicants under different heads in seriatim of their application numbers and in separate category they had applied. The “chart” also shows that no ranking was allotted to the individual candidates, as per their marks, by it. Thus it is apparent that this exercise was only a ground work on the basis of which final combined merit list had to be prepared by the Selection Committee wherefrom only the final panel of candidates to be recommended for appointment had to be prepared. There is nothing on record to show that the



Selection Committee did this. The vital link in the process, between the chart of the names of the candidates with details of marks, without their ranking, as contained in Annexure-3, and panel notified by the University, as contained in annexure-4, namely, a combined final merit list is missing in the case. There is no pleading on record and no document available with the affidavits of any party to show that such a final combined merit list was prepared by the Selection Committee, on the basis of which the panel was prepared as notified by the University, vide Annexure-4. From the note at the bottom of Annexure-4, it appears that, up to three days prior, the Vice Chancellor, in the capacity of Chairman of Selection Committee, had passed orders and had issued directions. This clearly shows that final merit list and panel was not prepared by the Selection Committee and, if at all, it was left to the discretion of the Vice-Chancellor, in the capacity of Chairman of the Selection Committee, to select the names for inclusion in the panel and notify the same. This was clearly beyond



the authority vested in him by the Statute, even though he was in the capacity of Chairman of the Selection Committee, and any delegation of powers to him by the Selection Committee, if at all there was, clearly amounted to abdication of its functions by the Committee not warranted in law. This clearly vitiates the entire selection process and goes to the root of the matter.

Para-18 : It cannot be disputed that transparency and accountability are call of the day. Every public functionary must act responsibly, fairly, objectively and with maximum possible transparency, in consonance with the spirit of the Constitution and statutory provisions. In the matter of public employment, to conform with the requirements of Articles 14 and 16, the selection process must be flawless, open and objective, giving equal opportunity and equality in the matters of consideration to all eligible candidates. In case fairness of a selection process is called in question in a court of law, it is the authority concerned which has to establish its actions as strictly satisfying the



test of Articles 14 and 16. Any infraction in the same, leading to breach of the Constitutional mandate, is bound to lead to invalidity of the entire selection process. It is not the question of consideration of the individual candidates and the comparative rights between two individuals. It is the question of inspiring confidence of the people in the process adopted, by making it transparent to the maximum and flawless. In this case the respondents and particularly the Selection Committee constituted as per the substituted Section 57 of the Bihar State Universities Act, 1976 have failed to do so.”

Basically in those paragraphs, the Court has held that there should be fairness in the selection and while making selection, statutory rules should be followed. Any action dehors to the provisions of the Statute has not been subscribed, rather criticized and held that it vitiates the entire selection process as it goes to the very root of the matter.

In 2011(4) PLJR 170 (Navin Kumar v. State of Bihar) where challenge was made that the Selection Committee was not constituted in terms of Section 57(1) of the Bihar Municipal Act,



ground for illegal constitution has been given that the Selection Committee was not constituted under the revised Statute as there was no representation of women, extremely backward and other incidental grounds were taken. The other point was taken that the name of experts should have been nominated from the panel of names prepared by the academic Council which was lacking. It was found to be mandatorily requirement ground violation resulted in illegality. It is relevant to quote Para-9, 10 and 24 of the judgment which are as follows:

Para -9: Counsel for the petitioner has also challenged the procedure adopted for constitution of Selection Committee, stating that under Section 57 (1) of the Bihar State Universities Act, appointments on the post of Principals, Teachers and Officers of the University could be made, on the recommendation of the duly constituted Selection Committee, as provided under the Statute. The revised statute dated 30.6.2008 prescribes the guidelines regarding eligibilities, qualifications, constitution of Selection Committee, division of marks allocated to the career achievements and viva-voice etc. Under Article 7 of the revised statute



provides for composition of Selection Committee. Representation of Women/Extremely Backward Class in Selection Committee is mandatory, but it was ignored. Composition of the Selection Committee was not in terms of revised statute. Advertisement had been published in September, 2007 and at that time even the selection panel had not been prepared. A meeting of Academic Council was held on 26.5.2008, in which it was decided to ask for five experts names from each Head of the Department, which shall also include names of SC/ST candidates. It is apparent from this fact that the Selection Committee was not in existence till 26.5.2008. The list of 10 names was never produced before the Academic Council and panel of 10 experts was never approved by the Academic Council. The constitution of Selection Committee was, therefore, in utter violation of the statutory provision as the Academic Council was only competent to approve the panel of experts with at least 10 names, out of which at least 2 members should belong to SC/ST and Women category. The



