

(2016) 08 AHC CK 0117

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (S/S) No. 4688 of 2013

Suresh Kumar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 02-08-2016

Acts Referred:

Constitution of India, 1950 — Article 16

Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 2(d), 3

Citation : (2016) 10 ADJ 391

Hon'ble Judges : Rajan Roy, J.

Bench : Single Bench

Advocate : Anurag Srivastava, Anand Mani Tripathi, B.R. Singh and Mudit Agarwal, Advocates, for the Petitioners; C.S.C, Rajnish Kumar and Upendra Nath Mishra, Advocates, for the Respondents; Avinash Chandra and Akhilesh Kalra, Advocates, for the Petitioners; C.S.C,

Final Decision : Dismissed

Judgement

Rajan Roy, J.—Heard.

2. Challenge herein is to the action of the opposite parties in declining to appoint the petitioners of these writ petitions who were selected by the U.P. Public Service Commission for appointment against 81 reserved category posts for which special recruitment was held treating the same as carried forward/backlog vacancies.

3. Requisition was sent by the Secretariat, Administrative Department to the U.P. Public Service Commission on 11.5.2004 in respect of 83 vacancies of Assistant Review Officer belonging to the SC/ST Category said to have been created in the U.P. Civil Secretariat between 2001-02 to 2002-03. The requisition was for special recruitment. Along with 12 vacancies for general selection which were also requested for being notified. A modified requisition was sent on 12.4.2005 wherein the posts requisitioned under the General category were cancelled and

with regard to special selection, one post each in the category of SC/ST were reduced, meaning thereby modified requisition was in respect of 81 vacancies.

4. An advertisement was issued on 2.5.2006 for filling up the aforesaid 81 posts i.e. 76 vacancies of SC and 5 vacancies of S.T.

5. The petitioners herein belonging to the aforesaid reserved category, applied. A pre-written examination was held on 23.8.2009. On 22.1.2011 result of the pre-written examination was declared. Thereafter, the main written examination was held between 14.3.2011 to 28.3.2011. The participants of the main written examination appeared in a typing test held between 24.4.2012 to 26.4.2012. The result of the main written examination was declared by the Commission on 13.8.2012. The name of the petitioners figured in the select list based on the special recruitment for the reserved category posts held by the Commission. On 6.11.2012 the Commission sent its recommendations to the U.P. Civil Secretariat for appointment of 78 candidates of Scheduled Casts/Scheduled Tribes category as against 81 carried forward/backlog vacancies.

6. As appointment letters were not issued to the selected candidates therefore, writ petition bearing No.4688 (S/S) of 2013, Suresh Kumar & ors. v. State of U.P. & others was filed seeking issuance of such appointment orders.

7. It is contended by learned counsel for the parties that at this stage the matter was re-processed at the level of the Secretariat i.e. after receipt of the recommendations of the Commission and it was found that in fact the requisition which was sent to the Commission for filling up 81 carried forward/backlog vacancies of the reserved category was itself erroneous as these vacancies could not be termed as carried forward/or backlog vacancies, because they were never advertised earlier nor were they ever put to selection. The proposal for withdrawing the requisition and sending a fresh requisition for normal/general selection was processed, but it could not be sent to the Commission within reasonable time.

8. The entire matter is said to have been re-examined, specially in view of a query made by the Finance Department on 25.6.2013. A preliminary enquiry is said to have been ordered on 5.12.2013 to fix responsibility of the officers concerned for not taking corrective measures within reasonable time. On 7.2.2014 a preliminary enquiry report was submitted in which certain officials were identified as being guilty prima facie for the aforesaid lapse and ultimately punishment orders were issued against them.

9. In the meantime, some of the selected candidates filed writ petition No.44609 of 2013 before this Court at Allahabad which was disposed of on 27.9.2013 with a direction to the concerned to decide the petitioner's representation.

10. On 17.2.2014 a decision is said to have been taken by the State of U.P. amending an earlier Government Order dated 15.11.1999 by virtue of which any recommendation of the Commission had been made binding upon the State

Government. This Government Order was amended to the effect, inter alia, that on receipt of recommendation of the Commission, if the requisition sent itself was erroneous or vacancies notified were not available, it would not be mandatory to allow joining of candidates recommended. This amendment was made applicable even to such selections where the recommendations had been received by the concerned department from the Commission. The formal Government order is said to have been issued on 26.3.2014.

