

HIGH COURT OF ORISSA: CUTTACK

RVWPET No.257 of 2023

&

W.P.(C) No.19402 of 2023

In the matter of the applications under Order 47 Rule-1 of the Code of Civil Procedure, 1908 and under Articles 226 and 227 of the Constitution of India.

RVWPET No.257 of 2023

Kabita Jena and others

...

Petitioners

- Versus -

Rajat Kumar Mishra and others ...

Opposite parties

For Petitioners

...

Mr. Budhadev Routray,
Senior Advocate.

M/s. S. Routray, M. Panda
& Parida

For Opposite Parties

...

Mr. Tarun Pattnaik,
Additional Standing Counsel

Mr. P.K. Mohanty,
Senior Advocate

M/s. Pronoy Mohanty,
S.K. Sahu, S.N. Dash &
K.T. Muduli
(For O.P.S.C.)

W.P.(C) No.19402 of 2023

Ruksana Ara Begum and others ... Petitioners

- Versus -

Rajat Kumar Mishra and others ... Opposite parties

For Petitioners ... Mr. Budhadev Routray,
Senior Advocate.
M/s. S. K. Samal,
S.P. Nath, S. Routray,
S. Sekhar, J. Biswal &
A.K. Das

For Opposite Parties ... Mr. Tarun Pattnaik,
Additional Standing Counsel
Mr. P.K. Mohanty,
Senior Advocate
M/s. Pronoy Mohanty,
S.K. Sahu, S.N. Dash &
K.T. Muduli
(For O.P.S.C.)

PRESENT:

THE HONOURABLE SHRI JUSTICE A.K. MOHAPATRA

Date of hearing : 13.07.2023 : Date of judgment : 31.07.2023

A.K. Mohapatra, J. The private Opposite Parties No.1 to 16 in the above noted review petition as well as in the above noted writ petition had earlier approached this Court by filing W.P.(C) No.32174 of 2022. In the said writ petition, the

private Opposite Parties No.1 to 16 as Petitioners questioned the selection procedure adopted by Odisha Public Service Commission (OPSC) while conducting the recruitment examination for appointment to the post of Assistant Section Officer (ASO) in Group-B of Odisha Secretariat Service. This Court after hearing the learned counsels appearing for both the sides in the said writ petition vide a detailed judgment dated 19.05.2023 under Annexure-7 to the review petition allowed the writ petition. Accordingly, the select list of the short listed candidates published vide Notice dated 07.11.2022 by the OPSC for the next phase of the selection process, i.e., for document verification and skill test under Annexure-5 to the aforesaid writ petition was quashed. Further, this Court directed the OPSC to redraw the select list of the short listed candidates strictly in terms of Rule-6(5) and Rule-6(6) as well as the schedule appended to the Odisha Secretariat Service (Method of Recruitment and Conditions of Service) Rules, 2016 on the basis of the aggregate marks

secured by the candidates within a period of two months from the date of judgment.

2. The Petitioners, who are the candidates short listed after conclusion of the first phase of selection process and were supposed to appear in the second phase of the selection, i.e., document verification and skilled test, have approached this Court by filing the above noted review petition with a prayer to review/recall the judgment dated 19.05.2023 under Annexure-7 to the review petition. The above named Petitioners have also filed a writ petition as mentioned hereinabove with a prayer for review/recall of the judgment dated 19.05.2023 passed in the above noted writ petition. Therefore, on a careful scrutiny of both the review petition as well as the writ petition noted hereinabove, this Court observed that not only the parties are same, but also the prayer made in both the petitions are almost identical. Since both the aforesaid applications arise out of a common set of facts and the judgment dated 19.05.2023 has been assailed

almost on identical grounds, therefore, this Court deems it proper to take up both the matters together and the same is being disposed of by this common judgment.

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3. The factual background on which the present review petition has been filed, as narrated in the review petition, is that the OPSC published an advertisement on 31.12.2021 bearing Advertisement No.26 of 2021-22 for recruitment to the post of Assistant Section Officer in Group-B of Odisha Secretariat Service under Home Department. Accordingly, online applications were invited from prospective candidates. 25.02.2022 was the last date for submission of registered online application. In total 796 posts of A.S.O. in Group-B Cadre of Secretariat Service were advertised to be filled up.

4. Pursuant to the aforesaid advertisement dated 31.12.2021 under Annexure-1 to the review petition, many eligible candidates submitted their online application form to participate in the recruitment process. On receiving the

application forms of the candidates having eligibility to participate in the recruitment process, the OPSC initially scrutinized the application forms and after such verification, the candidates were issued with admit card to appear in the written examination which was to take place on 21.8.2022. However, subsequently postponed to 27.8.2022. The Petitioners along with private Opposite Parties and many other eligible candidates appeared in the examination held on 27.8.2022. The dispute arose after publication of the provisional list of the short listed candidates. The private Opposite Parties No.1 to 16 approached this Court challenging the list of short listed candidates published on 07.11.2022 on the allegation that such list has not been prepared in terms of the Rule-6 and the schedule attached to the relevant rules. It was also alleged by the private Opposite Parties that the OPSC without having the authority of law and contrary to the rules has fixed minimum qualifying marks of each subject in the written test. Accordingly, it was also

alleged that the final list of short listed candidates reflecting the names of 1104 candidates (1.5 times of the advertised vacancy categoriwise) was prepared illegally and contrary to the provisions of the relevant rules.