Academic Council did never select/nominate 3 experts, as per the revised statutes. In fact the names of 3 experts were selected by the Vice-chancellor, which is admitted in the counter affidavit filed on behalf of the University stating that Academic Council delegated its power to the Vice-chancellor.

Para-10: Counsel for the petitioner submits that under the revised statute, power to approve panel of 10 names of experts is vested in the Academic Council. This power could have been exercised by the Academic Council only and in no case there should have been delegation of this power to the Vice-Chancellor of the University. This view has also been propounded in a decision reported in 2011(1) P.L.J.R. 1134, that if statute vests any power/jurisdiction in a particular person/authority, it must be exercised by the authorized person, only as there cannot be re-delegation of delegated power.

Para- 24:Considering several irregularities, illegalities pointed out by the petitioner, specially with regard to the constitution of the Selection



Committee, observance of perfunctory selection process, in violation of the provisions under the revised statute, violation of reservation policy of the State Govt. applicable in the matters of the appointment, allocation of marks completely in violation of Article 13 of the revised statute as well as appointing persons not eligible for appointment as per the University statute, I find that appointment of 16 Principals, through notification dated 29.9.2008 (Annexure-5) is completely illegal and fit to be quashed.”

The judgment of Dr. Bimal Prasad Singh (supra) has been approved in 2011(2) PLJR 787 Dr. Om Prakash Singh v. Bimal Prasad Singh . The judgment of Navin Kumar (supra) was under scrutiny before the Division Bench in 2013(2) PLJR 673 Om Prakash Gupta v. State of Bihar and the Division Bench has affirmed the view taken by the Single Bench.

In the present case, as mentioned above, the foundational facts showing illegality in the constitution of the Selection Committee has not been properly worded in the whole of writ petition showing what manner the Constitution of the Selection Committee was formed de horse to the statute vague and



evasive statements have been made does not concretize the point raised. The other major objection has been made that the 7th member should not have been there, the explanation offered by the NIT that the 7th member has been made to protect the interest of SC/ST is accepted by this Court and mere presence of additional member to protect the right and interest of SC/ST will not make the constitution of the Selection Committee illegal in such manner will vitiate the whole process of selection, that too in a situation when the Central Government in the year 2014 vide letter date d 13th February 2014 has provided in the selection of the Selection Committee should comprise one person from the Minority Community or from the SC/ST/OBC with a view to protect the interest of those classes so much so that the power has been given to the Chairman of the Board of Governors to exercise the power of GOB in emergent situation with the rider of approval/ratification by the GOB which has been done in the present case and, as such, the claim of the petitioner that the constitution of Selection Committee is bad in law does not survive and, as such, this ground also goes against the petitioner.

In absence of specific pleading the Court may refuse to engage itself to grope and find out the point in support of parties to the case, it will be relevant to rely on AIR 1981 SC 588



(S.S.Sharma v. Union of India) where the Hon'ble Supreme Court has said that the Court should insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation, except through the well known. Besides the aforesaid, oral submission raising new points for the first time tend to grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response. It is relevant to quote the relevant portion of Para-6 of the said judgment which is as follows:

“No ground has been taken in the writ petitions assailing the validity of the Office Memorandum on the basis now pressed before us. We are of opinion that the courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well-known process of formally applying for amendment. We do not mean that justice should be available to only those who approach the court confined in a strait-jacket. But there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity and a too easy informality is permitted to enter the proceedings of a court it will not be long before a contemptuous familiarity assails its



institutional dignity and ushers in chaos and confusion undermining its effectiveness. Like every public institution, the courts function in the security of public confidence, and public confidence resides most where institutional discipline prevails. Besides this, oral submissions raising new points for the first time tend to do grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response.”

