SUPREME COURT OF INDIA

Sri Kant Tripathi

Vs.

State of U.P.

C.A.No.5908 of 1997

(G.B. Pattanaik and Ruma Pal JJ.)

07.09.2001

JUDGMENT

PATTANAIK, J.

This batch of cases deals with the dispute between the direct recruits and the promotees in the cadre of u.p. Higher judicial service comprising of posts borne in class i. U.p. Higher judicial service rules, 1975 have been framed in exercise of powers conferred by the proviso to article 309, read with article 233 of the constitution by the governor in supersession of the earlier recruitment rules of 1953. The earlier recruitment rules of the year 1953 were struck down by this court in the case of chandra mohan vs. State of u.p. On a conclusion that the same was violative of article 233 of the constitution.

The present rules govern the conditions of service including recruitment of the members of the service constituting a cadre. The dispute, in fact centers round recruitment made in different recruitment years, and is basically one on the calculation made by the high court to find out the ratio between direct recruits and promotees in a given year. We, however do not propose to examine the calculation made by the high court in each recruitment year, on the other hand, we propose to interpret the relevant provisions of the rules and decide what should be the correct mode of calculation whereafter the high court may itself re- calculate and re-adjust the appointments already made or to be made in future.

Under the present recruitment rules the expression 'service' has been defined in rule 3 (c) to mean, the uttar pradesh higher judicial service. the strength of the service has been defined in rule 4 to indicate that it constitutes a single cadre comprising of the posts of district and sessions judges and additional district and sessions judges, the permanent strength of service was specified in appendix 'a' in accordance with the provision contained in sub-rule (3) of rule 4. rule 5 provides that the recruitment to the service shall be made by direct recruitment and by promotion of confirmed members of u.p. nyayik sewa from amongst those members who have put in not less than 7 years, to be computed on the 1st day of january of next following year in which notice inviting applications is published, as well as from u.p. judicial officers service. rule 6 is the rule providing quota, which is of paramount importance in the case in hand, and as such is quoted hereinbelow in extenso:-

6. Quota.- subject to the provisions of rule 8, the quota for various sources of recruitment shall be -

(I) Direct recruitment from the bar 15% (ii) u.p. Nyayik sewa 70% of The Vacancies.

(III) U.P. Judicial officers service 15% (judicial magistrates) provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:

Provided further that when the strength in the cadre of the judicial magistrate gradually gets, depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst judicial magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the nyayik sewa and their quota shall, in due course, becomes 85 per cent."

Rule 8 Is Yet Another Important Provision Which Requires Consideration In The Case In Hand And The Said Rule Also Is Extracted Hereinbelow In Extenso:-

"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 of 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 of recruits to be taken by promotion from the nyayik sewa:

Provided that the number of vacancies filled in as aforesaid under this sub-rule shall 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 total permanent 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% By Direct Recruitment

(II) 30% From Out Of The Judicial Magistrates; (III) 55% from out of the members of the nyayik sewa."

Part iv, starting with rule 17 provides the procedure for direct recruitment, and part v starting with rule 20 provides the procedure for recruitment by promotion. Part vi containing rule 21 deals with the recruitment of judicial magistrates. Rule 22, contained in part vii deals with appointment. We are not concerned with the other rules in the present case.

The Hierarchy In The Judicial Service Of The State Is That The Civil Judge (Junior Division) Is The Lowest And The Next Promotional Post Is Civil Judge (Senior Division), Whereafter Is The Post Of Additional District Judge And Finally The District Judge.

Under the recruitment rules, more particularly in rule 8, the court is required from time to time, but not later than 3 years from the last recruitment, 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 2 years. Rule 6, which is subject to rule 8, and which provides for quota for various sources of recruitment stipulates that 15% of the vacancies would go for direct recruitment from the bar, 70% of the vacancies would go for promotion from nyayik sewa, and 15% would go by promotion from u.p. Judicial officers service. Second proviso to rule 6 further provides that when the strength in the cadre of judicial magistrate gets completely exhausted and suitable candidates are not available or no candidate remains available, then the entire 85% of the vacancies could be filled up from the promotion from amongst the members of u.p. Nyayik sewa. Though the Recruitment Rules Have Come Into Force With Effect From 1976, But In This Batch Of Cases We Are Concerned With Recruitment Starting From The Year 1988.

The joint registrar, allahabad high court issued an advertisement for direct recruitment to the u.p. Higher judicial services on 27.7.89 and the total number of vacancies indicated therein was 5. It was also, however, indicated that there may be variation in the number of vacancies. The last date for obtaining the application form was 16.8.89 and the last date for submission of application forms was 16.9.1989.the advertisement contemplated a written examination as well an interview. A selection committee was constituted under rule 16, comprising of three hon'ble judges of the court. The full court of allahabad high court in august 1990 approved the case of 68 officers from out of the members of nyayik sewa for promotion to higher judicial service under sub-rule (3) of rule 22. Needless to mention that appointment by promotion under sub-rule (3) of rule 22 is meant as a temporary measure when regular appointments under sub-rules (1) and (2) cannot be made from the three different sources out of the list contemplated under rules 18, 20 and 21. Though the full court had approved the names of 68 promotees but in march 91 only 16 of them were appointed to higher judicial service. In the meanwhile, the selection committee constituted under rule 16 for selecting personnel for direct recruitment being of the opinion, that more direct recruits could be appointed than the number of posts advertised, prepared a list on 28.3.1991 of 9 persons. On 6.4.1991, the full court of allahabad high court, however, recommended 7 persons for direct recruitment. Notwithstanding the full court's approval to the list of promotees, as no appointment was made excepting 16, as already stated, a writ petition was filed in the allahabad high court, by the promotees, which was registered as civil misc. Writ petition no. 3485 of 1992, contending inter alia that the recruitment rules must be duly implemented and while taking steps for filling up the post by direct recruitment from the bar, steps should also be taken for filling up the quota available for

promotees simultaneously.

