
(2019) 11 UK CK 0066
In the Uttarakhand High Court
Case No : Special Appeal No. 97 Of 2019

Ruchi Kandpal

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 07-11-2019

Acts Referred:

Contempt Of Courts Act, 1971 — Section 2(c), 12
Assistant Teachers Trained Graduate Service Rules, 2014 — Rule 5
Constitution Of India, 1950 — Article 14, 16, 16(1), 129, 142, 142(1), 226

Citation : (2019) 11 UK CK 0066

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Kumar Verma, J

Bench : Division Bench

Advocate : T.A. Khan, Aditya Kumar Arya, C.S. Rawat

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. This Special Appeal is preferred against the order passed by the learned Single Judge in Writ Petition (S/S) No. 2381 of 2018 dated 11.12.2018.

2. The appellant herein filed Writ Petition (S/S) No. 2381 of 2018 seeking a writ of mandamus directing the respondent-State Government to send the amended requisition of 151 vacancies of Assistant Teacher, L.T. Grade (Arts), in terms of the proviso to Rule 5 of the Assistant Teachers Trained Graduate Service Rules, 2014 (for short the '2014 Rules'), to the examining body for inclusion of the same in the advertisement dated 03.01.2017; and for a writ of mandamus directing the selecting body to issue a corrigendum, to the advertisement dated 03.01.2017, revising the vacancies of the posts of Assistant Teacher, L.T. Grade (Arts) by 60% i.e. by including 151 unfilled vacancies of the promotional quota of the year 2014 as provided in the proviso to Rule 5 of the 2014 Rules.

3. This case has had a checkered history. Sri Raghuwant Rawat and others had earlier invoked the jurisdiction of this Court by way of Writ Petition (S/S) No.

2339 of 2016 wherein they contended that, in terms of Rule 5 of the 2014 Rules, 60% of the posts of Assistant Teachers LT Grade were required to be filled up by direct recruitment, 30% by way of promotion on the basis of seniority subject to rejection of the unfit, where the feeding cadre was that of Assistant Teachers and Head Masters in Primary and Senior Primary Schools, and the remaining 10% of the posts of Assistant Teachers L.T. Grade were required to be filled up by way of a competitive examination from the same feeding cadre of Assistant Teachers and Head Masters in Primary and Senior Primary Schools. In terms of the proviso to Rule 5 if, in a particular year, 40% of the posts to be filled up by way of promotion cannot be filled up because of shortage of eligible candidates from amongst the feeding cadre, such posts should be carried forward for the next selection year, and then be filled up by way of direct recruitment.

4. The petitioners, in Writ Petition (S/S) No. 2339 of 2016, had contended before this Court that the last selection, to the posts of Assistant Teacher, was made in the year 2014; in the said selection, a total of 151 promotional posts of Assistant Teachers L.T Grade, in the Garhwal and Kumaun regions, could not be filled up; and these posts should now be filled up by way of direct recruitment in the present on-going selection process for which a requisition had already been made by the State Government to the Subordinate Service Selection Board.

5. After taking note of the contents of the counter affidavit, the learned Single Judge observed that Rule 5 of the 2014 Rules stipulated that, in case the promotional vacancies were not filled up in a particular year due to non-availability of eligible candidates, such posts should be filled in the next selection year by way of direct recruitment. The writ petition was disposed of with the direction that in the next selection process, for which a requisition had been made by the State authorities to the Subordinate Service Selection Board, 151 posts of the last selection year should be carried forward, and included among the vacant posts for which the next selection had to be made by way of direct recruitment.

6. The order of the learned Single Judge in Writ Petition (S/S) No. 2339 of 2016 was passed on 07.01.2017, and the next selection process, for which a requisition had already been made by the State Government to the Subordinate Service Selection Board, had commenced with an advertisement being issued by the Subordinate Service Selection Board on 03.01.2017, four days prior to the date on which the order in Writ Petition (S/S) No. 2339 of 2016 was passed on 07.01.2017. The advertisement issued by the Subordinate Service Selection Board on 03.01.2017 refers to a total of 153 vacant posts in the cadre of Assistant Teachers, LT Grade (Arts), and required candidates to submit their applications during the period between 22.01.2017 to 12.03.2017. The corrigendum, issued to the said advertisement on 12.01.2017, also made no mention of the 153 posts advertised on 03.01.2017 being increased by the additional 151 unfilled posts carried forward from the previous recruitment year.

7. Pursuant to the advertisement dated 03.01.2017, the appellant, who was not

a party to Writ Petition (S/S) No. 2339 of 2016, submitted her application form on 25.01.2017. The affidavit filed by her, in support of Writ Petition (S/S) No. 2381 of 2018, does not, however, disclose how the appellant-writ petitioner came to know of the order of this Court in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017. The appellant herein filed an application, under the Right to Information Act on 23.07.2017, seeking information as to whether 154 additional posts had been included in the advertisement dated 03.01.2017. The said application does not, however, make any mention of the order in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017. In reply thereto, the appellant herein was informed, by letter dated 27.09.2017, that all the posts had been included. Similar replies were received by her to the subsequent RTI applications made by letters dated 11.12.2017 and 06.10.2018. The appellant-writ petitioner filed Writ Petition (S/S) No.2381 of 2018 before this Court on 27.07.2018 seeking the reliefs mentioned earlier in this order.

8. As stipulated in the advertisement dated 03.01.2017, a written examination was held on 21.05.2018, and the results of the first batch of selected candidates was declared on 31.05.2018, and the second on 19.07.2018, before the appellant-writ petitioner invoked the jurisdiction of this Court on 27.07.2018 filing Writ Petition (S/S) No. 2381 of 2018. The result of the third batch of selected candidates was declared thereafter on 28.08.2018, the results of the fourth batch was declared on 07.09.2018, the fifth batch on 04.10.2018, the sixth batch on 30.10.2018, the seventh batch on 04.12.2018, the eighth batch on 30.04.2019, the ninth batch on 04.06.2019 and the tenth batch on 19.06.2019. Sri T.A. Khan, learned Senior Counsel, would submit that, of the 153 posts of Assistant Teacher, L.T. Grade (Arts) advertised on 03.01.2017, 20 posts still remain unfilled.

