

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7949 of 2020

-
1. Anil Kumar Sharma Son of Marchhu Sharma Resident of Village and P.O.- Fakharpur, P.S.- Arwal, District- Arwal, Bihar- 804401.
 2. Sudhanshu Kumar Son of Ganesh JiPathak Resident of At and P.O.- Satwar, P.S.- G.V. Nagar, District- Siwan, Bihar- 841439.
 3. Bikas Kumar Jha Son of Sharwan Kumar Jha Resident of At and P.O.- Shahpur, P.S.- Muffasil, District- Begusarai, Bihar- 851129.
 4. Shakil Ahamad Khan Son of Md. Wasim Khan Resident of Koshi Colony, Quarter No. E/15, P.O. and P.S. Birpur, District- Supaul, Bihar- 854340.

... .. Petitioners

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Department of General Administration, Government of Bihar, Patna.
3. Bihar Staff Selection Commission through its Secretary, Veterinary College, Patna- 800014.
4. The Chairman, Bihar Staff Selection Commission, Veterinary College, Patna- 800014.
5. The Secretary, Bihar Staff Selection Commission, Veterinary College, Patna- 800014.
6. The Controller of Examination, Bihar Staff Selection Commission, Veterinary College, Patna- 800014.

... .. Respondents

Appearance :

For the Petitioners	:	Mr. Kumar Kaushik, Advocate Mrs. Namrata Dubey, Advocate
For the Respondent State:		Mr. Shiv Shankar Prasad, S.C.-8
For the Respondent Commission	:	Mr. Lalit Kishore, Senior Advocate Mr. Anjani Kumar Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 01-12-2020

Nearly four decades ago in 1982, the Kanpur University had held a Combined Pre-Medical Test for admission in MBBS course in Medical Colleges, which was 'Multiple Choice Objective Type Test'. For achieving high level of transparency and



fairness in the process of selection, the University had published key answers for the questions along with the result of the test. Some of the candidates had questioned the correctness of the result on the ground that the key answers, prepared for evaluation of their answer scripts, as disclosed by the University, were incorrect. The dispute had ultimately travelled up to the Supreme Court in case of *Kanpur University and Others vs. Samir Gupta and Others*, reported in (1983) 4 SCC 309. The Supreme Court, in case of *Samir Gupta* (supra), made very significant observation of great importance in paragraph 15, relevant portion of which reads as under : -

“15.If the University had not published the key answer along with the result of the test, no controversy would have arisen in this case. But that is not a correct way of looking at these matters which involve the future of hundreds of students who are aspirants for admission to professional courses. If the key answer were kept secret in this case, the remedy would have been worse than the disease because, so many students would have had to suffer the injustice in silence. The publication of the key answer has unravelled an unhappy state of affairs to which the University and the State Government must find a solution. Their sense of fairness in publishing the key answer has given them an opportunity to have a closer look at the system of examinations which they conduct. What has failed is not the computer but the human system.”



2. *Samir Gupta* (supra), dealt with the importance and relevance of publication of model answers, which are the bases for evaluation of answer scripts in a multiple choice objective type test. *Samir Gupta* (supra), has noted the adverse consequences of non-disclosure of key answers, if the key answers are kept secret in a multiple choice objective type test and observed that had the key answers been not published, numerous students 'would have had to suffer injustice in silence'. The Supreme Court recorded with appreciation, the sense of fairness in the University in publishing the key answers, which had given the students an opportunity to have a closure look at the system of examinations, which they had conducted.

3. In the present case, the Bihar Staff Selection Commission (hereinafter to be referred to as 'the Commission'), which has the consistent track record of falling into errors at considerable scale in holding similar type of multiple choice objective type tests, in past, in relation to recruitment to various posts under the State of Bihar, has not only failed to publish the model key answers, but it is resisting the petitioners' claim to know the key answers, which were the basis for evaluation of the answers scripts. The Commission had adopted the practice of publishing the key-answers in past, but in relation to the selection



process in hand it has decided to keep the key-answers secret. In the present proceeding, the Court considering the rationality and tenability of the decision of the Commission to withhold the key-answers from public domain into the background of the explanation put forth by the Commission to justify the said decision.