While the said writ petition was pending in allahabad high court, this court disposed of writ petition (civil) no. 259 of 1990 and writ petition civil no. 1304 of 1988 on 23rd april, 1991 in the case of o.p. Garg & ors. Vs. State of u.p. - reported in (1991) suppl. 2 scc 51. In the aforesaid case this court held on interpreting different provisions of the recruitment rules that on 5th april, 1975, the date on which 1975 rules were enforced, all 236 officers working against the permanent and temporary post of additional district and sessions judges in the service would deemed to be existing members of service constituted under the 1975 rules, and they shall enbloc rank senior to officers appointed to the service thereafter from 3 sources in accordance with their quota under the rules. It was further held that the service under the rules consists of both permanent as well as temporary posts and all temporary posts created under rule 4(4) of 1975 rules are in addition to the permanent strength of the cadre and, as such form part of the cadre. Consequently the appointments under rule 22 can be made to a permanent post as well to a temporary post. Sub-rule (3) and sub-rule(4) of rule 22 were struck down being violative of article 14 as under the said sub-rules appointments could be made from two other sources and not from the bar as direct recruits. It was, however, stated that appointments already made under the aforesaid sub-rules will not be invalidated on that ground. The court, also stated that while selecting candidates under rule 18 meant for selection of direct recruits the committee shall prepare a merit list of candidates of twice the number of vacancies and the said list shall remain operative till the next recruitment. It may be borne in mind that, so far as the provisions of rule 18 are concerned, it did not contain any period for which a list prepared could remain operative, though such a provision was there in sub-rule 5 of rule 20 dealing with the procedure for recruitment by promotion of the members of nyayik sewa, but by virtue of the judgment of this court in o.p. Garg's case the aforesaid provision contained in sub-rule (5) of rule 20 stood engrafted into rule 18. On account of the decision of this court in garg's case since the direct recruits were entitled to have their quota against temporary posts, the selection committee which was in seisin of the matter for selecting persons for the recruitment year 1988, itself made the necessary calculation and increased the number of posts available for direct recruits to 25.

The writ petition that had been filed before allahabad high court in the year 1992, by the promotees, came to be disposed of on 11.2.1994 and the same was dismissed as having become infructuous as by that date the names of the applicants who had filed the writ petition, had been sent to the governor by the high court for being promoted, and the court, therefore, thought that no cause of action survived. This order of the allahabad high court dated 11.2.1994, passed in civil misc. Writ petition no. 3485 of 1992, is the subject matter of challenge in civil appeal no.5908 of 1997 at the behest of the promotee candidates.

The quota of direct recruitment. Another bishamber singh, an advocate, who was entitled to apply for a post in the higher judicial service, to be filled up by direct recruitment filed a petition under article 32 which was registered as writ petition no. 394 of 1994, assailing the power and authority of the selection committee to increase the number of direct recruits, the decision of the full court of allahabad high court dated 25.7.1992, recommending the names of those selected as well as the notification issued by the state government dated 13.4.1994, appointing 24 direct recruits in the cadre of higher judicial service. The essential ground of challenge was that the advertisement having been issued only for 5 vacancies, and recruitment process having already started for filling up those advertised vacancies, it was not open for the selection committee to enter into a process of calculation and enhance the number of persons to be recruited by direct recruitment and the full court was not entitled to approve the same. It is contended that such procedure debarred many

aspirants like the petitioner, from availing of their chances of being appointed to any of those posts meant for direct recruitment. It was prayed in the aforesaid writ petition that the appointments made of respondents nos. 3 to 26, which were in excess of 5 advertised vacancies should be quashed and the high court should be commanded to issue a fresh advertisement in respect of the increased vacancies in advocate, ms. Suman gupta, also filed a similar petition under article 32, which was registered as writ petition no. 592 of 1994 for similar relief as prayed for in writ petition no. 394 of 1994. The aforesaid 3 cases, therefore, relate to the recruitment meant for the year 1988.

On 30th march, 1992, an advertisement was published for appointment to the higher judicial service by direct recruitment and the total number of vacancies indicated therein was 6. The advertisement, however, indicated that there could be variation in the number of vacancies. The persons who could not be selected for being appointed within the number of vacancies notified, filed writ petitions in the lucknow bench of the allahabad high court, 11 in all, alleging anomalies in the process of recruitment to the higher judicial service and contending inter alia, that there has been an excess recruitment from the promotion quota which ought to have been given to the direct recruits, and as such, conversion of posts meant for direct recruits for being filled up by promotees must be held to be illegal and the promotion, thus made should be struck down.

All the writ petitions were heard together and were disposed of by a common judgment dated 30th june, 1998. By the said judgment the high court declared the recommendation of the selection committee dated 2.11.1995 and the resolution dated 18.11.1995, to be invalid and came to the conclusion that those 13 posts could be filled up only by direct recruitment. The promotee appointees, however, were allowed to be continued on ad hoc basis till the full court took a final decision on the matter. The full court was also requested to consider the question as to how 13 posts, meant for direct recruitment could be filled up. Civil appeal nos. 1669-1680 of 2001 are the appeals against the aforesaid judgment of the full bench of the allahabad high court.