5. It is pertinent to mention here that at the time of admission of W.P.(C) No.32174 of 2022, this Court after hearing the learned counsel appearing for the Petitioner as well as learned counsel for the State and the learned counsel appearing for the OPSC, passed an interim order on 02.12.2022 to the effect that the process of selection for the post of A.S.O. may continue as per schedule, however, no final merit list shall be published/notified till the next date. Such interim order continued till disposal of the writ petition.

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6. The present writ petition has been filed by the above named Review Petitioners with almost identical pleading and prayer. Since the present Petitioners were not arrayed as parties to W.P.(C) No.32174 of 2022, they have filed the

above referred review petition for review/recall of judgment dated 19.05.2023. However, apprehending that the review may not be maintainable at their instance since they were not parties to the earlier writ petition, for abundant precaution, they have also filed the present writ petition by invoking jurisdiction of this Court under Articles 226 and 227 of the Constitution of India seeking review/recall of the judgment dated 19.05.2023 passed in W.P.(C) No.32174 of 2022. Since the factual background of both the review petition as well as the present writ petition is almost identical, to avoid repetition, this Court is of the view that the same is not necessary to be reiterated here again.

Grounds of Challenge

7. On perusal of the review petition, this Court observed that the review petition has been filed principally on the ground that the present Petitioners as well as the short listed candidates of the list published vide Notice dated 07.11.2022 containing 1104 number of candidates were not arrayed as

Opposite Parties in the earlier writ petition bearing W.P.(C) No.32174 of 2022. Therefore, it has been stated in the review petition that since they are necessary parties to the earlier writ petition, in their absence the judgment delivered by this Court needs to be reviewed by this Court. It has also been stated that nonjoinder of the short listed candidates is an error apparent on the face of the record and, as such, the same is a very good ground to review the judgment dated 19.05.2023.

8. Additionally, it has also been contended in the counter affidavit, the State has raised a question with regard to maintainability of the writ petition on the ground of nonjoinder of necessary parties. However, the same has not been dealt with and answered while delivering the judgment dated 19.05.2023. Accordingly, it has been stated that the same is also a very good ground to review judgment dated 19.05.2023.

9. The judgment dated 19.05.2023 is also sought to be reviewed by the present Petitioners on the ground that the advertisement dated 31.12.2021 under Annexure-1 contains a clause, i.e., Clause-6(c) providing that “The Commission shall be competent to fix up the qualifying marks in any or all the subjects of the examination.” Therefore, it has been stated in the review petition that the OPSC being the recruiting agency is competent to fix up the qualifying marks in order to short list the candidates for appearing in the skill test and, as such, there is no illegality in the press note. It has also been stated that a total number of 148888 aspirants applied pursuant to the advertisement and that the OPSC being the expert body had devised its own method to short list the best candidates as per Clause-6(c) of the advertisement dated 31.12.2021. Moreover, it is also alleged in the review petition that the Petitioners were well aware of the Clause-6(c) of the advertisement and that after being unsuccessful in their

attempt, they are estopped to turn around and challenge the select list of the short listed candidates.

10. In the grounds of the review petition, it has also been stated that since Clause-6(c) of the advertisement was not challenged and such Clause-6(c) confers discretion on the OPSC to fix up the qualifying marks in all or any other subjects, therefore, there is an error apparent on the face of the record and the judgment which is being sought to be reviewed. The grounds taken in the review petition further reveals that the Petitioners are also seeking review of the judgment on the ground that Rule-6(5) and Rule-6(6) of the 2016 Rules only specify the scheme and subject for the written examination and that one has to secure at least 40% marks in the skill test to qualify. Therefore, the aforesaid rules does not provide anything with regard to aggregate marks secured by the candidates moreover the aforesaid rules does not specify the method of short listing of the candidates. Accordingly, it has been stated in the review petition that the

same is a very good ground for review of judgment dated 19.05.2023.

11. Finally, a ground has also been taken in the review petition that a valuable right has accrued in favour of 1104 selected candidates including the Review Petitioners. Therefore, they were necessary parties to the earlier writ petition. Further, the judgment dated 19.05.2023 deciding the issue in the absence of the Petitioners and other short listed candidates has caused serious prejudice to such candidates as they were not impleaded as Opposite Parties and no opportunity of hearing was given to such candidates. Therefore, it was alleged that the earlier writ petition was a defective one and such a ground has not been dealt with in the impugned judgment.

12. On perusal of the above noted writ petition filed by the Review Petitioners, it appears that the grounds taken in the writ petition seeking review/recall of judgment dated

19.05.2023 are almost identical. Therefore, for the sake of brevity, the same is not repeated here.

13. Heard Mr. Budhadev Routray, learned Senior Counsel appearing for the Petitioners; Mr. Pradipta Kumar Mohanty, learned Senior Counsel appearing for the Odisha Public Service Commission and Mr. Tarun Patnaik, learned Additional Government Advocate appearing for the State-Opposite Parties.