11. It is said that on the same date i.e. 17.2.2014 the Chief Secretary, U.P., albeit after initiation of contempt proceedings, rejected the claim of the petitioners for appointment on the ground that the requisition itself was erroneous. It was also stated by the Chief Secretary that the selectees did not have any indefeasible right of appointment in view of the Constitution Bench decision of the Supreme Court in Shankarsan Dash case, (1991)3 SCC 47, as there were no backlog vacancies and there had been gross statutory violations.

12. Thereafter, writ petition No.1629 (S/S) of 2014 (Ajeet Kumar v. State of U.P.) and writ petition No.1726 (S/S) of 2014 (Shrikant Azad v. State of U.P.) were filed before this Court challenging the decision of the Chief Secretary dated 17.2.2014.

13. At this stage it is also not out of place to mention that in one of the writ petitions i.e. W.P. No. 4688 (S/S) of 2013 another advertisement dated 14.6.2013 was put to challenge whereas in fact the same had no concern with the selection in which petitioners of the said writ petition had appeared. However, it appears that the said advertisement was put to challenge for the reason that the same posts against which the petitioners claimed appointment had been re-advertised, therefore it had an adverse bearing as far as entitlement of the petitioners to appointment based on the special recruitment held by the Commission in pursuance to the advertisement dated 2.5.2006 was concerned. At this stage, Shri U.N. Mishra, Advocate submitted that in the advertisement dated 4.6.2013 no post of Assistant Review Officer was advertised therefore, writ petition No.4688 of 2013 was filed under a factual misconception.

14. The moot point to be considered in this writ petition is as to whether 81 posts belonging to the Scheduled Casts/Scheduled Tribes category could be filled up by way of Special recruitment in terms of the U.P. Public Service Reservation for Scheduled Casts, Scheduled Tribes and backward classes Act, 1994, as amended from time to time, without having been advertised earlier and without any selection for filling up the same having been held earlier.

15. It is not in dispute that these vacancies were never advertised nor put to selection in terms of the relevant Service rules and the Act 1994. In fact it appears no requisition was sent to the Commission earlier for undertaking any selection in respect of these vacancies.

16. It is also not in dispute that Section 3 as existing prior to 31.8.2002 underwent a change vide U.P. Public Services (Reservation for Scheduled Castes,

Scheduled Tribes and other backward classes) (Amendment) Act, 2002. The amended Section 3 reads as under:-

"3. In section 3 of the principal Act,

(a) for sub-section (1), (2) and (3) the following sub-section shall be substituted, namely :-

"(1) In public services and posts there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-Section (5) in favour of the persons belonging to Scheduled Casts, Scheduled Tribes and other Backward Classes of citizens,-

(a) in the case of Scheduled Castes 21%;

(b) In the case of Scheduled Tribes 2%;

(c) in the case of other Backward Classes of citizens 27%;

Provided that the reservation under clause (c) shall not apply to the category of other Backward Classes of citizens specified in Schedule II :

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty percent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1) ;

(3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three special recruitments made under sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes"

(b)(i) sub-Section (3-A, (3-B) shall be omitted ;

(ii) sub-Section (4) shall be omitted "

(c) for sub-Section (5), the following sub-Section shall be substituted, namely :-

"(5) The State Government shall for applying the reservation under sub-Section (1), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve point and the roster so issued shall be implemented in the form of a running account from year to year

until the reservation for various categories of persons mentioned in sub-Section (1) is achieved and the operation of the roster and the running shall, thereafter, come to an end and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster."

17. Section 2(d) of the Act of 1994 which defines the year of recruitment reads as under:

"2(d) "year of recruitment" in relation to a vacancy means a period of twelve months commencing on the first of July of a year within which the process of direct recruitment against such vacancy is initiated."

18. As per Section 3 (1), as amended by the Act No. 1 of 2002, in Public Service and Posts, there shall be reservation at the stage of direct recruitment as per percentage of vacancies prescribed therein to which recruitments are to be made in accordance with the roster referred to in sub-Section 5 in favour of the persons belonging to the SC/ST and other backward classes of citizens to the extent 21% for Scheduled Casts, 20% for Scheduled Tribes and 27% in the case of other backward classes of citizens, provided that the reservation under Clause-(c) shall not apply to the category of other backward classes of citizens specified in Schedule-II, provided further, that reservation of vacancies for all categories of persons would not exceed in any year of recruitment. 50% of the total vacancies of that year or as also 50% of the cadre strength of the service to which the recruitment is to be made. On a conjoint reading of amended Section 3 (1) with the un-amended Section 3 (1), the only change which is noticed is insertion of the IIInd proviso.

