

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION NO. 1106 OF 2008**

Date of decision: 5th February, 2009

UOI THR. SECRETARY MINISTRY OF
PERSONNEL PUBLIC GRIEVANCES & PENSIONS
DEPARTMENT OF PERSONAL & TRAINING

..... Petitioner

Through Mr. H.K.Gangwani, Advocate

versus

STATE OF U.P. THR. CHIEF SECRETARY GOVT.
OF U.P. & ORS.

.... Respondents

Through Mr. Devendra Arora Addl. Adv. General
with him Mr. Upendra Mishra Mr. Ashok
Chhabra, Advs. for the Respondent
no.1/State of UP.
Mr. G.D.Gupta, Sr. Advocate with Mr.
S.K.Sinha, Adv. for Respondents 3-7.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K.SIKRI,J(ORAL)

We are concerned in this writ petition with the issue of filling up of the vacancies in the Indian Administrative Service by promotion which is to

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be filled in accordance with the provisions contained in the Indian Administrative Service (fixation of Cadre Strength) Regulations, 1955. The Central Government has also framed the Indian Administrative Service (Recruitment), 1954 which provide that there are three methods of recruitment to the IAS. As per clause (a) sub rule 1 the recruitment is by competitive examination. Clause (b) provides for recruitment by promotion of a substantive member of the State Civil Service. Clause (c) with which we are concerned stipulates following mode:

“By selection, in special cases from among persons, who hold in a substantive capacity gazette posts in connection with the affairs of a State and who are not members of a State Civil Service.”

As per this clause, non State Civil Service personnel can also be recruited by selection, Rule 2(g) defines State Civil Service. Appointment to the service as per Rule 6, in so far as recruitment by promotion or selection for appointment to State and joint cadre is concerned, is regulated by Rule 8 of 1954 Rules . As per this promotions are to be made from amongst the substantive members of State Civil Service. However, sub rule (2) of Rule 8 provides another channel as well, namely, selection from non State Civil Service and this provision specifically mentions that it would be from amongst those persons who are of outstanding ability and merit serving in connection with the affairs of the State but not the member of the State Civil Service. We shall refer to this regulation at length at the appropriate stage, as it is the

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interpretation of this rule which is material for determining the controversy that we are faced with in this writ petition.

Coming back to the rule position for making appointment to the IAS by the promotion method from amongst State Civil Service employees, the Central Government has also framed the Indian Administrative Service (Appointment by Promotion) Regulations, 1995 (herein referred to as 'the Promotion Regulations, 1995'). Appointment by selection is governed by the Indian Administrative Service (Appointment by selection), Regulations, 1977 (herein referred to as Regulations 1977).

In the State of UP the selection to the IAS service by promotional method was to be made in the year 2001, 2002, 2004 and onwards. For certain reasons, to be stated herein after, certain vacancies for these years could not be filled up i.e. one vacancy for the year 2001, 2 vacancies for the year 2002 and 7 vacancies for the year 2004. All these vacancies were carried forward by the Central Government to the year 2005 to be filled up along with the vacancies of 2005. Some officers who were eligible for consideration in the previous year challenged this action of the petitioner herein. In so far as this writ petition is concerned, it may be mentioned that two OAs, namely, OA No. 1097/2006 and OA No. 1137/2006 were filed by some such officers (Respondent Nos. 3 to 7 herein). The action of the petitioner/Central Government was challenged on the ground that vacancy of a particular year should have been filled in that year

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only and even if it could not be filled for certain reasons, there should be a review DPC for that year to fill up the said vacancy. It was also argued that even if the vacancies to be filled up are related to SCS Cadre and candidates from said cadre were not available, then the vacancies should have been filled from the employees belonging to the officers of State Civil Service. The Tribunal found favour with these submissions of respondent Nos. 3 to 7 (applicants in the said OAs). OA No. 1137/2006 has accordingly been allowed vide judgment dated 15.12.2006. In this judgment various aspects are argued by learned counsel for either side which have been discussed by the Tribunal in detail with the aid of various judgments of the Supreme Court. Some of them, which are relevant for which purposes, would be adverted to at the appropriate stage.