14. Mr. Budhadev Routray, learned Senior Counsel appearing for the Petitioners, at the outset, submitted that the judgment dated 19.05.2023 delivered in W.P.(C) No.32174 of 2022 needs to be reviewed by this Court as there are errors apparent on the face of the record and moreover no opportunity of hearing was given to the Petitioners while delivering the final judgment in the above noted writ petition. While elaborating his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioner assailed the judgment

dated 19.05.2023 mainly on the ground that the present Petitioners, who were short listed after conclusion of first phase of selection, were not arrayed as parties to the writ petition. He further submitted since a valuable right of the Petitioner is likely to be affected, therefore, they are necessary parties to the writ petition. As such, he further submitted that any decision in the absence of the necessary parties like the Petitioners, the judgment rendered by this Court on 19.05.2023 is a nullity in the eye of law. The entire argument and focus of Mr. Routray, learned Senior Counsel, while assailing the judgment dated 19.05.2023 was focused on the fact that necessary parties like the Petitioners were not arrayed as Opposite Parties and, as such, they did not get any opportunity to present their case before the final judgment was delivered on 19.05.2023. In such view of the matter, he further contended that the judgment dated 19.05.2023 needs to be reviewed/recalled by this Court on that ground alone.

15. Keeping in view the argument advanced by the learned Senior Counsel appearing for the Petitioners and the grounds taken in both the review petition as well as the writ petition, this Court is of the opinion that the present review application involves the following questions of law for adjudication:-

- (i) Whether the grounds taken in the review petition are good grounds to come to a conclusion that there exists an error apparent on the face of the record and, accordingly, the same calls for interference in judgment dated 19.05.2023 by this Court in exercise of its review jurisdiction?
- (ii) Whether the writ petition which is in the shape of a review/recall application by the parties, who were not arrayed as Opposite Parties to the original writ petition, is maintainable in law?

(iii) Whether the review petition at the instance of the present Petitioners is entertainable within the parameters of law laid down for entertaining a review/recall application, particularly keeping in view the factual background of the present case?

16. Before advertng to answer the aforesaid questions, this Court would like to clarify, at the outset, that in course of his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioners led much emphasis on the ground that the judgment dated 19.05.2023 is unsustainable on the ground that the Petitioners, who are necessary parties to the earlier litigation were not arrayed as Opposite Parties and they were not given an opportunity of hearing in violation of the principles of natural justice. So far other grounds taken in the writ petition are concerned, not much emphasis was led on such grounds by the learned Senior Counsel appearing on behalf of the Petitioners. Therefore, this Court would proceed

to adjudicate the review petition as well as the writ petition keeping in view the factual background of the present case as well as the fact that the learned Senior Counsel for the Petitioners assailed the judgment dated 19.05.2023 on the ground that the said judgment is required to be reviewed on the ground that the Petitioners were not added as Opposite Parties and, as such, they were not heard before delivering the judgment dated 19.05.2023. On a analysis of the ground other than the nonjoinder of necessary parties as taken in the review as well as in the writ petition, this Court is of the considered view that such grounds are based on merits of the matter which can only be challenged by filing an intra-court appeal as provided in law.

17. In view of the aforesaid factual scenario, this Court would like to first analyze the scope of the review by this Court of judgment dated 19.05.2023. It is no doubt that the review is a creature of the statute. Therefore, the same has to be based on the principle as enumerated in Order-47 Rule-1

of the C.P.C. Although the provisions of the Code of Civil Procedure, 1908 does not apply to the writ proceedings in view of the specific provision contained in the explanation to Section-141 of C.P.C. However, as a standard practice, the Hon'ble Supreme Court as well as this Court have on many occasions held that the principle laid down in the Code of Civil Procedure are applicable to the writ proceedings although the substantive provision may not be applicable to the writ proceeding.

18. Keeping in view the aforesaid position of law, this Court would proceed to analyze the provisions contained in Order-47 Rule-1 of the C.P.C. Order-47 Rule-1 of the C.P.C. provides that any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; (b) by a decree or order from which no appeal is allowed; or (c) by a decision on a reference from a court to small causes and who from the discovery of new and important matter or evidence which

after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order made against him, may apply for review of judgment to the court which passed the decree or made the order. The aforesaid sub-rule(1) is clarified by the provisions contained in sub-rule(2). Sub-rule(2) provides that a party, who is not appealing from a decree or order may apply for a review of the judgment notwithstanding the pendency of the appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he appeals for the review. Moreover, the explanation attached to Order-47 Rule-1 of C.P.C. reveals that the fact that the question of law involved in the judgment of the court, which has been reversed or

modified by the subsequent decision of a superior court in another case, shall not be a ground for review of such judgment.