Another point has been taken that the Statute does not provide criteria for selection of candidates. From the proceedings of the BOG it shows that it was pending before the Human Resources Department, in such a situation action of the Selection Committee fixing the criteria of selection of candidate fixing 60 marks for interview and 40 marks for academic excellence is illegal as fixing the qualification can be done by framing the rule under the Statute or by the BOG but the Selection Committee does not have authority to fix criterion of selection without giving prior notice to the participating candidates.

For this proposition placed reliance on the judgment reported in AIR 1996 SC 352 (Krishna Chandra Sahu v. State of Orissa) where the Court has said that power to make rule regulating the condition of service of a person appointed on the Government post is conferred to the Governor of the State under Article 309



of the Constitution of India. If the statutory rule in a given case has not been made either by the Parliament or by the Legislature or by the Governor of the State, it would be open for the appropriate Government to issue executive instructions. If the Rules made but they are silent on that subject, omission can be supplied and the rule can be supplemented by executive instruction but in that case neither the rule was there nor there was instruction providing the criteria for the selection of candidates. The Court has said that fixing the criteria of selection of candidate was made on the basic character roll of the candidate was declared by the Hon'ble Supreme Court to be wrong and held the qualification of selection to be arbitrary and without jurisdiction.

It will be reliant to quote Para - 34, 35, 36, 37, 38, 40 and 43 of the judgment which are as follows:

Para- 34. In the instant case, the Government did neither issue any administrative instruction nor did it supply the omission with regard to the criteria on the basis of which suitability of the candidates was to be determined. The members of the Selection Board, of their own, decided to adopt the confidential character rolls of the candidates who were already employed as Homeopathic Medical

Officers, as the basis of determining their suitability.

35. The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Art. 309. It is basically the function of the rule making authority to provide the basis for selection. This Court in State of Andhra Pradesh v. V. Sadanandam, AIR 1989 SC 2060 observed as under (para 16, at pp. 2065-66 of AIR):-

"We are now only left with the reasoning of the Tribunal that there is no justification for the continuance of the old Rule and for personnel belonging to either zones being transferred on promotion to offices in other zones. In drawing such conclusion, the Tribunal has travelled beyond the limits of its jurisdiction. We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive".(Emphasis supplied)

36. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In *Ramachandra Iyer v. Union of India*, (1984) 2 SCR 200 : (AIR 1984 SC 541), it was observed (para 44, at p.562 of AIR):-

"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 reasons that such deviation from the rules is likely to cause irreparable and irreversible harm".

37. Similarly, in *Umesh Chandra Shukla v. Union of India*, 1985 Suppl (2) SCR 367 : (AIR 1985 SC 1351), it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in *Sh. Durgacharan Misra v. State of Orissa*, (1987) 2 UJ (SC) 657 : (AIR 1987 SC 2267) and the limitations of the Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce test.

38. It may be pointed out that rule making function under Art. 309 is legislative and not executive as was laid down by this Court in *B.S. Yadav v. State of Haryana*, AIR 1981 SC 561. For this reason also, the Selection Committee or the

Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection.

40. A candidate in order to be suitable for appointment on a teaching post must have at least three qualities; he should have thorough knowledge of the subject concerned; he should be organised in his thoughts and he should possess the art of presentation of his thoughts to the students. These qualities cannot possibly be indicated or reflected in the confidential character rolls relating to another service, namely, the service in the Health Department as Homoeopathic Medical Officers where the character rolls would only reflect their integrity, their punctuality, their industry and their evaluation by the Reporting or the Accepting Officer recorded in the annual entries. True it is that the candidates being already serving officers, their character rolls have to be looked into before inducting them in the new service but this can be done only for the limited purpose of assessing their integrity etc. These character rolls, however, cannot form the SOLE basis for determination of their suitability for the posts of junior teachers in the Medical Colleges. Then, what formula or method should be adopted to assess these qualities is the question which next arises. This Court in *Liladhar v. State of Rajasthan* (1981) 4 SCC 159 : AIR 1981 SC 1777 pointed out (at p. 1778 of AIR) :-

"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".

