

(2018) 03 CAT CK 0031

In the Central Administrative Tribunal

Case No : Original Application No. 2390, 2399, 2492, 2506, 2543, 2578, 2618, 2619, 2626, 2876, 2877, 2878, 2880, 2884, 2885, 2886, 2887, 2888, 2921, 3199, 3297 Of 2016

Nidhi Pandey And Ors

APPELLANT

Vs

Union Public Service Commission And Ors

RESPONDENT

Date of Decision : 23-03-2018

Acts Referred:

Indian Penal Code, 1860 — Section 21
Drugs And Cosmetics Rules, 1945 — Rule 49, 51, 52
Constitution Of India, 1950 — Article 14, 16, 309, 315, 320

Citation : (2018) 03 CAT CK 0031

Hon'ble Judges : Permod Kohli, J;K.N. Shrivastava, Member (A)

Bench : Division Bench

Advocate : Anju Bhattacjarya, Yogesh Kumar Mahur, Pushkar Arora, P. K. Aggarwal, R.V. Sinha, Vijendra Singh, Ranjan Tyagi, R.K. Sharma, Rajinder Nischal, Ashok Kumar, J.P. Tiwary

Final Decision : Allowed

Judgement

Permod Kohli, J

1. The issues being common, all these OAs were heard and are being decided by this common order. Facts are being noticed from OA No.2390/2016.

2. The Respondent No.1, i.e., Union Public Service Commission (UPSC) issued an Advertisement No.04/2015 published in Employment News in its issue dated 28th February- 6th March, 2015 inviting online applications for recruitment to 147 posts of Drug Inspectors (Vacancy No.15020403128) in the Central Drugs Standard Control Organization (CDSCO) in the Ministry of Health and Family Welfare. Out of 147 posts, three posts were permanent and remaining 144 posts are temporary. The advertisement contains stipulation that the temporary posts are likely to continue. 147 vacancies were distributed amongst the following categories:-

UR - 78
OBC - 38
SC&ST - 13 each

The applicants claiming to be qualified for the posts of Drug Inspector filled up application forms electronically as prescribed in the advertisement.

3. The applicant in this OA was issued e-admit card with Roll No.008467 in respect to the examination to be conducted on 26.07.2015. Similarly, applicants in other OAs were also issued admit Cards and allotted roll numbers (details are not being noticed here). The examination was held on the notified date, i.e., 26.07.2015. The result of the exam was declared and notified on the website of respondent No.1 on 16.09.2015. The applicants were shown short listed subject to verification of the documents. As per the notice dated 16.09.2015, the candidates were also informed to furnish self attested copies of the certificates/ documents along with the copy of online recruitment applications within 15 days (not later than 30.09.2015) to verify the eligibility for the said post. It was further stipulated that the date and time of interview for the post will be intimated later on through e-mail. The applicant having been short listed submitted all the requisite documents as per the notice dated 16.09.2015. The applicant received an email dated 08.07.2016 from the respondent No.1 informing the cancellation of her candidature for not fulfilling the essential experience as mentioned in the advertisement. The contents of the email are reproduced hereunder:-

"4.8.....

Dear Candidate,

I am refer to your application for the subject post/s and to inform you that your candidature has been cancelled by the Commission due to lack of essential experience in any of the below mentioned condition:

- a) Eighteen months experience in the manufacture of substances specified in Schedule "C" to the Drugs and Cosmetic Rules, 1945.
- b) Eighteen months experience in testing of substances specified in Schedule "C", in a laboratory approved for this purpose by the licensing authority.
- c) three years experience in inspection of firms manufacturing any of the substances specified in Schedule "C" to the Drugs and Cosmetic Rules, 1945.

Yours faithfully,

Sd/-

(R.K. Roy)

Under Secretary

Union Public Service Commission"

4. The applicant claims to be possessed of requisite experience having worked for two years two months and 18 days as computed by the software of respondent No.1. The applicant has twofold submissions; (i) that she possesses the experience in the field of manufacturing substance in Schedule-C to the Drugs and Cosmetics Act, 1940 which was sufficient in terms of the advertisement. The alternative submission made is that no such experience is required under the law. In support of her second contention, it is stated that the Drugs and Cosmetics Act, 1940 was enacted to regulate import, manufacture, distribution and sale of drugs and cosmetics. The post of Drug Inspector is a statutory post. The service conditions of the Drug Inspector are regulated by Drug and Cosmetics Rules, 1945. The qualifications for the post of Inspector are prescribed under Rule 49 of the Drugs and Cosmetics Rules, 1945. It is accordingly contended that the applicant fulfills all the conditions of service as prescribed under Rule 49 and any additional condition incorporated in the advertisement notice is not enforceable. The applicants rely upon a Full Bench judgment of Hon"ble Allahabad High Court in the matter of Kuldeep Singh and others vs. State of UP & Anr. in Civil Misc. Writ Petition No.46079/2010 decided on 10.04.2014.