19. It is an admitted position of fact that the present Petitioners were not arrayed as parties to the writ petition wherein the judgment passed even sought to be reviewed. The law with regard to such person is also no more *res integra*. It has been held by the Hon'ble Supreme Court in many judgments including the one reported in **86 (1998) CLT 738 (SC)** that review at the instance of such persons is maintainable. It has also been held by the Hon'ble Supreme Court in many judgments including the one reported in **2014(1) OLR 642 (SC)** that the review jurisdiction is extremely limited and unless there is a mistake apparent on the face of the record, the order/judgment does not call for review. The mistake apparent on record means that the mistake is self-evident, needs no such elaboration and stairs at its face. While observing in the above manner, the

Hon'ble Supreme Court as well as this Court in many judgments have also cautioned that the review application shall not be used as an appeal in disguise and that the review does not permit rehearing the matters on merits. By applying the aforesaid yardsticks, this Court has decided many applications for review. It would be apt to mention here that the stand taken by a party not considered in the order/judgment sought to be reviewed, has been considered to be an error apparent on record and, accordingly, the order/judgment has been reviewed on such ground. In this context, the judgment of the Hon'ble Supreme Court reported in **AIR 2005 SC 2087** may be referred to.

20. In a judgment of Hon'ble High Court reported in **AIR 2005 SC 592**, it has also been held that the review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of record, but also if the same is necessitated on account of some mistake or for any other sufficient reasons.

The words “sufficient reasons” are wide enough to include a misconception of fact or law by a court or even an advocate. The application for review may be necessitated by way of invoking the doctrine of “*actus curiae nimum gravabit*”. Moreover, by applying the broader principle that law has to bend before justice, if the courts find that the error pointed out in the review petition was under a mistake and the earlier judgment could not have been passed but for erroneous assumption which in place did not exist and its perpetration shall result in miscarriage of justice, then nothing would preclude the court from rectifying the error. Similarly, review cannot be entertained merely to conduct the scrutiny of the order/judgment to find fault with the predecessor as if the court reviewing the order/judgment is exercising the power of appellate court. In the said context, it would be desirable to refer to the judgment of the Hon’ble Supreme Court reported in **AIR 1979 SC 1047** which has been taken note of in the judgment reported in **AIR 1995 SC 455**. A wholesome

reading of the aforesaid judgments and on a wholesome analysis of the principle enunciated by the courts so far would establish that it is a standard procedure that is being followed by the courts that a review of the order/judgment is permissible to prevent miscarriage of justice and to correct grave and palpable errors.

21. In view of the aforesaid analysis of the legal position with regard to entertaining an application for review/recall of an order/judgment, this Court is required to analyze the facts of the present case as well as the grounds taken by the Petitioners in their application and in the event this Court comes to a conclusion that the grounds taken by the Petitioners in both review as well as the writ petition falls within the parameters as prescribed and elaborated by various judgments, then this Court would certainly review the judgment dated 19.05.2023, otherwise not.

22. Reverting back to the argument advanced by the learned Senior Counsel appearing on behalf of the Petitioners, this Court is required to adjudicate as to whether such grounds fall within the parameters as provided under Order-47 Rule-1 of C.P.C. or the judgments referred to hereinabove.

23. Mr. Routray, learned Senior Counsel appearing for the Petitioners in course of his argument led much emphasis on the ground that the Petitioners, who are the short listed candidates after conclusion of the first phase of selection, were not arrayed as Opposite Parties. Therefore, the judgment dated 19.05.2023 delivered by this Court without providing them an opportunity is a nullity in law. Accordingly, he also argued that such a glaring defect in the judgment is a good ground for review as provided under Order-47 Rule-1 of the CPC and in various pronouncements of the Hon'ble Supreme Court and this Court. Other than the aforesaid grounds, learned Senior Counsel appearing for the

Petitioners did not press on the other grounds taken in the review petition.

24. In course of his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioners first referred to the judgment in *Prabodh Verma and Others v. State of Uttar Pradesh and Others*, reported in (1984) 4 SCC 251. By referring to the aforesaid judgment, more particularly to paragraph-50 of the judgment, it was argued before this Court that a High Court ought not to hear and dispose of the writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity, if their number is too large to join them as respondents individually. Moreover, if the Petitioners refuse to join them, the High Court ought to dismiss the petition for nonjoinder of necessary parties. Such a proposition of law has been affirmed by the Hon'ble Supreme Court in a recent judgment

in *Ajay Kumar Shukla and Ors. v. Arvind Rai and Ors.* decided in Civil Appeal No.5966 of 2021 vide judgment dated 08.12.2021.

In the above noted case of *Prabodh Verma* (supra), the Hon'ble Supreme Court has categorically held that the Allahabad High Court ought not to have proceeded to hear and dispose of the civil Miscellaneous Writ No.9174 of 1978 without insisting upon the reserve pool teachers being made respondents to that writ petition or at least some of them being made respondents thereto in a representative capacity as the number of the reserve pool teachers was too large and, had the Petitioners refused to do so, to dismiss that writ petition for nonjoinder of necessary parties. On a careful analysis of the judgment in *Prabodh Verma's* case (supra), this Court found that the reserve pool teachers whose rights got affected directly by the judgment of the High Court, were not arrayed as parties to the writ petition. The Hon'ble Supreme Court came to a conclusion that they were necessary

parties. Therefore, nonjoinder of such necessary parties and a decision in their absence would affect such reserve pool teachers adversely. Accordingly, the Hon'ble Supreme Court in concluding paragraph-52 of the judgment has come to the conclusion as has been narrated hereinabove. Therefore, in sum and substance in the judgment of *Prabodh Verma's* case (supra), it was held by the Hon'ble Supreme Court that the left out reserve pool teachers were necessary parties to the writ petition. Therefore, it was held that in the absence of such necessary parties, the High Court of Allahabad could not have decided the issue in their absence.