4. This case relates to an advertisement dated 11.10.2014 for conducting First Inter Level Combined Examination for appointment to 'Inter Level Posts', i.e., to fill up such posts for which minimum qualification is 'Intermediate pass', under various Departments of the Government of Bihar. It transpires from the pleadings that earlier, the preliminary examination was conducted in two stages on 29.01.2017 and 05.02.2017. Rest of the examinations were scheduled on 19.02.2017 and 26.02.2017, which could not be conducted because of registration of a criminal case, being Agamkuan P.S. Case No.44 of 2017 for the offences punishable under Sections 419, 420, 467, 468, 471 and 34 of the Indian Penal Code, on the allegation of use of unfair-means including use of electronic equipments for manipulating selection of various candidates. The police found complicity of the Secretary as well as the Chairman of the Commission. From the materials on record of the present case, it appears that it



transpired, during the course of investigation, that the question paper of the examination held on 05.02.2017 was circulated on *WhatsApp* and other social media platforms and many incriminating materials were found from the house of the accused, who was the then Secretary of the Commission. In the aforesaid background, the entire preliminary examination was cancelled vide a notice dated 08.02.2017.

5. The preliminary examination again commenced on 08.12.2018 and ended on 10.12.2018. It is an admitted fact that the preliminary examination consisted of 150 multiple choice questions from (1) General Knowledge, (2) General Science and Mathematics, and (3) Comprehension/Reasoning/Mental Ability. The result of the examination was published on 14.02.2020, in which 63739 candidates were declared successful against 13120 vacancies.

6. There is pleading in the writ application that the Commission did not upload the model key answers on the *website* before or at the time of publication of result, as had been the past practice of the Commission. The petitioners have relied on a Division Bench decision of this Court, in case of ***Md. Nafis Nawaz Khan and Another vs. The State of Bihar and Others***, reported in (2016) 1 PLJR 667, to contend that in the light of



direction issued in paragraph 40 therein, it was incumbent upon the Commission to have published the model keys answers and given the candidates an opportunity to raise objection, if any, to such model key answers. It has been averred in the writ application that they had approached the Public Information Officer of the Commission under the Right to Information Act, 2005, and had also filed appeal under the said Act for supply of OMR sheets, model key answers and marks secured by the petitioners and category-wise cut off marks.

7. This is to be pointed out that those, who have been declared successful in the preliminary examination, can participate in the main examination to be held by the Commission. The petitioners have a grievance that the Commission is not disclosing the marks obtained by the individual candidates and category-wise cut off marks, fixed by the Commission.

8. A counter affidavit has been filed on behalf of the Commission. It has been stated in the counter affidavit that after holding of the examination, the Commission discussed the matter regarding uploading of model key answers provided by the question setters in its meeting dated 08.08.2020, when the Commission unanimously decided that the model key answers provided by the question setters would be scrutinized by a team of



experts and on the basis of model key answers prepared by the experts, the evaluation shall be done. The Commission decided to get all the questions scrutinized by the team of experts to ascertain whether the questions were correctly framed having the definite answers. In addition, it was also decided to scrutinize the model key answers provided by the setters for the said purpose. The Commission had taken services of experts of different subjects. In all the phases of examinations, there were altogether 900 questions, which were gone through by the experts minutely and after scrutiny, the experts came to the conclusion that 21 questions were either wrongly framed or had incorrect answers. In addition to that, the body of experts also found that in respect of two questions there were printing mistakes and accordingly, as per recommendation of the earlier body of experts, the Commission decided to delete 23 questions. After the said decision, the Commission had conducted three examinations, in which the same process of not uploading the model key answer on the *website* has been followed. In order to justify the decision not to publish the key-answers before or at the time of publication of result, it has been stated in paragraph 5(B) of the counter affidavit that in such cases objections are received only for a few questions and only those questions are scrutinized by the panel of experts, whereas in



the present system, when model key answers are not uploaded on the *website*, entire model key answers, provided by the respective setters, are scrutinized by the panel of experts.

9. It is accordingly the case of the Commission that it is better to scrutinize the entire model answers rather than answer of few questions. It has further been stated in paragraph 5(C) of the counter affidavit that there is no mandate, either statutory or in the nature of administrative instructions, for uploading of model answers. There was no such stipulation in the advertisement in this regard. It has also been stated that some recruitment agencies like, Bihar Public Service Commission and CSBC Bihar do not upload model answers on their *website*. Reference has also been made to the practice adopted by the Union Public Service Commission, which too does not upload the model answers.

10. It is a peculiar stand taken by the Commission in its counter affidavit that uploading of model answers may lead to filing of various cases before the Courts of law, which causes unnecessary delay in publication of result. By way of example, the case of First Graduate Level Examination has been narrated, result of which was published in 2013, but the cases remained pending before the Supreme Court till May, 2020. It is, thus, the case of the Commission that publication of model key answers delays the



process of selection because it generates litigations before this Court and up to the Supreme Court. It has been asserted that in such background, the Commission, after discussion, took a conscious decision that panel of experts would scrutinize the answers suggested by the question setters and evaluation shall be done on the basis of the report of the panel of experts.