9. The results declared on 31.05.2018 disclosed that the marks secured by the last selected candidate in the General category for Kumaon region was 78.75 marks, and the marks secured by the last selected woman from the General category was 78.50 marks. The cut-off marks for the Garhwal region was higher than in Kumaun and, while the marks secured by the last selected candidate from the General category was 82 marks, the last selected candidates in the General category (women) had secured 80 marks. The appellant-writ petitioner, who had secured lesser marks i.e. 75.50 marks, was therefore declared unsuccessful.

10. In Writ Petition (S/S) No.2381 of 2018, the appellant-writ petitioner contended that if only these 151 posts, as directed to be included in the 2017 recruitment process by the order of the learned Single judge in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, had been included, she would then have had the opportunity to compete for 304 posts of Assistant Teacher, L.T. Grade (Arts) (153 advertised posts + 151 unfilled posts carried forward from the 2014 selections to the recruitment year 2017), and she would have been selected for appointment to the said post.

11. On being made aware of the possibility of several other candidates having secured more marks than the appellant-writ petitioner, but lesser marks than the last successful candidate, Sri T.A. Khan, learned Senior Counsel appearing on behalf of the appellant, would fairly submit that all such candidates would also be required to be considered for selection, and to be appointed as Assistant Teacher, L.T. Grade (Arts), after adding the 151 posts, carried forward from the 2014 selection year, to the 2017 recruitment process.

12. Though the respondents had, in their counter affidavit, claimed that these 151 posts were included in the 2017 selection process, the learned Single Judge, while passing the order in Writ Petition (S/S) No. 1381 of 2018 dated 1.12.2018, proceeded on the premise that these posts had not been so included. In the order under Appeal, the learned Single Judge noted the petitioner's grievance that, according to the direction issued by this Court in its order in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, 151 promotional posts as well as departmental posts of Assistant Teachers should have been made available, by its inclusion, for direct recruitment in the advertisement dated 03.01.2017; failure to do so, had resulted in depriving the appellant-writ petitioner of an opportunity, as also the probability, of being selected; and this gave a cause for the filing of the present writ petition.

13. The learned Single Judge, thereafter, observed that, after the advertisement was issued on 03.01.2017, the appellant-writ petitioner, considering the total number of advertised vacancies, had responded to the process of selection by submitting her application; in the results declared on 31.05.2018, she was unsuccessful, as she had secured below the cut off marks; she could not be selected on conclusion of the selection process; at a much belated stage, after having participated in the selection process held by way of a written examination on 21.01.2018 and after declaration of the result on 31.05.2018, the appellant-writ petitioner had started making a probe by filing applications, under the Right to Information Act, before various authorities, first being that of 27.09.2017, with a view to derive particulars as to whether 151 posts, which were directed to be included by the judgment dated 07.01.2017, had in fact been included in the selection process initiated on the basis of the advertisement dated 03.01.2017; and it was her case that, because of the failure of the respondents to include these 151 posts, she had been deprived of her right to be considered for selection, which she would have been entitled to if the respondents had included the 151 carried forward posts in the selection process for the year 2017.

14. The learned Single Judge opined that, by the time the judgment was passed in Writ Petition (S/S) No. 2339 of 2016 on 07.01.2017, an advertisement had already been issued on 03.01.2017; the respondents had already undertaken the process of determining the vacancies, and had issued the advertisement based on which the selection was initiated; the appellant-writ petitioner ought to have been vigilant, and should have inquired regarding the number of vacancies, which had been advertised on 03.01.2017, and as to whether or not the 151

posts had been included therein; despite being aware of the aforesaid facts, she had participated in the selection process undertaken to fill up the 153 posts advertised on 03.01.2017; she had filed the writ petition only after she was found unsuccessful in the results declared on 31.05.2018; the appellant-writ petitioner had slept over her rights, and had made no efforts to ensure enforcement of the judgment dated 07.01.2017 by filing a contempt petition before this Court; she had also not approached the authorities, at the appropriate time, seeking inclusion of these 151 posts in the 2017 selection process; it was also not her case that she had ever served a copy of the judgment dated 07.01.2017, on the respondents, immediately after it was delivered by the Court, so as to enable the respondents to take steps for necessary action; the order of the learned Single Judge dated 07.01.2017, whereby 151 posts were directed to be included, was a direction for inclusion of these posts in the next selection year; since the selection process had already been initiated by the advertisement dated 03.01.2017, with the determination of vacancies much earlier, the selection process, referred to in the order dated 07.01.2017, could only be for the subsequent selection year; the appellant-writ petitioner, having responded to the advertisement dated 03.01.2017, must be deemed to have accepted the conditions of the advertisement in its totality, including the total number of advertised vacancies against which her candidature was to be considered; she had acquiesced to the selection process, and the doctrine of acquiescence was attracted; having participated in the selection process, without enforcing the judgment dated 07.01.2017, the appellant-writ petitioner could not now be permitted to revert back after her failure to succeed in the process of selection which culminated on 31.05.2018; the judgment was delivered on 07.01.2017, after the advertisement was issued on 03.01.2017; the appellant-writ petitioner never sought enforcement of the said judgment, when she applied for selection; and, even according to the appellant-writ petitioner, she had submitted her representation for the first time on 17.05.2018, before the Additional Regional Director, Kumaon Mandal, Nainital, seeking inclusion of the posts, carried forward from the 2014 selection year, i.e. after culmination of the selection process and a few days before the declaration of results.