25. The next judgment that was relied upon by the learned Senior Counsel appearing for the Petitioners is in the case of *Public Service Commission, Uttaranchal v. Mamta Bisht and Others*, reported in (2010) 12 SCC 204.

26. Referring to the aforesaid judgment, it was argued by the learned Senior Counsel appearing for the Petitioners that

the Hon'ble Supreme Court referring to the case of *Prabodh Verma* (supra) has categorically held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties. Accordingly, it was argued by the learned Senior Counsel appearing for the Petitioners that the Petitioners in the present case being the short listed candidates are necessary parties and, accordingly, the selection process could not have been challenged by the private Opposite Parties without adding the present Petitioners, who are necessary parties to the said writ petition.

27. Similarly, reference was made to the judgment in *Jharkhand Public Service Commission v. Manoj Kumar Gupta and Ors.*, reported in **2020 (1) OLR (SC) - 216** by the learned Senior Counsel appearing on behalf of the Petitioners. On a careful analysis of the factual background of the aforesaid judgment, this Court found that the selection process for appointment as Lecturer was under challenge in the aforesaid judgment by some of the unsuccessful

candidates. Moreover, such unsuccessful candidates approached the High Court after final publication of the result wherein the Petitioners were found not to be eligible to be considered for appointment as Lecturer. Although the ground taken by the Petitioners in the said writ petition was that the rules of the game were changed after the selection process has started, however, the Hon'ble Supreme Court after analyzing the facts came to a conclusion that the said case is not a case of change of rules of the game after the selection process had started. Relying upon the said judgment, learned Senior Counsel appearing on behalf of the Petitioners made an attempt to seek review of the judgment dated 19.05.2023 on merits of the case already adjudicated by this Court vide judgment dated 19.05.2023. It is needless to mention here that the Petitioners are estopped to seek review of the judgment by merely relying upon a judgment of the Hon'ble Supreme Court which had taken a different view in a given set of facts involved in the aforesaid writ petition. Such an

attempt by the learned Senior Counsel appearing on behalf of the Petitioners is contrary to the explanation appended to sub-rule(2) of Order-47 of C.P.C. Moreover, such a scenario has been taken note of by this Court in a judgment reported in **1991(1) OLR 44** and it has been held that the same shall not be a ground for review of the judgment. In course of his argument, learned Senior Counsel appearing for the Petitioners also referred to a judgment of the Hon'ble Supreme Court in *Ajay Kumar Shukla* (supra). On perusal of the aforesaid judgment, this Court observed that the Appellants before the Hon'ble Supreme Court challenged the final seniority list by filing a writ petition. The Appellants before the Hon'ble Supreme Court-Writ Petitioners belonged to the Mechanical and Civil Stream whereas the private Respondents were from the Agriculture Stream. The learned Single Judge allowed the writ petition and, accordingly, quashed the seniority list. However, in an intra-court appeal before the Hon'ble Division Bench of the High Court, the

judgment delivered by the learned Single Judge was set aside. Accordingly, the Writ Petitioners had approached the Hon'ble Supreme Court by filing the above noted case. The Hon'ble Supreme Court on a careful analysis of the facts as well as law came to a conclusion that the appointing authority had in fact committed an error while preparing the seniority list and, as such, the Appellants cannot be found at fault. It was also held that the Division Bench committed an error in setting aside the judgment of the learned Single Judge. Accordingly, while allowing the appeal, the judgment of the learned Single Judge was affirmed by the Hon'ble Supreme Court while setting aside the judgment of the Hon'ble Division Bench.

28. In *Ajay Kumar Shukla's* case (supra), the Hon'ble Supreme Court in paragraphs-42, 43, 45 and 47 analyze the position with regard to nonjoinder of the necessary party to the writ petition. Referring to the judgment of the Hon'ble Supreme Court in *Prabodh Verma's* case (supra) and *State of*

Uttaranchal v. Madan Mohan Joshi and Ors., reported in (2008) 6 SCC 797, as well as the judgment in *Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.*, reported in (2009) 1 SCC 768 and *Mukul Kumar Tyagi and Ors v. The State of Utter Pradesh, reported in (2020) 4 SCC 86*, it was concluded in paragraph-47 to the effect that in matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and everyone who could be affected but if a section of such affected employees is impleaded, then the interest of all is represented and protected. Further, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal. For better appreciation, paragraph-47 of the judgment in *Ajay Kumar Shukla's* case (supra) is quoted herein below:-

“47. The present case is a case of preparation of seniority list and that too in a situation where the Appellants (original writ petitioners) did not even know the marks obtained by them or their proficiency in the examination conducted by the Commission. The challenge was on the ground that the Rules on the preparation of seniority list had not been followed. There were 18 private respondents arrayed to the writ petition. The original Petitioners could not have known who all would be affected. They had thus broadly impleaded 18 of such Junior Engineers who could be adversely affected. In matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. In view of the above, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal.”