11. A rejoinder has been filed on behalf of the petitioners. They have countered the stand taken on behalf of the Commission that publication of key answers delays the process of selection and have contended that it was because of erroneous preparation of model answer keys by the Commission that the process of selection got delayed. Reference has been made to decision of this Court rendered in case of ***Dhananjay Kumar Mishra and Others vs. Bihar Staff Selection Commission***, reported in (2013) 4 PLJR 169, in which case, correctness of some of the model key answers were challenged before this Court. In the said case, the stand of the Commission, taken before this Court, has been noted in paragraph 48 of this Court's decision, wherein, *inter alia*, it was pleaded that in order to ensure complete fairness and to avoid future complication and delay in final publication of merit list, the Commission has adopted the process



of uploading the model answer keys and inviting objections, if any, from the candidates.

12. In the said case, fairness and transparency was pleaded on behalf of the Commission on the ground that model answers were made available to the candidates and objections were invited, which were placed before an expert committee to re-assess and scrutinize correctness of framing of questions and termination of model answers. It has been asserted that the model key answers in respect of four questions were found incorrect by learned Single Judge of this Court and subsequently, the Division Bench found further key answers to be incorrect, while deciding L.P.A. No. 1200 of 2012 and other analogous cases in case of *Kumod Kumar and Others vs. The State of Bihar and Others*, reported in **2015 (3) PLJR 693**. The said matter related to First Graduate Level Examination and the Supreme Court has finally decided the matter by judgment and order dated 06.05.2020 passed in S.L.P. (Civil) Nos. 23202-04 of 2015 (*Bihar Staaff Selection Commission and Others vs. Arun Kumar and Others*). Referring to the Supreme Court's decision, dated 06.05.2020, it is the petitioners' case that though the Supreme Court did not approve assessment of answer keys by this Court, the answer keys were got examined afresh by a team of experts. The petitioners have also



relied on Supreme Court decision in case of ***Rajesh Kumar and others vs. State of Bihar and Others***, reported in (2013) 4 SCC 690, which also arose out of a selection process undertaken by the Commission for making recommendation for appointment against various posts of Junior Engineers. In the said selection process, 41 out of 100 key answers were found to be wrong.

13. It is accordingly the petitioners' case that the Commission has history of preparing wrong model answers, which causes delay in finalization of results. It has been pleaded that the Commission, instead of giving the petitioners an opportunity of remedying the wrong, has decided to do away with the remedy itself, contrary to the observations made by the Supreme Court in case of ***Samir Gupta*** (supra). It has been stated that BPSC follows the procedure of uploading model answer keys and inviting objections from the aspirants in Multiple Choice question (MCQ) objective type tests. Reliance has also been placed on another Division Bench decision of this Court, rendered in case of ***Ashutosh Kumar Jha and Others vs. The State of Bihar and Others*** dated 04.10.2016 in L.P.A. No. 1235 of 2016 and other analogous matters, in which case, this Court, upon noticing the fact that after publication of model answers, since objections were invited and were scrutinized by the experts, in consonance with the



decision issued by the Division Bench of this Court, in case of ***Md. Nafis Nawaz Khan and Others*** (supra), recorded that there was no scope of judicial review under Article 226 of the Constitution of India.

14. I have heard Mr. Kumar Kaushik, learned counsel appearing on behalf of the petitioners, and Mr. Lalit Kishore, learned Senior Counsel representing the Bihar Staff Selection Commission.

15. Mr. Kumar Kaushik, learned counsel appearing on behalf of the petitioners, has heavily relied on the following decisions in support of his submissions: -

(I) Supreme Court : -

(i) ***Samir Gupta*** (supra)

(ii) ***Rajesh Kumar*** (supra)

(iii) ***Richal and Others vs. Rajasthan Public Service***

Commission, reported in **(2018) 8 SCC 81**.

(II) Patna High Court :

(i) ***Nafis Nawaz Khan and Others (DB)*** (supra).

(ii) ***Ashutosh Kumar Jha and Others (DB)*** (supra)

16. Mr. Lalit Kishore, learned Senior Counsel appearing on behalf of the Bihar Staff Selection Commission, has reiterated the stand taken on behalf of the Commission that in the absence of



any specific statutory requirement or mandatory administrative instruction/guideline, the Commission was under no obligation to undertake the process of publication of model key answers inviting objections from the aspirants. He has relied on a Division Bench decision of this Court in case of ***Bihar Police Subordinate Service Commission vs. Ramesh Kumar***, reported in **2019 (2) PLJR 416**, and has also referred to the observation made in paragraph 18 of the Supreme Court's decision in case of ***Richal and Others*** (supra).