15. The learned Single Judge held that, if at all 151 posts were to be included in the advertisement, it ought to have been so included at the time when the selection process itself was going to be initiated at the initial stage, or at least at the time when the posts were advertised or at the most by the date when the last date was fixed for applying for the posts i.e. 12.03.2017, that too by including the posts by issuing a corrigendum advertisement so that the public at large was made aware of the inclusion of additional posts available for selection, and they may have an opportunity to apply also; the increased vacancies would have resulted in an increase in the probability of selection of candidates who were aspirants to the posts; acceptance of the prayer, to include these 151 posts, would violate Articles 14 and 16 of the Constitution of India; if these 151 posts had been included, in the advertisement dated 03.01.2017, then more

candidates may have applied as it would have increased the probability of their selection; and at this stage, when the process of selection stood culminated by the declaration of results on 31.05.2018, the appellant-writ petitioner, who had otherwise failed in the selection process, could not revert back and take advantage, by seeking inclusion of the 151 posts as directed in terms of the judgment dated 07.01.2017, to enable her inclusion in the select list dated 31.05.2018.

16. The learned Single Judge found no justification in granting the relief, sought for in the writ petition, after conclusion of the selection process and the declaration of results on 31.05.2018. He held that the writ petition was belated; and such a relief would not be granted in the exercise of the equitable jurisdiction under Article 226 of the Constitution of India as it would result in disturbing the entire selection process, which stood finalized. The writ petition was, accordingly, dismissed. Aggrieved thereby, the present Special Appeal.

17. While acknowledging that the appellant-writ petitioner was not a party to Writ Petition (S/S) No. 2339 of 2016, which was disposed of on 07.01.2017, Sri T.A. Khan, learned Senior Counsel appearing on behalf of the appellant-writ petitioner, would submit that the learned Single Judge had erred in holding that the appellant-writ petitioner had acquiesced to the selection process, and had questioned non-inclusion of these 151 posts only after the results were declared on 31.05.2018; after the petitioner came to know of the order of the learned Single Judge dated 07.01.2017, requiring 151 more posts to be included in the 2017 selection process, she had submitted an application, under the Right to Information Act on 23.07.2017, long before the written examination was held on 21.01.2018; in fact, the appellant-writ petitioner had, even subsequent thereto, submitted RTI applications to which she had received reply on 11.12.2017, 03.01.2018 and 06.10.2018 informing her that these posts were included in the 2017 selection process; it was only because the appellant-writ petitioner was misled into believing that these posts had already been included in the selection process, for the 2017 recruitment year, did she not question the failure of the respondents to include these 151 posts, in the 2017 recruitment process, till much later when she came to know that these posts had not been included; the appellant-writ petitioner could have been faulted for not approaching this Court earlier, only if the total number of posts notified, in terms of the advertisement dated 03.01.2017, was less than the carried forward 151 posts; since the total number of posts advertised were 153, the appellant-writ petitioner bonafidely believed the information supplied to her under the RTI Act, and had participated in the selection process on the premise that the 151 carried forward vacancies formed part of the 153 posts which were advertised on 03.01.2017; having misled the appellant-writ petitioner into believing that these 151 posts had been included in the advertisement dated 03.01.2017, and in filing a false counter affidavit before the learned Single Judge reiterating what was informed to her under the Right to Information Act, the respondents cannot now be heard to contend that the appellant-writ petitioner should have approached this Court

earlier; the respondents had committed perjury, and had deliberately misled this Court; an elaborate order was passed by this Court in the present Special Appeal on 02.07.2019 which, though interlocutory in character, fully supported the appellant-writ petitioner's case; this Court should consider directing the respondents to fill up these 151 posts from among the candidates next in merit i.e. candidates below the last ranked successful candidate in the 2017 recruitment process; failure to do so, would result in the respondents violating the order passed by the learned Single Judge on 07.01.2017; the respondents cannot be heard to contend that, even if their action was in violation of the order passed by the learned Single Judge on 07.01.2017, the appellant-writ petitioner should nonetheless be denied relief on the ground of acquiescence; the doctrine of waiver would have been attracted only if the appellant-writ petitioner had participated in the selection process knowing fully well that the 151 carry forward posts had not been included; the said principles have no application, since the appellant-writ petitioner was misled into believing that the 151 posts had already been included in the 2017 selection process; the respondents should be directed to fill up, the unfilled posts + these 151 carried forward posts, by selecting candidates next in merit in the 2017 recruitment process; and the appellant-writ petitioner should also be awarded damages of Rs. 10 lacs.

18. While contending that the information furnished to the appellant-writ petitioner, under the Right to Information Act, indicated that these carried forward 151 posts had not been included even in the 2019 selection process, Sri T.A. Khan, learned Senior Counsel, would submit that, in the alternative, since the State Government claims to have sent a requisition to the State Subordinate Selection Commission to include these 151 posts in the 2019 recruitment process, the State Subordinate Selection Commission should at least be directed to issue an advertisement forthwith, and to fill up the advertised posts including these 151 carried forward vacancies, as per the existing Rules. Learned Senior Counsel would rely on the judgment of the Supreme Court in *Alok Kumar Singh and others v. State of U.P. and others* (2018) 4 UPLBEC 3000.

19. On the other hand Sri C.S. Rawat, learned Additional Chief Standing Counsel appearing on behalf of the State Government, would submit that the appellant-writ petitioner cannot approbate and reprobate; having participated in the selection process, and having failed to get selected, the appellant-writ petitioner cannot now turn around and question the selection process undertaken to fill up the 153 posts referred to in the advertisement dated 03.01.2017; the appellant-writ petitioner cannot take advantage of the bonafide mistake, committed on behalf of the respondents, in furnishing wrong information under the RTI Act to the effect that these 151 posts had been included in the advertisement dated 03.01.2017; the appellant-writ petitioner had submitted her application nearly three weeks after the order of the learned Single Judge dated 07.01.2017; if she was really aggrieved by the non-inclusion of the 151 posts, carried forward from the 2014 selection year, she ought to have approached this Court soon after the said judgment, and should not have waited till the entire selection process had

