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**(2009) 09 AHC CK 0057**  
**In the Allahabad High Court**

Vikas Mishra

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

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**Date of Decision :** 14-09-2009

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16

**Citation :** (2010) 1 AWC 104

**Hon'ble Judges :** Shishir Kumar, J; Amitava Lala, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

Amitava Lala, J.—Since both the aforesaid writ petitions are connected and have been heard analogously, the same are being decided by this common judgment and order having binding effect upon both the writ petitions.

2. Both the aforesaid writ petitions have been filed on 3.6.2009 and 20.5.2009 respectively almost making similar prayers. However, the prayers of both the writ petitions are chronologically set out hereunder:

Prayers of C.M.W.P. No. 29450 of 2009:

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned advertisement dated 15.4.2009 (Annexure-2 to this writ petition) published by Registrar General, High Court at Allahabad.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent to provide only 50% of reservation out of the total advertised vacancy including the carried forward vacancies after excluding the candidates who belong to the creamy layer.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondents to exclude the candidates belonging to the creamy layer of the other backward classes and scheduled caste and scheduled tribe from the reserved category of the candidate.

(iv) Issue a writ, order or direction in the nature of mandamus directing the respondent to provide reservation to the persons belonging to economically weaker section of the society and provide reservation on the basis of economic weakness of a person or candidate.

(v) Issue a writ, order or direction to treat the candidates satisfying the criteria mentioned in office memorandum dated 8.9.1993 as the criteria for determining creamy layer of candidates.

(vi) Issue a writ, order or direction in the nature of mandamus directing the respondents to hold examination in Hindi subject for selecting the candidates for Uttar Pradesh Higher Judicial Service in Pre and Main Examination.

(vii) Issue a writ, order or direction in the nature of mandamus directing the respondents to provide question paper in Hindi as well as in English to the candidates for Pre and Main Examination.

(viii) Issue any other suitable writ, order or direction, as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

(ix) Award cost of this petition in favour of the petitioner.

Prayers of C.M.W.P. No. 26720 of 2009:

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned advertisement dated 15.4.2009 (Annexure-2 to this writ petition) published by Registrar General, High Court at Allahabad''.

(ii) Issue a writ, order or direction in the nature of certiorari quashing the order dated 4.5.2009 (Annexure-8 to this writ petition) issued by the Joint Registrar (E)/Central Public Information Officer, High Court, Allahabad.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondent to provide only 50% of reservation out of the total advertised vacancy including the carried forward vacancies.

(iv) Issue a writ, order or direction in the nature of mandamus directing the respondents to hold examination in Hindi subject for selecting the candidates for Uttar Pradesh Higher Judicial Service in Pre and Main Examination.

(v) Issue a writ, order or direction in the nature of mandamus directing the respondents to provide question paper in Hindi as well as in English to the candidates for Pre and Main Examination.

(vi) Issue a writ, order or direction in the nature of mandamus declaring Rules 4, 5, 6 and 20 of the Allahabad High Court Rules (Right to Information Act, 2005) as ultra vires the Constitution of India and the Right to Information Act, 2005.

(vii) Issue any other suitable writ, order or direction, as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

(viii) Award cost of this petition in favour of the petitioner.

In spite of making challenge in respect of holding examinations by the High Court for selecting candidates for Higher Judicial Service, the petitioners participated in the respective preliminary examination as general category candidates and became unsuccessful. This fact is very crucial for the purpose of determining the cause.

3. Mr. Arvind Srivastava, learned Counsel appearing for the petitioners, though sought for various reliefs but mainly confined to the issues, which are being discussed hereunder.

4. Firstly, Mr. Srivastava has raised the issue with regard to the decision of the Full Court of the High Court dated 12.7.2008 regarding carrying forward the vacancies at the time of next recruitment, to which the records of the High Court have been produced by Mr. Amit Sthalekar, learned Counsel appearing for the High Court. From the records when we find that there is a Full Court resolution to that extent, Mr. Srivastava has given up such point.

5. Secondly, Mr. Srivastava has urged that the students more conversant in Devnagari than English cannot be said to be betterly qualified candidates. There is no scope to adjudge Devnagari language in the process of selection for the Higher Judicial Service, to which Mr. Sthalekar has brought to our notice the advertisement and also Appendix "G" under Rule 18 of the Uttar Pradesh Higher Judicial Service (Sixth Amendment) Rules, 2006 (hereinafter in short called as the "Rules, 2006"). Such appendix speaks about the language, as follows:

Paper No. 2 : Language

This paper will be of 200 marks and 3 hours duration. It shall comprise four questions as specified below--

(i) Essay to be written in English 60 marks (ii) English Precis writing 60 marks (iii) Translation of passage from Hindi to English 40 marks (iv) Translation of passage from English to Hindi 40 marks

6. From such appendix we find that leaving aside the language paper, Paper No. 1 is made for General Knowledge; Paper No. 3 is made for Law-1 (Substantive Law); Paper No. 4 is of Law-II (Procedure and Evidence); and Paper No. 5 is made for Law-III (Penal, Revenue and Local Laws), and after giving description of all the papers a clarificatory note is also given, as follows:

Clarification.--The candidates will have a choice to answer General Knowledge and Law papers either in Hindi or in English.