5. The prayer made in the present OAs is as under:-

"(i) quash the decision of Respondent No.1 as contained in the mail dated 8.07.2016 cancelling the candidature of the Petitioner, communicated by email dated 8th July, 2016.

(ii) direct the respondent to consider the petitioner for appointment on the post of Drug Inspector and allowing the petitioner to participate in the upcoming interview schedule of 18th July 2016 till 29th July, 2016 and

(iii) to pass any other relief(s)/direction(s) as this Hon"ble Tribunal may deem fit and proper in the facts and circumstances of the case."

Since the selection process included written examination to be followed by interview, and on account of rejection of the applicants' candidature, all these OAs have been filed before the Tribunal.

OANo.2390/2016 was taken up on 22.07.2016 and the Tribunal passed the following order:-

"Heard.

Issue notice to the respondents. Mr. R.N. Singh for Mr. R V Sinha, learned counsel, appears and accepts notice on behalf of respondent No.1, and Hanu Bhasker, learned counsel appears and accepts notice on behalf of respondent No.2. Reply(s) be filed within four weeks. Rejoinder, if any, be filed within two weeks thereafter.

In the meantime, the applicant shall be allowed to participate in the interview.

However, his result shall not be declared. Such participation shall not confer any right upon the applicant in any manner and will remain subject to outcome of any Order that may be passed by this Court.

List on 27.7.2016.

Service dasti under the signature of Court Officer."

In view of the interim directions, the applicants were allowed to participate in the interview which was held on 29.07.2016.

6. The respondent No.1 has filed detailed counter affidavit defending the action. It is pleaded that no cause of action has accrued to the applicants as no enforceable right has been violated or infringed by the action of respondent No.1. Reliance is placed upon the judgment of Apex Court in the case of Ekta Shakti Foundation vs. Govt. of NCT of Delhi, AIR 2006 SC 2609. It is also stated that the present OAs are misuse of process of law and are based upon wrong and misleading averments. The respondents have also objected to the UPSC being impleaded through its Chairman who is not amenable to the jurisdiction of this Tribunal. Referring to some judgments, it is stated that UPSC has to be sued through its Secretary and thus the present OA is not maintainable as the UPSC has been sued through its Chairman. UPSC is a constitutional body established under Article 315 of the Constitution of India. It is required to discharge its functions under Article 320, a constitutional obligation upon it of making recruitment to all civil services and posts of the Government of India. It is further pleaded that the UPSC is vested with the power to devise their autonomous modes of functioning and procedures objectively in a just and equitable manner of which a reasonable classification of various applicants on the basis of their qualifications and experience is an integral part.

Reference is made to judgments of the Hon'ble Supreme Court in the cases of M. P. Public Service Commission vs. Navnit Kumar Potdar (1994) 6 SCC 293, Union of India vs. T. Sundararaman (1997) 4 SCC 664 and B. Ramakichenin vs. Union of India (2008) 1 SCC 362, wherein the autonomy of the UPSC has been recognized and maintained by the Apex Court. It is also mentioned that the Commission carries out the selection/recruitment strictly in terms of the Recruitment Rules and the terms of the advertisement which has been done in the present case.

7. Objecting to the exercise of judicial review in the matters of selection/recruitment, it is stated that the Courts or Tribunals in exercise of power of judicial review do not review the decision of the Commission and examine only the decision making process and such interference is required only if the process of selection is vitiated by arbitrariness, vice or mala fides. For this purpose, again reliance is placed upon Union of India vs. A. K. Narula (2007) 11 SCC 10 and UPSC vs. Jagannath Mishra (2003) 9 SCC 237. The submission made is that the action of the respondents is not vitiated by arbitrariness or mala fide, hence no interference is required. Further objecting to the grant of interim order, reliance

is placed upon the judgment of the Apex Court dated 05.08.2011 in Civil Appeal No.6349/2011 (arising out of SLP (C) No.11779/2011) titled UPASC and another vs. S. Krishna Chaitanya, wherein following observations have been made:-

".... this Court has observed time and again that an interim order should not be of such a nature that by virtue of which a petition or an application as the case may be is finally allowed or granted even at an interim stage. We reiterate that normally at an interlocutory stage no such relief should be granted that by virtue of which the final relief which is asked for and is available at the disposal of the matter is granted. We, however, find that very often courts are becoming more sympathetic to the students and by interim orders authorities are directed to permit the students to take an examination without ascertaining whether the concerned candidate had a right to take the examination. For any special reason, in an exceptional case if such a direction is given, the court must dispose of the case finally on merits before declaration of the result.... In our opinion, grant of such interim orders should be avoided as they not only increase work of the institution which conducts examination but also give false hope to the candidates approaching the court....."