To complete the narration of facts, it would be apposite to point out that against this judgment, the State of UP had earlier filed CW No. 129/2007. However, the State of UP withdrew the said writ petition on 11.07.2007 as decision was taken at the State level to implement the judgment of the Tribunal. Union of India had chosen not to challenge the judgment dated 15.12.2006 at that stage. However, after the withdrawal of the writ petition by the State of UP, it dawned on the Union of India to impugn the said judgment and, therefore, present writ petition is filed. That is also the reason given by the petitioner for coming to this Court belatedly.

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We may state at the outset that main grievance of the petitioner relates to the directions given by the Tribunal in Para-59 of the judgment and to appreciate the contention of the petitioner, it would be necessary to read that Para:

“ As regard the seven vacancies earmarked for Non-SCS Officers for the year 2004, we are of the considered opinion that the State Governments were not in a position to fill them up in that year. No concrete steps to fill them up were taken at all. It is not the case of the respondents that UPSC was requested to convene a meeting of the Selection Committee for the purpose and the UPSC, thereafter, invoking the provisions of proviso (c) of Rule 5 of the Selection Regulation, 1997, decided not to hold the meeting for the year 2004. In the fitness of things, therefore, the State Governments should have reviewed their decision in the course of the year and finding that they were not in a position to fill up those vacancies through Non-SCS Officers, released them for SCS Officers. It is also not quite obvious, against the backdrop of un-preparedness discussed above, as to why a disproportionate number of vacancies (7 out of 8), even though keeping the total number of posts earmarked for Non-SCS Officers in the promotion quota within the prescribed upper limit, were earmarked for them in 2004. Sending SOS to the Central Government for doing something quickly to meet the shortage of officers, while practically ensuring that 7 vacancies will not get filled up, shows that there was something amiss. One gets a creeping suspicion that there is more to this saga than meets the eye.”

It is the submission of the petitioner that aforesaid directions could not be given which are in the teeth of Regulation 5 of the 1955 Regulations. Submission was that after the vacancies earmarked for Non-SCS Officers for the year 2004 are filled up from amongst those Officers who belong to SCS Cadre it will disturb the ratio/quota maintained between the Non-SCS Officers.

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It is also contended that there is no provision in the Rules for holding year wise DPC. It is also the contention of the petitioner that there is also no provision for holding review DPC with reference to the particular year. Since these arguments are predicated on the position contained in Rule 5 of the Regulations 1955, we deem it appropriate to reproduce that Rule which is as under:-

5. PREPARATION OF LIST OF SUITABLE OFFICERS :-

5(1) Each Committee shall ordinarily meet every year and prepare a list of such members of the State Civil Service as are held by them to be suitable for promotion to the Service. The number of members of the State Civil Service to be included in the list shall be determined by the Central Government in consultation with the State Government concerned, and shall not exceed the number of substantive vacancies as on the first day of January of the year in which the meeting is held, in the posts available for them under Rule 9 of the Recruitment Rules. The date and venue of the meeting of the Committee to make the selection shall be determined by the Commission;

Provided that no meeting of the Committee shall be held, and no list for the year in question shall be prepared when;

- (a) There are no substantive vacancies as on the first day of January of the year in the posts available for the members of the State Civil Service under Rule 9 of the Recruitment Rules; or
- (b) The Central Government in consultation with the State Government decides that no recruitment shall be made during the year to the substantive vacancies as on the first day of January of the year in the posts available for the members of the State Civil Service under Rule 9 of the Recruitment Rules;

Provided further that where no meeting of the Committee could be held during a year for any reason other than that provided for in the first proviso as and when the Committee meets again, the Select List shall be prepared separately for each year during which the Committee could not meet as on the 31st December of each year.

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EXPLANATION :- In case of Joint Cadres, a separate select list shall be prepared in respect of each State Civil Service.