41. It further observed (at p.1779 of AIR):-

"It is now well organised 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 alertness, resourcefulness, dependableness, co-operativeness, 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.

42. Liladhar's case (AIR 1981 SC 1777) was approved in Ashok Kumar Yadav's case (1985) 4 SCC 417 : (AIR 1987 SC 454).

43. On the basis of these decisions, we are

inclined to say that in order to assess the suitability or real worth of a candidate for the post of junior teacher in the college, the basis, namely, the character rolls, adopted by the Selection Board was wholly arbitrary besides being without authority or jurisdiction.

Another judgment dealing with this aspect of the matter is (2000)7 SCC 719 (Kiran Gupta v State of U.P.) which deals with two aspects of the matter, one with respect to constitution of the Selection Committee and another selection on the ground of being higher in marks in the interview. With regard to higher marks in Para-21 of the judgment the Court has held that in (1973)1 SCC 440 (Janki Prasad Parimoo v. State of Jammu & Kashmir) where the Constitution Bench of the Hon'ble Supreme Court has approved the matter of selection by interview, held that when the appointment to the higher post is made it might be perfectly legitimate to test the candidate at a properly conducted interview. It was observed that the efficiency of a teacher and his qualification to be appointed as a Headmaster depended upon several conditions – his character, his teaching experience, ability to manage his class, his popularity with the students and the high percentage of successful students he was able to produce and that all those matters must be necessarily taken into consideration before making a selection. The Hon'ble Court has further said that there cannot be affixed ratio for fixing interview as

in selection in the higher level the percent of interview may be on the higher side.

Another aspect with regard to qualification fixed by the Selection Committee has been taken care in Para-14 where the Court has said that the Commission is an expert body entrusted with the duty of selection of teachers to the post of Principal/Headmaster, it will be the most competent body to lay down the guidelines on the method when it is so authorized by an Act of Legislature or by the Statutory rules which is the well accepted principle and no exception can be taken to it. It is relevant to quote Para- 14,21 and 22 of the judgment which are as follows:

Para-14. A bare reading of Section 4 makes it evident that the Commission was composed of members of whom one member was having a position of eminence in the judicial services and the other members were experts in the field of education. Inasmuch as the Commission was an expert body and it was entrusted with the duty of selection of Teachers, Principals/Headmasters, it would



be the most competent body to lay down guidelines on matters relating to the method of recruitment and promotion of teachers to the posts of Principals/Headmasters. Indeed laying down of guidelines by the Commission in such matters when it is so authorised by an Act of legislature or by statutory rules is a well-accepted principle and no exception can be taken to it. (See: *Krushna Chandra Sahu (Dr) v. State of Orissa*².)

Para-21. In *Janki Prasad Parimoo v. State of J&K*³ the challenge was against selection for the posts of Headmasters made by the Selection Committee on the basis of interview. A Constitution Bench of this Court while approving the method of selection by interview, held that when appointment to higher posts were made it might be



perfectly legitimate to test the candidate at a properly-conducted interview. It was observed that the efficiency of a teacher and his qualification to be appointed as a Headmaster depended upon several considerations — his character, his teaching experience, ability to manage his class, his popularity with the students and the high percentage of successful students he was able to produce; and that all those matters must be necessarily taken into consideration before making a selection.

Para-22. It is difficult to accept the omnibus contention that selection on the basis of viva voce only is arbitrary and illegal and that since allocation of 15% marks for interview was held to be arbitrary by this Court, selections solely based on



interview is a fortiori illegal. It will be useful to bear in mind that there is no rule of thumb with regard to allotment of percentage of marks for interview. It depends on several factors and the question of permissible percentage of marks for an interview-test has to be decided on the facts of each case. However, the decisions of this Court with regard to reasonableness of percentage of marks allotted for interview in cases of admission to educational institutions/schools will not afford a proper guidance in determining the permissible percentage of marks for interview in cases of selection/appointment to the posts in various services. Even in this class, there may be two categories: (i) when the selection is by both a written test  732 and viva voce; and (ii) by viva voce



alone. The courts have frowned upon prescribing higher percentage of marks for interview when selection is on the basis of both oral interview and a written test. But, where oral interview alone has been the criteria for selection/appointment/promotion to any posts in senior positions the question of higher percentage of marks for interview does not arise. Therefore, we think it an exercise in futility to discuss these cases — *Minor A. Peeriakaruppan v. State of T.N.*⁴ and *Ajay Hasia v. Khalid Mujib Sehravardi*⁵ — relied upon by Mr Goswami, which deal with admission to educational institutions/schools and also cases where prescribed method of recruitment was written test followed by an interview — *Ashok Kumar Yadav v. State of Haryana*⁶; *D.V. Bakshi v. Union of*