In view of the request of the full bench of allahabad high court in its judgment dated 30.6.98, the full court of allahabad high court in its meeting dated july 11, 1998, considered the observations and requests of the full bench and resolved that the 13 left over vacancies of direct recruits would not be filled up from out of the applicants in the previous recruitment process of 1990, as by that date the recruitment process for 1996 had already commenced and was almost complete. In fact the report of the selection committee was under consideration of the full court on that very date. The aforesaid resolution of the full court was assailed in two writ petitions which were registered as civil misc. Writ petition no. 2830 of 1998 and civil misc. Writ petition no. 43485 of 1998. Both these writ petitions were dismissed by the order dated 24.3.1999, and the said judgment of dismissal is the subject matter of challenge in civil appeal no. 1657 of 2001. An identical writ petition filed by one avinash kumar sharma, which was registered as writ petition no. 29617 of 1998, assailing the validity of the resolution of the full court was dismissed on the very same day i.e. On 24.3.1999, which order is the subject matter of challenge in civil appeal no. 1656 of 2001. The full court resolution of allahabad high court dated 11.7.1998 was also challenged in this court by filing application under article 32 of the constitution, which has been registered as writ petition nos. 97 of 2000 and 460 of 99. These cases, therefore, deal with the selection and recruitment for the year 1990.

For the recruitment year covering the period 1992 to 1994 an advertisement was issued in june 1996 inviting applications for recruitment against 19 vacancies in the higher judicial service out of which 10 were ear-marked for general candidates, 4 for scheduled castes and 5 for obcs. The advertisement

also contained a variation clause. A select list was prepared enlisting 21 candidates, but the full court, however, recommended only 20 persons. Five writ petitions were filed by persons claiming direct recruitment in the high court contending, inter alia that the high court had not properly calculated the number of vacancies available for direct recruitment and that on a proper and true interpretation of rule 8 read with rule 6, there existed several vacancies which had not been taken into consideration in making the determination. The aforesaid 5 writ petitions stood disposed of by a common judgment dated 10th may, 2000 whereunder the high court came to hold that in fact 31 vacancies were available for being filled up by direct recruits out of which 8 vacancies were to be filled up from obc candidates and 7 from scheduled castes candidates and 16 from general candidates. The decision of the high court of allahabad has been assailed in civil appeal nos. 1658-62 of 2001. The self same judgment of the allahabad high court dated 10th may, 2000, is also the subject matter of challenge in civil appeal no. 1663 of 2001 and civil appeal nos. 1664-68 of 2001. The appellants are persons empanelled and claim to be appointed against the direct recruits' quota. Yet another writ petition has been filed by two persons munna lal and mehi lal under article 32 of the constitution claiming inter alia that while calculating the vacancies' position and posts meant for direct recruitment the high court had committed error in not taking into account the vacancies likely to occur in the next two years. According to the applicants, their names having been approved and recommended by the full court they were entitled to be appointed, and not sending their names to the governor under rule 18(4) was an infraction of articles 14 and 16 and appropriate directions should be issued. All these civil appeals viz. 1658-62 of 2001, 1663 of 2001, 1664-68 of 2001 and this writ petition, relate to the recruitment of the year 1992.

The last writ petition filed under article 32 is writ petition (c) no. 444 of 2000 and this has been filed by a promotee who had been promoted to the higher judicial service under rule 22(3) of the rules and who has been working as additional district judge since 25.1.2000. It has been alleged in the aforesaid writ petition that the high court had committed a serious mistake in calculating and finding out the number of vacancies available in a given recruitment year, and such erroneous calculation has caused gross injustice to the promotees. It has been prayed in the aforesaid writ petition, that a direction should be issued not to make any fresh advertisement for recruitment of direct recruits to the higher judicial service as they are in excess of their quota. In support of the prayer, it was submitted that the registrar of the high court had submitted a report on 15.11.1999 that 17 direct recruits have been appointed in excess in the recruitment year of 1988 and 5 direct recruits had been appointed in excess in the recruitment year of 1990, and 4 had been appointed in excess of the quota in the next recruitment year, and thus 26 direct recruits are at present there in excess of their quota. But notwithstanding the same, the high court had decided to advertise 38 vacancies for being filled up by direct recruitment. As such the present writ petition had to be filed for the relief, as already stated. The aforesaid writ petition, therefore relates to recruitment year 1998. An interim order has been passed by this court to the effect that any appointment made would be subject to the final decision of this court.

So far as the interpretation of the rules are concerned, under sub-rule (2) of rule 4, the strength of the service has to be determined from time to time by the governor, in consultation with the court, which means, as defined under rule 3(d) to be the high court of judicature at allahabad. The permanent strength of the service must be, as specified in appendix 'a' in view of sub-rule (3) of rule 4. The recruitment to the service has to be made, both by direct recruitment and by promotion and promotion could be made from amongst the confirmed members of uttar pradesh nyayik sewa, who have put in, not less than seven years of service and also from out of the dying cadre of the u.p. Judicial officers service. Rule 6 which is subject to rule 8 and provides for the quota for various