The submission of learned counsel for the petitioner is that the system of carry forward of vacancies is inbuilt into Regulation 5 of the aforesaid Regulations, vacancies of each year are determined with reference to substantive vacancies of 1st January of the year. It is also submitted that first proviso of Regulation 5(1) provides that no meeting of the Committee shall be held and the selected list for the year in question shall be prepared when there are no substantive vacancies or the Central Government in consultation with the State Government decides that recruitment shall be made during the year to substantive vacancies. This Rule clearly indicates that it is not necessary that determination of vacancies and preparation of the Select List must be done for each of the year. It is further argued that the vacancy which is not filled in a particular year gets merged with the pool of vacancies to be determined for the subsequent year(s) and there is no concept of wait list and review DPC in the Rules or in the Regulations. Learned counsel further argues that method of recruitment to be adopted for the purpose of filling up particular vacancy or vacancies during particular year is to be determined by the Central Government in consultation with the Commission and the State Government concerned. Where a vacancy occurs in a State Cadre which is to be filled under the provisions of Rule 8, the vacancy shall be filled by promotion of the member of

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State Civil Service or as the case may be, by selection of any other office serving in connection with the affairs of the States. This is the position contained in Rule 4(2)(a)(b) and Rule 8(3)(a) of the IAS Recruitment Rules, 1955.

Though the aforesaid arguments may appear to be attractive in the first blush, it loses its sheen and force when we consider these arguments with reference to other provisions of the relevant Rules and Regulations and the manner they are interpreted by the Supreme Court. We observe that all these aspects are considered by the Tribunal in greater details and therefore, it would not be necessary to unnecessarily burden this judgment by repeating the same, more so when after reading the judgment of the Tribunal, we are in agreement with those reasons and the conclusions of the Tribunal. Therefore, we would be indicating our reasons in brief to support the conclusion arrived at by the learned Tribunal.

Before delving into all these issues, it would be relevant to refer to two aspects of this case which, in fact, would be the clinchers. Learned counsel for the State of UP has produced the original records of the case and has drawn our attention to a letter dated 22/26.09.2005, it is a letter addressed by the Additional Secretary Government of India, Department of Personnel & Training, Ministry of Personnel, Public Grievances & Pensions to the Chief Secretary of the Government of UP. As per this communication, the Central

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Government had clearly authorized the State Government to fill up 19 vacancies in the year 2005 (i.e. after taking into consideration the vacancies of 2001, 2002 and 2004 as well) from among SCS Officers. Thus a deliberate and conscious decision was taken by the Central Government itself to fill up the vacancies because of the non-availability of non-SCS Officers from amongst SCS Officers. The plea now raised that the vacancies earmarked for non-SCS Officers cannot be filled from amongst SCS Officers would be of non-avail. Clearly it appears to be an afterthought. That apart, learned counsel for the Petitioner could not produce any relevant Rule or Regulation which would indicate that vacancy of non-SCS Officers cannot be filled by SCS Officer in case non-SCS Officers were not available.

At this stage we may refer to Rule 8 of 1954 Rules and particularly sub Rule 2 thereof which deals with filling up of the vacancies from amongst non-SCS Officers which reads as follows:-

“8(2) The Central Government may, in special circumstances and on the recommendation of the State Government concerned and in consultation with the Commission and in accordance with such regulations as the Central Government may, after consultation with the State Government and the Commission, from time to time, make, recruit to the Service any person of outstanding ability and merit serving in connection with the affairs of the State who is not a member of the State Civil Service of the State (but who holds a gazette post in a substantive capacity).”

Bare reading of the aforesaid provision reveals that persons from SCS Officers Cadres are to be promoted only when such Officers are of

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outstanding ability and merit, serving in connection with the affairs of the State and who are not a member of the Civil Service of the State. In the present case, as noted by the learned Tribunal, no such officers of outstanding merit were available and no such exercise was even done in respect of seven vacancies in the year 2004. Our purpose would be served by reproducing the discussion in this behalf from the judgment of the Tribunal contained in Para-56 thereof, as there is no quarrel about the factual position stated therein. It reads as follows:-