India⁷ and Krishan Yadav v. State of Haryana⁸.

Another judgment is (2008)3 SCC 512 (K. Manjusree v. State of A.P.) which shows that where the rules do not prescribe any procedure, the Selection Committee may prescribe the minimum marks, as stated above. It is relevant to quote Para-33 of the judgment which is as follows:

“Para-33 The Resolution dated 20.11.2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify t hat prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection can prescribe by rules, t he minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the



Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.”

In the aforesaid judgment, the power to frame rule for service condition or selection lies with the competent authority, if any particular issue is silent, can be filled up by executive instruction. If no rule is framed, the Selection Committee can fix basis of selection before commencement of selection process not in midway. The Hon’ble Supreme Court has dealt with similar issue in



AIR 2010 SC 3714 (Ramesh Kumar v. High Court of Delhi) where the Hon'ble Court has held that in case of statutory rule prescribed a particular mode of selection which has to be given strict adherence accordingly. In case of no procedure prescribed by the rule and there is no other impediment in law, the competent authority while laying down the law for selection may prescribe for test and further specify the minimum benchmark for the written test as well as for viva voce. This judgment also dealt with the issue that once the petitioner had appeared in the examination and could not succeed cannot be permitted to take a round and challenge the selection procedure. It is relevant to quote Para -13 and 14 of the judgment which are as follows:

“Para- 13: Thus, law on the issue can be summarized to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum Bench Marks for written test as

well as for viva-voce.

Para-14: In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in All India Judges' Association & Ors. V. Union of India & Ors. AIR 2002 SC 1752 accepted Justice Shetty Commission's Report in this regard which had prescribed for not having minimum marks for interview. The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in Syed. T.A. Naqshbandi & Ors. V. State of J & K & Ors. (2003)9 SCC 592: and Malik Mazhar Sultan & Anr. V. Union Public Service Commission (2007)2 SCALE 159. We have also accepted





the said settled legal proposition while deciding the connected cases, i.e. Civil Appeals @ SLP (Civil)Nos ... in CC 14852-14854 of 2008 (Rakhi Ray & Ors. V. The High Court of Delhi & Ors.), vide judgment and order of this date. It has been clarified in Ms. Rakhi Ray (supra) that where statutory rules do not deal with a particular subject/issue, so far as the appointment of the Judicial Officers is concerned, directions issued by this Court would have binding effect”.

It is apparently clear, selection criterion has to be fixed before commencement of selection, cannot be changed in midway. When the rule is silent fixing the criterion in that situation providing criteria for selection of the candidates before interview started and all candidates appear without demur only the petitioner is challenging the mode and method of selection is not acceptable to this Court as it suffers from estoppels and acquiescence. It will be relevant to rely on the judgment reported in (2013)11 SCC 309 ((Ramesh Chandra Shah v. Anil Joshi), Para-18 and 24, which are as follows:

Para-18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

Para-24: In view of the propositions laid down in the abovenoted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.

Another judgment of estoppels is the judgment reported in (1997)9 SCC 527 (Raj Kumar v. Shaktiraj) which deals with the situation that when the defect is glaring, goes to the root of the matter, the principle of estoppels does not arise. In that case, the Government has committed gross illegality in the selection of the candidates as the Government had not taken out posts from the purview of the Board Examination, but after examination was



conducted under 1955 Rules and after results were published, exercised the power under the proviso to Para-6 of 1970 Notification posts were taken out from the purview thereof. Thereafter the selection committee was constituted for selection of candidates. The entire selection process was illegal, in that context the Hon'ble Supreme Court held the principle of estoppels, waiver or acquiescence has no application to the facts of that case. It is relevant to quote Para-16 of the judgment which is as follows:

Para-16: Yet another circumstance is that the Government had not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rules and after the results were announced, it exercised the power under the proviso to para 6 of 1970 Notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. 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*² 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.