sources of recruitment, unequivocally indicates that 15% of the vacancies would be, by direct recruitment from the bar, 70% of the vacancies from the uttar pradesh nyayik sewa and 15% from uttar pradesh judicial officers service. Under the second proviso to rule 6, when the strength in the cadre of judicial magistrate gets completely exhausted and no officer from that cadre is available, then the vacancies in the cadre of higher judicial service have to be filled up by 15% from the direct recruitment from the bar and 85% from uttar pradesh nyayik sewa. Rule 7 provides reservation of posts for scheduled caste etc., and reservation has to be made in accordance with orders of the government for reservation in force at the time of recruitment. Rule 8 is the provision which requires the court 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. Though the effect of the carry forward under proviso to sub-rule (2) of rule 8 is in fact not an issue in this batch of cases, but since the rules relating to recruitment to the higher judicial service from different sources are being considered, we think it appropriate also to deal with the proviso to sub-rule (2) of rule 8. On fixation of the number of officers to be taken at the recruitment under sub-rule (1) of rule 8 from different sources and after taking recourse to the procedure contained in part iv for making direct recruitment to the service in respect of the vacancies advertised, if selected direct recruits for appointment become less than the number decided by the court to be recruited, then it would be open for the court to correspondingly increase the number of recruits to be taken by promotion from nyayik sewa. But under the proviso, while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment under sub-rule (1) of rule 8, the quota has to be raised to the extent the number was not available in the earlier recruitment. But that raising of number would in no case exceed 15 per cent of the strength of the service. It may be noted that while the rules prohibit that under no situation, the number of direct recruits would exceed 15 per cent of the cadre strength, there is no prohibition so far as promotees are concerned and, therefore, in a given situation, the rule contemplates of having promotees more than the quota fixed for them viz. 85 per cent. As we have stated earlier, this issue has not cropped up in the present batch of cases and as such, we need not further probe into the matter.but it must be remembered that the rules only provide the embargo that under no circumstances the direct recruits would exceed the 15% of cadre strength. But that does not compel the high court to recruit 15% of the vacancies by direct recruitment at every recruitment. It would be for the high court to decide taking all relevant factors into consideration, and ordinarily it may follow the quota provided in rule 6. The second proviso to rule 8(2) however indicates that the permanent vacancies existing on may 10, 1974 as well as 31 temporary posts existing on that date, as and when they are converted into permanent posts, would be filled up by promotion and the vacancies occurring thereafter, would be shared between the three sources under rule 8, in accordance with the quota provided under rule 6. Rule 8, therefore, casts an obligation on the court to determine and fix the number of officers to be taken at a particular recruitment, keeping in view the vacancies then existing and likely to occur in the next two years. In fact the process of recruitment to the higher judicial service from both sources would start only after the number is fixed by the high court under rule 8 and that number has to be fixed, keeping in view the vacancies existing then as well as the "vacancies likely to occur in the next two years". The expression "vacancies likely to occur in the next two years", requires consideration by this court, in view of a judgment of allahabad high court, which is the subject matter of challenge in one of these cases, but we will advert to it at the appropriate time. Rule 16 provides for appointment of a selection committee by the chief justice and rule 17 prescribes the procedure for direct recruitment, whereas rule 20 prescribes the procedure for recruitment by promotion from nyayik sewa. So far as the direct recruitment is concerned, the high court is required to publish a notice inviting applications and on receipt of such applications, the selection committee is required to scrutinize the same, whereafter, the said selection committee may hold such examination, as it may consider

necessary for judging the suitability of the candidates. The selection committee would then call for interview of such of the applicants, who in the opinion of the committee have qualified for interview, after scrutiny and examination. Sub-rule (2) of rule 18 is the guideline for the selection committee to assess the merit of a candidate and under the same provision, due regard has to be made to the professional ability, character, personality and health of the applicant. The selection made by the selection committee is preliminary in nature and the selection committee has to submit the record of all candidates to the chief justice and would recommend the names of the candidates in order of merit, who in its opinion are found suitable for appointment to the service. This list of preliminary selection, prepared by the selection committee, has to be examined by the full court of the high court and then ultimately the court prepares a list of selected candidates in order of merit, having regard to the number of direct recruits to be taken and forward the same to the governor, who ultimately appoints under rule 22.

So far as the recruitment by promotion of the members of the nyayik sewa is concerned, the selection has to be made on the basis of seniority-cum- merit and the field of eligibility is confined to four times the number of vacancies to be filled by promotion. The selection committee has to prepare a list in order of seniority of the eligible officers, as provided under rule 5(b), and a preliminary selection of the officers is made by the committee, who in its opinion are found fit to be appointed, on the basis of seniority-cum-merit. The said list of preliminary selection would contain the names of officers, twice the number of vacancies required to be filled by promotion and that list is forwarded to the chief justice along with the names of officers who are superseded. The recommendation of the selection committee then is finally considered by the full court and final selection for promotion is made and a list is prepared in order of seniority of the candidates, which list is forwarded to the governor, as provided under sub-rule (5) of rule

20. The list forwarded by the court to the governor remains operative till the next recruitment. There is no such provision in rule 18, which is the procedure of selection of direct recruits but in view of the judgment of this court in o.p.garg, even the list forwarded to the governor under sub-rule (4) of rule 18, would remain operative till the next recruitment.

The expression "next recruitment" used in sub- rule (5) of rule 20, has not been defined. But having regard to the scheme of the rules and the language of rule 8, which in fact is the key provision, with which the recruitment process would start, it would be reasonable for us to hold that the expression "till the next recruitment" would mean, till the court fixes the number of persons to be taken by recruitment under sub-rule (1) of rule 8. Once the number of vacancies is fixed for the recruitment to be held, question of keeping the life of the earlier list operative, would not arise. In other words, after fixation of the vacancies to be filled at the next recruitment by the court under sub- rule (1) of rule 8, it would not be permissible to make any further appointment from out of the list prepared, in respect of the previous recruitment, either under sub- rule (4) of rule 18 or under sub-rule (5) of rule 20.

Rule 22 authorises the governor to make appointment to the service and sub-rule (2) of rule 22 provides for appointment on rotational basis. Rule 22 also has taken care of a situation, when the governor in consultation with the court can make appointment by promotion to manage the cadre on a temporary basis, when an emergent situation arises and when it is not possible to make appointments from different sources, as contemplated under rules 18, 20 and 21. But such appointment made under sub-rule (3) of rule 22, obviously would not be an appointment on substantive basis in the cadre and, therefore, may not confer seniority from the date of such

appointment. One other rule, which can be taken note of, is sub-rule (4) of rule 4, which is quoted herein-below in extenso:

"Rule 4(4). 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 from time to time, additional posts, temporary or permanent as may be found necessary."