19. Under the amended section 3(2), if in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancies shall be carried forward and be filled through special recruitment in that very year or any succeeding year or years of recruitment as a separate class of vacancies and such class of vacancies shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purposes of determining the ceiling of 50% reservation of the total vacancies of that year notwithstanding anything to the contrary contained in Sub section (1). Sub section (2), referred herein above, is, partly in consonance with Article 16 (4) (B) of the Constitution of India which was inserted on 9.6.2000. Amended Sub-Section (2) has undergone a change. The embargo of three year for filling the carry forward vacancy or unfilled vacancy has been removed. (See paras 95 and 100 of the M. Nagraj v. U.O.I., 2006(8) SCC 212). Consequently sub-section (4) has been omitted. Relevant ingredients of un-amended sub-section (4) have been incorporated in amended sub-section (2). Further the unfilled vacancy can be carried forward and filled by special recruitment in that very year.

20. Amended sub-Section (3) of Section 3 provides, where a vacancy reserved

for scheduled Tribe remains unfilled even after three special recruitments made under sub-section (2), such vacancy may be filled from amongst the person belonging to the scheduled caste. In this sub-section the word "shall" has been substituted by "may", thus the mandatory character of the earlier provision has been done away with. Sub-Section (4) was omitted, as already noticed. Section 3(6) did not undergo any change.

21. On a conjoint reading of section 2(d) with 3(2) of the Act 1994 this court has no doubt that the reserved vacancy remaining unfilled, referred therein, is, with regard to a vacancy which has remained unfilled after initiation of process of recruitment and completion of the same. This is evident from the stipulation contained therein that if in respect of any year of recruitment any vacancy reserved for any of the categories of persons under sub-section (1)(SC, ST, OBC) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment "in that very year or in succeeding year or years of recruitment". The term recruitment year is defined under Section in relation to a vacancy to mean a period of twelve months commencing on the first of July of a year within which the process of direct recruitment against such vacancy is initiated."

22. If such a reserved vacancy remains unfilled and on being carried forward, is to be filled by special recruitment "in that very recruitment year", then the eventuality of such vacancy remaining unfilled has also to occur in that very year i.e. within a period of 12 months mentioned in Section 2(d). This can only be, if, it is put to selection in that very year as per Rules 1999, otherwise the vacancy is available for selection till the end of the recruitment year i.e. 12 months period coming from 1st of July in which the process of recruitment was initiated. The eventuality that the vacancy remains unfilled will arise either at the end of the recruitment year or during it. During the recruitment year it will arise when attempts to fill it fail which can only be if it is put to selection.

23. The concept of back-log vacancy came up for consideration before a Single Judge Bench of this court wherein the legal position was enunciated as under:

"a perusal of section 3 of the Act indicates that it is not necessary for any vacancy having been advertised on an earlier occasion in order to carry out the special recruitment. The special recruitment has to be made with the sole objective of achieving the target of unfilled vacancies of the reserve category after applying the roster. The State Government, in the opinion of the Court, has segregated the 367 posts as posts for special recruitment in view of the fact that these posts exclusively belong to the reserved category remains undisputed. The petitioner, who belongs to the general category, therefore, cannot have any right or claim against the said posts, even if, they have been advertised by the State Government. The posts, which are meant to be filled up by the reserved category, cannot be offered to the general category candidates. In this view of the matter, the State Government, has to apply the roster in order to achieve the target. The questions as to whether they are backlog vacancies or not need not

to be probed any further in view of the fact that the applicability of the roster against the said posts has to be determined. The aforesaid discussions, therefore, leave to only one conclusion that the State Government has not over stepped the 50 per cent reservation quota but the selections have to be finalised after applying the roster."

