

(1998) 06 AHC CK 0010

In the Allahabad High Court

Case No : Writ Petition No. 35384 of 1995, connected with 10 other writ petitions

Umakant Sharma, Advocate

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 30-06-1998

Acts Referred:

Constitution of India, 1950 — Article 16, 16(1), 232, 309

Uttar Pradesh Higher Judicial Service Rules, 1975 — Rule 16, 18, 18(4), 20, 20(5)

Citation : (1998) 4 AWC 410 : (1998) 3 UPLBEC 1805

Hon'ble Judges : S.K. Phaujdar, J;G.S.N. Tripathi, J;B.K. Roy, J

Bench : Full Bench

Advocate : Shashi Nandan, Ravi Kant, Ajit Kumar and M.M.D. Agarwal, for the Appellant; S.C., Dinesh Dwivedi, A.K. Gaur, S.M.A. Kazmi, S.S. Tripathi and A.P. Tiwari, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Phaujdar, J.—on his own behalf and on behalf of Binod Kumar Roy, J.--The above mentioned 11 writ petitions relate to the selection of candidates for recruitment in the U. P. Higher Judicial Service (for short called as "H.J.S."). The different petitioners made different prayers in their writ petitions and the prayers cover issuance of mandamus upon the respondents to fill up all existing vacancies in the quota of direct recruit, for a declaration that certain amendments in the U. P. Higher Judicial Service Rules (for short called as the "Rules") were ultra vires and for quashing a resolution of the Full Court of the Allahabad High Court as regards appointment of direct recruits and promotion of persons belonging to the U. P. Nayik Sewa (for short called as the "Nayik Sewa"). In some cases, prayers were made to command the respondents to carve out a fresh select list in view of the direction of the Supreme Court in the case of O.P. Garg and others, Vs. State U.P. and others, . Most of the petitioners desired that as the number of vacancies for direct recruitment was more than what was shown, they should be appointed as they had taken the examinations for such recruitment and had come out successfully, although they were placed below the

six nominated for appointment. In one of the writ petitions, the petitioner, Vinod Kumar Verma required implementation of D.O. Letter No. C-39/PA/AR/LKO 1994, dated 5.3.1994 and to declare him selected for appointment in the H.J.S.

2. All the aforesaid writ petitions were heard together as common points of fact and law arose in these matters. The facts behind these petitions relate to alleged anomalies in the process of recruitment to the H.J.S. In the context of these facts certain provisions of the Rules were also sought to be challenged. Under the provisions of the Constitution of India, the power of appointment to the H.J.S. lies with the Governor on recommendation by the High Court and the Rules covering such appointment are contained in the Rules, 1975, as amended from time to time. The sources of recruitment are (1) promotion from members of the Nyayik Sewa, (2) promotion from the cadre of Judicial Magistrates, and (3) direct recruitment from the Bar.

3. An advertisement was published concerning 1990 appointment to the H.J.S. by direct recruitment from amongst the members of the Bar. It was issued under the signature of the then Registrar of the High Court, Sri Bhanwar Singh. on March 30, 1992. It was indicated that a competitive examination is likely to be held sometime in September. 1992 and the total number of vacancies for such appointment was six. Reservation for the candidates of the Scheduled Castes and Scheduled Tribes and others were to be made in accordance with the Government Orders concerning reservation from time to time. The advertisement also Indicated that there could be variation in the number of vacancies without prior notice. The petitioners responded to this advertisement and were successful in the written test. They were called for interview. However, they could not compete within the number of vacancies notified and were, therefore, not selected for appointment, which is apparent from the report dated 2.11.1995 of the Selection Committee as reproduced below :

"Report of the Selection Committee regarding 1990 recruitment of the U. P. Higher Judicial Service by way of Direct Recruitment and by way of promotion.

This Selection Committee was constituted for 1990 recruitment to the U. P. Higher Judicial Service for selection both through direct recruitment and by way of promotion from the U. P. Nyayik Sewa under the U. P. Higher Judicial Service Rules. 1975.

1.

Direct Recruitment

15%

2.

U. P. Nyayik Sewa

70% of the vacancies

3.

U. P. Judicial Officers (Dying Cadre)

15%

As per rules, in case of non-availability from the dying cadre (Judicial Officers), the 15% goes to the quota of the U. P. Nyayik Sewa. which has gone for this year of recruitment. Thus, for the purpose of 1990 recruitment, the Committee considered the quota of 15% for the direct recruits and 85% for the U. P. Nyayik Sewa.

As per Rule 8, the Court has to fix the number of officers to be taken at the recruitment for the year of recruitment in question keeping in view the vacancies then existing and likely to occur in the next two years. Thus, for 1990 recruitment, we are considering the vacancies till 31st December, 1992. While considering the matter of selection of direct recruitment from the Bar in the recruitment year 1988, the total sanctioned strength in the said cadre was worked out at 596 including deputation and leave-reserve posts. Against this, 15% for the direct recruits comes to 89, prior to 1988 recruitment 46 officers of direct recruits were working. Thus, in 1988 recruitment, 43 candidates of direct recruits were required to be selected, but only 24 candidates were selected. As such, there are 19 remaining vacancies which remained to be filled for 1990 recruitment year. Out of the aforesaid 24 selected candidates against 1988 recruitment, one was of Scheduled Caste and four were of Backward Classes. The quota of four Scheduled Caste against 24 candidates was to be filled but only one belonging to Scheduled caste was found suitable. Thus, the balance of these three belonging to Scheduled Caste were required to be filled up in the next recruitment, which is this recruitment in question, The aforesaid 19 vacancies included the deputation and leave reserve-posts, which were subsequently made permanent by the Government. However, while advertising for selection through direct recruitment for 1990, the vacancies of deputational and leave-reserve posts were not taken into consideration, hence only six vacancies were advertised adding Scheduled Castes candidates, as aforesaid, the total comes to nine. This break-up of the six advertised vacancies by way of direct recruitment according to the rule is, Scheduled Caste 1 (21% of six vacancies advertised) O.B.C. (27% of six vacancies), Scheduled Tribes nil, non-applied special, 3 physically handicapped or freedom fighter and ex-servicemen nil (5% of six vacancies). This makes up one Scheduled Castes being carried forward as aforesaid. The total vacancies for Scheduled Castes candidates thus comes to four. The Committee did not enhance the vacancies from six to nineteen in view of the decision of the Supreme Court in the case of State of Bihar and another Vs. Madan Mohan Singh and others, , which rejected the decision of enhancement of the recruitment beyond what was advertised. However, this balance vacancy, which could not be filled through this selection in view of limitations, is carried forward to the next recruitment.

The Committee in order to maintain the minimum standard in the Higher Judicial Service decided that the candidates, who have secured marks below 35% in the reserved category and below 45% in the general category be not called in the interview. Thereafter, the Committee considered the marks obtained by various candidates and found that none of the candidates belonging to the Scheduled Castes secured qualifying marks within the said criterion. Hence, no candidate from the Scheduled Castes was called for interview. The interview was subsequently held for other reserved categories, as aforesaid, and general candidates and such candidates were called for interview in the ratio 1 : 4.

The Committee further scrutinised the cases of O.B.Cs. to eliminate the creamy-layer from O.B.Cs. by obtaining the forms from each candidate initially falling under Schedule II of U. P. Act No. IV of 1994, U. P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. Though the said information was obtained from each of the candidates belonging to O.B.C. but the said Act was held ultra vires by the Supreme Court through judgment dated 4th September, 1995. with the direction for the selection of 1995-96, to eliminate the creamy-layer from the O.B.Cs., it should be on the basis of Office Memorandum issue by the Central Government dated 8th September, 1993. In terms thereof, prescribed forms were sent and information received from each candidate but the Committee found none of the candidates belonging to the creamy-layer.

Thus, selection through direct recruitment was made for the three vacancies in the general category and two vacancies in the reserved category (O.B.C.). The 4 candidates of Scheduled Castes did not qualify for interview, as aforesaid, the Committee recommended that the said 4 vacancies of the Scheduled Castes candidates be now filled in the next recruitment. The Committee feels, in view of inordinate delay, the next recruitment, both 1992 and 1994. be initiated at the earliest and be held compositely.

List "I" annexed to this report is double of the vacancies both of the general category and reserved category (O.B.C.) in order of their merit. List "II" is the names of all the 12 candidates called in interview in the general category according to merit along with obtained by them and List "III" is of all the 8 candidates in the reserved category (O.B.C.). who were called for interview according to their merit along with marks obtained. List IV is the combined merit list inter se general category and O.B.C. out of the aforesaid 20 such candidates called for interview in their respective categories along with marks obtained by them.