29. Finally, Mr. Routray, learned Senior Counsel appearing for the Petitioners also referred to the judgment of the Hon’be Supreme Court in ***Km. Rashmi Mishra v. M.P. Public Service Commission and Others***, reported in ***(2006) 12 SCC 724***. In the aforesaid matter, a ground was taken by the

private Opposite Parties to the writ petition that the private Opposite Parties, who were finally selected, are only a part of the selected candidates. Further, it was pleaded that all 17 candidates were not impleaded as parties in the writ petition against whom allegation of irregularities were made and that no steps were taken in terms of Order-1 Rule-8. The factual background involved in the above noted case is that the validity/legality of the selection process involved in the process of selecting Assistant Registrars, Class-II Gazetted posts, who were finally selected by the PSC pursuant to an advertisement and the recruitment procedure was called in question before the Hon'ble Supreme Court. On perusal of the paragraph-8 of the said judgment it clearly reveals that pursuant to the advertisement, 6158 candidates filed their applications. After conducting an examination on 23.11.2003, the PSC short listed 55 candidates for 17 posts. The short listed candidates were asked to appear in the viva voce test. Interviews were held between 9.2.2004 and 11.02.2004.

Finally, a final select list of 17 candidates was prepared by the PSC including Respondents No.3 and 4. One of the unsuccessful candidates approached the High Court by filing a writ petition. However, only adding respondents No.3 and 4 out of 17 candidates on the allegation that they were inexperienced and were having inferior academic qualification and were selected being influential persons. The counsel appearing for the Petitioner in that case before the High Court, among other grounds, took a ground that all the selected candidates having not been impleaded as parties, the writ petition was not maintainable and while doing so he had also referred to the judgment in *Prabodh Verma's* case (supra). The Hon'ble Supreme Court in paragraphs-13 and 15 of the judgment has categorically held that all finally selected 17 candidates are necessary parties to the writ petition. However, only 2 of them were added as parties and no steps under Order-1 Rule-8 whatsoever was taken with regard to other finally selected candidates. Accordingly, in

paragraph-30 of the judgment, it has been held that since all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant. However, it is worthwhile to refer to paragraph-28 of the judgment, which is quoted herein below:-

“28. The post of Assistant Registrar in the universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professional experience. What was required to be seen was academic qualification, experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon to hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held. However, the same was held only for the purpose of shortlisting the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefor to consider the desirability of amending the Rules suitably so that such charges of favoritism or

nepotism by the members of the constitutional authority in future are not called in question.”

30. Learned Senior Counsel appearing for the Petitioners argued that this Court in judgment dated 19.05.2023 although has referred to the issue of nonjoinder of necessary party in paragraph-14 of the judgment, however, the same has not been answered while delivering the final judgment. In this context, this Court would like to observe that a bare reading of the paragraph-14 of the judgment would reveals that the same has been mentioned with reference to the pleading in the counter affidavit of the Opposite Party. It is further clarified that in course of final hearing of the matter, none of the counsels appearing for the Opposite Parties neither raised the said question nor led any emphasis on such aspect of the matter. Therefore, the contention that the issue was although raised but the same has not been answered would not be a fair argument in the factual background of the present case. Moreover, the learned Senior Counsel appearing for the Review Petitioners was not the counsel in the matter in which

the judgment delivered by this Court is being sought to be reviewed. Since such a question of nonjoinder of necessary party has been raised in the review as well as in the connected writ petition, this Court would discuss the same in this judgment.

31. To be impleaded as a party in a proceeding, it is the well established proposition of law that the person who is taking the plea of nonjoinder of party has to prima facie establish that he is a necessary party to the proceeding and in whose absence the lis could not have been decided. Order-1 of the C.P.C. deals with parties to the suits. Although the substantive provision does not apply, however, as a matter of practice, the Courts in India are guided by the underlying principle of Order-1 of C.P.C. while considering the issue as to who can be added as a party to the suit/proceeding. Further, Order-1 Rule-3 of the C.P.C. provides as to who may be joined as defendant. The same provides all persons may be joined in one suit as defendants where any right to relief in

respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally. The aforesaid provision essentially means that a person can be added as defendant/Opposite Party against whom relief is sought for by the Petitioner/Plaintiff. Therefore, no suit or proceeding can be decided effectively in their absence. They are also otherwise known as necessary parties to the proceeding. A necessary party is a person/party whose presence in the proceeding is necessary and in whose absence the lis cannot be decided as has been held in several judgments delivered by the Hon'ble Supreme Court as well as this Court.