been completed and the result had been declared on 31.05.2018, before filing this writ petition on 27.07.2018; acceding to the appellant-writ petitioner's request, for inclusion of these 151 posts in the 2017 selection process, would deprive other candidates, who did not submit their applications on the ground that a limited number of 153 posts had alone been advertised, to submit their applications; if such candidates had known that the total number of posts to be filled up would be 304 instead of 153, they may also have applied, and participated for selection to the 304 posts; any direction issued by this Court to the respondents, to fill up these 151 carried forward posts only from those who had participated in the selection process of 2017 but were not selected, would only result in further litigation, and those, who had not applied pursuant to the advertisement dated 03.01.2017, invoking the jurisdiction of this Court questioning the action of the respondents in filling up posts more than what was advertised; these 151 posts have now been included in the 2019 recruitment process, and a requisition has been sent to the Subordinate Selection Commission on 08.05.2019 for the Kumaun region, and on 28.05.2019 for Garhwal region; and these 151 posts would now be filled up in the 2019 recruitment process. Learned Additional Chief Standing Counsel would rely on Pradeep Kumar Rai and others v. Dinesh Kumar Pandey and others (2015) 11 SCC 493; Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others (2011) 1 SCC 150; and D. Sarojakumari v. R. Helen Thilakom and others (2017) 9 SCC 478).

20. As noted hereinabove, the learned Single Judge, while disposing of Writ Petition (S/S) No. 2339 of 2016 by order dated 07.01.2017, had directed that in the next selection process, for which a requisition had been made by the State Authorities to the Uttarakhand Subordinate Service Selection Commission, 151 posts of the last selection process should be carried forward, and included among the vacant posts for which the next selection was being made by way of direct recruitment. The order of the learned Single Judge, in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, has attained finality as no appeal was preferred there-against by any of the parties to those proceedings. Consequently, the said order is binding on the State Government which was a party thereto and, in terms thereof, the State Government ought to have taken steps to include the unfilled 151 posts of the previous selection process in the next recruitment for which a requisition had been made by the State Authorities, to the Uttarakhand Subordinate Service Selection Commission, even before the order dated 07.01.2017 was passed by the learned Single Judge.

21. While the order, in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, discloses that the learned Single Judge was made aware of a requisition having already been made by the State Authorities to the Uttarakhand Subordinate Service Selection Commission, the said order does not reflect the learned Single Judge having been informed that an advertisement had already been issued on 03.01.2017. Notwithstanding the fact that an advertisement had already been issued on 03.01.2017, the order of the learned Single Judge, in Writ Petition (S/

S) No.2339 of 2016 dated 07.01.2017, obligated the State Government to include these 151 posts in the 2017 recruitment process as that was the next recruitment for which a requisition had already been issued. These 151 carried forward unfilled posts, from the previous selection process. could only have been included in the 2017 recruitment process on an errata being issued to the advertisement dated 03.01.2017. While an errata was no doubt issued on 12.01.2017, it did not relate to these 151 carried forward unfilled posts from the previous selection process. The selection process for the 2017 recruitment year was undertaken, in terms of the advertisement dated 03.01.2017, only to fill-up the 153 advertised posts, and not the 151 carried forward unfilled posts of the previous selection process, inclusion of which would have resulted in increasing the total number of posts to be filled-up, in the 2017 recruitment process, from 153 to 304 posts of Assistant Teacher (L.T. Grade) (Arts).

22. The appellant-writ petitioner herein was, admittedly, not a party to Writ Petition (S/S) No. 2339 of 2016. She submitted her application, pursuant to the advertisement dated 03.01.2017, on 25.01.2017 and participated in the selection process. While claiming that she had invoked the jurisdiction of this Court on coming to know that these 151 posts had not been included in the advertisement dated 03.01.2017, the appellant-writ petitioner does not state how and when she came to know that these 151 carried forward unfilled posts had not been included in the recruitment process for the year 2017, or for that matter as to when and how she came to know of the order passed by the learned Single Judge in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017.

23. Since the learned Single Judge had disposed of Writ Petition (S/S) No. 2339 of 2016 by order dated 07.01.2017, only after an advertisement was issued on 03.01.2017, it is obvious that these 151 posts could not have been, and were in fact not, included in the advertisement dated 03.01.2017, for if it had been so included, there would have been no necessity for any such direction to have been issued by the learned Single Judge directing its inclusion. The appellant-writ petitioner ought to have invoked the jurisdiction of this Court, (before participating in the selection process by submitting her application form on 25.01.2017), questioning the failure of the State Government to issue a requisition for inclusion of these 151 carried forward unfilled posts in the 2017 recruitment process, or the failure of the Uttarakhand Subordinate Service Selection Commission to issue an errata to the advertisement dated 03.01.2017 inviting applications for these 151 posts also.

24. As noted hereinabove, the appellant-writ petitioner not only applied pursuant to the advertisement, by submitting her application form on 25.01.2017, she also appeared in the written examination on 25.01.2018. It is only after the results of the first and the second batch of selected candidates were declared on 31.05.2018 and 09.07.2018 respectively, did she chose to invoke the jurisdiction of this Court by filing Writ Petition (S/S) No. 2381 of 2018 on 27.07.2018. By the time the order under appeal was passed on 11.12.2018, the results of batches 3

to 7 had already been declared, and by the time this appeal came to be heard, the results of batches 8 to 10 had also been declared and, even according to Mr. T.A. Khan, learned Senior Counsel appearing on behalf of the appellant-writ petitioner, only 20 of the 153 advertised posts still remain to be filled-up. The appellant-writ petitioner did not come up high in the order of merit to be selected for appointment to any one of the remaining 20 of the 153 posts for which the advertisement dated 03.01.2017 was issued, and it is for this reason that she invoked the jurisdiction of this Court filing Writ Petition (S/S) No. 2381 of 2018 seeking inclusion of the 151 carried forward posts, of the previous selection process, in the 2017 recruitment.