This Committee also considered the second source of recruitment, viz., through promotion from amongst the members of the U. P. Nyayik Sewa within their respective quota for the year in question. From the office report out of the aforesaid 596 vacancies existing on 31st December, 1992. after excluding such members of the U. P. Nyayik Sewa, who have already been absorbed in 1988 recruitment which also covered the same period upto 31st December, 1992, as

per the Full Court resolution, all posts in the quota of promotees have been filled up, rather one over and above the quota has been appointed. This Committee for the recruitment is recommending 5 direct recruits only as aforesaid, through the quota comes to 19, 14 are carried to the next recruitment. According to Rule 8 (2) "if at any selection the number of direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa".

In view of this, 14 vacancies of the direct recruits which could not be filled in this recruitment are allocated to the members of the Nyayik Sewa. Thus, after deducting this one already appointed over and above the quota, 13 go to the members of Nyayik Sewa.

List "A" is a list of 39 members of the U. P. Nyayik Sewa. whose cases were considered for promotion to the aforesaid 13 vacancies. In considering their cases the committee examined their annual confidential remarks including the representations as against the adverse remarks, if any. and consequential orders passed on it for the last five years from the years 1989-90 to 1993-94 and other relevant papers. Where Court's remarks were not available for the years in question, the Committee based its assessment on the remarks given by the District Judge, the Committee also considered the cases of the officers of the U. P. Nyayik Sewa who had been passed over by the earlier Selection Committee.

List "B" contains the names of the officers who are found fit to be promoted to the U. P. Higher Judicial Service.

List "C" contains the names of the officers who have not been found fit to be promoted to the U. P. Higher Judicial Service.

Reasons for finding fit and not finding fit for promotion have been recorded in the aforesaid two lists, viz., "B" and list "C".

(Mr. Justice A. P. Misra)

Chairman

(Mr. Justice Om Prakash)

Member .

(Mr. Justice T. P. Garg)

Member."

4. The Selection Committee, constituted under the Rules, not only selected six persons found fit for the notified vacancies, it had also directed that really the vacancies for direct recruitment were 19 and as only six could be selected in terms of the advertisement, the rest of the posts were to be utilised for promoting eligible candidates from the Nyayik Sewa. This selection was made in exercise of the powers under Rule 8 (2) of the Rules as per the report of the

Selection Committee. The aforementioned report was put up before the Full Court on 18.11.1995 which resolved as follows under Resolution No. 2 dated 18.11.1995 :

"2. Considered the report dated 2.11.1995 of the Selection Committee consisting of Hon"ble Mr. Justice A. P. Misra, Hon"ble Mr. Justice Om Prakash and Hon"ble Mr. Justice T. P. Garg relating to selection of candidates for appointment to the U. P. Higher Judicial Service. Resolved that the same be accepted. The following three candidates are selected in order of merit from the general category by direct recruitment :

1. Sri Desh Bhushan Jain.
2. Sri Mahendra Dayal, and
3. Sri Virendra Vikram Singh.

The following two candidates are selected in order of merit from the O.B.C. category by direct recruitment :

1. Sri Uma Shanker Tomar. And
2. Sri Het Singh Yadav.

The following thirteen candidates are selected by promotion in order of seniority :

1. Sri Surendra Pratap Singh,
2. Sri R. K. Kulshrestha,
3. Sri Suraj Prasad Shukla,
4. Sri Mohan Kumar Bansal,
5. Sri Shri Prakash Jain.
6. Sri Aditya Prasad Chauhan,
7. Sri Anant Ram Kureel.
8. Sri Suresh Kumar Srivastava,
9. Sri Hari Har Shukla.
10. Sri Syed Qutub Uddin,
11. Sri Ashok Kumar Kacker.
12. Sri Subodh Kumar, and
13. Km. Manju Rani Gupta.

Further resolved that the names of the following three candidates who have been selected by the Committee by direct recruitment in order of merit under general category be placed in the waiting list :

1. Sri Avinash Kumar Sharma,
2. Sri Prem Shanker Mishra, and
3. Sri Dinesh Kurnar Gupta.

Also resolved that the names of the following two candidates who have been selected by the Committee by direct recruitment in order of merit under O.B.C. category be placed in the waiting list :

1. Sri Shitla Prasad Singh. And
2. Sri Brij Kishore Verma.

Further resolved that the names of the following candidates who have been selected by the Committee by promotion in order of seniority be placed in the waiting list :

1. Sri Jai Krit Singh Negi,
2. Sri Neyaz Ahmad. II,
3. Sri Shamshad All.
4. Sri Prem Mohan Srivastava,
5. Sri Ram Chandra Nigam.
6. Sri Khalid Iqbal.
7. Sri Rama Kant Singh,
8. Sri Ram Lal,
9. Sri Ashok Kumar Singh. II.
10. Sri Nirmal Kumar Jain, and
11. SriChandraBhan, II.

The list shall remain operative till the next recruitment.

It is further resolved that the names of the candidates selected by the Court by direct recruitment and by promotion be forwarded to the Governor as contemplated under Rules 18 (4) and 20 (5) of the U. P. Higher Judicial Service Rules. 1975."

5. The petitioners, in course of their arguments, had taken several objections concerning non-observance of the Rules. It was stated that only six vacancies were notified, although in fact 19 vacancies were in existence for direct recruitment on the date of publication of the advertisement. There was, thus, a suppression of fact and it was argued that this suppression was deliberate at the instance of certain officials in the Registry of the High Court. It was further stated that the High Court had no authority to withhold any vacancy which

according to the Rules, lay only with the Governor under Rule 4 (4) of the Rules. The petitioners also contended that under Rule 8 (2) of the Rules, only those vacancies, which were notified, could come under the purview of the Rule and if any one or more of such notified vacancies could not be filled in by direct recruitment, the High Court could fill up those vacancies by promotion of candidates from the Nyayik Sewa. It was contended that the Selection Committee and the Full Court acted arbitrarily, firstly, by withholding 13 vacancies at one stage and then taking recourse to Rule 8 (2) of the Rules to fill up the said vacancies by promotion, although those were meant for direct recruitment and were never advertised. Most of the petitioners claimed appointment on the basis of the fact that the exact number of vacancies were 19 and had the same number been notified, the petitioners would have come within the zone of selection and they should have been given appointment. The decision in the case of O. P. Garg, is most relevant on the last mentioned point.

6. Vacancies in the different cadre posts under the H.J.S. are to be filled in from three sources, as aforesaid, but the real dispute arises in between the claims and counter claims by the promotees and direct recruits. One such matter had been taken to the Supreme Court and the decision therein is relevant to the present controversy before us. This was the case of O. P. Garg and others v. State of U. P. and others. The first petitioner in that case has now been elevated as an Hon'ble Judge of this High Court. The decision of the Supreme Court in this case stands in O.P. Garg and others, Vs. State U.P. and others, . It was indicated therein (vide paragraph Nos. 30, 32 and 34) that even for temporary addition to the cadre of H.J.S., the quota Rule has to be applied to the temporary posts and it would not be confined to the promotees alone but would be available to the direct recruits as well. In the light of such finding, the Supreme Court held that the then existing Rules 22 (3) and 22 (4) of the Rules were discriminatory and violative of Articles 14 and 16 of the Constitution of India and the same were struck down. It was directed that while selecting candidates under Rule 18 the Committee was to prepare a merit list of candidates twice the number of vacancies and the said list was to remain operative till the next recruitment. Rule 18 dealt with direct recruitment. The Supreme Court further directed that the appointment under Rules 22 (1) and 22 (2) was to be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the 1975 Rules.

7. To appreciate the objections raised in the writ petitions against the selection process, we may look to the provisions of the U. P. Higher Judicial Service Rules, 1975 (for short called as the "1975 Rules"). The relevant Rules are quoted below :

"8. Number of appointments to be made.--(1) The Court, shall, from time to time, but not later than three years from the last recruitment, fix the number officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.

Note.--The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.