32. By applying the aforesaid well settled principle of law with regard to determination of a necessary party to a proceeding to the facts of the present case, this Court would now examine as to whether the Review Petitioners are necessary parties to the writ petition filed earlier by the private Opposite Parties No.1 to 16. The writ petition out of

which the present Review Petition arises or the judgment dated 19.05.2023 which has been challenged in the connected writ petition was filed by the private Opposite Party No.1 to 16 assailing the selection process adopted by the OPSC while short listing the candidates, who had submitted their candidature pursuant to the Advertisement No.26 of 2021-22 under Annexure-1 issued by the OPSC on the principal ground that the procedure adopted by the OPSC for the second stage of selection, i.e., viva voce test is illegal, arbitrary and dehors the rules. They had also prayed for quashing of the list of the short listed candidates published vide Notice dated 7.11.2022 by the OPSC and further for a direction to the OPSC to prepare a fresh merit/select list of candidates by taking into consideration the provisions of the relevant rules.

33. The analysis of aforesaid factual background of W.P.(C) No.32174 of 2022, this Court found that the final merit list had not been published by the time the writ petition

was filed before this Court. Moreover, the Writ Petitioners-present Opposite Parties No.1 to 16 had approached this Court by challenging the method of selection adopted by the OPSC at an interim stage. On a detailed analysis of facts as well as the law, this Court in the earlier writ petition had come to a conclusion that the procedure adopted by the OPSC in short listing the candidates after written examination is dehors the relevant rules. Therefore, this Court had to intervene in the matter by delivering judgment dated 19.05.2023. Moreover, by the time the judgment was delivered on 19.05.2023, no legal right was crystallized in favour of the Review Petitioners as the selection process for recruitment to the post of ASOs was not concluded and, as such, had not attained the finality. Therefore, by no stretch of imagination, it can be concluded that the selection for appointment to the post of ASO by the OPSC was final by mere publication of a Notice dated 07.11.2022 and thus a valuable right has accrued in favour of the Petitioners. Mere

reflection of name in the notice of short listed candidates for the next phase of selection does not confer any legal right on the Review Petitioners. Therefore, this Court believes that the learned counsels appearing for the Opposite Parties in the writ petition although raised the ground of nonjoinder of necessary party, however, the same was not pressed into service at the time of final hearing of the matter as no right has accrued in favour of the Petitioners by mere inclusion of their name in the list of short listed candidates for the next phase of selection. In such view of the matter and in the absence of any legal right to finally claim for appointment, it cannot be said that the Petitioners had acquired a right to be appointed to the post of ASOs for which the selection process was on going. Accordingly, this Court has no hesitation in coming to a conclusion that the Review Petitioners were not necessary parties to the earlier writ petition bearing W.P.(C) No.32174 of 2022.

34. Even otherwise also, mere inclusion of the name in the select list does not confer any right to claim for appointment. However, the right to get appointment once the final select list is published after completion of the entire selection process cannot just be merely brushed aside. The judgments relied upon by learned Senior Counsel appearing for the Review Petitioners are either based on the fact of final publication of the select list or where the Petitioners were already in service and their promotion/seniority was being questioned without impleading them as parties. Therefore, there is a huge difference between the two scenarios depicted hereinabove. (1) Where the right has not crystallized, i.e, the selection process is not over and a mere list of short listed candidates prepared in violation of rules and the other scenario. (2) After publication of the final select list or while questioning the promotion/seniority vis-à-vis a candidate who have not been added as a party to the writ petition. Under the first scenario, no right of such persons is affected as it was

not finalized that they would be considered for being appointment after the entire selection procedure got over.

35. In addition to the above, this Court would also like to observe that in course of hearing of the earlier writ petition bearing W.P.(C) No. 32174 of 2022, learned Senior Counsels including the Advocate General appearing for the State-Opposite Parties took almost all possible grounds to defend the conduct of the OPSC. This Court in a detailed judgment by taking note of the contentions of all the appearing parties vide judgment dated 19.05.2023 disposed of the said writ petition. Moreover, by an interim order, this Court had directed not to finalize the selection process, as a result of which the selection could not be finalized for several months. The short listed candidates were all aware of the pendency of the earlier writ petition as the selection for appointment to the post of ASO was hanging for quite some time. However, no effort whatsoever was made by them to implead themselves as parties to the earlier writ petition. On the contrary, they

preferred to wait and watch as fence-sitters. After the final judgment was delivered by holding that the selection process adopted by the OPSC is de hors the relevant rules, the Review Petitioners have approached this Court by filing the present review petition as well as connected writ petition only with the intention to delay the selection further.

36. Indisputably, in the facts and circumstances of the present case, the Review Petitioners were not finally selected and no final merit/select list was published by the OPSC thereby conferring a valuable right on the Review Petitioners for being appointed to the post of ASO. Further, the private Opposite Parties No.1 to 16 had challenged the selection process on the errors which were apparent on the face of the record, i.e., the OPSC had conducted the selection process by violating the provisions of the relevant rules, more particularly, the provisions of Rule-6. Further, the previous writ petition remained pending before this Court for several months and by virtue of the interim order, the selection

process was directed not to be finalized. The hearing of the matter also continued for several days and the same was being reported by the local newspapers as well as the electronic media. No attempt whatsoever was made to intervene in the matter at that stage. However, after the final judgment was delivered upon conclusion of a lengthy hearing, the Review Petitioners have approached this Court by filing the present review as well as writ petition challenging the final judgment dated 19.05.2023. In addition to the above, this Court has categorically held that the Review Petitioners were not necessary parties to the previous writ petition.