25. There are two principles in service law which are indisputable. Firstly, there cannot be appointment beyond the advertised number, and secondly norms of selection cannot be altered after the selection process has started. (Secretary, A.P. Public Service Commission v. B. Swapna & Ors. (2005) 4 SCC 154; and Mohammad Hasnain Raza v. Uttarakhand Public Service Commission & others Order of D.B. of Uttarakhand High Court in Writ Petition (S/B) No. 478 of 2019 dated 11.10.2019). No authority can make any selection/appointment beyond the number of posts advertised, even if there are larger number of posts available than those advertised. The underlying principle is that, if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates, who had chosen not to apply for the vacant posts which were being sought to be filled, may have also applied if they had known that the other vacancies were under consideration for being filled up. (Arup Das & others v. State of Assam & others Order in Special Leave Petition (C) No.27 of 2012 dated 27.01.2012; and Mohammad Hasnain Raza Order of D.B. of Uttarakhand High Court in Writ Petition (S/B) No. 478 of 2019 dated 11.10.2019).

26. Vacancies cannot be filled up over and above the number of vacancies advertised as "recruitment of candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question, in accordance with the statutory rules, subsequent to the date of notification of vacancies. Filling up vacancies, over and above those notified, is neither permissible nor desirable, as it amounts to "improper exercise of power. Only in rare and exceptional circumstances, and in an emergent situation, can such a rule be deviated, and such a deviation is permissible only after adopting a policy decision based on some rational", otherwise the exercise would be arbitrary. (Union of India and Ors. v. Ishwar Singh Khatri and Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat and Ors. (1994) Supp 2 SCC 591; State of Bihar and Ors. v. Secretariat Assistant Successful Examinees Union 1986 and Ors. (1994) 1 SCC 126; Prem Singh and Ors. v. Haryana State Electricity Board and Ors. (1996) 4 SCC 319; Surinder Singh and Ors. v. State of Punjab and Anr. (1997) 8 SCC 488; Kamlesh Kumar Sharma v. Yogesh Kumar Gupta and Ors. (1998) 3 SCC 45; State of U.P.

& others v. Rajkumar Sharma (2006) 3 SCC 330; Ashok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors. (1996) 1 SCC 283; Rakhi Ray & others v. High Court of Delhi & others (2010) 2 SCC 637; and Mohammad Hasnain Raza Order of D.B. of Uttarakhand High Court in Writ Petition (S/B) No. 478 of 2019 dated 11.10.2019).

27. Since the number of persons to be taken at a particular recruitment, keeping in view the vacancies then existing as well as likely to occur, are determined before an advertisement is issued for direct recruitment, the question of any variation thereafter would not arise in the ordinary course. But in an extraordinary situation, like sudden creation of posts in the cadre, subsequent to the issuance of advertisement, but before the last date of submission of application forms, the variation clause may become applicable, so that a greater number of persons, than the posts advertised for, can be considered for the said recruitment. However, such a situation will have to be an extraordinary one. (Sri Kant Tripathi v. State of U.P (2001) 10 SCC 237; and Mohammad Hasnain Raza Order of D.B. of Uttarakhand High Court in Writ Petition (S/B) No. 478 of 2019 dated 11.10.2019). Posts beyond those advertised cannot, save in exceptional circumstances, be filled up for others, who may have applied had they known that a larger number of posts were sought to be filled-up, would be denied the opportunity to apply to be considered for selection and appointment to the post of Assistant Teacher (L.T.Grade) (Arts).

28. While the order of the learned Single Judge, in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, undoubtedly necessitates compliance, and both the State Government and the Uttarakhand Subordinate Service Selection Commission have failed to discharge their obligations to comply with the directions of this Court in the aforesaid judgment, what we are called upon to examine is what can be done at this belated stage when almost all the advertised 153 posts (other than the 20 posts yet to be filled up) have been filled up by selecting candidates in their order of merit. Accepting the appellant-writ petitioner's contention that the 151 carried forward posts should be filled-up only from those who participated in the 2017 selection process, would result in the law declared by the Supreme Court in the aforesaid judgments being flouted, for it is not possible for an errata to be now issued, to the advertisement dated 03.01.2017, at this belated stage when the selection process has been completed, and most of the advertised 153 posts have already been filled up.

29. In the order under appeal, the learned Single Judge has faulted the appellant-writ petitioner for not approaching the Court earlier, and for waiting till the selection process was completed before she invoked the jurisdiction of this Court. The appellant-writ petitioner claims that it is because she was misled by the respondents, in their reply to the queries raised by her under the Right to Information Act as to whether these 151 carried forward posts had been included in the advertisement, that she did not approach this Court earlier. While it is evident from the reply furnished to the appellant-writ petitioner, under the Right

to Information Act, that the respondents have falsely stated that these 151 carried forward posts had been included in the advertisement dated 03.01.2017, the appellant-writ petitioner has not stated as to why, despite being so informed by the respondents, she nonetheless filed Writ Petition (S/S) No. 2381 of 2018 before this Court on 27.07.2018.

30. As held earlier in this order, the order of the learned Single Judge, in Writ Petition (S/S) No. 2339 of 2016, was passed on 07.01.2017 after the earlier advertisement was issued on 03.01.2017, and the said order dated 07.01.2017 makes no mention of these 151 carried forward posts having been included in the advertisement issued for initiation of the 2017 selection process. The very fact that the learned Single Judge had, in his order dated 07.01.2017, directed the respondents to do so, would itself show that these 151 carried forward posts had not been included in the advertisement dated 03.01.2017. The appellant-writ petitioner, after having participated in the selection process and having taken a chance of being selected, has evidently chosen to invoke the jurisdiction of this Court only because she failed to get selected. In *G. Sarana (Dr.) v. University of Lucknow and others* (1976) 3 SCC 585 the Supreme Court held that a candidate, who participated in the selection process, cannot challenge its validity after appearing in the said selection process, and availing the opportunity of being selected; and a candidate who had voluntarily appeared before the committee, and had taken a chance of having a favourable recommendation from it, could not turn round and question the constitution of the committee. In *P.S. Gopinathan v. State of Kerala and others* (2008) 7 SCC 70, the Supreme Court held that, once a candidate chooses to join the mainstream on the basis of the option given to him, he cannot turn back and challenge the conditions; it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition; he was estopped and precluded from questioning the said order; and the principles of estoppel, waiver and acquiescence would apply.