17. I have carefully examined the pleadings on record and submissions advanced on behalf of the parties. There is no gainsaying that this Court, in a proceeding of judicial review under Article 226 of the Constitution of India, cannot substitute its opinion in place of the opinion of an expert body, particularly when it comes to determination of correctness or otherwise of key-answers prepared by experts for the questions set up in multiple choice objective type test. The opinion of the experts will have to be given finality unless such opinion verges on palpable absurdity. The only question, which the present proceeding involves, is as to whether in order to maintain transparency and fairness in the process of selection, the Commission ought to have made known to the candidates the answer keys prepared by the Commission and



whether it ought to have invited objections from the candidates before finalizing the result, after scrutinizing the said objections by a body of experts.

18. I have referred to the Supreme Court's decision, in case of *Samir Gupta* (supra), at the very outset, which is apparently the first on this and lucidly states as to what procedure should be adopted to ensure fairness and transparency in a test, which is multiple choice objective type. The expression, in paragraph 15 of the judgment, that 'if the answer keys were kept secret, remedy would have been worse than the disease', cannot be conveniently ignored by the institutions/bodies conducting such tests.

19. In case of *Md. Nafis Nawaz Khan and Others* (supra), which related to teachers eligibility test, the Division Bench noted in paragraph 35 as under : -

"35. Our attention has been drawn by learned Senior counsel, appearing for the Board, to the effect that the decision of this Court in case of Manoj Kumar (Supra), which has been relied upon by learned Single Judge, in his order under appeal, has been affirmed by a Division Bench decision of this Court reported in 2012 (1) PLJR 578 (Manoj Kumar Vs. State of Bihar and Ors.). Those cases had arisen out of preliminary test held by the Bihar Public Service Commission. In the said preliminary test, certain questions were found to have been incorrectly framed, which were decided to be weeded out for the purpose of re-evaluation of the mark sheets. On going through the said decisions, we find that on



many occasions, situations had arisen, where, in a multiple-choice question type test, framing of incorrect questions came to be detected after the examination had been held by statutory bodies, sometimes suo motu and sometimes after objections having been raised by the test takers, giving rise to several litigations. In order to remedy such a situation, the bodies, holding such tests, adopt different ways and means, of which the present case is a living example. Initially, when the Board had detected certain questions to be wrong, it had decided to delete such questions and re-evaluate the answer sheets on the basis of the remaining questions on pro rata basis. Subsequently, when more questions were detected to be incorrect by the expert body, they decided to give additional marks for each such incorrect question across the Board.”

20. The Division Bench, in case of *Md. Nafis Nawaz Khan and Others* (supra), held in paragraph 30 that it is well within the jurisdiction of this Court exercising power of judicial review to assess whether the action of the executive passes the test of reasonableness, fairness in action and whether the action discriminates none. The main question, which was framed to be answered in the very opening paragraph, in case of *Md. Nafis Nawaz Khan and Others* (supra), was as under : -

“What should be the mode and manner and what corrective measures would be essential for evaluation of answer sheets in a multiple choice question (MCQ) test, in the event, few questions are found to be incorrect for one reason or the other, withstanding the test of reasonableness, fairness in action and in conformity with principles of equality embodied under Articles 14 and 16 of the Constitution of India, is the foremost issue involved



in the present batch of intra-Court appeals under Clause 10 of letters patent of this Court.”

21. The Division Bench, answering the said question, concluded in paragraph 40 as under : -

“40. Having considered the matters in its entirety and in the interest of justice, we, therefore, direct as follows:-

(a) Immediately after a multiple choice question test is held, it shall be obligatory for the Committee or the Body, which conducts such a test, to undertake an exercise, before evaluating the answer-sheets, to ascertain whether the questions were correctly framed having definite answers. In case any objections are invited from the candidates and such objections are received, they must be looked into by a body of the experts, who would not only be required to ascertain whether the questions were correctly framed or not, but they would also be required to examine as to whether the model answers, prepared by the question-setter, are correct or not, for the purpose of correct evaluation of answer-sheets;

(b) If the structure of a question is found to be incorrect or if the option suggested is found to be incorrect or if there is any printing mistake of such a nature that the correct answer cannot be ascertained or more than one option is found to be correct, such a question must be rejected and should not be allowed to be evaluated;

(c) If, after publication of result, despite due care, it is found that the model key answer/answers suggested was/were incorrect, leading to wrong evaluation, remedial measures must be taken and answer-sheets must be re-evaluated with correct model answers.”