8. It is also pleaded that the process of selection has already been completed and interview of the eligible candidates were conducted from 18.07.2016 to 29.07.2016, and final result of the post in question was declared on 09.08.2016. List of the recommended candidates has also been forwarded to the respondent No.2. It is further stated that in compliance to the interim order dated 22.07.2016, the applicant was allowed to attend interview held on 29.07.2016 for the post in question. The UPSC has also challenged the maintainability of the OA in absence of the recommended candidates as party respondents who are necessary parties.

9. Giving details of the process of selection, it is stated that the Commission had advertised 147 posts of Drug Inspectors in CDSCO, Ministry of Health & Family Welfare vide advertisement No.04/2015 published on 28.02.2015, Vacancy No.15020403128, Item No.3, with closing date of submission of online applications being 23:59hrs on 19.03.2015. The essential qualifications as per the Recruitment Rules for the post of Drug Inspectors are reproduced hereunder:-

"Education (EQ-A):

Degree in Pharmacy or Pharmaceutical Science or medicine with specialization in Clinical Pharmacology or Microbiology from a recognized University or equivalent.

a. Eighteen (18) months" experience in the manufacture of at least one of the substances specified in Schedule "C" to the Drugs and Cosmetic Rules, 1945;

or

b. Eighteen (18) months" experience in testing of at least one of the substances in Schedule "C" to the Drugs and Cosmetics Rules, 1945 in a laboratory approved for this purpose by licensing authority,

or

c. Three (3) years" experience in the inspection of firms manufacturing any of the substances specified in Schedule "C" to the Drugs and Cosmetics Rules, 1945 during the tenure of their services as Drugs Inspector.

Further explaining the process of selection, it is stated that a combined Computer Based Recruitment Test (CBRT) was held on 26.07.2015. All the eligible candidates were allowed to appear on the basis of information/declaration furnished by them in their online application forms. The result of the CBRT was declared in two phases. In the first phase, 496 candidates were declared qualified on 16.09.2015 subject to eligibility. However, due to short fall in the number of eligible candidates available for interview, it was decided by the Commission to seek additional result and further 723 candidates were declared qualified on 08.04.2016. Thus, a total of 1290 candidates were declared qualified in the written test. Two subject experts were engaged for framing/finalization of modalities and scrutiny of the application forms so that the eligible candidates may be called for interview. Out of 1290, 273 candidates were found eligible to appear in the interview and the candidature of remaining 946 candidates was cancelled by the UPSC and they were informed accordingly. About the applicant also, it is stated that she was informed vide email dated 08.07.2016 that she was not found eligible due to lack of requisite experience in the manufacture of at least one of the substance specified in Schedule "C" to the Drugs & Cosmetics Rules, 1945. Hence, she was not called for interview.

10. In OA No.2506/2016, the applicant therein applied for the post of Drug Inspector in response to the Advertisement No.07/2015, dated 11.04.2015, Item No.7, Vacancy No.15040707111. This post was under the Health & Family Welfare, Department of Government of National Capital Territory of Delhi. This applicant was also short listed and issued e-admit card for appearance in the written examination to be held on 26.07.2015. The result of the examination was declared on 15.09.2015 and 24 candidates were short listed against 7 advertised posts. The applicant was also short listed for the post of Drug Inspector in the result declared on 16.09.2015 in respect to the Advertisement No.04/2015. This applicant was also not called for interview scheduled to be held on 29.07.2016. The candidature of this applicant was also cancelled vide letter dated 08.07.2016 due to lack of essential experience. The applicant earlier approached the High Court by filing Writ Petition (Civil) No.6095/2016. This writ petition was disposed of vide order dated 18.07.2016 granting liberty to the applicant to approach the Tribunal.