(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number recruits to be taken by promotion from the Nyayik Sewa :

Provided that the number of vacancies filled in as aforesaid under this sub-rule may be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly : so however, that the percentage of direct recruits in the service does not in any case exceed 15 per cent of the strength of the service :

Provided further that all the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date if and when they are converted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa : and only the remaining vacancies shall be shared, between the three sources under these rules :

Provided also that the number of vacancies equal to 15 per cent of the vacancies referred to in the last preceding proviso shall be worked out for being allocated in future to the Judicial Magistrates in addition to their quota of 15 per cent prescribed in Rule 6, and thereupon, future recruitment (after the promotion from amongst the members of the Nyayik Sewa against vacancies referred to in the last preceding proviso) shall be so arranged that for so long as the additional 15 per cent vacancies worked out as above -have not been filled up from out of the Judicial Magistrates, the allocation of vacancies shall be as follows :

- (i) 15 per cent by direct recruitment :
- (ii) 30 per cent from out of the Judicial Magistrates ;
- (iii) 55 per cent from out of the members of the Nyayik Sewa."

x x x x x "16. Selection Committee.--(1) The Chief Justice shall, for each recruitment to the service, appoint a Selection Committee consisting of such number of Judges of the Court, not less than three, as he may decide.

(2) No proceeding of the Selection Committee shall be invalid merely by reason of a vacancy occurring in it, or by a member or members being not present at one or more of its meetings, provided that a majority of the members of the Committee have been present at each meeting."

x x x x x 22. Appointment.--(1) Subject to the provisions of sub-rule (2), the Governor shall on receipt from the Court of the lists mentioned in Rules 18. 20 and 21 make appointment to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.

(2) Appointments to service shall be made on the rotational system, the first vacancy shall be filled from the list of Officers of the Nyayik Sewa. The second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies shall, thereafter be filled by promotion from the list of the Officers of the Nyayik Sewa :

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the Service shall be made in such a way that the second, fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3) in the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short-term appointment as a stop-gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these service within the quota fixed by the Court till the appointments are made under sub-rules (1) and (2) :

Provided that the period of service spent by a member of Nyayik Sewa on short-term appointment to the service as a stop-gap arrangement shall not be computed for seniority under Rule 26."

Part II of the Rules of 1975 spoke of the cadre and Rule 4 under this part dealt with strength of service. In sub-rule (4) thereof, it is provided that the Governor may from time to time in consultation with the High Court leave unfilled or hold in abeyance any vacant post in the service without entitling any person to compensation or create from time to time additional posts, temporary or permanent, as may be found necessary. Rule 5 spoke of the three sources of recruitment as indicated earlier and Rule 6 fixed the quota of direct recruitment to 15% (per cent), on promotion from Nyayik Sewa to 70% and promotion from the cadre of the U. P. Judicial Officers' Service to 15%. Rule 6 provided further that if in calculating the number of vacancy the quota came in fraction then less than 1/2 (half) would be ignored and fraction of 1/2 or more would be counted as "1" (one). It was further indicated that as the cadre of Judicial Magistrate was getting depleted, the quota allotted to that branch might be filled by promotion from amongst the Nyayik Sewa Officers, if there be any short fall in filling up the vacancy from that quota. Rule 7 spoke of reservation.

8. Rule 8 again is very important for the instant dispute. It empowers the High Court, rather it is an obligation to it by use of the term "shall", to fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years. This exercise is to be done from time to time but not later than three years from the last recruitment. Sub-rule (2) of Rule 8 provides that if at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa. Rule 8

(2) must be read with Rule 8 (1) and the words used in sub-rule (2) "the number of recruits decided by the Court to be taken from that source" could only mean the number fixed by the Court for recruitment from a particular source as per Rule 8 (1).

9. For direct recruitment, the procedure has been indicated in Part IV of the Rules. Applications are to be invited by publication of notice in leading newspapers and the Selection Committee constituted under Rule 16 is to scrutinise the applications, hold such examination as may be thought necessary, and thereafter call the candidates for interview and only thereafter the Selection Committee shall make a preliminary selection and submit the records of all candidates to Hon'ble the Chief Justice with their recommendation of the names of the candidates in order of merit. Only thereafter the Court is to examine the recommendations and having regard to the number of direct recruits to be taken prepare a list of selected candidates in order of merit, forward the same to the Governor, who is the ultimate authority for appointment. Under this procedure, the Court is required to have regard to the number of direct recruits to be taken and when this provision is read with Rules 8 (1) and 8 (2), the only logical conclusion that could be arrived at is that this number is not to exceed the number fixed by the Court under Rule 8 (1) subject, of course, to the provisions of Rule 8 (2) whereby a post meant for direct recruit may go to a promotee. If no direct recruit is available. Appointment is to be made under Rule 22 on a rotational system, the first vacancy to be filled up by a promotee, the second from a direct recruit and so on, and once the list of direct recruit is exhausted, then only the remaining promotees would come in. The rules also provide for ad hoc appointment in the eventuality of delay in making appointment under sub-rule (1) of Rule 22 or for some exigencies of service. Such appointment is to be made on a stop-gap arrangement from amongst the members of the Nyayik Sewa in the vacancy in these services then the quota fixed by the Court till appointments are made under sub-rules (1) and (2) and any person promoted and appointed on stop-gap arrangement would not be given seniority under Rule 26 till substantive appointment is made.

10. The advertisement in question may now be looked into. It was published on 30.3.1992 under the signature of the Registrar of the Allahabad High Court. Through this advertisement, applications were invited for recruitment to the H.J.S. (pay scale of Rs. 4,500-5,700 plus admissible allowances). It indicated that a competitive examination for the recruitment is likely to be held sometime in September, 1992 and the date would be indicated subsequently. The advertisement indicated the eligibility clauses for the candidates and other details. It indicated that candidates successful in written examination would have to submit their Income Tax return for the last three years and the candidates must possess a thorough knowledge of Hindi in Devnagari script. The total number of vacancies was advertised to be "6" only with reservation of candidates of Scheduled Castes and Scheduled Tribes and others in accordance with Government Orders for reservation in force from time to time. However, there

was a clause that there might be variation in the number of vacancies without prior notice. The last date for submission of application was 30.5.1992.

11. The aspirants for the post from the source of direct recruitment had known that the vacancies were only "6" and there is nothing on record to indicate that it was ever advertised to be increased by any further fixation by the Court, as required under Rule 8 (1). However, only in the report submitted by the Selection Committee the number of vacancies for direct recruitment was held to be "19" and there having been only "6" candidates from that source, the Selection Committee allotted the other "13" to the promotees, taking recourse to Rule 8 (2).

12. In this connection, we may refer to the decision of the Supreme Court in the case of State of Bihar and another Vs. Madan Mohan Singh and others, . Here was a case where an advertisement was published on 29.9.1989 for filling up 32 vacancies of Additional District and Sessions Judges on direct recruitment. As 128 candidates (four times the number of actual vacancies) were declared successful in the written test but one more candidate was included in the list as the persons in the 128th and 129th positions secured equal marks. Interview was held in November, 1990, and out of the 129 candidates, so interviewed, 32 were selected and a panel was prepared. Subsequently the High Court, at a Full Court meeting, passed a resolution that any further vacancy that might fall within one year, against direct recruitment quota, would be filled up from the merit list already prepared by it. This action of the High, Court was held invalid as there was no statutory rule for such increase nor was there any indication in the advertisement that the panel would be in force for one year. In the case at our hands, the advertisement spoke of probable variation in the number of vacancies without prior notice. This, however, must be read with the statutory provisions as contained in the rules. It is not for the Registrar or even for the Selection Committee to Increase the number of vacancies as the same is to be fixed by the Court, which means by the High Court, at a Full Court meeting and not by any other authority. Nothing has been placed before us to Indicate that there had been such an increase by any resolution in a Full Court meeting of the High Court.

13. We had already indicated the main points of objection taken up by the different petitioners. We may now point "out the plea of the respondents in support of the action of the High Court. Regarding the 1990 selection, the one we are dealing with, it was stated that "6" vacancies in the quota of direct recruits were advertised and these vacancies related to 1990 examination, although the advertisement was published on 30.3.1992. It was stated that till the publication of such advertisement selection for the 1988 examination could not be finalised. The 1988 selections were inordinately delayed because of litigations and because of the decision of the Apex Court in the case of O. P. Garg (supra). The effective period of vacancy, which was taken into consideration for the 1988 recruitment, ranged from 1.1.1988 to 31.12.1992. On account of this

extension of the period of consideration, the two selection processes overlapped to a large extent when the advertisement related to 1990 was published. For the 1990 examination, the period from 1.1.1990 to 31.12.1992 ought to have been considered, but since a period upto 31.12.1992 had already been taken into consideration for the 1988 selection, it became necessary that when advertisement relating to 1990 selection was published, only a few vacancies were taken into consideration, which arose after 31.12.1992. This number, according to the respondents' version, was 38, out of which 32 were meant for the promotees and 6 for the direct recruits. It was urged that apparently on account of overlapping of 1988 and 1990 selections, lesser number of vacancies have been advertised in 1990.