24. Learned Single Judge of this court in the said case was of the opinion that reserved vacancies having remained unfilled for the purposes of special recruitment under Section 3, it was not necessary that it should have been advertised earlier and should have been put to selection. The matter went up in special appeal No.1202 of 2006 before a Division Bench of this court which held as under:

"In view of the aforesaid we clarify that the backlog vacancies with reference to Clause 2 of Section 3 of U.P. Act No. 4 of 1994 as amended by U.P. Act No. 1 of 2002 necessarily mean those vacancies within the reserved category which were subject matter of an earlier advertisement but remained unfilled because of non availability of suitable candidates within the reserved category after selection. It is only in respect of such vacancies that the procedure qua backlog vacancies can be adopted. We may further clarify that any vacancy in the reserved category (however old it may be), if it had not been advertised earlier and was not a part of an earlier process of selection which was completed, the same cannot be termed to be a backlog vacancy.

In the facts and circumstances of the present case it is not in dispute that the total number of vacancies which were advertised earlier i.e. 954 but subsequently reduced to 887 were not covered by any earlier advertisement nor were part of any process of selection and, therefore, none of the vacancies which were subject matter of the advertisement in question (belonging to the reserved category) can be termed to be backlog vacancy. Therefore, the action of the State respondents treating 367 vacancies belonging to the reserved category as backlog vacancies is legally not justified. Respondents are directed to declare the result afresh in respect of these vacancies as if they are not backlog vacancies and appointments may be offered in terms of the roster provided for under notification dated 25th May, 2002 issued in exercise of powers under Section 3(1) read with Section 3(5) of the U.P. Act No. 4 of 1994. The aforesaid exercise may be completed by the State respondents within two months from the date a certified copy of this order is filed before the authority concerned."

25. Thus, the view taken by the learned Single Judge was upset by the Division Bench and the Division Bench, after considering the amended section 3 of U.P. Act No.94, held, that, backlog vacancies with reference to Clause 2 of Section 3 of Act 1994 as amended by U.P. Act No.1/2 necessarily mean those vacancies within the reserved category which were subject matter of an earlier advertisement, but, remained unfilled because of non availability of suitable candidates within the reserved category, after selection. The legal position was further clarified that it is only in respect of such vacancy that the procedure qua

Backlog vacancies can be adopted and that any vacancy in the reserved category, however old it may be, if it had not been advertised earlier and was not a part of earlier process of selection which was completed, the same can not be termed to be a "backlog vacancy".

26. The matter went up further to the Supreme Court vide Civil Appeal Nos. 4360-4381 of 2010, *State of U.P. & ors. v. Sangam Nath Pandey*, which was decided on 15.12.2010 and the pronouncement is reported in (2011) 2 SCC 105. Their lordships of the Supreme Court considered the amended provisions of Section 3 of the Act of 1994.

27. The relevant paragraphs of the said decision which contain its ratio are paragraphs 24 to 34. It is not out of place to mention that in paragraph 23 of the said judgment the earlier decisions in the case of *Indira Sawhney v. Union of India*, 1992 SCC (L & S) Supp. 1; *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745; *M. Nagraj v. Union of India*, (2006) 8 SCC 212 and *Ramesh Kumar v. High Court of Delhi*, (2010) 3 SCC 104, were noticed in the context of the arguments advanced by the learned counsel for the parties. A perusal of the aforesaid paragraphs reveals that their Lordships went through the amended provision of Section 3 threadbare and thereafter in paragraph 33 their Lordships observed as under:-

"A harmonious construction of Sections 2(d), 3(2) and 3(5) would lead to the conclusion, as stated by the Division Bench, that only those vacancies can be declared backlog vacancies, within the reserved category, which were subject-matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy."

28. Further in paragraphs 34, 35, 36 and 37 their Lordships observed as under:

"34. Section 2(d) defines a period of 12 months commencing on 1st of July of a year as a year of recruitment for calculation of the number of vacancies. Section 3(1) gives the different percentages of vacancies, which are reserved for different categories of backward class candidates. The percentage of vacancies reserved under Section 3(1) had to be filled according to the roster mechanism provided under sub-section 5 of Section 3. Section 2(d) would tend to indicate that the State was required to determine the number of available vacancies in every year of recruitment. Once the vacancies are determined, necessary requisition would have to be sent to the Public Service Commission for initiating the process of selection.

35. We have noticed earlier the correspondence of the Government with the Public Service Commission intimating the number of posts to be filled at various stages.

36. In spite of the aforesaid requests, it appears that the posts meant for the reserved categories could not be filled. The State Government had only partly performed its duties by sending the necessary requisitions to the Public Service Commission for initiating the selection process. Thereafter, the selection process ought to have been completed as provided under the Statutory Rules.