Therefore, one cannot say that Devnagari language has been ignored as alleged or at all. Hence, Mr. Srivastava has also given up such point.

7. Thirdly, Mr. Srivastava has raised the issue that since there is no provision for preliminary examination either in the Uttar Pradesh Higher Judicial Service Rules,

1975 (hereinafter in short called as the "Rules, 1975") or in the amended Rules, 2006, therefore, the High Court cannot hold preliminary examination. In support of his contention, he said that though the Committee of the Judges constituted for giving suggestion with regard to amendment in the Rules, 1975 has accordingly suggested in favour of holding preliminary examination and the High Court after approval of such suggestion has forwarded the same to the State Government, but no such rule has been amended as yet providing authority to the High Court to hold the preliminary examination.

8. Against this background, let us first of all see the provision of Rule 18 of the Rules, 1975. For the sake of comparison respective rules before and after amendment in 2006 are set out hereunder:

6. Amendment of Rule 18.--In the said rules, in Rule 18, for the existing Sub-rule (1) set out in column-I below, the sub-rule as set out in column-II shall be substituted namely:

| COLUMN-I                                                                                                                                                                                                                                                                                                                                                                     | COLUMN-II                                                                                                                                                                                                                                                                                                                                                                                 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Existing sub-rule (1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such a written examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview and examination. | Sub-rule as hereby substituted (1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such a written examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview and examination. |

The Sub-rule 18(1A), as proposed by the High Court is as follows:

18 (1A).--The Selection Committee may hold a preliminary examination for judging the suitability of the candidates to be admitted in the written examination as referred in Sub-rule (1). The preliminary examination shall consist of one paper consisting of 100 marks of three hours duration from the syllabus prescribed for the written examination in Appendix "G" of the Rules. .

Only those candidates will be treated to be eligible for the written examination who secure minimum 50% marks in the preliminary examination.

9. A plea has been taken by Mr. Srivastava by showing both the sub-rules, as aforesaid, that when the word "such" was deleted by incorporating the word "written" by the amendment of 2006, then it should be construed that it was done for a specific purpose and everyone has to follow the same to adjudge suitability of the candidates. Mr. Sthalekar has opposed such submission by saying that there is no much of difference between such examination and written examination in applying the same in case of preliminary examination because of the fact that the preliminary examination itself is a written examination. Moreover, if the High Court does not fill up the posts as early as possible then the

scheme of filling up of the posts as provided by the Supreme Court in the case of Malik Mazhar Sultan and Anr. v. U.P. Public Service Commission and Ors. 2006 (2) AWC 1993 (SC), Civil Appeal No. 1867 of 2006, while disposing of I.A. No. 35 vide order dated 24.7.2008, will be frustrated. We have gone through such judgment to know the desire of the Supreme Court when we found that following directions have been given:

We have heard Mr. Vijay Hansaria, learned amicus curiae and learned Counsel for some of the States and the High Courts.

By a detailed order dated 4.1.2007, certain directions were issued by this Court for filling up the vacancies in the Cadre of the District Judges and Civil Judges (Senior Division and Junior Division).

In order to ensure that timely selection and appointments are made, Chief Justice of each High Court was requested to constitute a Committee of Judges to monitor the selection process. It was also observed that a special Cell in the name of "selection and appointment" shall be constituted in the High Court and the Registrar will assist the said Committee. It was further directed that the Registrar of the said Committee shall send to the Registrar General of this Court by 31st January every year report as regards the filling up of vacancies with copies to Minister for Law and Justice in the Central Government and the Law Minister of the concerned State.

We are constrained to observe that most of the High Courts have failed to send the report.

So far as the High Court of Allahabad is concerned, unfortunately till today no such report has been filed. We are also not aware whether as per the abovesaid order the Minister for Law and Justice of the concerned State has been informed about the progress in the selections or not. Let the requisite information be filed on affidavit within a period of four weeks from today.

I.A. No. 35 has been filed by the Allahabad High Court seeking extension of time schedule for declaration of final select list. In paragraphs 12 and 13 it is stated that written examinations for the Uttar Pradesh Higher Judicial Service Recruitment, 2007 and 25% direct recruitment was held on 23rd, 24th and 25th November, 2007 and the suitability test for promotion under 50% quota (promotion) was held on 10.2.2008. It is further pointed out that as per the orders of this Court examinations have already been held and the administrative committee in its meeting has resolved that the result may be placed before the Full Court.