14. On this defence, we must look into the rules again. The rules nowhere provide declaration of vacancy in terms of a particular year. Article 233 of the Constitution speaks of appointment of District Judges by the Governor of the State in consultation with the High Court exercising Jurisdiction in relation to such State. If a person is not already in the service of the Union or the State, he would be eligible to be appointed as a District Judge only if he has been, for not less than 7 years, practising as an Advocate or a pleader and is recommended by the High Court for appointment. Article 309 of the Constitution speaks of power of the Legislature by passing Acts, to regulate recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State, and it also empowers, in respect of a State, the Governor of such State to make rules regarding recruitment and conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and once such rules are made the same shall have effect subject to the provisions of such Act.

15. The 1975 Rules is a set of rules framed under Article 309 read with Article 232 of the Constitution by the Governor of U. P. for regulating the recruitment and appointment to the H.J.S. and the conditions of service of the persons appointed thereto. The Rules are, therefore, statutory. We may refer to Rule 8 (1) again. It speaks that the Court (meaning the High Court in a Full Court meeting) shall, from time to time but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years. Every word in this sub-rule is important and a proper reading of this Rule removes the wrong conception that recruitments in H.J.S. are made in relation to any particular year. It gives ample power to the Court to fix the number of officers to be taken at any particular time of recruitment and the process may be repeated "from time to time". There is nothing in the rules that it should be repeated every year or once in every two years. But there is a limitation that between two recruitments, there must not be a gap of more than three years. The Court is required to fix the number of vacancies and the date of such fixation will be the criterion for calculating the existing vacancies on that date (the words used in

the rule - "then existing"). The period of two years occurring in the last line of this sub-rule is to be counted from the date of fixation of the number of such vacancies. In the absence of any other material on record, it should be presumed that the date of advertisement is the date of such fixation as the Registrar is expected to act under the orders of the Court. It is true that the advertisement had spoken of possibility of variation in the number but that variation is also required to be fixed by the Court only. The plea of the respondents that the overlapping of the two selection processes of 1988 and 1990 was the reason of showing a shorter number than the actual vacancies, therefore, does not appeal to our reasons. The advertisement was published in March, 1992 and the vacancies which were likely to occur till March, 1994, were to be taken into consideration without being confused by the completion of any outstanding selection process.

16. Rule 4 (1) of the Rules empowers that the Governor may from time to time, in consultation with the Court leave unfilled or hold in abeyance, any vacant post in the service without entitling any person to compensation or create for time to time, additional posts, temporary or permanent as may be found necessary. This sub-rule makes it clear that it does not lie with the High Court alone to hold back any vacancy or order to create any post, either temporary or permanent. The prerogative is of the Governor, subject to consultation with the Court. Nothing has come on record to indicate that the Governor had directed that certain posts, meant for the direct recruits, would remain unfilled or would be kept in abeyance. Nothing is there also on the record to show that after the advertisement, 13 more posts were created by the Governor by way of temporary or permanent vacancy to fulfill the short-fall. In terms of the decision in O. P. Garg's case, even these temporary vacancies, had they been created, should have the representative numbers as per quota fixed by Rule 6. As observed above, the High Court could not have held back the vacancies and by no stretch of imagination the Registrar could have done it.

17. We now come to Rule 8 (2) invoked permitting appointment of promotees against the posts meant for direct recruits. Such appointment could be made when at any selection, the number of selected direct recruits available for appointment is less than the number of recruits DECIDED BY THE COURT TO BE TAKEN FROM THAT SOURCE. The words written in capital letters could have only one meaning with reference to Rule 8 (1). which requires the Court to fix the number of officers to be taken at the recruitment. Once the vacancies for direct recruitment were declared, the number could not be increased without intervention by the Court under Rule 8 (1).

18. In the Instant case, a very peculiar approach was made-by the Selection Committee. On one hand, it held that only "6" posts were advertised for direct recruitment and on the other, it held that on a proper calculation the number of vacancies appeared to be "19". The Selection Committee, therefore, thought that 19 posts for direct recruitment lay vacant and the Committee recommended

promotion for 13 officers of the Nyayik Sewa against these 13 posts, oblivious of the fact that these 13 posts for direct recruitment were never fixed, notified or advertised. Rule 8 (2) could not have been applied at all in the present situation. With greatest respect to the Hon"ble Members of the Selection Committee, this matter should have been reported to the Pull Court that in terms of the advertisement, and the number of existing vacancies being 19, it be permitted to interview appropriate number of candidates for appointment in H.J.S.

19. With this analysis in the background, we may now look to the prayers of the different petitioners. In Civil Misc. Writ Petition No. 35384 of 1995, the petitioner. Umakant Sharma, had made a prayer for filling up all the existing vacancies of the quota of direct recruits and he claimed to be appointed as he would have come within the first 19 as per the selection list. He had made certain other prayers concerning vires of certain provisions of the Rules, but these points were not pressed during arguments. There had been a prayer for quashing the resolution of the Full Court dated 18.11.1995 in relation to appointment of direct recruits and promotion of persons belonging to Nyayik Sewa.

20. The second petitioner. Suresh Chandra Misra, made a prayer in Civil Misc. Writ Petition No. 36589 of 1995, for quashing the aforesaid resolution together with the direction of promoting the persons from the Nyayik Sewa in the vacancies meant for the direct recruits. There was a further prayer to fill up all the existing vacancies of direct recruits by appointing amongst others, the petitioner in accordance with the Rules. He had also challenged the vires of different provisions of the Rules and in arguments again this point was not pressed.

21. In Civil Misc. Writ Petition No. 1265 of 1996, Dinesh Kumar Gupta made similar prayers with a twist in respect of the resolution dated 18.11.1995 to say that a writ of prohibition should be issued restraining the respondents from giving effect to that resolution. He also prayed for appointment against the direct recruitment quota.

22. Sri Raj Kumar had made a prayer in Civil Misc. Writ Petition No. 3429 of 1996, for carving out a fresh select list in view of the judgment of the Supreme Court in O. P. Garg's case and he had further prayed that all the 19 vacancies for direct recruitment should be filled up from the candidates who had attended the interview. This very writ petitioner had moved another Writ Petition No. 3430 of 1996, with similar prayers read with challenge on the vires of different provisions of the Rules. His last point, however, was not pressed.

23. In Civil Misc. Writ Petition No. 5813 of 1996. the petitioner. Balbir Singh, came up with similar prayers concerning appointment and quashing of the resolution dated 18.11.1995 of the Full Court.

24. Mohd. Ahmad Suhail moved Civil Misc. Writ Petition No. 8480 of 1996. with a prayer to declare the entire result of the examination for direct recruitment and to Indicate where did he stand in the merit list. He also challenged the vires of

the different provisions of the Rules, but did not press it. He had also made prayers concerning appointment and quashing of the resolution in unison with other writ petitioners.

25. The petitioner, Prem Shanker Misra, moved Civil Misc. Writ Petition No. 30496 of 1996, with almost equal prayers and so was the prayer of Avinesh Kumar Sharma in Civil Misc Writ Petition No. 32410 of 1996. There was yet another writ petition by Umakant Sharma (the petitioner in the first mentioned writ petition). Suresh Chandra Misra and Dinesh Kumar Gupta had also joined him, being Civil Misc. Writ Petition No. 34289 of 1997. and the prayers were almost the same.

26. in Civil Misc. Writ Petition No. 36493 of 1997, however, the petitioner. Vinod Kumar Verma, prayed for Implementation of D.O. Letter No. C-39/PA/AR/LKO 1994, dated 5.3.1994 and the report of the Selection Committee dated 2.11.1995 and sought appointment as a member of H.J.S.

27. As prayers concerning the vires of different amended provisions of the Rules were not pressed during arguments, we need not go to the exercise of discussing that aspect.

28. The prayer for appointment of different petitioners against the quota of direct recruitment must be looked under the law that has been enunciated earlier and analysed by us. The total number of vacancies, as per advertisement, was "6" and without going to the question whether this number was fixed arbitrarily or with mala fide intention, we must start from this point alone. The vacancies might have been miscalculated and might have been wrongly shown, but appointments could be made only against the vacancies fixed by the Court. The Selection Committee could not have increased it to "19" nor could we increase it. It could be done by the Full Court alone.