37. It appears that the selection process for the 367 posts was not completed. Therefore, the aforesaid vacancies could not be termed as unfilled vacancies belonging to the reserved categories. But, at the same time, it also can not be disputed by anybody that the 367 posts, which are sought to be filled by special recruitment are posts, which are meant for the reserved categories and have remained unfilled. This is evident from the letter dated 25th October, 2005 pointing out that out of the 887 posts mentioned in the letter dated 13th October, 2005, 367 posts were in fact reserved category posts, which had been lying vacant and had been wrongly included in the general recruitment. Hence, a request was made to exclude the aforesaid posts from the general selection and be filled by holding a special recruitment for the reserved category candidates."

29. In para 37 it has been observed that the selection process for 367 posts was not completed, therefore, the vacancies could not be termed as unfilled vacancies belonging to the reserved categories. It went on to observe "but at the same time" it also cannot be disputed by anybody that the 367 posts which are sought to be filled by special recruitment are posts, which are meant for the reserved categories and have remained unfilled." On a perusal of the subsequent paragraphs of the judgment, it is found that considering the peculiar facts and circumstances of the case as the requisition for filling up the reserved posts had been sent; challenge to such special recruitments of alleged backlog vacancies had been made by unsuccessful candidates belonging the General category and also considering the fact that the posts meant for General category remained intact and had been filled up, as also the fact that, the selectees of the reserved category had already joined after issuance of appointment letters and had been continuing in service for several years, the Supreme Court was persuaded to hold that the fact was that they were reserved vacancies to be filled up by the reserved category which were notified to the Commission, but, further selection could not take place and by filling up of the said vacancies by the reserved personnel no right of the General category was infringed. Based on this reasoning as contained in paragraphs 36 to 43 of the said report, the Supreme Court inter alia in paragraph 44 observed as under:-

"In our opinion, the authorities have been rather casual in their approach in implementing the reservation policy, in letter and spirit. We are, however, conscious of the fact that the 367 posts lying vacant for a number of years are meant only for the reserved categories. They have been calculated on the basis of the percentages reserved for various categories. In segregation of the aforesaid posts, none of the unreserved categories would be deprived of any posts which ought legitimately to have fallen to their share. Therefore, we are of

the considered opinion that the interest of justice, in the peculiar facts of this case, demands that the course adopted by the State Government in segregating 367 posts for special recruitment ought not to be disturbed."

30. Where the Supreme Court makes an observation or direction qualifying it by use of the words "in the peculiar fact of this case" then such observation/directions do not constitute the ratio of its judgment nor a binding precedent.

31. The Supreme Court in Sangam Nath Paney's case did not lay down as a principle of general application that a reserved vacancy could be filled by special recruitment without being advertised/notified and without any selection being held. It was in the peculiar facts before it that it upheld such special recruitment. As already noticed earlier, based on Section 2(d) and 3(2) of Act 1994 a vacancy can only remain unfilled if it is put to selection. The Supreme Court in Sangam Nath Pandey (supra) also affirms this legal position in paras 33,36 and 37. It is this enunciation of law which has been followed by another Division Bench of this Court in the case of Dr. Narendra Singh v. State of U.P. reported in (2014) 3 UPLBEC 2190, relying upon Sangam Nath Pandey (supra). Furthermore the same proposition has been followed by a co-ordinate Bench while rendering its judgment dated 21.07.2015 in Writ-A No. 39973 of 2011, Krishna Mohan Singh & ors. v. State of U.P. & ors.

32. As against the aforesaid, the contention of Shri H. N. Singh, learned counsel for the petitioners was that there was no necessity for such posts being advertised or put to selection as a condition precedent for being treated as carried forward/backlog vacancies. In this regard he relied upon the amendments made on 31.08.2002 viz.-a-viz. the earlier provision.