This Court in 1999(1) PLJR 664 (Dilip Kumar Jha v. State of Bihar) has also dealt with the issue of estoppels where the Court has said that when the selection process is vitiated by glaring defect, can be challenged by the petitioner even though they have participated for the selection process in Para-72 of the said judgment which is as follows:

“Para-72 : Therefore, the selection procedure in this case is vitiated by ‘glaring defects’ and can be challenge d by the petitioners even though they participate d in the selection process.”

This Court in 2012(2) PLJR 18 (Anurag Verma v. State of Bihar) has said that if the candidate has participated without any demur now he cannot turn around and challenge the mode of selection itself. It is relevant to quote Para-9 of the judgment which is as follows:

“Para-9 :In our view, there can be no quarrel with the settled proposition of law that there can be no estoppel against statute. But we are also of the view that it is not strictly the principle of estoppel which is applicable in the present situation rather the issue involved is more basic and fundamental for exercising discretionary writ jurisdiction in a situation where a party has accepted the terms of notices or advertisement and has taken his chance of success without any protest and then seeks exercise of discretionary writ jurisdiction to challenge the terms of advertisement/notice. In such a situation the Courts have held that the proper and lawful



course for the affected persons is to challenge the violation of rules or law apparent from the notice or advertisement, instead of accepting the terms without any demur and then raising a grievance on being unsuccessful in the selection process. In such a situation, the Apex Court has clearly laid down the law that such petitioner should not be permitted to succeed in his challenge to the terms of advertisement/notice inviting applications. No doubt, there are exception to this rule such as a case where the authorities commit illegality in the selection process contrary to law but without there being any sanction for their such conduct in the terms of advertisement. In the case of Amlan Jyoti Borooah Vrs. State of Assam; (2009) 3 SCC 227 the law has been discussed in paragraphs 29 to 36 with due reference to earlier cases also for coming to the conclusion in paragraph-32 which is in the following words :-

“The appellant, in our opinion, having accepted the change in the selection procedure sub silentio, by not

questioning the appointment of the 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so.”

The same issue was involved in the case of Dhananjay Malik Vrs. State of Uttaranmchal ; 2008 (3) PLJR (SC) 271. The Supreme Court not only approved an earlier judgment in the case of Marripati Nagaraja Vrs. The Government of Andhra Pradesh; 2007 (11) SCC 522 but made succinct exposit of principle in paragraph-7 in following terms :-

“It is not disputed that the writ petitioners-respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped

from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.”

On the principle of estoppels, another judgment is (2008)4 SCC 171 (Dhananjay Malik v. State of Uttaranchal) where the Court has said that unsuccessfully candidates participated in the selection process without any demur they are estopped from challenging the selection process on any ground, they should have challenged the selection process before commencement of selection or without participating in the process. It is relevant to quote Para-7 and 9 which are as follows:

Para-7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and

selection with regard to requisite educational qualifications were contrary to the Rules..

Para-9. In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

Another judgment reported in 2007(3) PLJR 109 (Bihar State Pollution Control Board v. Dilip Kumar Jha) the Division Bench said on contravention of provision of law a selection has been made, the very selection being vitiated, a person having participated in such selection cannot be shown the door. It is relevant to quote Para-4, 6 and 7 of the judgment which are as follows:

“Para-4: Before the writ Court, the principal defence was that the petitioners having had participated in the selection process and having had taken a chance before the selectors cannot turn round



and contend that the very selection process is vitiated. The learned Single Judge, to our mind, correctly held that the principle upon which the said defence is based, is founded on estoppel or waiver. A person having had offered whatever he could offer before selectors, knowing them to be selectors, is estopped by conduct from contending that the selectors were incompetent. However, the principles of waiver or estoppel applies only in relation to matters which are not covered by law, that is no estoppel or waiver applies in relation to matters not sanctioned by law. Because anything done in contravention of law is illegal and void. Therefore, in contravention of the provisions of the law, a selection has taken place, the very selection being vitiated, a person having had participated in such selection cannot be shown the door for he offered what he could offer to the selectors, who could not select in terms of the law.