29. We may come to the prayer of Vinod Kumar Verrna. the petitioner in Civil Misc. Writ Petition No. 36493 of 1997. wherein he had stated that in terms of certain D.O- letter, as quoted in page 17 of this judgment, he was entitled to be employed at least from the quota of physically handicapped candidates. He calculated the number of posts of direct recruit to be 89 and on the basis thereof, he claimed that 2% (per cent) of the posts should have been allotted to candidates who were physically handicapped. He relied on the paper in Annexure-"14" to his writ petition, which was the report of the Selection Committee dated 2.11.1995 to say that absorption of physically handicapped candidates was to be made on the basis of total strength of the cadre and not on the basis of vacancies available on the date of notification/advertisement. A reading of the report, however, suggests that the Hon"ble Members of the Selection Committee had calculated reservation of Scheduled Castes. O.B.Cs. and physically handicapped persons, etc. and in the last mentioned category, the available vacancy was nil as the same was to be 5% of the total number of vacancies, i.e.. 5% of "6" which comes to 0.3, less than half and hence it was ignored. Nothing has been placed before us to indicate that in determining the

percentage of reservation for physically handicapped candidates, the total number of officers in the cadre is to be considered and not the total number of vacancies in the particular advertisement. The plea raised by Sri Vinod Kumar Verma in this respect is, thus, not sustainable.

30. We now come to another important aspect of the matter. It is a fact that only 6 vacancies were advertised for direct recruitment. Candidates have applied against those 6 vacancies only. In page 4 of their report dated 2.11.1995, the Selection Committee made the following comments :

"This Committee also considered the second source of recruitment, viz., through promotion from amongst the members of the U. P. Nyayik Sewa within their respective quota for the year in question. From the office report out of the aforesaid 596 vacancies existing on 31st December. 1992. after excluding such members of the U. P. Nyayik Sewa, who have already been absorbed in 1988 recruitment which also covered the same period upto 31st December, 1992. as per the Full Court resolution all posts in the quota of promotees have been filled up. rather one over and above the quota has been appointed. This Committee for the recruitment is recommending 5 direct recruits only as aforesaid, though the quota comes to 19, 14 are carried to the next recruitment. According to Rule 8 (2) "if at any selection the number of direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may Increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa."

31. The Committee had considered the total number of vacancies existing on 31.12.1992 after excluding such numbers of the U. P. Nyayik Sewa. who were already absorbed in the 1988 recruitment. The Committee recommended appointment for 5 direct recruitments and was of the view that the quota came to 19. The Committee then carried the rest of the vacancies to the next recruitment and applied Rule 8 (2) to make these posts available to the promotees and, thus, respondents No. 3 to 15 were promoted to the H.J.S. from amongst members of the Nyayik Sewa. Rule 8 (2) has been analysed by us in the earlier pages of this judgment and we have given out our views that such vacancies for direct recruitment could not be transferred for the promotees unless the same were fixed by the Court under Rule 8 (1). The recommendation of the Selection Committee to the Full Court, the resolution of the Full Court to appoint these respondent Nos. 3 to 15, and the appointment of these persons in response to such recommendation, were, thus, against the statutory rules.

32. A question was raised whether their appointment could be challenged by the present petitioners, who. by themselves, could not claim a relief for appointment as they did not come within the first 6 positions as only 6 vacancies were advertised. It was contended that the petitioners could not claim any relief against these respondent Nos. 3 to 15 as their status was in no way affected by the promotion to/appointment in the H.J.S. Article 16 guarantees to the petitioners their right for consideration for appointment to the H.J.S. and this

right of theirs could not and cannot be nullified vis-a-vis availability of 19 vacancies in the quota of direct recruits and the promotion of respondent Nos. 3 to 15 pursuant to the recommendation of the Selection Committee dated 2.11.1995 was bad in law and cannot be sustained. However, as these persons are already working in the H.J.S. and as there is a dearth of Judicial Officers in the subordinate judiciary, we dub (their appointment as ad hoc in nature as per Rule 22.

33. The present Judgment, at its draft stage, was sent to Brother G. S. N. Tripathi. for his kind perusal. He has been pleased to forward his judgment for perusal by us. A reading of his judgment Indicates that copious quotations were made of different paragraphs of the earlier draft judgment, sometimes to agree with the views expressed therein and sometimes to differ from the same and his observations require our views. Brother Tripathi has taken a view that when the number of vacancies fixed by the High Court was only 6, it could not be enhanced to consider the candidature of the present petitioners. However, he has differed from our view on the question regarding appointment of respondent Nos. 3 to 15 on promotion from Nyayik Sewa to H.J.S., as recommended by the Selection Committee on 2.11.1995. He has further opined that Rule 8 (2) of the U. P. Higher Judicial Service Rules could come to the rescue of the promotees (present respondent Nos. 3 to 15) and at least they could be appointed on ad hoc basis as contemplated in Rule 22. He has further expressed an opinion that when the appointment of respondent Nos. 3 to 15 did not affect the appointment of the direct recruits against posts beyond 6, there had been no cause of action for the present petitioners so far respondent Nos. 3 to 15 were concerned.

34. In its report of the Selection Committee has not recommended ad hoc appointment of respondent Nos. 3 to 15, rather it speaks of full-fledged appointment of all these promotees against posts available for the direct recruits. Reasons have been given and the law has been explained by us as to when a post meant for direct recruitment could be made over to a promotee under Rule 8 (2). Under the true interpretation of Rule 8 (2), only such posts are available for conversion which have been fixed by the Court and not beyond that. Rule 8 (2) could not, therefore, be pressed into service for giving substantive appointment to any promotee on a presumption that the real vacancy for direct recruitment was 19. When the Court is dealing with a writ petition wherein the very recommendation has been challenged, the Court cannot shut its eyes from the true constitutional safeguards provided to the petitioners under Article 16 of the Constitution of India. A writ of certiorari may be issued when any body of persons having a legal authority to determine questions affecting rights of subjects and having the duty to act judicially, acted in excess of their legal authority. The High Court on its administrative side was is certainly having a legal authority and in the instant case, the High Court was to determine the question affecting the rights of subject concerning appointment to the H.J.S. It cannot be denied that even in the administrative capacity, the High Court is bound to act judicially in contrast to acting contrary to rules and/or arbitrarily.

We have Indicated how the Selection Committee had acted in excess of their legal authority and had wrongly relied on Rule 8 (2) of the U. P. Higher Judicial Service Rules to recommend appointment of respondent Nos. 3 to 15 which was wrongly approved by the Full Court. In fact, the Selection Committee and, in that sense, the Full Court had on one hand limited the vacancy for direct recruitment to 6 only and on the other extended it to 19 and gave the benefit to the promotees in complete disregard to Rule 8 (2). It cannot be held that the appointment of respondent Nos. 3 to 15 was legal in view of Rule 8 (2). We merely observe that if an extension could be made for promoting officers of the Nyayik Sewa against the 13 vacancies meant for direct recruitment, on actual calculation by the office, then why the same could not be done for the direct recruits in terms of the express provisions in the advertisement that the number of vacancies could be varied without prior notice. If we put a stamp of legality on the substantive appointment of respondent Nos. 3 to 15 that will be conceding something illegal, although we have held it to be illegal.

35. It is now factually clear that although "6" posts for direct recruitment were advertised, really there were 19 such vacancies. The recruitment rules require that for each vacancy four persons were to be called for interview. It is also clear that only $6 \times 4 = 24$ candidates were called for interview and once it is taken that the vacancies were really 19, the selection process must be held to be bad for non-observing the principle of 1 : 4 for Interviewing prospective appointees. Thus, the selection process suffers another set-back on this point also, though the Selection Committee had taken the number of vacancies for direct recruitment to be 19.