31. In *Vijendra Kumar Verma* (2011) 1 SCC 150, the Supreme Court held that, when the list of successful candidates in the written examination was published by way of a notification, it was made clear that the knowledge of the candidates, with regard to basic knowledge of Microsoft Operating System and Microsoft Office operations, would be tested at the time of interview; in the call letter sent to the appellant calling him for interview, the aforesaid criteria was reiterated and spelt out; no minimum benchmark or a new procedure was introduced midstream of the selection process; all candidates knew the requirements of the selection process, and were fully aware that they must possess the basic knowledge of computer operations, meaning thereby Microsoft Operating System and Microsoft Office operations; knowing the said criteria, the appellant also appeared in the interview, and faced questions from the expert on computer application; they had taken a chance without protest at any stage; and they could not now turn around and contend that the aforesaid procedure adopted was wrong and without jurisdiction.

32. Following its earlier judgments in *Vijendra Kumar Verma* (2011) 1 SCC 150; and *K.H. Siraj v. High Court of Kerala and Ors.* (2006) 6 SCC 395, the Supreme Court, in *Pradeep Kumar Rai* (2015) 11 SCC 493, held that the appellants before it had participated in the process of interview, and had not challenged it till the results were declared, though there was a gap of almost four months between the interview and the declaration of result; it appeared that only when the appellants found themselves unsuccessful, had they challenged the process of interview; candidates could not approbate and reprobate at the same time; and the candidates should not have participated in the interview if they intended to challenge the procedure.

33. Once a person takes part in the process of selection, and is not found fit for appointment, the said person is estopped from challenging the process of selection. (*D. Sarojakumari* (2017) 9 SCC 478). Candidates, who take part in the selection process knowing fully well the procedure laid down therein, are not entitled to question the same later. (*Union of India and others v. S. Vinodh Kumar and Others* (2007) 8 SCC 100; and *K.H. Siraj* (2006) 6 SCC 395). If a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of selection was unfair or the Selection Committee was not properly constituted. (*Madan Lal and others v. State of J&K and others* (1995) 3 SCC 486; and *Dr. G. Sarana* (1976) 3 SCC 585).

34. After having taken part in the selection process, and having been found lower in merit, the applicant cannot, at that stage, be permitted to turn around and claim that the procedure adopted is illegal. (*D. Sarojakumari* (2017) 9 SCC 478). Having taken part in the process of selection with full knowledge that the recruitment was being made as per the conditions of the advertisement, the applicant must be held to have waived her right to question the advertisement or the methodology adopted by the Board for making selection. (*Ramesh Chandra Shah and others v. Anil Joshi and others* (2013) 11 SCC 309; and *Madras Institute of Development Studies and another v. K. Sivasubramaniyan and others* (2016) 1 SCC 454). The conduct of the petitioner, in invoking the jurisdiction of the High Court under Article 226 of the Constitution of India only after she found that her name does not figure in the merit list prepared by the Commission, disentitles her from questioning the selection. (*Manish Kumar Shahi v. State of Bihar and others* (2010) 12 SCC 576). The doctrine of acquiescence would, undoubtedly, apply and the appellant-writ petitioner would, therefore, not be entitled to be granted any relief on this score also.

35. In *Alok Kumar Singh* (2018) 4 UPLBEC 3000, on which reliance is placed on behalf of the appellant-writ petitioner, the Supreme Court noted that the tabular chart placed before it showed that 226 posts remained unfilled as a result of non-availability of candidates in the category of dependents of freedom fighters etc, and 607 posts were lying vacant as a result of candidates who discontinued training or did not qualify in the medical examination/character verification; and,

theoretically, the 226 unfilled posts ought to be carried forward for further selection as those posts were earmarked for dependents of freedom fighters. In the peculiar fact situation of the case before it, and as a one-time exception, the Supreme Court issued the following directions: (a) the 607 posts lying vacant, as a result of certain candidates having discontinued training or having failed to qualify in medical examination/character verification, shall be offered and made available, in the present selection itself, strictly in the order of merit and subject to fulfillment of having obtained 50% or more marks; (b) normally, "freedom fighters" was not a category which, over a period of time, would keep increasing; in any case, there were selections which were round the corner in which more than 8000 posts would be available for the candidates; the interest of those candidates, who answered the description of "dependents of freedom fighters", would therefore be taken care of in the succeeding selections; the 226 unfilled posts, as a result of non-availability of candidates in the cadre of dependants of freedom fighters, should also be made available for the present selection; and (c) the State Government and its authorities should make available 833 posts (607+226) for the present selection strictly in order of merit subject to the fulfillment of the criteria that the candidates had obtained 50% or more marks in the main written examination, in keeping with the principles of reservation and preference.

36. As observed by the Supreme Court, in *Alok Kumar Singh* (2018) 4 UPLBEC 3000, the direction, to fill up the unfilled vacancies in the present selection process, was issued in the peculiar fact situation of the case before it, and as a one-time exception. It is evident, therefore, that the directions issued therein would not constitute a precedent for the High Court to follow. In any event, the jurisdiction conferred on the Supreme Court under Article 142 of the Constitution of India, to do complete justice, is not available to be exercised by the High Court under Article 226 of the Constitution of India. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, in writ proceedings, is circumscribed by limitations which cannot be transgressed on the whim or subjective sense of justice varying from Judge to Judge. (*State of Punjab and others v. Surinder Kumar and others* (1992) 1 SCC 489; *Chairman, Grid Corpn. of Orissa Ltd. (Gridco) and others v. Sukamani Das (Smt.) and another* (1999) 7 SCC 298). The power conferred on the High Court, under Article 226 of the Constitution of India, is not on par with the constitutional jurisdiction conferred upon the Supreme Court under Article 142 of the Constitution of India. (*State of U.P. and another v. Johri Mal* (2004) 4 SCC 714; *State of Himachal Pradesh v. A parent of a Student of Medical College, Simla and others* (1985) 3 SCC 169; and *Asif Hameed and others v. State of J&K and others* 1989 Supp (2) SCC 364). Exercise of the extraordinary jurisdiction, constitutionally conferred on the Supreme Court under Article 142(1) of the Constitution, can be of no guidance on the scope of Article 226. (*State of*

Haryana v. Naresh Kumar Bali (1994) 4 SCC 448; State of H.P. and others v. Mahendra Pal and another 1995 Supp (2) SCC 731). Reliance placed on behalf of the appellant-writ petitioner on Alok Kumar Singh (2018) 4 UPLBEC 3000 is therefore misplaced.