37. In the aforesaid background, this Court would now record its finding to the issues formulated in the preceding paragraph. The first ground that was formulated by this Court was as to whether the grounds taken in the review petition are good grounds and, accordingly, a review petition is entertainable on such grounds? In reply to the said ground,

this Court is of the considered view that the ground with regard to nonjoinder of necessary party which was emphatically argued by the learned Senior Counsel is definitely a good ground, so far maintainability of the review petition is concerned. With regard to the other grounds taken in the review petition, this Court would like to record that such grounds are based on the merits of the issue which has already been decided by this Court in the earlier writ petition. Therefore, in the event the Petitioners are aggrieved by the findings of this Court they should have been well advised to challenge the same by filing an intra-court appeal. Thus, the first issue is answered accordingly.

38. The next question that was formulated by this Court was with regard to maintainability of the writ petition by the Review Petitioners challenging the judgment dated 19.05.2023 in a proceeding where they were not added as parties? In reply to the same, this Court would like to refer to a judgment of a constitution Bench of the Hon'ble Supreme

Court in the matter of *Shivdeo Singh and others v. State of Punjab and others*, reported in *AIR 1963 SC 1909*. The constitution Bench while interpreting Order-47 Rule-1 of C.P.C. has categorically held that this Court has inherent power to review its order under Article 226 of the Constitution of India and, accordingly, it was held that the second writ petition filed by a person aggrieved, who was not impleaded as a party in the first writ petition, is maintainable and that the High Court had not acted without jurisdiction in reviewing its previous order at the instance of the subsequent Writ Petitioners. In the said judgment, the constitution Bench has categorically held that there is nothing in Article 226 of the Constitution of India to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it and, therefore, in entertaining the subsequent writ petition challenging the order passed by the earlier writ petition by

the High Court. The High Court did what the principle of natural justice required it to do. In view of the law pronounced by the aforesaid constitution Bench of the Hon'ble Supreme Court in *Shivdeo Singh's* case (supra), this Court has no hesitation to come to a conclusion that the writ petition at the instance of the Review Petitioners is maintainable in law.

39. In view of the answer arrived at to the Question Nos.(i) and (ii), this Court is of the considered view that both the writ petition as well as the review petition at the instance of the Petitioners are maintainable. So far acceptance of such review petition and the writ petition and the entertainability thereof is concerned, this Court is required to apply underlying principle of Order-47 Rule-1 of C.P.C. As in both the above noted applications this Court was called upon to review of its own judgment dated 19.05.2023. To entertain such application, the Petitioners are required to establish that they are necessary parties to the earlier writ petition and,

therefore, the earlier writ petition as well as the judgment dated 19.05.2023, which is sought to be reviewed in the present applications are vitiated by nonjoinder of necessary parties. While analyzing the question as to whether the Petitioners were necessary parties to the previous writ petition, this Court has already held in the preceding paragraph that they are not necessary parties to the previous writ petition as no right was crystallized in their favour by publishing the final select/merit list for appointment to the post of ASO. Moreover, the process of selection was continuing dehors the relevant rules, particularly Rule-6 of the Rules in question. Such error was apparent on the face of record.

40. With regard to observance of principles of natural justice and providing an opportunity to the Petitioners is concerned, this Court would like to refer to a judgment of the Hon'ble Supreme Court in *Union of India and Others v. Bikash Kuanar*, reported in (2006) 8 SCC 192. In

paragraph-12 of the aforesaid judgment, it has been held as follows:-

“12. The matter relating to appointment or recruitment of EDDA is not governed by any statute but by departmental instructions. It is now trite that if a mistake is committed in passing an administrative order, the same may be rectified. Rectification of a mistake, however, may in a given situation require compliance with the principles of natural justice. It is only in a case where the mistake is apparent on the face of the records, a rectification thereof is permissible without giving any hearing to the aggrieved party.”

Since the Petitioners were not necessary parties to the earlier writ petition and further the error in the selection process was apparent on the face of the record, by applying the principle as reflected in paragraph-12 of **Bikash Kuanar's** case (supra), this Court holds that rectification of such errors/mistakes is permissible without giving any hearing to the aggrieved party, if any, there is one. Thus, this Court found no force in the argument of learned Senior Counsel appearing for the Petitioners that the judgment dated 19.05.2023 rendered by this Court in the previous writ

petition is vitiated in any manner by nonjoinder of a party, who according to this Court, are not necessary parties, and by not providing such parties an opportunity of hearing before giving a direction for rectification of the mistake/error in the selection process as it cannot be construed that the Petitioners can be in any manner be called as aggrieved parties.

41. In view of the aforesaid analysis of the legal as well as factual position, this Court found no ground whatsoever to entertain the review petition as well as the writ petition filed by the Petitioners. Hence, both the review petition as well as writ petition are hereby dismissed.

42. Accordingly, both the review petition as well as the writ petition stand disposed of.

(A.K. Mohapatra)
Judge