22. It is precisely the case of the Commission that since the said decision, in case of *Md. Nafis Nawaz Khan and Others*



(supra), does not essentially require the Committee or the body, which conducts such test to invite objections and it was left open to the bodies to invite or not to invite objections, the Commission, in its discretion, decided not to invite objections and decided to adopt its own fool proof method.

23. It has been rightly contended on behalf of the petitioners that the stand taken on behalf of the Commission that publication of model answers results into litigations and thereby delays the process of selection is preposterous. The Supreme Court, in case of **Rajesh Kumar** (supra), which also had arisen out of selection process undertaken by the Bihar Staff Selection Commission, remarked that the High Court was entitled to mould the relief prayed for in the writ application and issue directions considered necessary not only 'to maintain purity of the selection process but also to ensure that no candidate earned an undeserving advantage over others by application of an erroneous answer key. It can be seen from the facts noted, in case of **Rajesh Kumar** (supra), that the model answer keys, prepared by the Commission, were referred to experts by a coordinate Bench of this Court when it was found that 45 questions/answers out of 100 were wrong. The entire examination in question was held liable to be cancelled. When the matter came up before the Division Bench of this Court,



the Division Bench held that the entire examination was not required to be cancelled in the absence of any allegation of corrupt motive or malpractices in respect of other question papers. The Division Bench opined that a fresh examination only in Civil Engineering paper could be sufficient to rectify the defect and prevent injustice to any candidate. The Division Bench further held that while those appointed on the basis of impugned selection shall be allowed to continue until publication of result, however, those, who failed to make grade on the basis of fresh examination, shall be given another chance to appear in another examination to be conducted by the Commission. The order of the Division Bench was assailed before the Supreme Court by such candidates, who were already appointed on the basis of the impugned selection. The Supreme Court, in the aforesaid background, held in paragraph 21 as under : -

“21. There is considerable merit in the submission of Mr. Rao. It goes without saying that the appellants were innocent parties who have not, in any manner, contributed to the preparation of the erroneous key or the distorted result. There is no mention of any fraud or malpractice against the appellants who have served the State for nearly seven years now. In the circumstances, while inter-se merit position may be relevant for the appellants, the ouster of the latter need not be an inevitable and inexorable consequence of such a re-evaluation. The re-evaluation process may additionally benefit those who have lost the hope of an appointment on the basis of a wrong key applied



for evaluating the answer scripts. Such of those candidates as may be ultimately found to be entitled to issue of appointment letters on the basis of their merit shall benefit by such re-evaluation and shall pick up their appointments on that basis according to their inter se position on the merit list.”

24. Further, the Court ordered that the answer scripts of the candidates, appearing in ‘A series’ of the competitive examination, shall be got reevaluated on the basis of correct key answers prepared on the basis of report of the committee to which the model key answers were referred to by a coordinate Bench of this Court. The Commission was directed to draw a fresh merit list accordingly.

25. Similar controversy again came up before this Court, in case of *Ashutosh Kumar Jha* (supra), which related to 56 to 59th Joint Combined (Preliminary) Competitive Examinations, 2014, held by the BPSC. This Court noticed that preliminary test was conducted on 15.03.2015. On 11.04.2015, the model answer keys to the questions of booklet series ‘A’, ‘B’, ‘C’ and ‘D’ were uploaded on the official *website* of the Commission. The candidates, who had participated in the preliminary tests, were allowed to tender their suggestions or raise objections supported with reliable evidence with regard to said answer keys published by the Commission by 30.04.2015 so that necessary corrections, if required, could be carried out before publication of final results.



An expert body of 12 experts in different subjects was constituted to consider the objections-suggestions. The expert body examined the objections and suggestions and came to a conclusion that 11 out of 150 questions were required to be deleted, the same being either ambiguous or wrongly framed. The expert body also found some of the answer keys to be incorrect. The result was accordingly published. Noticing these steps having been taken by the Commission, the Division Bench of this Court, in case of *Ashutosh Kumar Jha* (supra), noted, in paragraph 33, that the Commission had invited objections, if any, from the candidates against wrong framing of questions/model key answers in order to cure defects, if correctly pointed out in the representation, so as to maintain fairness in the process of selection. Having noticed the said aspect, this Court refused to sustain the challenge made on behalf of the petitioners. This Court, however, noticed, in case of *Ashutosh Kumar Jha* (supra), in paragraph 47 as under : -