The aforesaid sub-rule unequivocally confers power on the governor in consultation with the high court, not to fill up or hold in abeyance, posts in service though ordinarily, the vacancies determined by the court should be filled up from the different sources. Lengthy arguments had been advanced on the existence of a variation clause in the advertisement. Since the court determines the number of officers to be taken at a particular recruitment, keeping in view the vacancies then existing as well as likely to occur in the next two years and from out of such available vacancies, allocates, in respect of various sources of recruitment, in terms of rule 6, only after which an advertisement could be published for direct recruitment under rule 17, the question of any variation thereafter, would not arise in the ordinary course. But in an extraordinary situation, like sudden creation of posts in the cadre, subsequent to the issuance of advertisement, but before the last date of submission of application forms, the variation clause may become applicable, so that a greater number of persons, than the posts advertised for, could be considered for the said recruitment. However, as has been stated earlier, such a situation will have to be an extraordinary one.

A combined reading of different rules, discussed above, therefore, leads to the conclusion that for smooth functioning of the service as well as for efficient management of the cadre, after the court fixes the number of officers to be taken at any recruitment under sub-rule (1) of rule 8 and then makes the allocation in favour of different sources of recruitment, as provided in rule 6, steps should be taken for filling up of those vacancies, strictly in accordance with the prescribed procedure in chapters iv, v and vi, by the eligible persons so that there will not be any heart burning amongst the employees.

The higher judicial service forms the back-bone of the judicial system and strengthening of such service with efficient people is a solution against the malady of long pending litigation in the subordinate courts. Any discontentment amongst the members of the judicial service, on account of inaction on the part of the high court, either in the matter of fixing the number of officers to be taken by way of recruitment under rule 8 or selecting the persons for promotion by adopting the criteria of seniority-cum-merit, as provided in rule 20 as well as rule 21 should be avoided and the high court must adhere to the time-frame as well as the process of selection and appointment from different sources, which alone would subserve the smooth functioning of the cadre of higher judicial service.

Having analysed the different provisions of the rules, as aforesaid, let us now examine whether the high court has discharged its obligation in accordance with the rules or has committed any mistake. So far as the recruitment for the year 1988 is concerned, it is not clear as to whether before advertising for filling up of five posts by direct recruitment, the high court did fix the number of officers to be taken at the recruitment, keeping in view the vacancies then existing and vacancies likely to occur in the next two years. In the absence of any materials on that score, we assume that the high court arrived at the figure of five, as direct recruit quota for the recruitment in the year 1988, in keeping with the rules. It further appears that while taking steps for making recruitment of direct recruits, no steps had been taken to fill up the posts available under the promotional quota.

We also find from the records, on the basis of assertions made in the counter affidavit filed by the high court in the pending litigation, that the high court had determined the availability of posts on the basis of a percentage of the total cadre strength and not on the basis of the vacancies available for the recruitment as well as the vacancies likely to occur during two succeeding years. In other words, for the purpose of recruitment in the year 1988, the high court was duty bound to examine and find out the number of vacancies as were available in 1988 as well as the anticipated vacancies likely to occur in 1989 and 1990 and thereupon, calculate the posts available from three different sources, in accordance with rule 6 and then take steps for filling up the posts in accordance with prescribed procedure. Mr. Srivastava, learned counsel appearing for the high court, however fairly concedes that the high court had made the calculation on the basis of percentage of the cadre strength. This, on the face of it, is unsustainable, in view of the clear and unambiguous language in rule 6, as we have discussed earlier. The very basis of calculation being incorrect, necessarily, it has resulted in gross injustice.

That apart, from the averments made as well as materials on record, including the resolution of the full court, it transpires that the selection committee, constituted under rule 16 by the chief justice, took upon itself the task of finding out the number of vacancies in the cadre available to be filled up by direct recruitment and then selected persons on the basis of such determination. The preliminary selection list submitted by the selection committee under sub-rule (3) of rule 18, was for nine appointments, notwithstanding the fact that the advertised vacancies were only five. The determination of the number of officers to be taken at a recruitment, keeping in view the vacancies then existing and likely to occur in the next two years, is a statutory obligation of the court under rule 8 and the court cannot abdicate its obligation and leave it to be determined by the selection committee constituted under rule 16. The factual fixation of the number of officers to be taken at a recruitment could be determined by a committee, constituted by the court if the administrative exigency so requires, but then such determination would have to be approved by the court in its full court meeting. Until such number is fixed under rule 8, the question of taking recourse to rule 17 for direct recruitment and rules 20 and 21 for promotion would not arise. At any rate the selection committee, constituted under rule 16 by the chief justice has to discharge its function of scrutinizing the applications and holding of such examination, as it may consider necessary for judging the suitability of the candidates and it may call for interview such of the applicants, who in its opinion have qualified for interview and thereafter, assess the merits of the candidates, having regard to the guidelines indicated in sub-rule (2) of rule 18. It would not have any jurisdiction to consider the question of determining the number of vacancies available for direct recruits nor could it enhance or reduce the number of vacancies, already determined by the court under rule 8. In the case in hand, the conceded position being that it is the selection committee, who determined the number of posts available for being filled up by direct recruitment, on account of the judgment of this court in garg's case, holding that the quota available in favour of direct recruits in rule 6 would also apply to the temporary vacancies, such determination must be held to be not in accordance with the rules.