11. The applicant in OA No.2390/2016 has placed on record two certificates. One from Systochem Laboratories Ltd. dated 12.04.2013 (Annexure P/4), which indicates that she has worked with the company in Parenteral Section from 24.12.2012 to 25.08.2013 as Assistant Manufacturing Chemist. This works out to an experience of three months. Another certificate dated 14.03.2015 has been placed on record from Akums Drugs & Pharmaceuticals Limited which indicates

that the applicant has worked in the company from 01.04.2013 to 31.03.2014 as Management Trainee & 01.04.2014 to 25.09.2014 as Executive-III in Production Department. It is also stated that the company is engaged in manufacturing drugs as per Form 28 (Schedule C & C1 as per the Drugs and Cosmetics Act, 1940 and Rules, 1945). Based upon these certificates, it is stated that against the requirement of 18 months experience, the applicant possesses 20 months and 25 days experience. Similar certificates have been placed on record by other applicants in their respective OAs to indicate that their experience is more than the required experience.

12. Apart from the above, the main argument on behalf of the applicant is based upon the provisions of Drugs & Cosmetics Act, 1940 and Rules, 1945. Thus, we take up this issue for consideration. The Drugs & Cosmetics Act, 1940 extends to whole of India. Section

3 (e) defines the Inspector and reads as under:-

"[(e) "Inspector" means-

(i) in relation to [Ayurvedic, Siddha or Unani] drug, an Inspector appointed by the Central Government or a State Government under section 33G; and

(ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under section 21;]"

Further reference is made to the manner of appointment and powers and duties of Drug Inspectors. Section 21 reads as under:-

"21. Inspectors.-(1) The Central Government or a State Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or State Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or [classes of drugs or cosmetics or classes of cosmetics] in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest [in the import, manufacture or sale of drugs or cosmetics] shall be appointed to be an Inspector under this section.

(4) Every Inspector shall be deemed to be public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority [having the prescribed qualifications,] as the Government appointing him may specify in this behalf.]"

Powers of Inspectors are further mentioned in Section 22., which reads as under:-

"[22. Powers of Inspectors.-(1) Subject to the provisions of section 23 and of any rules made by the Central Government in this behalf, an Inspector may, within

the local limits of the area for which he is appointed,-

4 [(a) inspect,-

(i) any premises wherein any drug or cosmetic is being manufactured and the means employed for standardising and testing the drug or cosmetic;

(ii) any premises wherein any drug or cosmetic is being sold, or stocked or exhibited or offered for sale, or distributed;

(b) take samples of any drug or cosmetic,-

(i) which is being manufactured or being sold or is stocked or exhibited or offered for sale, or is being distributed;

(ii) from any person who is in the course of conveying, delivering or preparing to deliver such drug or cosmetic to a purchaser or a consignee;

(c) at all reasonable times, with such assistance, if any, as he considers necessary,--

(i) search any person, who, he has reason to believe, has secreted about his person, any drug or cosmetic in respect of which an offence under this Chapter has been, or is being, committed; or

(ii) enter and search any place in which he has reason to believe that an offence under this Chapter has been, or is being, committed; or

(iii) stop and search any vehicle, vessel or other conveyance which, he has reason to believe, is being used for carrying any drug or cosmetic in respect of which an offence under this Chapter has been, or is being, committed, and order in writing the person in possession of the drug or cosmetic in respect of which the offence has been, or is being, committed, not to dispose of any stock of such drug or cosmetic for a specified period not exceeding twenty days, or, unless the alleged offence is such that the defect may be removed by the possessor of the drug or cosmetic, seize the stock of such drug or cosmetic and any substance or article by means of which the offence has been, or is being, committed or which may be employed for the commission of such offence;]"

As regards the powers and duties of Inspectors are concerned, sub- Section (2) of Section 21 provides that the powers and duties shall be such as may be prescribed. "Prescribed" means prescribed under the rules. Section 33 of the same Act empowers the Central Government to make rules. The relevant extract of Section 33 is reproduced hereunder:-

" 33. Power of Central Government to make rules.-[(1) The Central Government may [after consultation with, or on the recommendation of, the Board] and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter:

Provided that consultation with the Board may be dispensed with if the Central

Government is of opinion that circumstances have arisen which render it necessary to make rules without such consultation, but in such a case the Board shall be consulted within six months of the making of the rules and the Central Government shall take into consideration any suggestions which the Board may make in relation to the amendment of the said rules.]

(2) Without prejudice to the generality of the foregoing power, such rules may-

(b) prescribed the qualifications and duties of Government Analysts and the qualifications of Inspectors; ..."

From the conjoint reading of the aforesaid provisions, we find that mode of appointment and powers of Inspectors are enumerated in Sections 21 and 22 of the Act, whereas the qualifications and duties of Inspectors are to be prescribed by the rules to be framed by the Central Government in exercise of its statutory power. The Central Government has framed rules in exercise of its powers under Section 33 called as Drugs & Cosmetics Rules, 1945. Rule 49 prescribes the qualifications of Inspectors to be appointed under the Act. Rule 49 is reproduced hereunder:-

"[49. Qualifications of Inspectors. -A person who is appointed an Inspector under the Act shall be a person who has a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:

Provided that only those Inspectors: ?