“47. We find, in the present appeals, that out of 150 questions, 11 (eleven) questions were found, by the Experts Body, to have been wrongly framed or not capable of being correctly answered. Further, 5 (five) Model Key Answers, out of the remaining 139, were also found to be incorrect, by the said Experts Body. For a constitutional body, constituted with the central purpose of making recommendations for appointment to civil services/civil posts on the basis of competitive examinations, cannot afford to function unless it endeavors to acquire high level of expertise in holding recruitment tests with perfection. Once in a



while, a mistake can happen since „to err is human’. But, it is being noticed that such errors of wrong framing of questions and preparation of wrong Model Key Answers is taking place more often than not, which is a disturbing phenomenon. More disturbing is the fact that number of such questions and/or answers is sizeable. This phenomenon generates, in the minds of the participants, a sense of uncertainty. This is happening either because the persons concerned have not developed effective method, which is fool-proof or, at least, pretty near to it, to ensure errorless setting up of question papers and preparation of accurate Model Key Answers or this has not been taken up as seriously as it ought to have been taken.”

26. The observations made by the Supreme Court, in case of *Richal and Others* (supra), gains significance in the background of the observations, which has been made, in case of *Ashutosh Kumar Jha* (supra), where the Supreme Court noted in paragraph 19 that key answers prepared by the paper setter or the examination body is presumed to have been prepared after due deliberation. The Court remarked, ‘to err is human’. The publication of key answers, the Supreme Court stated, ‘is step to achieve transparency’ and to give an opportunity to candidates to assess the correctness of their answers. An opportunity to file objections against the key answers uploaded by the examining body is a step to achieve ‘fairness and perfection in the process’. The Court further remarked that the objections to key answers are to be examined by the experts and thereafter corrective measure, if



any, should be taken by the examining body. In case of *Richal and Others* (supra), The Rajasthan Public Service Commission had adopted the above noted procedure. The Supreme Court, after having noticed substance in some of the submissions in relation to the challenge to correctness of the model answers, had required re-examination by the experts. The experts, upon re-examination, had submitted its report. Considering the report of the experts, the Supreme Court finally disposed of the case with following directions as contained in paragraph 28 : -

“28. In view of the foregoing discussions, we dispose of these appeals with the following directions:

28.1. The Rajasthan Public Service Commission is directed to revise the result of all the candidates including all the appellants on the basis of the report of the Expert Committee constituted in pursuance of our order dated 16-1-2018 [*Richal v. Rajasthan Public Service Commission*, 2018 SCC OnLine SC 749] and publish the revised result.

28.2. While carrying the above exercise, the Commission need not revise the result of all those candidates whose names were included in the Select List earlier published. We having already pointed out that the appointments shall not be affected by this exercise, there is no necessity to revise their result. Thus, this exercise shall be undertaken excluding all the candidates who are included in the Select List.

28.3. The Commission shall also publish the cut-off marks of the last selected candidates in the respective categories who were included in the Select List on the basis of which appointments have been made by the Commission.

28.4. On the basis of the revised result, those candidates who achieve equal or more marks in their respective categories



shall be offered appointments against 1045 vacancies as has been mentioned by the Commission in Para 7 of the affidavit, noted above.

28.5. The entire exercise of revising the result and making recommendations for appointments shall be completed by the Commission within a period of three months from today. The State shall take necessary consequential steps thereafter.”

(underlined for emphasis)

27. The Commission, in the present case, wants a situation where the candidates do not have the opportunity to know the model answer keys prepared by the Commission for evaluation of the OMR sheets on the basis of multiple choice objective type test so as to avoid any challenge to the process of selection on that ground, by the candidates. Intention of the Commission is to keep the candidates in dark so that they may not have any basis to question the action of the Commission, apparently before a Court of law. The Commission has not disclosed to the candidates their respective scores nor the Commission is disclosing category-wise cut off marks. The Commission, it appears, has decided to adopt a procedure which is just the reverse of what has been repeatedly observed by the Supreme Court for a selection body to maintain transparency and fairness in the process of selection.

28. This Court is conscious of the limitations of exercise of powers of judicial review under Article 226 of the Constitution of India. It is true that the Court exercising such power cannot seat



as an appellate body or supervisory authority over the administrative actions. The Court exercising such power ordinarily does not interfere with the decisions of expert bodies/institutions/agencies in the matter of selection/recruitment for public employment. However, though Court exercising power of judicial review over administrative action cannot take over the function of an administrator/Government/local body, the Court, in appropriate cases, can certainly ensure that the statutory function of 'State', within the meaning of Article 12 of the Constitution of India, are not carried out at the whims and caprices of its officials. [See : (1979) 3 SCC 489 (*Ramana Dayaram Shetty vs. International Airport Authority of Indian and Others*) and (2006) 13 SCC 382 (*Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. and Others*)].