36. In the instant Judgment, we have indicated that this Bench is aware of the difficulty of dearth of officers in the H.J.S.. but the difficulty cannot be overcome by illegal or even irregular appointments. The vacancies fixed for direct recruitment, as per the quota rule, cannot be shifted to another channel of appointment except with the help of Rule 8 (2) and we have given our reasons vide S.G. Jaisinghani Vs. Union of India (UOI) and Others, : T.N. Saxena and Others Vs. State of Uttar Pradesh and Others, and Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, is not applicable in the instant case. In view of the difficulties expressed and the legal position, it could only be indicated that it would be for the Full Court to decide if respondent Nos. 3 to 15 could be treated as having been appointed on ad hoc basis as per Rule 22 and we could only say, keeping in view the fact that these persons are already working, that their appointment would be deemed to be only on ad hoc basis subject to the final decision of the Full Court on this issue. This had to be stated because we feel that once the real number of vacancies was 19, then the selection process has to be gone into afresh from that point as the advertisement itself indicated "The total number of vacancies is 6. Reservation for the candidates of Scheduled Castes/Scheduled Tribes and others shall be in accordance with Government Orders for reservation in force at the time of recruitment. There may be variation in the number of vacancies without prior notice." Unless required, number of

persons on the principle of 1 : 4 are interviewed for the remaining 13 vacancies of direct recruitment and unless suitable candidates are "not available upto the number "13". Rule 8 (2) cannot be resorted to.

37. Mr. Gaur, learned counsel appearing on behalf of the Court, repeatedly emphasised that pursuant to the resolution of the Court vacancies meant for direct recruits have been taken into account subsequently and necessary advertisement was made on that basis and the selection process having commenced, a difficulty will be created if in the event, we quash the resolution. It is a settled law that the Court is competent to take into account such events which happened during pendency of the writ proceedings. The fundamental rights guaranteed to the petitioners under Article 16(1) of the Constitution cannot be denied to them, more so, when the actual number of vacancies could be made known only to the Selection Committee and the petitioners were not admittedly responsible, in any manner whatsoever, in this regard. We must rely on the principle "*actus curiae neminem gravabit*" meaning that an act of the Court shall prejudice no one. The maxim *actus curiae neminem gravabit* an act of the Court shall prejudice no one, stands recognised by seven Judges" Bench of the Apex Court in the case of *A.R. Antulay Vs. R.S. Nayak and Another*, . In paragraph 83 of the majority judgment (rendered by Sabyasachi Mukharji, G. L. Oza and S. Natarajan, JJ.), It has been laid down that "This maxim is founded upon Justice and good sense and affords a safe and certain guide for the administration of the law." Ranganath Misra, J., who agreed with the majority judgment, also observed in paragraph 100 that it is a well-settled position in law that an act of the Court should not injure any of the suitors, remembering the Privy Council decision in *Alexander Rodger v. Comptori D' Escompte De Paris* (1871) 3 PC 465, that whenever the expression "Act of the Court" is used, it means act of the Court as a whole, B. C. Ray, J., who too agreed with the judgments of Sabyasachi Mukharji and Ranganath Misra. JJ.. also stated similarly in paragraph 114 of the judgment. Even M. N. Venkatachaliah. J., who dissented with the majority, had stated that "the best illustration of the operation of the maxim is provided by the application of the rule of *non pro tunc*. For instance. If owing to the delay in what the Court should, otherwise, have done earlier but did later, a party suffers owing to events occurring in the interregnum, the Court has the power to remedy it ; and that the operation of the maxim is, generally, procedural" (vide paragraph 139 of the judgment). The aforesaid maxim, which stands approved by the Apex Court has to be applied in its true spirit. Apparently, the mistake was of the office in not working out the correct number of vacancies for the direct recruits. This was required to be rectified. After all, this Court will be failing in its duty if it refuses to exercise its jurisdiction in favour of the petitioners for no fault of theirs. The jurisdiction has to be exercised *ex debito justitiae*. We need not multiply the applicability of this principle by the Supreme Court in numerous other cases. It was a mistake on the part of the office of the Court to indicate the number of vacancies for direct recruitment as only "6". That the office was not sure about the actual number of vacancies is

clear from the averment in the advertisement which stated that the number of vacancies could be varied without prior notice. When it was a mistake of the office of the Court and thereby a mistake of the Court itself, the Court must not hesitate in correcting this mistake and a relief may not be denied simply because of this mistaken notification of vacancies. It would rather be proper that the Court, i.e., the Full Court, considers this aspect afresh to determine and fix the number of vacancies.

38. In fairness to Mr. Gaur, learned counsel appearing on behalf of the Court, we also noticed his further submissions that the writ petitions are bad on account of applicability of principles of estoppel by conduct and acquiescence ; that the petitioners are not entitled to challenge the report and the resolution of the Full Court as they have not disclosed the source from where they got them, which are confidential documents ; that all persons, who have been selected in the examinations, have not been impleaded as respondents and thus these writ petitions are bad for non-joinder of necessary parties ; and that if the entire selection process is quashed by us, the natural corollary would be that selection of even those 5 persons amongst the direct recruits would be nullified and hence these writ petitions deserve to be dismissed on this ground as well. Sri Gaur also took us through several decisions during submissions. However, we are of the view that these contentions have got no substance and we have no hesitation in rejecting them. In fact in the counter-affidavit, no privilege has been claimed on behalf of the Court, rather the counter-affidavit it self refers to the report of the Selection Committee as also the resolution of the Full Court.

39. The net result of our aforementioned discussions are as follows :

(i) The conversion of 13 posts of direct recruits, as available for promotion from Nyaylk Sewa, is declared illegal and the recommendation of the Selection Committee dated 2.11.1995 and the resolution of the Full Court dated 18.11.1995 in question in this regard are quashed.

(ii) The appointees (respondent Nos. 3 to 15) will be deemed to be appointed on ad hoc basis only and not on substantive basis and that too till the final decision on this point to be taken by the Full Court.

(iii) The Full Court is requested to consider the question of increase in the number of vacancies from "6" to "19", which was admittedly available as per report of the Selection Committee itself.

(iv) Hon"ble the Chief Justice is requested to take necessary steps expeditiously for formation of a Selection Committee, so that appropriate number of candidates be interviewed for the 13 remaining posts for direct recruitment to the H.J.S.

(v) The petition for intervention of Vinod Kumar Verma (filed in Civil Misc. Writ Petition No. 35384 of 1995) is rejected.

40. These batch of petitions are disposed of accordingly without any order as to

costs. Let writs of certiorari and mandamus issue accordingly.

G. S. N. Tripathi, J.

41. I have the privilege to go through the judgment prepared by my learned brother Hon"ble S. K. Phaujdar, J. On most of the points, I find myself in agreement with the views expressed by His Lordship with certain modifications, which I shall be pointing out as and when needed.

42-93. (Not Printed).

94. Now the next question which arises for consideration is that whether the appointments given to the respondent Nos. 3 to 15 (all from U. P. Nyayik Sewa) can be held to be ultra vires. Hon"ble S. K. Phaujdar, J., has dealt with this point from page 19 onwards of his Judgment. In his erudite Judgment, he has incorporated the reasons given by the Committee for allotting the remaining vacancies to the U. P. Nyayik Sewa. One of the observations was that as per Full Court Resolution, all posts in the quota promotees (U. P. Nyayik Sewa) has been filled up rather one over and above the quota has been appointed. At page 2 of its report, the Selection Committee has taken into consideration the short falls in the reserved vacancies for Scheduled Castes. etc. and recommend that the said 4 vacancies of Scheduled Castes and Scheduled Tribes candidates be filled in the next recruitment. The Committee felt that in view of the inordinate delay, the next recruitment batch 1992-94 be initiated at the earliest so that this class of candidates might be adequately compensated without further delay.

95. The Committee at page 6 considered the claim of U. P. Nyayik Sewa in the circumstances that there were several vacancies existing and several posts were lying vacant for want of officers and the usual delay in the recruitment and further to ensure that the public Interest do not suffer, took the shelter behind the provisions of Rule 8 (2) of the H.J.S. Rules, which runs as follows :

"if in any selection the number of selected/direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa." and observed at page 7 as below :

"in view of this, 14 vacancies of the direct recruit thus could not be filled in this recruitment allocated to the members of the Nyayik Sewa. Thus after deducting this one already appointed over and above the quota, thirteen go to the members of the Nyayik Sewa."

These are the persons who have been arrayed as respondent Nos. 3 to 15 in the writ petitions, whose selection and appointment has been sought to be quashed by way of these petitions. Hon"ble Justice S. K. Phaujdar has not accepted this recommendation of the Committee as valid. Reasons for that are contained at page 7 of His Lordship's Judgment. While dealing with Rule 8. His Lordship has observed at pages 6 and 7 as below :

"Rule 8 again is very important for the instant dispute. It empowers the High Court, rather it is an obligation to it by use of the term "shall", to fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years. This exercise is to be done from time to time but not later than three years from the last recruitment. Sub-rule (2) of Rule 8 provides that if at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa. Rule 8 (2) must be read with Rule 8 (1) and the words used in sub-rule (2) "the number of recruits decided by the Court to be taken from that source" could only mean the number fixed by the Court for recruitment from a particular source as per Rule 8 (1)."