(i) Who have not less than 18 months" experience in the manufacture of at least one of the substances specified in Schedule C, or

(ii) Who have not less than 18 months" experience in testing of at least one of the substances in Schedule C in a Laboratory approved for this purpose by the licensing authority, or

(iii) Who have gained experiences of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their services as Drugs Inspectors; shall be authorised to inspect the manufacture of the substances mentioned in Schedule C:]

[Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day of October, 1993.]"

From the reading of Rule 49, we find that it contains academic qualifications. However, the proviso refers to experience of Inspectors in certain areas. There is no dispute about the academic qualification in any of the cases. The only dispute relate to the nature of experience. The advertisement notice prescribes the academic qualifications as also the experience mentioned therein as the eligibility criteria for appointment to the post of Inspector. There are three categories of experience. Under sub-rule (i) of Rule 49, 18 months" experience in the

manufacture of at least one of the substances specified in Schedule C is referred and under sub-rule (ii) 18 months experience in testing of at least one of the substances in Schedule "C" in a laboratory approved by the licensing authority is referred whereas under sub-rule (iii), experience of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their services as Drug Inspectors is also referred. It is noticed that these experiences are in the alternative, meaning thereby, experience may be in any of the specified areas. Proviso to Rule 49, however, exempts the possession of academic qualification in respect to the persons appointed as Inspectors on or before 18.10.1993. The rejection notice refers to lack of experience as essential qualification.

13. The categorical stand of the respondents is that the qualification in the advertisement has been prescribed on the basis of the Recruitment Rules framed under proviso to Article 309 of the Constitution of India. The respondents, Ministry of Health & Family Welfare framed the Central Drugs Standard Control Organization (Drug Inspectors) Recruitment Rules, 2010 in the Director General of Health Services in exercise of the powers conferred by the proviso to Article 309 vide G.S.R. 86 (E) Notification dated 19.02.2010 amended vide Notification dated 27.04.2010. For the post of Inspector, the essential qualifications as prescribed under the Notification are as under:-

"Essential:-

- (i) Degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology from a recognized University or equivalent;
- (ii) (a) Eighteen months" experience in the manufacture of at least one of the substances specified in Schedule "C" to the Drugs and Cosmetics Rules, 1945 ; or
(b) Eighteen months" experience in testing of at least one of the substances specified in Schedule "C" to the Drugs and Cosmetics Rules, 1945 during the in a laboratory approved for this purpose by the licensing authority or
(c) Three years" experience in the inspection of firms manufacturing any of the substances specified in Schedule "C" to the Drugs and Cosmetics Rules, 1945 during the tenure of their services as Drugs Inspector."

In para 18 of the counter affidavit, reference is made to "lack of requisite experience in the manufacture of at least one of the substances specified in Schedule "C" to the Drugs & Cosmetics Act, 1940 and Rules, 1945.

14. The applicants have heavily relied upon the judgment of Kuldeep Singh and others (supra), wherein, proviso to Rule 49 of Drugs & Cosmetics Rules, 1945 has been interpreted. Considering the language of the proviso, it has been held that the experience envisaged under the proviso is only to enable a Drug Inspector to inspect the manufacture of substances mentioned in Schedule "C" and it is not an essential qualification/eligibility condition for purposes of

appointment.

15. We have carefully considered Rule 49 of Drugs & Cosmetics Rules, 1945. The main object of Rule 49 is that a person who is appointed as Inspector under the Act shall be a person who has the qualification laid down therein. Thus, the educational qualifications prescribed under the rule are essential qualifications which are necessary for appointment of a person as Drug Inspector. The proviso deals with the expression "only those Inspectors" and after the expression is mentioned it further reads that he shall be authorized to inspect the manufacturing of the substances mentioned in Schedule "C". From the reading of the proviso, the only conclusion which can be drawn is that this proviso would be attracted if a person is appointed as Inspector and cannot constitute an essential condition for purposes of appointment as Drug Inspector. This qualification one has to acquire after the appointment and only thereafter he would be authorized to inspect the manufacture of substances mentioned in Schedule "C" of Drugs & Cosmetics Act, 1940. Considering the language used, the Full Bench interpreted Rule 49 in the following manner:-