37. Reliance placed on the interlocutory order passed by us, in this Special Appeal on 02.07.2019, is also of no avail. It is true that, in the said order, we had observed that, since the selection process had not yet been completed, we were inclined to direct the respondents to fill-up these 151 carried forward posts also with the most meritorious of the remaining candidates. We had, however, deferred hearing of the Special Appeal to enable the respondents to seek review of the order passed by the learned Single Judge in Writ Petition (S/S) No.2339 of 2016 dated 07.01.2017. It is also true that the modification/clarification application (MCC No. 733 of 2019) preferred by respondents 2 and 4 in Writ Petition (S/S) No.2339 of 2016 was also dismissed by the learned Single Judge by order dated 05.08.2019. The fact, however, remains that the order passed by us, in this Special Appeal on 02.07.2019, is interlocutory in character, and the observations made therein were without noticing the law declared by the Supreme Court, in the judgments, referred to hereinabove, that posts, beyond those advertised, should ordinarily not be filled up. Passing a final order, strictly in terms of the earlier interim order dated 02.07.2019, would result in the law declared by the Supreme Court that more posts, than that which have been advertised, should not ordinarily be filled up, being flouted in the process. Such a course of action is impermissible.

38. Even otherwise, interlocutory orders have no finality and observations made therein would not bind us while passing a final order. 'Interlocutory Orders' are orders of a purely interim or temporary nature which do not decide or touch upon the important rights or the liabilities of the parties. (Amar Nath and others v. State of Haryana and another (1977) 4 SCC 137; Wharton's Law Lexicon (14th Edn., p. 529); V.C. Shukla v. State through CBI 1980 Supp SCC 92; P. Ramanatha Aiyar's : The Law Lexicon). Interim Orders are made by the Court to have effect only for a time. It is one which is made pending the cause and before a final hearing on the merits. (P. Ramanatha Aiyar's : The Law Lexicon). In Webster's Third International Dictionary (Vol. II, p. 1179) the expression "interlocutory order" has been defined as "Not final or definitive: made or done during the progress of an action: Intermediate, Provisional." Stroud's Judicial Dictionary (4th Edition, Vol. 3, p. 1410) defines "interlocutory order" to mean an order other than a final judgment. Halsbury's Laws Of England (3rd Edn., Vol. 22, pp. 743-44) describes an "interlocutory order" as an order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declaration of rights already given in the final judgment are to be worked out. (V.C. Shukla 1980 Supp SCC 92). It is only an order which does not terminate the proceedings, or finally decides the rights of the parties, which is an

interlocutory order. (V.C. Shukla 1980 Supp SCC 92). An intermediate order is one made between the commencement of an action and the entry of the judgment. (Vol. 60 of the Corpus Juris Secundum; V.C. Shukla 1980 Supp SCC 92).

39. Interlocutory orders are made in aid of final orders and not vice versa. (Shipping Corporation of India Ltd. v. Machado Brothers and others (2004) 11 SCC 168; Kavita Trehan (Mrs.) and another v. Balsara Hygiene Products Ltd. (1994) 5 SCC 380; and Pitta Naveen Kumar and others v. Raja Narasaiah Zangiti and others (2006) 10 SCC 261). No interlocutory order will survive after the original proceeding comes to an end. (Shipping Corporation of India Ltd. (2004) 11 SCC 168; Kavita Trehan (Mrs.) and another v. Balsara Hygiene Products Ltd. (1994) 5 SCC 380; and Pitta Naveen Kumar and others v. Raja Narasaiah Zangiti and others (2006) 10 SCC 261). When a party obtains an interim order, and the final proceedings come to an end, the interim order also, automatically, comes to an end. (V. Ramakrishna v. Smt. N. Sarojini and others 1992 (2) ALT 35 (DB)). Interlocutory orders have no finality and are, therefore, not binding as a precedent. There is no finality to an interlocutory order, and interim orders passed by Courts on certain conditions are not precedents. (Empire Industries Limited and others v. Union of India and others (1985) 3 SCC 314; M . Vijaya Kumar v. General Manager, Milk Products Factory, Andhra Pradesh Dairy Development Cooperative Federation Ltd. 1990 (3) ALT 382). Viewed from any angle, we are satisfied that the learned Single Judge was justified in declining to grant the appellant-writ petitioner the relief sought for in the Writ Petition. The Special Appeal fails and is, accordingly, dismissed. However, in the circumstances, without costs.

40. Since the Special Appeal itself is being dismissed, the interim order passed by us on 02.07.2019, directing the respondents, not to issue an advertisement including these 151 posts, also stands vacated. For the purposes of this Special Appeal, we see no reason to undertake an examination as to whether or not the State Government had, in the requisition sent by them to Subordinate Selection Commission for the 2019 recruitment year, included these 151 carried forward vacancies of Assistant Teachers, L.T. Grade (Arts) of the year 2014, and it would suffice to record the submission of Sri C.S. Rawat, learned Additional Chief Standing Counsel, that these 151 carried forward posts of the year 2014 have, in fact, been included in the requisition sent to the Subordinate Selection Commission to undertake the 2019 selection process; and these carried forward 151 posts, along with subsequent vacancies, are intended to be filled up, by the respondents, in the 2019 selection process itself. Suffice it, in such circumstances, to direct the Uttarakhand Subordinate Service Selection Commission to forthwith, and in any event within three weeks from today, issue an advertisement, including these 151 carried forward posts therein, inviting applications from all eligible candidates to participate in the 2019 recruitment process.