For direct recruitment, the procedure has been indicated in Part IV of the Rules. Applications are to be invited by publication of notice, ".....under Rule 16....."

96. There is no dispute now that, in fact, a notification for vacancy only was made, whereas, there did exist 19 vacancies in fact, but the recruitment was confined to only 6 vacancies because of the observations made by Hon'ble Supreme Court in Madan Mohan's case (supra). The word "Court" includes the Selection Committee as it works on behalf of the Full Court. Therefore, there need not be any specific resolution of the Court prior to the application of Rule 8 (2) because in the entire body of the Rules, the word Full Court" finds place nowhere. Therefore, the insistence by Hon'ble S. K. Phaujdar, J., is that there must be primarily a resolution of the Full Court, fixing the number of vacancies and then only the Selection Committee could have utilized the powers contained under Rule 8 (2) of the H.J.S. Rules for allocating the remaining seats of U. P. Nyayik Sewa as it is now no longer in dispute that in fact, there were 19 vacancies, whereas the recruitment was made for 6 vacancies only as per notification supra. There is a provision of ad hoc appointment, under sub-rule (1) of Rule 22 or for some exigencies in service. Such an appointment is to be made on a stop-gap arrangement from amongst the members of the Nyayik Sewa in the vacancies in these services, then the quota fixed by the Court till the appointments are made under Rules (1) and (2) and any person promoted and appointed on stop-gap arrangement would not be given seniority under Rule 26 till substantive appointment is made. Therefore, the H.J.S. Rules have self-contained provision to maintain balance and also to secure the interest of the litigant public that justice should not be delayed unduly. The admitted fact is that a large number of vacancies are still existing. Due to time-taking procedure, the recruitments are delayed and the public Interest suffers. Therefore, the provisions were made in Rule 8 (2) and also for ad hoc appointment from the members of U. P. Nyayik Sewa. The reasons appear to be simple. Whereas, the direct recruits had to undergo several tests/interviews etc. as provided in the Rules. The officers of the U. P. Nyayik Sewa have proved their merit and metal after working for years together. Throughout their period of service, every year,

the High Court had an opportunity to watch their work and conduct, apart from integrity- Here also, the officer has to first earn a certificate from the District Judge concerned that he is a hard worker. He takes interest in judicial work, his judicial approach is sound. He is a man of unimpeachable character. He has taken interest in disposal of old cases and enjoys a good reputation of being an honest and upright officer. This assessment made by the District Judge is subject to a check and correction by the High Court every year. So to utilize the seasoned and experienced officers of U. P; Nyayik Sewa under Rule 8 (2), including for appointment as on ad hoc basis to their galaxy of well-merited officers are available to the High Court. That is why no test has been provided whether oral or written before taking officers of U. P. Nyayik Sewa to the H.J.S., of course, subject to quota, rota etc. Of course, the emergency provisions made under Rule 8 (2) of the rules is meant to serve this situation. Hence if the Committee after considering the actual vacancy of 19 persons for the direct recruits was compelled to confine its exercise only for six persons because of Madan Mohan's case (supra), at the same time providing and recommending that future recruitments may be made without delay to take care of the short falls in the vacancies of direct recruits from the Bar. It cannot be said that the approach of the Committee was not legally sustainable. Hon'ble S. K. Phaujdar. J.. has rejected the claims of respondent Nos. 3 to 15 mainly on the ground that there was no material before this Court to indicate that there has been such an increase by a Full Court Meeting of the High Court. I think, with all due respect to His Lordship, this is a super-technical view taken by His Lordship. The reasons behind containing a provision in Rule 8 (2) of the H.J.S. Rules is perhaps slipped out of consideration by His Lordship, inadvertently, it seems.

97. Taking inspiration from the findings at pages 8 to 10, while dealing with respondent Nos. 3 to 15. His Lordship at page 20 has observed in these words :

"Rule 8 (2) has been analysed by us in the earlier pages of this judgment and we have given out our views that such vacancies for direct recruitment could not be transferred for the promotees. unless the same were fixed by the Court under Rule 8 (1). The recommendation of the Selection Committee to the Full Court, the resolution of the Full Court to appoint these respondent Nos. 3 to 15, and the appointment of these persons in response to such recommendations, were, thus, against the statutory rules."

With all due respects to His Lordship, I find that the view taken by him. Is not sustainable otherwise if his views are taken as correct, the entire purpose of framing Rule 8 (2) shall frustrate and the object to be achieved, shall remain a mirage. The Court of Justice shall remain a Court of technicality only, which cannot be said to be a valid approach. At this stage, i am tempted to incorporate the following observations made by the Court of law giver Vrihaspati. which runs as follows :

dsoye "kkL=e vkfJR;% u djksfl fofu.kZ;% ;qfDr ghus fopkja rq- /keZ gkfu% izT;;rs A

Rendered in English, it means that the Courts should not go by letters of the statutes only and not base their judgments thereon alone for want of a reasonable explanation and logic, mere technical approach is likely to cause harm to the justice.

98. We can profitably utilize this prescription of legal interpretation, which was followed not only 6 thousand centuries ago, but also till today. Normally accepted rule of interpretation at present is that as far as possible, the Court should start with a presumption that every word used by the Legislature is meaningful and valid but where literal interpretation goes to kill the very intent of the law makers, that must be avoided.

99. As already observed, the reason behind the framing of Rule 8 (2) and later on including ad hoc appointments also from U. P. Nyayik Sewa, was to further safeguard the interest of the litigant public and to ensure that injustice due to delay be avoided. If we catch up this secret behind Rule 8 (2) of H.J.S. Rules, it will be difficult for us to accept the interpretation given by Hon^{ble} Mr. Justice S. K. Phaujdar. That is why. I am of definite and resolute view that the Selection Committee did not exceed its brief while making recommendation for appointments of respondent Nos. 3 to 15 and the Full Court of the High Court, by endorsing and accepting the same. Therefore, with all due respects to His Lordship. I find that his observations for making the appointments of respondent Nos. 3 to 15 as invalid, cannot hold the field and in the interest of justice, it deserves to be ignored.

100. Another question raised on behalf of respondent Nos. 3 to 15 was that the present litigation is of adversarial nature, meaning thereby, that a person who has no cause of action, cannot move a Court of law, for annulling something which does not prejudice his interest. The Court need not go into making robins enquiries and decide a case as if it were deciding a Public Interest Litigation (P.I.L.). As seen earlier, the petitioners have not suffered in not getting their appointments on account of anything done by the respondent Nos. 3 to 15. They are not likely to suffer any more, if these officers, respondent Nos. 3 to 15 are allowed to continue in their service in H.J.S. because they are bound to be adjusted against their quotas prescribed by the rules. The respondents suffered on account of several causes, including one, the view taken in Madan Mohan's case (supra). They could not be selected because the Selection Committee could not increase their seats, then what was notified (6). They could not be selected because the recruitment exercise was confined to 6 vacancies only. In the interview held, four times the number of vacancies, i.e.. 25-26 persons were alone called for interview. The Selection Committee had proceeded on the premise that there were 19 vacancies only for direct recruits. They would have been necessarily called for an interview at least 100 to 104 persons and in that scenario, it could not be said that even 6 persons, who have been selected by the Selection Committee would have "retained their present position, what to talk of the petitioners, in this case, who were merely wait-listed. I have discussed

this point in detail in the earlier part of my judgment, hence I do not want to repeat the same. The only thing, which I want to say at this stage is that the petitioners had not suffered for any conduct of the respondent Nos. 3 to 15, nor are they likely to benefit if the appointments of respondent Nos. 3 to 15 are washed off or quashed by this Court. So, the continuance in service of respondent Nos. 3 to 15 is not likely to cause any prejudice to the interest of the petitioners. Therefore, it can be safely said that the petitioners have no cause of action against respondent Nos. 3 to 15 and in this adversarial position of litigation, their contentions cannot be entertained that the appointments of respondent Nos. 3 to 15 be quashed, on the simple reason that they had no cause of action against them. It was urged that there was a genuine apprehension in the mind of the petitioners that in case in subsequent recruitments if anyone of the petitioner was selected, his seniority would be adversely affected. This argument, to say the least, deserves to be rejected by merely mentioning it. Most of the petitioners in this case have alleged in their petitions that they are now age-barred and have no future scope of recruitment in the H.J.S. Secondly, even for the sake of argument, if anyone of them does get an appointment, that will not be covered by the doctrine of legitimate expectancy. There was no material on record that in the subsequent recruitment, which had taken place after the impugned recruitment, anyone of the petitioners has been selected or even called for an interview, although, admittedly, recruitment process has been continuing even after this advertisement by dint of subsequent advertisements. including special drive to recruit the members from the Scheduled Castes and Scheduled Tribes. So the doctrine of legitimate expectancy cannot be overstretched. Hence it has absolutely no application in the present case.