"16. Now, we proceed to interpret the provisions of Rule 49 of the Drugs and Cosmetics Rules, 1945. The substantive part of Rule 49 specifies that in order to be appointed as an Inspector under the Act, a person must have (i) a degree in Pharmacy; or

(ii) a degree in Pharmaceutical Sciences; or (iii) a degree in Medicine with specialization in Clinical Pharmacology or Microbiology from a University established in India by law. The first proviso, however, specifies that only those Inspectors who fulfill the experience referred to in clause (i) or (ii) or (iii) shall be authorized to inspect the manufacture of substances mentioned in Schedule C to the Rules. When a Court interprets a statutory provision, or a provision which is made by the delegate of the legislature while framing subordinate legislation, it must give effect to the plain, literal or grammatical meaning of the provision. Under the substantive part of Rule 49, the qualifications which are required to be held by an Inspector have been specified. These are mandatory requirements and before a person can be appointed as an Inspector, he must necessarily hold the educational qualifications which are prescribed in the substantive part. The proviso, however, specifies that "only those Inspectors" shall "be authorized to inspect the manufacture of substances mentioned in Schedule C" who possess the experience as set out in one of the three clauses thereto. In other words, the proviso carves out an exception. A person who holds the qualifications which are referred to in the substantive part of Rule 49, is eligible to be appointed as an Inspector. Once appointed as an Inspector, such a person would be empowered to exercise the powers which are conferred upon an Inspector under Section 21 (2) and Section 22 together with Rules 51 and 52 of the Rules of 1945. However, the effect of the proviso is that only those Inspectors who fulfill the experience which is prescribed in one of the three clauses of the first proviso to Rule 49 can be authorized to inspect the manufacture of substances mentioned in Schedule

C. But for the provisions contained in the proviso to Rule 49, there would have been no embargo on an Inspector being authorized to inspect the manufacture of substances mentioned in Schedule C. The effect of the proviso is that even though a person is appointed as an Inspector, he can be authorized to inspect the manufacture of Schedule C substances only upon fulfilling the experience as prescribed in clauses (i) or (ii) or (iii) to the first proviso to Rule 49. Hence, the proviso engrafts an exception by entailing that before an Inspector can be authorized to inspect the manufacture of substances mentioned in Schedule C, he must fulfill the requisite experience as prescribed in the proviso. Clause (i) of the proviso stipulates an experience of 18 months in the manufacture of a Schedule C substance. Clause (ii) of the proviso stipulates 18 months' experience in the testing of a Schedule C substance in a laboratory approved by the licensing authority. Clause (iii) of the proviso stipulates experience which is gained of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their service as Drug Inspectors. Ex facie, clause (iii) of the proviso specifies experience which is gained during the tenure of service as a Drug Inspector and not before appointment. The second proviso to Rule 49 contains a stipulation that the requirement of academic qualifications shall not apply to those persons appointed as Inspectors on or before 18 October 1993. Rule 49 was substituted with effect from 19 October 1993. Hence, what the second proviso provides is that it protects the services of those Inspectors who had been appointed before the introduction of Rule 49 in its present form on 19 October 1993. Rule 51 specifies the duties of an Inspector to inspect premises licensed for the sale of drugs. Rule 52 specifies the duty of an Inspector "authorized to inspect the manufacture of drugs or cosmetics". Before an Inspector can be regarded as being authorized to inspect the manufacture of a Schedule C drug, he must possess the experience specified in the first proviso to Rule 49 of 1945 Rules. Consequently, the experience specified in the first proviso to Rule 49 is not a condition of eligibility or a qualification for appointment as an Inspector within the meaning of Rule 49. Undoubtedly and as a matter of general principle, it is open to the appointing authority to prescribe the conditions of eligibility for the holding of a post. The conditions of eligibility may, in a given case, legitimately include the possession of an academic qualification and of experience even prior to appointment. But, once the field is governed by a rule which has been framed in exercise of a rule making power vested by statute, the statutory rules must govern. Where, as in the present case, the statutory rule does not incorporate a requirement of experience as a condition of appointment, a requirement of experience as a condition of eligibility can be introduced only by way of an amendment to the statutory rules. Neither the State in its administrative capacity nor, for that matter, the Court would have the power to rewrite subordinate legislation, in the present case Rule 49, by providing that the provisions contained in the first proviso to Rule 49 are an essential qualification or a condition of eligibility for appointment to the post of Inspector. What Rule 49 plainly postulates is that only those Inspectors who possess the experience

specified in the first proviso can be authorized to inspect the manufacture of substances specified in Schedule C. This is in the nature of an exception, as explained earlier, since it permits only a certain category of Inspectors holding the required experience to inspect the manufacture of Schedule C substances. Plainly, the holding of experience is not a condition of eligibility or a condition for appointment."