33. Shri Singh invited attention of the Court to various paragraphs of the judgment of the Supreme Court in Sangamnath Pandey's case, specially paragraph nos. 39, 40 and 41, to contend that even in the facts of the present case as the vacancies were in fact reserved vacancies, therefore, there was no wrong done by the Commission in recruiting reserved category candidates against such vacancies whether by special recruitment or not, is not of much relevance. It was also contended that this was done on the request of State Government, for which his clients are not at fault. Furthermore, he, argued that the fact of the matter is that on the relevant date the direct recruitment posts had been filled up by making promotion in excess of the promotion-quota and it is only to protect these promotees that a circuitous route had been adopted and a lame excuse had been put forward. He also contended that there was a Government Order dated 15.11.1999 existing on the relevant date which made it mandatory for the State Government to abide by the recommendation of the Public Service Commission, which, in any case, did not infringe the rights of the General category candidates who could not have been appointed against these reserved category vacancies. It was also contended that the subsequent decision dated 26.03.2014 was non-existent on 17.02.2014, when the decision was taken by the Chief Secretary to deny the claim of the petitioners herein. He being

bound of the earlier Government Order, which could not have been superseded by any officer of his rank, he could not have taken the impugned decision, therefore, his decision suffers from apparent error.

34. It was also his contention that in view of the judgment of the Supreme Court in the case of M. Nagraj the advertisement of a vacancy was not a pre-condition for treating a vacancy as having remained unfilled. With respect, having gone through the judgment of M. Nagraj carefully the Court does not find any such proposition laid down therein. The only decision about back-log vacancies contained in paragraph 95 of the said report is with reference to providing a time-cap to such vacancies. Moreover in Sangam Nath Pandey's case the Supreme Court was conscious of the Constitution Bench decision in M. Nagraj which had been noticed by it, therefore, this plea is not available for this reason also. This Court has perused paragraphs 95, 96 and 100 of the said judgment which has been specifically relied upon by Shri Singh, it does not find anything therein to support his contention as noticed herein above.

35. Sri. Akhilesh Kalra and Sri. Jaideep Narain Mathur, learned Senior Advocates had appeared and argued the matter on behalf of the petitioners on the earlier occasions and advanced their arguments on same lines as Sri. Singh.

36. Shri Upendra Nath Mishra, Advocate, appearing for the State, on the other hand, has supported the impugned action based on the precedent laid down in Sangam Nath Pandey's case and the Division Bench in Dr. Narendra Singh's case. He relied upon paragraphs 6 to 16, wherein, the vacancy position existing at the relevant time has been detailed and paragraphs 11 to 23, wherein, concept of backlog vacancy had been explained. According to him, the total number of vacancies available were 886 on the post of Assistant Review Officer. As per Rules, 60% of the posts were to be filled up by direct recruitment, while 40% by promotion. Out of this 60% i.e. 531 posts were available for direct recruitment, while 355 were available for promotion. As against this break up only 156 personnel were working against the direct recruitment quota. Thus 375 posts under the said quota were vacant, whereas under the promotion quota as against the sanctioned strength of 355, a total of 558 personnel were working, thus there were 203 personnel working in excess of the promotion quota against supernumerary posts created for this purpose, whereas Shri H.N. Singh, submitted that these were against direct recruitment posts.

37. Shri Rajneesh Kumar, Advocate, appearing for the Commission, submitted that it had recommended the names to the State Government for appointment based on the requisition received from it and it is for the Government to decide whether to issue appointment orders or not the issue in the orders. The Commission has no role to play in this regard.

38. Be that as it may, the indisputable fact is that 81 posts which were advertised on 2.5.2006 for special recruitment had never been advertised nor put to any selection, much less a complete selection process, as was required in

law. In fact there is nothing on record which may indicate that even a requisition had been sent to the Commission earlier for notifying these vacancies, as was the fact before the Supreme Court in Sangam Nath Pandey (supra). It being so, the irresistible conclusion is that the advertisement of the vacancies for special recruitment treating them as having remained unfilled under Section 3(2) of the Act, 1994 as amended on 31.08.2002, was apparently erroneous and against the statutory provisions contained in Section 3(2). For the reasons already discussed the contentions of Sri. H.N. Singh to the contrary are not tenable.

39. Furthermore, the Court finds that in the instant case the recommendations of the Public Services Commission, by the very nature of its constitution under Article 325 are always re-commendatory in nature and there is no law to the effect that such recommendation would be binding on the employer. Even if the contention of Shri H.N. Singh that the subsequent decision dated 26.03.2014 could not have retrospective effect is accepted for the sake of discussion, the Court is of the view that in a case such as the present one where the very requisition was based on a factual and legal error in treating the vacancies as backlog in the teeth of Section 3(2) of the Act, 1994, such a Government Order would not have tied the hands of the State Government to the extent of compelling it to provide appointment based on such an illegal selection. At this stage Shri Upendra Nath Mishra has placed before the Court the original record which shows that in fact the approval of the Chief Minister for the decision as contained in the Government Order dated 26.03.2014 was given on 17.02.2014 itself and the Karmik department merely issued the said decision subsequently on 26.03.2014.