It is also apparent from the records that although the court had approved the list of 68 persons for being promoted under rule 22(3), but actually only 16 of them were promoted. Be it be stated, that it is not clear whether the selection committee constituted under rule 16 also made the preliminary selection of the officers, who in its opinion were found fit to be promoted on the basis of seniority-cum-merit in accordance with sub-rule (3) of rule 20 or whether the said list of candidates chosen at the preliminary selection was forwarded to the chief justice under sub- rule (4) of rule 20 and finally, whether the court did in fact make the final selection under sub-rule (5) of rule

20. The grievance of the promotees, appears to be that the procedure for recruitment by promotion under rule 20 had not been adhered to, though the court was taking steps to fill up the quota meant for direct recruits in the service. Such inaction, would undoubtedly bring an imbalance in the cadre. Unless the court is unable to select suitable candidates, applying the criteria of seniority-cum-merit for being promoted to the post in superior judicial service, there is no reason why the court should not adhere to the procedure for recruitment by promotion, contained in chapter v and prepare the list of eligible candidates for promotion and forward the same to the governor, so that the governor can make appointment to the superior judicial service under rule 22.

Mr. Venkataramani, appearing for the direct recruits, vehemently contended that while the high court advertised five posts for direct recruitment for the 1988 recruitment, the advertisement itself contained a variation clause that "there may be variation in number of vacancies without prior notice". That being the position, when the selection committee recommended the names of nine persons for direct recruitment and the full court later on approved the said recommendation of the selection committee, there cannot be any infirmity merely because the full court does not appear to have fixed the number of officers to be taken at the recruitment, keeping in view the vacancies position, as contemplated under sub-rule (1) of rule 8. He further contended that in view of judgment of this court in o.p.garg's case, since temporary posts were required to be included for working out the quota for direct recruits, the variation was imminent and if the quota would not have been enhanced, then there would be an infraction of the direction given by this court in garg's case. The learned counsel also urged that though in the counter affidavit, the high court has indicated that quota was fixed on the basis of percentage of the total cadre strength, but there would be no difference even if the quota were calculated on the basis of percentage of the vacancies and consequently, the determination of number of posts meant for direct quota made by the selection committee and approved by the full court, cannot be held to be vitiated.

In view of the positive stand of the high court in its counter affidavit and in view of the submission of mr. Srivastava, appearing for the high court, conceding that the court made the calculation, on the basis of total cadre strength, we do not find any force in the submission of mr. Venkataramani, that there would be no difference, even if the percentage were worked out on the basis of the vacancies available on the date and the anticipated vacancies in next two years. As has been stated earlier, the high court committed a serious mistake in calculating the number of direct recruits to be recruited on the basis of 15% of the cadre strength and such basis is erroneous being in the teeth of the language in rule 6. The submission of mr. Venkataramani, is therefore, unacceptable in view of the interpretation of the rules, we have already indicated. Mr. Venkataramani in support of his contention, placed reliance on a decision of this court in the case of s.prakash and anr. Vs. K.m. Kurian and ors., 1999(5) s.c.c. 624, but we fail to understand, as to how that case has any application to the case in hand.

The two writ petitions filed under article 32 in relation to the recruitment meant for the year 1988 with the prayer that the appointments already made of direct recruits beyond the advertised posts should be quashed and a fresh process of recruitment should be started for filling up of the quota meant for direct recruits, must be outright rejected inasmuch as we do not propose to annul any appointment already made and our sole object is to interpret the relevant rules and require the high court to act in accordance with the said interpretation.

In relation to recruitment of 1990, for which advertisement was issued by the registrar of the high court on 30th of march, 1992, for filling up of vacancies of six direct recruits, 11 writ petitions had

been filed, which stood disposed of by a common judgment dated 30th of june, 1998. The majority of the bench set aside the recommendation of the selection committee dated 2.11.95 as well as the full court resolution dated 18.11.1995, promoting 13 persons from nyayik sewa, but allowed them to continue on ad hoc basis, till the full court took a decision with regard to the direct recruitment. The full bench also had requested the full court to take necessary steps for recruiting 13 persons by way of direct recruitment. The full court, however finally decided that those 13 vacancies, belonging to the quota of direct recruits, could be filled up in the succeeding years, as the recruitment process for which had already commenced since january, 1996. This resolution of the full court is of 11th july, 1998.

We need not make an in-depth inquiry into the legality of the aforesaid judgment, as in our view, the court also committed the same mistake of determining the quota at 15% of the total sanctioned strength of the cadre. The determination made by the full bench to the effect that for the recruitment of 1990, 13 more direct recruits ought to be taken is annulled and the percentage has to be recalculated, on the basis of the interpretation given by us to the rules. The promotees, who have been allowed to continue on ad hoc basis, shall continue as such, till the high court determines their quota, on the basis of available vacancy position, whereafter, necessary adjustment can be made.

Mr. P.p. Rao, appearing for the appellant in civil appeal no. 1656 of 2001, has submitted that the judgment of the full bench of allahabad high court dated 30th june, 1998 has not been implemented by the full court in letter and spirit and the full court was duty bound to constitute a selection committee to conclude the process of recruitment of 13 direct recruits. According to mr. Rao, the expression "request" in the full bench, was nothing but a direction, and therefore, the full court could not have taken the decision that those 13 persons would be recruited in the next recruitment. According to mr. Rao, issuance of a fresh advertisement for the next recruitment cannot nullify the mandamus issued by a court in a case and the resolution of the full court of allahabad high court dated 11.7.1998, must be held to be in contravention of the direction given in the full bench. Mr. Rao contends that when the resolution of the full court dated 11th of july, 1998 was assailed in writ petition no. 29617/98, the division bench had erroneously dismissed the same and such dismissal was in contravention of the earlier full bench judgment, which was required to be given effect to by the full court on the administrative side. According to mr. Rao, for the recruitment of 1990, if more posts were available in the quota for direct recruits, then the right of the empanelled candidates for being appointed cannot be nullified, in the manner in which the full court had passed the resolution, and therefore, this court should interfere with the same. In support of this contention, reliance has been placed on the decisions of this court in state of bihar and anr. Vs. Madan mohan singh and ors., 1994 supp (3) s.c.c. 308, o.p. Garg and ors., vs. State of u.p. And ors., 1991 supp.(2) s.c.c.51, and o.p.singla and anr.etc. Vs. Union of india & ors., 1985(1) s.c.r., 351.
We Do Not Propose To Examine Various contentions raised, as in our view, the very calculations to find out the available vacancies at the time of recruitment as well as the anticipated vacancies in the two succeeding years, were arrived at on an erroneous basis. By calculating 15% of the total strength of the cadre as the quota for direct recruitment, the high court acted contrary to rule 6 and, therefore, any direction in relation to filling-up such number of posts, would be contrary to law. The ultimate direction we propose to issue in these cases would be one for re-calculation and re-adjustment and consequently, we are not called upon to decide the points raised by mr. Rao.