Para-6: If, therefore, by reason of the provisions contained in the said Act and the Rules framed by the State Government, the first step taken to appoint

is vitiated, can it be said that the person, who appeared at one of stages, of such process, that is at the selection stage, cannot report to a Court and contend that the very process adopted for appointment is vitiated. We do not think so.

Para-7: We, therefore, hold that the learned Single Judge rightly held that in the facts and circumstances of the case and in particular by reason of the provisions contained in the said act and the Rules, the very process for appointment could not be initiated without the prior sanction of the State Government and, accordingly for the persons merely appeared before the selectors, it could not be said that the petitioners were estopped from contending that the process of appointment from the day one is bad.”

In 1989 PLJR 998 (Bihar Police Ministerial Officers Association v. State of Bihar) in Para-15 the Court has held that the petitioner cannot be said to have waived his right to challenge the jurisdiction only because he submitted himself to wrong forum, even a good judgment by wrong forum is of no value.

“Para-16 In view of the findings

mentioned above, it appears that respondent no.3 had absolutely no jurisdiction to adjudicate the matter and as such the petitioner cannot be said to have waived his right to challenge his jurisdiction only because he submitted himself to him”.

From the above decision, it emerges from the discussion, if the selection suffers from statutory violation, the selection process is embedded with such illegality, the person even participated, cannot be forbidden to challenge the selection but in absence of grounds available the person participated cannot turn round to challenge the selection and appointment. In this present case statutory violation is not of such nature, goes to the root of the case as well as does not cause any prejudice added with situation the single person in his category could not succeed to secure minimum qualifying marks. One important issue, how far this Court could, in exercise of judicial review, should interfere in such matter has been dealt with in the Judgment (2008)2 SCC 119 (M.V.Thimmaiah v. UPSC) where it has been held in exercise of power under judicial review the Court should not interfere with the outcome of selection, except on the ground of mala fide or serious violation of statutory rule. The Court cannot sit as an appellate Court to examine the recommendation by the Selection Committee

like the Court of appeal. Discretion has been given to the Selection Committee only and the Court rarely as a Court of appeal to examine the selection of candidates nor is business of the Court to examine each candidate and record its own opinion. It is relevant to quote Para-21 & 22 of the judgment which are as follows:

Para-21. Now, comes the question with regard to the selection of the candidates. Normally, the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the court of appeal. This discretion has been given to the Selection Committee only and courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion.

Para-22. Keeping in view the ratio laid down by this Court in several decisions, now we shall examine the argument of learned Senior Counsel for the appellants which had been addressed. But we may at the very outset



observe that the Court while considering the proceedings of the Selection Committee does not sit as a court of appeal. Courts have limited scope to interfere, either selection is actuated with mala fide or statutory provisions have not been followed. In the present case, 39 candidates were examined by the Selection Committee for being recommended for appointment to IAS. The selection process took place between 24-11-2003 and 28-11-2003 whereby the Selection Committee scrutinised the service records of the individual candidates and interviewed them and the Selection Committee selected those candidates who were found to be having outstanding merit and ability.

The Hon'ble Supreme Court in AIR 1993 SC 796 (Union Territory of Chandigarh v. Dilbagh Singh) has said that the interference can be made only in the case of exercise of power arbitrarily, without bona fide and in a case of dubious selection.

In the present case, petitioner is the single candidate from Scheduled Tribe and, as such, he was contesting on the said post against himself, as there was no other candidate against him in the fray.

Why this Court is not inclined to interfere with the selection on that post is that as the petitioner was single person in his category of S.T. could not secure even the minimum marks, cannot challenge the appointment of all, he could have challenged the selection made in his own category but there is none. He has nothing to do with the appointment of OBC and SC. Petitioner could not be selected because he got a very little marks, much below the qualifying marks.

In such view of the matter, this Court does not find any substance to interfere in the present case. Accordingly, this petition is dismissed.

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(Shivaji Pandey, J)