40. Now the only thing which remains to be considered is whether the factual scenario similar to the one existing in Sangam Nath Pandey's case (supra) exists in the present case so as to persuade the Court to adopt the same line and uphold the special selection of the petitioners who belong to the reserved category. The Court notices that in Sangam Nath Pandey's case reasons which prevailed upon the Hon'ble Supreme Court were firstly that a requisition for filling the reserved posts had been sent, but no selection could be held; the posts were in fact reserved for them; the reserved category candidates after having been selected in the special recruitment had been already appointed and were already working for several years; secondly, the challenge had been made by General Category candidates who had been unsuccessful in the selection and these candidates had no right to appointment against the reserved posts. The other reasoning which prevailed upon the Supreme Court was that by upholding the selection of the reserved category candidates against the posts in question the rights of the General Category were not infringed.

41. The factual scenario herein is slightly different. In Sangam Nath Pandey's Case (supra) the reserved posts had been earmarked and requisition was sent to the Commission for recruitment, but it could not take place. In the present case no such requisition was sent to the Commission. Further, though the name of the

petitioners had been recommended by the Commission on 6.11.2012, the fact is that no appointment was offered to them by the State based thereon, and they are not working. In Sangam Nath Pandey's case unreserved posts had been filled up, whereas in this case they were not even advertised. Under the service rules, the determination of vacancies for the purposes of recruitment is to be undertaken under Rule 14 of the U.P. Secretariat Ministerial Service Rules, 1999 which provides that the Appointing Authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Schedule Castes/Scheduled Tribes and other backward categories under Rule 6. The vacancies to be filled through the Commission shall be intimated to them.

42. Thus, on a plane reading of Rules 14 and 6 of the Rules of 1999 it is amply clear that the determination of all the vacancies, whether reserved or unreserved, is to be made in a composite manner in the sense that determination of both kinds of vacancies is to be undertaken for the purpose of recruitment followed by selection for both as a normal course and it is not the intention of the Rule that a special recruitment be undertaken for the reserved posts at the very first instance, without the necessary eventualities as contemplated in the Reservation Act, 1994 in respect of the reserved vacancies being satisfied. This is also in consonance with Article 16(1) of the Constitution of India which confers a fundamental right upon a citizen of being provided equality of opportunity in matters relating to public employment or appointment to any office under the State.

43. Now, in the present case 81 vacancies which had been advertised separately for special recruitment as carried forward/backlog vacancies i.e. those which remained unfilled under Section 3 of the Act, 1994, without advertising the unreserved/General vacancies which also existed at the relevant time thereby prejudicing the rights of the general category candidates, firstly for the reason neither the Rules 1999 nor the Act 1994 stipulate a separate special recruitment for reserved vacancies at the first instance itself; secondly, Rules 1999 read with Section 3(1) of the Act 1994 envisage a common selection, at the first instance, for the vacancies whether reserved or unreserved, which was clearly violated; thirdly, had the unreserved vacancies been also advertised, the selected candidates against such vacancies on the basis of their own merit would in all probability find place in the appointment order of same date which would have a bearing on their service benefits such as seniority which plays an important role in service career, specially, promotion and promotional pay-scale. There was no reason to deprive the candidates of an opportunity for selection against the said vacancies. Even reserved category candidates are entitled to compete against unreserved vacancies on their own merit and if selected, they would not be counted against reserved posts which would be filled by others of the reserved category.

44. In view of the above discussion, the petitioners are not entitled to

appointment based on the aforesaid selection which has rightly been treated as not conferring any right upon the selectees in view of the settled legal position as enunciated in Shankarshan Dash Case (supra). This Court has no hesitation to record that the reasons contained in the decision of the Chief Secretary dated 17.02.2014, are germane for declining to accept the recommendations of the Commission.

45. For the reasons aforesaid, this Court is not persuaded to uphold the selection in question nor to quash the action impugned herein.

46. The writ petitions are, accordingly, dismissed.