The question whether a wait listed candidate like avinash kumar sharma, for the recruitment of 1990, was an issue before the full bench of allahabad high court. The high court did not grant the relief to the wait-listed candidate and on the other hand, requested the chief justice of the high court

to take necessary steps for formation of a selection committee, so that appropriate number of candidates be interviewed for the 13 posts of direct recruitment to the higher judicial service. The aforesaid request of the full bench, tantamounts to have a fresh process of selection with the constitution of a selection committee under rule 16 and necessarily, therefore, the claim of a wait-listed candidate for being appointed, stood negatived. This decision of the full bench has not been assailed in any higher forum and has become final. It would, therefore, be difficult for us to accept mr. Rao's contention that in view of the vacancy position, the wait listed candidate could be appointed for the recruitment of the year 1990. A wait listed candidate has no vested right to be appointed, except when a selected candidate does not join and the waiting list is still operative, as was held by this court in the case of surinder singh & ors. Etc. Vs. State of punjab and anr. Etc., jt 1997(7) s.c. 537. In the case of sanjoy bhattacharjee vs. Union of india and ors., 1997(4) s.c.c. 283, this court considered the right of a wait-listed candidate and held that inclusion of candidates in merit list in excess of the notified vacancies, is not justified and waiting list candidates have no right to appointment. Reliance had been placed on the decision of this court in virender s. Hooda and ors. Vs. State of haryana and anr., 1999(3) s.c.c. 696, for the proposition that a wait- listed candidate could be appointed against the available vacancies. In our considered opinion, the aforesaid decision is of no application to the case in hand. In the said case, there existed two administrative circulars which in fact had been construed for conferring the right. This court came to the conclusion that the high court was in error in ignoring those circulars. But in the absence of any such circular or provision in the recruitment rules of higher judicial service, the aforesaid decision is of no assistance. Reliance had also been placed on the judgment of this court in the case of a.p.aggarwal vs. Govt. Of nct of delhi and anr., 2000 (1) s.c.c. 600, wherein the question of filling up of the vacancy of the member of the appellate tribunal under delhi sales tax act was under consideration. This court construed the provision of section 13(4) of the delhi sales tax act, 1978 as well as the office memorandum dated 14.5.1987, issued by the central government, and on construction of the aforesaid provisions, came to hold that a public duty is cast to fill up the vacancy as early as possible. We are not in a position to appreciate, how this decision will be of any assistance to the wait listed candidates.

Reliance had also been placed on the decision of this court in roshni devi and ors. Vs. State of haryana and ors., 1998 (8) s.c.c. 59, whereunder this court had observed that some margin over the advertised vacancies is permissible. That decision was given in the peculiar set of facts present there. The practice of selecting and preparing an unusually large list of candidates compared to the vacancy position, has been deprecated by this court in no uncertain terms. But in the fact situation, the court did permit some appointments to be made beyond the advertised vacancies, by exercising power under article 142, as otherwise, it would have caused great injustice to many who had been appointed. We are afraid, this decision is absolutely of no application to the case in hand. Several other counsel appeared for several persons in relation to the cases concerning appointment of 1990, but they all supported the arguments advanced by mr. Rao and, therefore, we need not reiterate the same. We, however, do not find any infirmity with the order of the division bench of the allahabad high court dated 24.3.1999, which is the subject matter of challenge in civil appeal nos. 1657 of 2001 and 1656 of 2001. The two writ petitions filed under article 32 of the constitution, viz. Writ petition nos. 97 of 2000 and 460 of 1999, challenging the full court resolution dated 11.7.1998, stand disposed of accordingly.

In course of arguments, certain claims had been advanced on behalf of a handicapped person. The rules in question, nowhere make any provision for a handicapped person, but we do not like to examine this issue and express any final opinion, since we are told that a review petition has been

filed and is pending before the high court.

For the recruitment of 1992, covering the period 1992 to 1994, an advertisement had been issued for 19 direct recruits. When writ petitions were filed in the high court, assailing the calculation to find out how many posts should be available for direct recruits, the division bench of the allahabad high court disposed of those writ petitions by judgment dated 10th of may, 2000, and the division bench in the impugned judgment, ultimately came to the conclusion that 31 vacancies were available for being filled up by direct recruitment. The said judgment is under challenge in civil appeal nos. 1658-1662 of 2001 at the behest of the high court as well as in civil appeal nos. 1663 of 2001 and 1664-1668 of 2001 at the behest of the persons, who have been empanelled and claimed to be appointed against direct recruit quota. Writ petitions under article 32 have been filed by munna lal and mehi lal, contending inter alia, that the high court committed error, in not taking into account the vacancies likely to have occurred in the next two years and they are entitled to be appointed. The aforesaid division bench judgment of allahabad high court, requires little consideration, in view of the interpretation given to the expression "the vacancies likely to occur in the next two years", in rule 8(1) of the rules. The high court in the impugned judgment has come to the conclusion that the vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and appointment of officers as judge of the allahabad high court, could also come within the expression "vacancies likely to occur in the next two years". This concept is wholly unsustainable inasmuch as nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed or even would be elevated to the high court. The expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur. In other words, it can only refer to the cases when people would superannuate within the next two years. The difficulty has arisen because of the fact that the high court is fixing the number of officers to be taken for the recruitment of 1990 in the year 1992 or 1994 and so on and so forth for the next recruitment. If the vacancy position is calculated, at the end of the block-period, then the expression "vacancies likely to occur in the next two years" would become redundant and in such a case, the vacancies actually existing for the period, will have to be taken into account. The expression "vacancies likely to occur in the next two years" will operate only, when the high court decides for the recruitment of 1988 in 1988 and then takes into consideration the anticipated vacancies in 1989 and 1990. The enunciation of law made by the high court in the impugned judgment, therefore, cannot be sustained, so far as, it relates to interpretation of the expression "vacancies likely to occur in the next two years" in rule 8(1).