41. Before parting with the case we must also consider what action should be taken against the person who filed the false counter affidavit in Writ Petition (S/S) No. 2381 of 2018. Not only was wrong information furnished in reply to the applications made under the Right to Information Act, this Court was also sought to be misled on a false counter affidavit being filed before the learned Single Judge in Writ Petition (S/S) No. 2381 of 2018. In the counter affidavit, filed on behalf of the third respondent therein, by Mr. K.K. Gupta, In-Charge Additional Director, Secondary Education, Garhwal Mandal, Pauri, it is stated that the posts, which were fixed for promotion in the advertisement of the year 2014 in case of non-availability of suitable candidates, had been merged in the total vacancies at the time of preparation of the adhiyachan (requisition) of 2017.

42. It is only in the supplementary counter affidavit, filed on behalf of respondents 2 and 4 by Dr. Mukul Kumar Sati, Additional Director, Secondary Education, Kumaon Mandal, Nainital in the present Special Appeal on 01.07.2019, is it stated that, by the time the order was passed by the learned Single Judge in Writ Petition (S/S) No. 2339 of 2016 dated 07.01.2017, an advertisement had already been issued on 03.01.2017; it was, therefore, not possible for the department to include the 151 posts in the advertisement dated 03.01.2017; requisition in regard to both the Garhwal and Kumaon regions was sent by the department on 22.11.2016 and 02.12.2016 respectively; the 151 posts, which were carried forward for the next selection/recruitment, were in fact not advertised vide advertisement dated 03.01.2017; and the department has sent the requisition, for filling-up these 151 posts to the selecting body in the year 2019, i.e. on 28.05.2019 for Garhwal Region and on 08.05.2019 for Kumaon Region.

43. Filing of false affidavits before this Court amounts to contempt of Court. Section 2(c) of the Contempt of Courts Act, 1971 (for short the Act) defines criminal contempt as "the publication (whether by words, spoken or written or by signs or visible representation or otherwise) of any matter or the doing of any other act whatsoever to (1) scandalise or tend to scandalise or lower or tend to lower the authority of any court; (2) prejudice or interfere or tend to interfere with the due course of judicial proceedings or (3) interfere or tend to interfere with, or obstruct or tend to obstruct the administration of justice in any other manner. Thus, any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt. The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings, but has also the tendency to impede, obstruct and interfere with the administration of justice. The filing of false affidavits in judicial proceedings in any court of law exposes the intention of the party concerned in perverting the course of justice. The due process of law cannot be permitted to be slighted, nor the majesty of law be made a mockery, by such acts or conduct on the part of the parties to the litigation. Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice,

by resorting to the filing of false evidence, commits criminal contempt of court and renders himself liable to be dealt with in accordance with the Contempt of Courts Act. (Dhananjay Sharma v. State of Haryana and others (1995) 3 SCC 757).

44. Filing false affidavit/statement amounts to criminal contempt. (Murray & Co. v. Ashok Kr. Newatia (2000) 2 SCC 367, Bank of India v. Vijay Transport and others (2000) 8 SCC 512; Hiralal Chawla and another v. State of U.P. and others (1990) 2 SCC 149; U.P. Residents Employees Coop. House Building Society and others v. New Okhla Industrial Development Authority And Another (2004) 9 SCC 670; Dhananjay Sharma (1995) 3 SCC 757; and M.C. Mehta v. Union of India and others (2003) 5 SCC 376). Giving false evidence by filing false affidavit is an evil which must be effectively curbed with a strong hand. Prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter of substance and the court should be satisfied that there is a reasonable foundation for the charge. (Muthu Karuppan, Commissioner of Police, Chennai v. Parithi Ilamvazhuthi and another. (2011) 5 SCC 496). Anyone who takes recourse to fraud deflects the course of judicial proceedings or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice. (Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421; Dhananjay Sharma (1995) 3 SCC 757).

45. Filing of false affidavit, in a Court of law, has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of the unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity. (Mohan Singh v. Amar Singh (Late) (1998) 6 SCC 686). No court can ignore such conduct which has the tendency to shake public confidence in the judicial institution, because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law. The stream of justice has to be kept clear and pure, and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the court, and interfere with the due course of judicial proceedings or the administration of justice. (Dhananjay Sharma (1995) 3 SCC 757; Bank of India (2000) 8 SCC 512). Administration of justice must remain unpolluted so that the purity of the Court's atmosphere may give vitality to all the organs of the State. Polluters of the judicial firmament should be taken care of, to enable the Court to administer justice fairly and to the satisfaction of all concerned. (Chandra Shashi (1995) 1 SCC 421; Dhananjay Sharma (1995) 3 SCC 757).

46. In *Secretary, Hailakandi Bar Assn. v. State of Assam and another* (1996) 9 SCC 74 the Supreme Court held that the contemner had, deliberately, forwarded an inaccurate report with a view to mislead this Court, and had thereby interfered with the due course of justice by attempting to obstruct the Court from reaching a correct conclusion; and, in the facts and circumstances of the case, it could not accept his apology and was rejecting it. The contemner was held guilty of contempt under Article 129 of the Constitution read with Section 12 of the Contempt of Courts Act, 1971 and was sentenced to undergo simple imprisonment for a term of three months.

47. Prima facie Mr. K.K. Gupta, In-Charge Additional Director, Secondary Education, Garhwal Mandal, Pauri has, by filing a false counter affidavit in Writ Petition (S/S) No. 2381 of 2018, sought to mislead this Court, and has committed contempt of Court. The Registry is, therefore, directed to initiate suo motu criminal contempt proceedings against Mr. K.K. Gupta, In-Charge Additional Director, Secondary Education, Garhwal Mandal, Pauri, for what appears to us, prima facie, to be a false counter affidavit filed by him, before the learned Single Judge, in Writ Petition (S/S) No. 2381 of 2018, on 24.10.2018.