29. It is also true that policy decisions must be left to the wisdom of the Government/'State', within the meaning of Article 12 of the Constitution, so long as it does not infringe any fundamental or legal right of an individual.

30. An action of a 'State' or its instrumentality can, however, be tested in a judicial review proceeding on the touchstone of rationality, reasonableness and proportionality as has



been enunciated in a series of decisions rendered by the Supreme Court.

31. One of such decisions rendered in the case of *All India Railway Recruitment Board v. K. Shyam Kumar*, reported in (2010) 6 SCC 614, can be usefully referred to to consider the present controversy. Stating the connotations of the expressions, ‘unreasonableness’ ‘irrationality’ and ‘proportionality’ for their application in the matters of judicial review of administrative action, the Supreme Court discussed the law in paragraphs 22 to 25 as under : -

“22. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the court is not much concerned with the merits of the decision but how the decision was reached. In *Council of Civil Service Unions v. Minister for Civil Service* [1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] (*GCHQ case*) the House of Lords rationalised the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision-maker must understand correctly the law that regulates his decision-making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorised delegation, failure to act, etc. fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural



justice, such as audi alteram partem, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons, etc.

23. The ground of irrationality takes in *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] unreasonableness propounded in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] wherein Lord Greene MR alluded to the grounds of attack which could be made against the decision, citing unreasonableness as an “umbrella concept” which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision-maker would in law come to it. In *GCHQ case* [1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL)] Lord Diplock fashioned the principle of unreasonableness and preferred to use the term “irrationality” as follows: (AC p. 410 G)

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘*Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] unreasonableness’ ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

24. In *R. v. Secy. of State for the Home Deptt., ex p Brind* [(1991) 1 AC 696 : (1991) 2 WLR 588 : (1991) 1 All ER 720 (HL)] the House of Lords re-examined the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein. The Court ruled that the exercise of the Home Secretary's



power did not amount to an unreasonable exercise of discretion despite the issue involving a denial of freedom of expression. The House of Lords however, stressed that in all cases raising a human rights issue proportionality is the appropriate standard of review.

25. The House of Lords in *R. (Daly) v. Secy. of State for the Home Deptt.* [(2001) 2 AC 532 : (2001) 2 WLR 1622 : (2001) 3 All ER 433 (HL)] demonstrated how the traditional test of *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two: (AC p. 547 E-F)

(1) Proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(2) Proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

Lord Steyn also felt most cases would be decided in the same way whatever approach is adopted, though conceded that for human rights cases proportionality is the appropriate test.”



32. The Court discussed the doctrine of proportionality *vis-a-vis Wednesbury* principle of unreasonableness in paragraphs 36 and 37 as under : -

“36. *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to “assess the balance or equation” struck by the decision-maker. Proportionality test in some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalise or lay down a straitjacket formula and to say that *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] has met with its death knell is too tall a statement. Let us, however, recognise the fact that the current trend seems to favour proportionality test but *Wednesbury* [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future.

37. Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with



the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.”

33. This is to be noted that, in case of *K. Shyam Kumar* (supra), in relation to a process of recruitment for Group ‘D’ post, certain malpractices and large scale irregularity were detected in the written examination. On reference made in this regard, on enquiry conducted by the State Vigilance Department, *prima facie*, revealed leakage of question papers, mass copying and impersonation of the candidates in the written examination. The Railway Board and the Railway Recruitment Board had decided to conduct a retest for those who had obtained minimum qualifying marks in the written examination. The said decision of the Board was challenged by some of the successful candidates. The decision of the Board was upheld by the Central Administrative Tribunal. The decision of the Administrative Tribunal was, however, interfered with by the High Court and the Boards’ decision was



held to be illegal. The matter thereafter travelled to Supreme Court.

34. The Supreme Court, after having discussed the ‘*Wednesbury* principle of unreasonableness’ and ‘proportionality’ as the tools of judicial review of administrative action, applied the said principles to test the correctness of the decision of the Board. After having seen that the decision of the Board passed both the tests, the Supreme Court reversed the decision of the High Court affirming the decisions of the Central Administrative Tribunal and that of the Boards.

35. In the aforesaid background and the law discussed in *K. Shyam Kumar* (supra), the Court is required to consider whether the conscious decision of the Staff Selection Commission, in the facts and circumstances noted above, not to publish the answer keys to the objective type questions withstands the test of proportionality or not.