Then again, the division bench of the allahabad high court has committed the self-same mistake by holding that under rule 6, the quota ought to have been worked out on the total cadre strength and thereafter, the vacancies would be apportioned by granting 15% to the direct recruits. As we have already interpreted rule 6, the position is clear that the court will have to find out the number of vacancies available for a given recruitment year under rule 8(1) and then applying the quota under rule 6, determination has to be made as to how many of those vacancies would go for direct recruitment and how many for promotion. On this score also, the impugned judgment must be held to be contrary to law and the determination made as to the posts available for direct recruitment as well as for promotion, must be held to be erroneous and cannot be sustained. Necessarily, therefore, the ultimate direction contained in the judgment, cannot be given effect to.

So Far As The Direct Writ Petitions Filed By The Wait- Listed Candidates Are Concerned In Relation To The Recruitment Of 1992-1994, At The Outset, It Must Be Stated That Their Case Is Based Upon A Re-Calculation Of The Number Of Vacancies, Which Can Be Filled Up By Direct

Recruitment By An Application Of The Percentage Provided In The Quota Of Direct Recruitment Under Rule

6. Since the calculation itself had been made on erroneous basis, as already stated, the question of a wait-listed candidate getting any right to be appointed, does not arise. that apart, the advertisement itself had been issued in the year 1996 and the challenge has been made by filing writ petitions under article 32 in 1999. no reason has been given, as to why they did not assail the advertisement for more than three years. an applicant, whose name appears in the wait list, does not get an enforceable right for being appointed to a post and particularly, in a situation like the case in hand, where the determination of the number of vacancies available for recruitment as well as the respective quotas available have not been done in accordance with the rules. that being the position, no relief can be granted to such applicants.

One applicant, belonging to o.b.c. Class had approached this court and mr. Srivastava, the learned senior counsel, appearing for him contended, that if 100 point roster is applied correctly, then his client would be entitled to be appointed. This contention also is based upon an erroneous impression about the application of the roster. The principle of application of roster has been explained by this court in the case of r.k.sabharwal and ors. Vs. State of punjab and ors., 1995(2) s.c.c. 745. It is not known, as to what is the cadre strength of direct recruits but it is certainly more than 100. In a 100 point roster, once the roster is fully operated upon, then thereafter, as and when there is a vacancy in a particular post, the same has to be filled from amongst the category to which the post belonged in the roster. At any rate, in the absence of any relevant data, indicating how there has been mis-application of the roster, it is difficult for us to issue any direction in favour of the said obc candidate. Consequently, the prayer of the said obc candidate for being appointed cannot be granted.

In view of our conclusions already arrived at, we dispose of all these cases with the following directions:

1. Appointments already made to the higher judicial service, whether by direct recruitment or by promotion, need not be annulled and shall be continued.

2. With effect from 1988 recruitment and in all subsequent recruitments which are the subject matter of challenge before us, the high court shall determine the number of vacancies available as on the relevant year of recruitment in terms of rule 8, as already explained by us and then, allocate the percentage to different sources of recruitment, contained in rule 6, and after such determination is made, then find out whether the appointments of direct recruits already made for that recruitment year are in excess of the quota or within the quota. If it is found that any appointment has been made in excess of the quota, then the said appointee would be allowed to continue, but his or her seniority will have to be reckoned only when he or she is adjusted in the next recruitment.

3. If in each recruitment year, posts were available in the quota of promotees and promotion has not been made, even though selection had been made under rule 20, then the legitimate right of the promotees cannot be denied and promotion must be made with effect from the date they should have been appointed.

4. This exercise has to be made for the recruitment of 1988 as well as for each subsequent recruitment that has been made.

5. Since the determination under rule 8 is being made now, pursuant to the directions of this court, in respect of past recruitment years for which recruitment has been made, the expression "vacancies likely to occur" loses its importance and determination has to be made, on the basis of the actual vacancies available in any of such recruitment year.

6. So far as the recruitment of 1998 is concerned, advertisements having been issued for 38 vacancies being filled up by direct recruitment and the process of selection being already over, but no appointment having been made, we think it appropriate to direct that the appointment of the selected candidates may be made against the quota available to direct recruits calculated in accordance with the rules in the light of our decision.

7. For all future appointments, the high court must take steps to fill the vacancies of every recruitment year during that year itself. the high court must determine the vacancies not only on the basis of the actual vacancies on the date of such determination but also take into account probable vacancies by reason of superannuation of officers in the next two years from that date. once the vacancies are so determined, the percentage of the vacancies available for recruitment by direct recruitment and by promotion must be fixed and steps taken for filling up the same expeditiously. the number of vacancies available for the direct recruits quota must be advertised without any variation clause. the select list prepared both for direct recruits as well as for promotees prepared by the high court will be operative only till the next recruitment commences with the fixation of the vacancies for the next recruitment year.