10. So far as the question of preliminary examination as such is concerned, we are of the view that there is no dearth of power of the High Court in doing so as it has already been held by the Supreme Court in the judgment in B. Ramakichenin @ Balagandhi Vs. Union of India (UOI) and Others, as under:

16. Even if there is no rule providing for shortlisting nor any mention of it in the

advertisement calling for applications for the post, the selection body can resort to a shortlisting procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. For example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them. In this situation, the procedure of shortlisting can be resorted to by the selection body, even though there is no mention of shortlisting in the rules or in the advertisement.

17. However, for valid shortlisting there have to be two requirements--(i) it has to be on some rational and objective basis. For instance, if selection has to be done on some post for which the minimum essential requirement is a B.Sc. degree, and if there are a large number of eligible applicants, the selection body can resort to short listing by prescribing certain minimum marks in B.Sc. and only those who have got such marks may be called for the interview. This can be done even if the rule of advertisement does not mention that only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus, the procedure of shortlisting is only a practical via media which has been followed by the Courts in various decisions since otherwise there may be great difficulties for the selecting and appointing authorities as they may not be able to interview hundreds and thousands of eligible candidates; (ii) if a prescribed method of shortlisting has been mentioned in the rule or advertisement then that method alone has to be followed.

11. According to us, factually the present case is based on a stronger footing because the advertisement provides for preliminary examination, in which not only the petitioners applied but sat for examination and came out being unsuccessful.

12. So far as the other incidental issue about the suitability test is concerned, we have to hold and say that the selected candidates have to discharge the judicial duty to a great extent, therefore, much relaxation will be given to the High Court in adjudging suitability by forming own mechanism. In this regard the ratio of the judgment in K.H. Siraj Vs. High Court of Kerala and Others, as hereunder, is to be seen:

The very use of the word "suitable" gives the nature and extent of the power conferred upon the High Court and the duty that it has to perform in the matter of selection of candidates. The High Court alone knows what are the requirements of the subordinate judiciary, what qualities the judicial officer should possess both on the judicial side and on the administrative side since the performance of duties as a Munsif or in the higher categories of Subordinate Judge, Chief Judicial Magistrate or District Judge to which the candidates may get promoted require administrative abilities as well. Since the High Court is the best judge of what should be the proper mode of selection, Rule 7 (as in the case therein) has left it to the High Court to follow such procedure as it deems fit. The High Court has to exercise its powers in the light of the constitutional scheme so

that the best available talent, suitable for manning the judiciary may get selected.

In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers.

13. Therefore, in totality we repeat and say that the High Court cannot be said to be powerless in holding the preliminary examination to short-list the candidates when number of candidates are much more than the vacancies and to adjudge the suitability of the candidates. It is desirable that the State should proceed fast on the basis of recommendations of the High Court but if the State is reluctant, the High Court cannot sit idly particularly when dearth of judicial officers and increase of pendency of the cases are very important aspects for the judiciary and in case of any failure, the judiciary itself will become victim of the criticism by the people outside the judiciary.

14. Lastly, Mr. Srivastava has come forward with a point of non-exclusion of "creamy layer" from the zone of consideration under the reserved category and offering of the seats to the other backward category candidates, which included the candidates who belong to the creamy layer. It is unconstitutional in nature being violative of Articles 14 and 16 of the Constitution of India. In support of his contention, he has relied upon several judgments of the Supreme Court in *Union of India (UOI) and Others Vs. T.G. Abraham and Others*, *The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others*, *M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others*, *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, and also *Ashoka Kumar Thakur Vs. Union of India (UOI) and Others*, to establish that creamy layer means the persons who are socially and educationally backward. It is not caste oriented but class oriented. However, with our little experience we cannot hold to say that the point agitated by the petitioners in the facts and circumstances is more than academic in nature. The petitioners have noticed the advertisement, filled up the forms as general category candidates, filed the writ petitions, even thereafter participated in the examination and upon being unsuccessful turned around and challenged the entire selection process to frustrate the same. In this background, the writ petitions cannot be converted to a public interest litigation to resolve the issue as proposed by the petitioners.

15. In addition thereto, the petitioner in Writ Petition No. 26720 of 2009 has also asked for direction upon the High Court to supply the in formations at a lesser cost by saying that the cost for getting in formations from the High Court is highly excessive in nature. In this respect we are of the view that such issue cannot be said to be an issue connected with the service matters, therefore,

exercise on the part of such petitioner on this score is futile in nature. Hence, no relief can be granted to that extent.

16. Thus, in totality, neither of the writ petitions can be sustained, therefore, both the writ petitions are dismissed, however, without imposing any cost.

Shishir Kumar, J.

17. I agree.