36. The principle of proportionality is mainly concerned with the ‘aims of the decision maker’ and ‘whether the decision maker has achieved the correct balance’. The test requires the Court’s attention to be directed to ‘relative weight according to interests and considerations’. In the present case, the Commission had two alternatives available before it viz., either to follow its



past practice of publishing the key answers and invite suggestions-objections in relation to framing of questions and answers prepared by the Commission from the candidates. The facts, noted above, eloquently narrate that the Commission had to face litigations because of its practice of publication of key answers and inviting objections because of which the process of selection got delayed. In such circumstances, it is the Commission's stand, the Commission decided to go for the other alternative of not allowing the applicants know the key answers prepared by the Commission so that they may not raise any objection and finality of evaluation can be achieved with the experts appointed by the Commission without any hindrance. The Commission opted for the second alternative apparently not with a view to achieve fairness and transparency in the process of selection but to expedite the process of selection by creating a situation so that the candidates may not have the grounds available for them to question the correctness of the result.

37. Further, the Court is clueless as to why the Commission, despite requests having been made by the candidates, decided not to disclose the cut off marks (category-wise) and the individual scores of the candidates in the test in question.



38. On the one hand, the Commission had the interest of expediting the process of selection and, on the other, it had a duty to conduct the process of selection in fair and transparent manner. The decision of the Commission not to publish the key answers is based on only one consideration, i.e., if the key answers are disclosed, the Commission may have to face litigations. This consideration is in clear breach of the Supreme Court's observations made in case of *Samir Gupta* (supra). The reason assigned by the Commission for not publishing the key answers in order to give the candidates an opportunity to raise objections is wholly unjustified and such decision, in the Court's opinion, does not pass the test of proportionality as enunciated in various decisions of the Supreme Court, lucidly discussed in case of *K. Shyam Kumar* (supra). The Supreme Court's observation in *Samir Gupta* (supra), quoted in the beginning, gains significance wherein it has been noted that if the answer keys were kept secret, the remedy would have been worse than the disease because so many candidates would have had to suffer injustice in silence. *Richal* (supra) has held that an opportunity to file objections against key-answers uploaded by an examining body is a step forward to achieve fairness and perfection in the process of selection. In view of the aforesaid exposition of law in *Samir Gupta* (supra) and



Richal (supra), the Commission cannot be allowed to take the step, which is rather backward and which would adversely impact fairness and perfection in the process of selection.

39. The decision of the Commission of not publishing the key answers and inviting objections from the candidates is evidently regressive in nature. The Commission instead of learning lessons from the past in positive direction has taken a U-turn, which cannot be countenanced.

40. Situated thus, in the backdrop of above noted discussion and keeping in mind the Supreme Court's decision, in cases of ***Samir Gupta*** (supra), ***Rajesh Kumar*** (supra) and ***Richal and Others*** (supra), I have considered it proper to dispose of this application with following directions to the Commission, which shall sub-serve transparency and fair-play, instead of interfering with the result itself: -

(1) Let the Commission upload the key answers on its *website*, based on which the questions have been evaluated, within one week from today.

(2) With the publication of model answers, the Commission shall invite suggestions-objections from the aspirants in relation to framing of questions and correctness or otherwise of the model key answers.



(3) The candidates shall be given a fortnight's time to submit their *on-line* objections supported by the materials relied upon in respect of their objections/suggestions.

(4) The said objections shall be placed before a body of experts to be constituted by the Commission, which shall consider the objections and decide the same.

(5) The Commission shall thereafter consider the opinion of the experts and if the Commission is of the opinion that any question is required to be deleted or any model answer key is required to be altered, the Commission shall proceed accordingly and revised result of the preliminary test shall be published.

(6) In case, the Commission finds that no alteration is required, the Commission shall proceed on the basis of result of the preliminary test.

(7) In case, the Commission decides to alter any of the model key answers, the Commission shall be required to place the revised model key answers on the *website* of the Commission after publication of result.

(8) The Commission is directed to place, on its *website*, the cut off marks prescribed by the Commission category-wise on the basis of which the candidates have been declared successful.



(9) The Court does not find any reason why the Commission should not disclose the marks obtained by the petitioners in the examination. The Commission is directed to ensure that the petitioners are supplied with the marks scored by them in the preliminary test in question.

(10) While inviting objections, the Commission shall be at liberty to put a condition that the individual candidates raising objections must disclose the answer in fact marked by them in the preliminary test.

41. These directions will, in Court's opinion, serve dual purpose of achieving fairness and transparency in the process of selection as well as ensuring perfection in the said process.

42. This application stands disposed of with the aforesaid directions and observations.

43. There shall be no order as to cost.

(Chakradhari Sharan Singh, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	01.12.2020.
Transmission Date	N/A