101. Thus here, the realities were realized by His Lordship Hon"ble Justice S. K. Phaujdar, as he has observed at page 20 towards the bottom as follows :

"It was contended that the petitioners could not claim any relief against these respondent Nos. 3 to 15 as their status was in no way affected by the promotion to/appointment in the H.J.S. We have our own reservation upon this interpretation of the law. The writ court is a Court of equity and the principles of pleading must not be applied strictly to the proceedings in writ petitions. As a Court of equity, the writ court must keep in mind that if a particular person is denied a relief on certain interpretation of law, the same interpretation must not go to the benefit of others, who had been given some relief against law. We are denying the prayer for appointment of the petitioners not on the ground that vacancies were incorrectly determined. We have our doubt, as expressed above, that there was wrong reporting of vacancies by the Registry, but we have further observed that we are bound by the number of vacancies fixed by the Court and on that score only the prayer for appointing the petitioner has been denied. If absence of posts is the sole reason for denying relief to the petitioners, it goes against the sense of equity to appoint anybody else against those posts only. In our view, the appointment of respondent Nos. 3 to 15, in response to the

recommendations of the Selection Committee dated 2.11.95 was bad in law and cannot be sustained. It will be for the administrative side of the High Court to see how the situation could be saved as these persons were already working in the H.J.S. and there is a dearth of Judicial Officers in the subordinate judiciary, but this difficulty alone may not be a reason to justify their appointment."

With profound respects to His Lordship, it is difficult for me to co-share his views. Firstly His Lordship has taken the view that the writ court is a Court of equity and it is not bound by the laws and principles of pleadings. That is not the case at all, here. This is not a case of want of pleadings. Why the petitioners should go to suffer. Rather it is want of total cause of action available to the petitioners against respondent Nos. 3 to 15. It is also because the petitioners are not going to benefit in any way. even if the appointments of respondent Nos. 3 to 15 is quashed. It is further because the petitioners have not suffered on account of any conduct of respondent Nos. 3 to 15. Therefore, the alleged jurisdiction should not be over-stretched for it is going to serve no useful purpose at all.

102. These observations of His Lordship at page 21 of his judgment "who (respondent Nos. 3 to 15) had been given some relief against law has no legal support from evidence on record". With profound respects and for the reasons aforesaid)n my judgment, it is not correct to say that the appointments of respondent Nos. 3 to 15 under Rule 8 (2) of H.J.S. Rules, is against law. Rather, in my view, it would be correct to say that the appointments of respondent Nos. 3 to 15 is very much in accordance with law, i.e.. Rule 8 (2) of the H.J.S. Rules.

103. Similarly the observations of His Lordship "We are denying the prayer for appointment of the petitioners not on the ground that vacancies were incorrectly determined. We have our own doubt, as expressed above, that there was wrong reporting of vacancies by the Registry, but we have further observed that we are bound by the number of vacancies fixed by the Court and on that score only the prayer for appointing the petitioners has been denied is not sustainable". This observation of His Lordship at page 21 has castigated the members of the judiciary without any rhyme or reason, much less against the principles of natural justice. The members of the Registry of the High Court have not been impleaded as respondents in this case. No doubt allegations have been made by the petitioners in their petitions against them. but all the same the Full Bench hearing the petitioners did not deem it proper to order the arraying of the members of the Registry as respondents at any stage till the conclusion of the arguments. Therefore, it cannot be said that the reporting of the vacancies was wrong. It may be incorrect arithmetically or for want of non-application of mind, but it cannot be said that it was wrong much less, intentionally wrong. We do not feel the necessity of calling upon the Registry to explain its conduct at any state during staggering argument advanced by the learned counsel. As observed earlier, this was absolutely a new law prescribed by the Hon"ble Supreme Court in O. P. Garg's case (supra) that the word "vacancy" included temporary vacancy as well. This was an innovation introduced in the service jurisprudence by the

Hon"ble Supreme Court for the first time. Therefore, any arithmetical exercise for determining the vacancies could not be made resulting in wrong calculation of vacancy. Therefore. I find that it will not be proper for this Court to hold the Registry of the Court guilty for any of the consequences that has fallen upon the petitioners.

104. This observation of His Lordship Hon"ble Justice S. K. Phaujdar exceeds my legal comprehension, which runs as follows :

"if absence of posts is the sole reason for denying relief to the petitioners, it goes against the sense of equity to appoint anybody else against those posts only".

With all due respects to His Lordship, this observation is factually incorrect.

105. I have mentioned some of the many reasons above, as to why the petitioners' petition were likely to be dismissed and it has nowhere been observed, even by His Lordship Hon"ble S.K. Phaujdar. J., that the relief was denied to the petitioners on the ground that there was absence of posts, much less, to say that this was the sole reason for denying the relief to the petitioners. Hence it cannot be said that the petitioners are being denied the relief for want of posts. The principal reason for denying the relief is the decision in the Madan Mohan case (supra) by the Apex Court. Posts for direct recruitment to the considers for Bar were there, no doubt available, although erringly calculated. Even the Selection Committee was in the know of the things on the date of its recommendation that there were, in fact. 19 posts available to the direct recruits. Out of which, only 6 were advertised in the impugned notification. Therefore. I do not subscribe to the views expressed by Hon"ble S. K. Phaujdar. J., that the absence of posts was the sole reason for denying the relief to the petitioners. Once this portion of the reasoning by His Lordship is Ignored as being not correct (with apology), the consequential onslaught upon the respondent Nos. 3 to 15 by inviting the sense of equity would be totally undeserved and under-merited.

106. Similarly this observation of His Lordship is not correct (with apology) made at page 21 "in our view the appointment of respondent Nos. 3 to 15. In response to the recommendation of the Selection Committee dated 2.11.1995. was bad in law and cannot be sustained."

107. However, at the cost of repetition, I may say that this observation is neither factually nor legally correct (with apology). The recommendation for appointment of respondent Nos. 3 to 15 had a valid legal source, i.e.. Rule 8 (2) of the H.J.S. Rules. So the question of determining them as bad in law, cannot be proved nor it can be said that they cannot be sustained in law. With all due respects to His Lordship. I find that this sentence does not carry legal sustenance and support. Hence I totally disagree with this observation.

108. I am extremely thankful to His Lordship in realizing the difficulties, legal and factual obligations to the respondent Nos. 3 to 15 and much more to the

litigant public. The most of the entire legal scenario is applied due to dearth 2 A.C.J. In 47 and also the fact that these persons were doing a very important job in the subordinate Judiciary. The jewel is contained towards the end of page 21 as follows :

"it will be for the administrative side of the High Court to see how the situation could be saved as these persons are already working in the H.J.S. as there is a dearth of Judicial Officers in the subordinate judiciary, but this difficulty alone may not be a reason to justify their appointment."

These words expressed a feeling of pain in the heart of His Lordship (an eminent jurist) towards respondent Nos. 3 to 15. Nay, it also shows that His Lordship is conscious of the fact that there is a dearth of Judicial Officers in the subordinate Judiciary. Hence I feel that apart from the reasons given by me above, these reasons, although expressed in the spirit of pain by His Lordship, are themselves sufficient to hold that the appointment of respondent Nos. 3 to 15 does not have a legal source under Rule 8 (2) of the H.J.S. Rules and it serves the purpose for which this Rule was made. The respondent Nos. 3 to 15 should not be punished for any technical flaw on the part of the High Court. Their appointments are valid in law and claim not suffer from any legal defect.

109. Taking the totality of the circumstances into consideration, I find that all the writ petitions must fail and they are liable to be dismissed.

110. All the writ petitions are dismissed accordingly. In the circumstances of the case, I make no order as to costs.