From the analysis made by the Full Bench of Hon"ble Allahabad High Court, it is absolutely clear that the experience envisaged under the proviso is not a condition of eligibility or a condition of appointment.

This is absolutely correct and true interpretation of Rule 49.

Considering the purpose of a proviso in a statute and its impact on the main proviso of law, the Full Bench observed as under:-

"24. The statutory provision which we are interpreting in the present case has a different scheme altogether. The main part of Rule 49 of the Rules of 1945 provides the qualifications for appointment of an Inspector. The first proviso carves out an exception by stipulating that only certain categories of Inspectors would be authorized to inspect the manufacture of Schedule C substances. But for the proviso which places an embargo, a person who is appointed as an Inspector upon possessing the qualifications prescribed by the substantive part of Rule 49 would have been authorized to inspect the manufacture of substances mentioned in Schedule C. What the first proviso does is that it ensures that before an Inspector can be authorized to inspect the manufacture of a Schedule C substance, he or she must possess the experience stipulated in the first proviso to Rule 49. What needs to be noticed is that the proviso to Rule 49 of the Rules stipulates that only those Inspectors, who satisfy condition (i) or (ii) or (iii), shall be authorised to inspect the manufacture of the substances mentioned in Schedule 'C'. Schedule 'C' deals with only sixteen types of biological and special products. Schedule 'C(i)' deals with other special products. Schedule 'D' deals with certain other classes of drugs. For these reasons, we have come to the conclusion that the first proviso to Rule 49 does not provide an essential qualification for appointment as a Drug Inspector and the acquisition of the experience as set out in the first proviso would operate to authorize a Drug Inspector to inspect the manufacture of a Schedule C substance."

As to whether the respondents could impose experience mentioned in the proviso or for that matter incorporated in the recruitment rules as an additional condition of eligibility for appointment to the post in question, in para 26, the Full Bench has answered this question as well. The same reads as under:-

"26. Finally, as we have noted earlier, we may clarify that it is always open to the legislature or its delegate to suitably amend a statutory provision or, as in the present case, subordinate legislation to make the holding of the requisite experience as a condition of eligibility or a qualification for appointment but, that would have to be by an amendment of the subordinate legislation. As a matter of

fact, the attention of the Court has been drawn to a notification dated 27 October 2010, of the Ministry of Health and Family Welfare, Government of India, amending the recruitment rules for the post of Drug Inspectors in the Central Drugs Standard Control Organization under the Directorate General of Health Services by making the holding of the requisite experience as an essential qualification for appointment. The relevant part of the notification reads as follows:

"Essential : -

(i) Degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology from a recognized University or equivalent;

(ii)(a) Eighteen months' experience in the manufacture of at least one of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945; or

(b) Eighteen months' experience in testing of at least one of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 in a laboratory approved for this purpose by the licensing authority; or

(c) Three years' experience in the inspection of firms manufacturing any of the substances specified in Schedule 'C' to the Drugs and Cosmetics Rules, 1945 during the tenure of their services as Drugs Inspector."

No such amendment has been made in Rule 49 of the Drugs and Cosmetics Rules, 1945. The Rules, as we have interpreted them on their plain and natural meaning as they stand, do not make the experience, which is stipulated in the first proviso, as a condition of eligibility."

The final observations of the Full Bench answers all questions raised by the UPSC in the present case. The Drugs & Cosmetics Act, 1940 is a principle legislation enacted by the primary legislative body at the relevant time. Section 33 of the Act empowers the Central Government to frame rules. These rules are though by separate legislative authority but are substantive in nature. The Recruitment Rules were framed in exercise of the powers conferred under proviso to Article 309 of the Constitution of India. Article 309 reads as under:-

"309. Recruitment and conditions of service of persons serving the Union or a State- Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons

appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

The main part of Article 309 empowers the principle legislative body to regulate the recruitment and conditions of service of persons appointed, to public service and posts in connection with the affairs of Union or of any State. The principle legislative body has enacted Drugs & Cosmetics Act, 1940 and the Rules framed thereunder. Section 33 (b) of the Act empowers the central government to laid down the service conditions and qualifications of the post of Drug Inspector. The Central Government in exercise of such legislative powers has framed Drugs & Cosmetics Rules 1945. Proviso to Article 309 of the Constitution of India empowers the President or the Governor of a State to make rules regulating the recruitment and conditions of service of persons appointed to civil services and posts until provision in that behalf is made by or under an Act of the appropriate legislature. The rules framed under proviso to Article 309 are transitory in nature and are subject to an Act of appropriate legislature which inter alia includes the rules framed in exercise of the powers under the Act. The proviso is attracted in absence of any legislative measure in respect to the recruitment and conditions of service. In the present case, when the recruitment rules were framed in 2010, the Drugs and Cosmetics Act, 1940 and rules framed thereunder were already in operation. Rule 49 had occupied the field laying down the qualifications for the post of Inspector. At the first place, there was no occasion to frame separate rules laying down the qualification or eligibility that too under proviso to Article 309 of Constitution of India. Even if such rules have been framed, these transitory rules cannot nullify or supercede Rule 49 of the Drugs & Cosmetics Act, 1940 and Rules 1945, that is why, the Hon"ble Full Bench has ignored the recruitment rules without the amendment of Rule 49 being in place. The same recruitment rules are being enforced in the present case to deny the appointment to the applicants. These rules have already been held to be inoperative, without amendment of Rule 49. Where the recruitment rules framed under Proviso to Article 309 are in conflict with Rules, i.e., The Drugs & Cosmetics Act, Rules 1945, the recruitment rules, the primary rules would operate and transitory rules would be inoperative to the extent of inconsistency. Hence, the experience laid down under the recruitment rules as an eligibility condition and notified in the advertisement would be of no consequence. The qualifications laid down under Rule 49 would alone operate as the essential qualification under law. The experience being, not such a condition, cannot be enforced as an essential qualification to reject any person"s candidature. Insisting on enforcement of the recruitment rules even by a body like UPSC, would not only be an arbitrary and unwarranted exercise of jurisdiction/power but would be violative of Articles 14 & 16 of the Constitution of India for the candidates who had applied for their selection/appointment to the post of Drug Inspector. Merely because the UPSC is a constitutional body does not empower it to modify the statutory qualifications on some perceived notions or even if such

qualifications are suggested by experts. The transitory legislative body under proviso to Article 309 by no stretch of legal interpretation could nullify any legislation under the main provision of Article 309 or for that matter modify the same.

16. The judgments relied upon by the UPSC as regards the jurisdiction of the Tribunal or the other constitutional courts to exercise the power of judicial review, there cannot be any second opinion about these propositions. It is also true that while exercising the power of judicial review, this Tribunal would not examine the decision but only the decision making process. In the present case what rule is to be applied for a particular selection would be a part of decision making process and while examining the validity of the action of the UPSC in applying any law, the court does not examine the decision but only the decision making process which inter alia includes various steps like, relevancy of the qualifications laid down for any particular post, whether the qualifications are authorized by any law or not, whether enough opportunities have been provided to the candidates to apply and particularly the fairness of the selection process so and so on. The full Bench judgment in Kuldeep Singh's case (surpa) noticed by us hereinabove is applicable on all fours to the facts of the present case.

17. In view of the dictum of the aforesaid judgment and the interpretation of the statutory rules, we are of the considered opinion that the experience laid down as an essential qualification in the advertisement is without any sanction of law. Such experience is not an essential qualification/eligibility condition for the post of Drug Inspector. The only essential qualification which is to be applied for purposes of selection/appointment to the post of Drug Inspector is as prescribed under Rule 49 of Drugs and Cosmetics Rules, 1945. Any additional qualification, even if, prescribed under the recruitment rules would not operate. The rejection of the candidatures of the applicants on the strength of the recruitment rules and advertisement is unjustified, unwarranted and non est in the eyes of law.

18. These OAs are accordingly allowed. (i) The impugned rejection notices are hereby quashed. Respondent No.1 is directed to re-examine the claims of the applicants for selection/appointment to the post of Drug Inspector without applying the experience as notified in the advertisement (Recruitment Rules) as an eligibility condition. (ii) Since all the applicants were allowed to appear/participate in the examination, respondent No.1 would determine the merit of the applicants on the basis of marks secured by them in the written examination and interview, and such of the applicants who come within the merit, i.e., secured more marks than the cut off marks would be recommended for appointment within a period of two months from the date of receipt of copy of this order. On receipt of recommendations from respondent No.1, the respondent No.2 would issue necessary offers of appointment to the selectees/recommendees within a period of one month from the date of receipt of recommendations from UPSC and (iii) All those candidates who may be selected/appointed are entitled to the benefit of their appointment from the date the final result was notified. They will

also be entitled to the notional benefit of appointment including notional fixation of their pay, increments and seniority on the basis of their merit in the selection process. They will be entitled to actual financial benefits from the date of appointment/joining.