“As regards the 7 vacancies, arising in the year 2004 on account of non-filling up of the posts allocated to non-SCS Officers, the applicants have further argued that even though those vacancies were earmarked for the non-SCS Officers, no concrete steps were taken to fill them up. Thus not even nominations of Non-SCS Officers of outstanding merit and ability were called for from different Departments of the State Government and, naturally, no list of outstanding officers was prepared. No certificate was also provided by the State Government, as required under the Rules, that it was in public interest to fill up the vacancies from outstanding officers of Non-SCS category. No meeting of the Selection Committee was convened for the purpose. As a matter of fact, it was not possible to fill up the vacancies determined for non-SCS officers since their bifurcation between U.P. and Uttranchal had not been completed. Correspondence received from the Central Government, vide letters dated 23.08.2004 and 09.03.2004 (Annexure A-5A Colly.), was not attended to. Hence, in the fitness of things, these vacancies should have been filled by SCS Officers as vacancies of the year 2004. The approach of the respondents, with regard to filling up of the unfilled vacancies for the year 2001, 2002 and 2004, as prayed for by the applicants, is at best ambivalent. On the one hand, they have relied heavily on the judgment of the Hon'ble Supreme Court in **T.N. Administrative Service Officers Association & Anr. V. Union of India & Ors.** (supra) and, have tried to discredit the orders and judgments cited by the applicants in order to argue that the vacancies which remained unfilled after the exercise relating to filling them up had been completed in a particular year are carried forward and become a part of the pool of

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general vacancies available next year. On the other hand, they have admitted that in certain unprecedented situations the unfilled vacancies of a particular year were filled up through a review DPC held for that year **Dr. Vishram Singh Yadav v. Union of India & Ors.** (supra).”

Following position emerges from the reading of this para:

(a) there was no nomination of Non-SCS Officers of outstanding merit and ability and their names were not even called from different Departments of the State Government. Thus no such list of outstanding officers was prepared

(b) No certificate was provided by the State, as required under the Rules, that it was in public interest to fill up those vacancies from outstanding officers of Non-SCS category.

(c) No meeting of the Selection Committee was convened for the purpose.

When there was no material to indicate that there were officers of outstanding merits belonging to Non-SCS category, sub Rule (2) of Rule 8 could not have even been involved. It appears that for this reason that the Central Government vide its communication dated 22/25/9/2005 itself agreed that vacancies could be filled from SCS Cadre. This provision and particularly the expression “in special circumstances” occurring in sub Rule (2) of Rule 8 came up before the Apex Court in the **P.M.Bayas v. Union of India & Others (1993) 3 SCC 319**. The Supreme Court gave following interpretation to the this expression:

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“9. We may examine the scheme of the Rules and Regulations. Rule 4(1) of the Rules provides four sources of recruitment to the IAS. The competitive examination and by promotion of substantive members of the State Civil Service are the two main sources of recruitment. Rule 4(1)(c) provides recruitment to IAS “by selection, in special cases from among persons, who hold in a substantive capacity gazetted posts in connection with the affairs of a State and who are not members of the State Civil Service”. In special cases from among persons” means the selection as special cases of the persons who have established their outstanding merit and ability while serving the State. Members of the State Civil Service who are not ‘outstanding’ but are only ‘good’ and ‘very good’ are also eligible to be considered for appointment to IAS but under Rule 8(2) of the Rules, it is only an ‘outstanding’ officer who is eligible. It is the outstanding merit and ability which makes him a ‘special case’ in terms of Rule 8(2) of the Rules. Rule 8(2) of the Rules. Rule 8(2) of the Rules read with Regulation 3 of the Regulations lays down the procedure for making the special selection provided under Rule 4(1) (c) of the Rules. **The Central Government, being the appointing authority to the IAS, has to be finally satisfied about the existence of the “special circumstances” as a condition precedent for making special recruitment. The “special circumstances” are to be spelled out from Rule 8(2) of the Rules read with Regulation 3 of the Regulations.** Rule 8(2) which talks of “outstanding ability and merit” when read with Regulation 3(1) and 3(4-A) of the Regulations makes it clear that the “special circumstances” required to be seen are (i) the existence of officers with 12 years of continuous service in a gazetted post under the State Government-other than State Civil Officers-who are of outstanding merit and ability and (ii) the satisfaction of the State Government that, in public interest, it is necessary to consider such officers for promotion to the IAS.

10. Reading Rule 8(2) and the Regulations together it is further clear that the process of selection has to be initiated by the State Government and as such it is for the State Government in the first instance to be satisfied regarding the existence of the “special circumstances” as culled out by us in the para above.”

The only other question which needs determination is: whether vacancies of 2001, 2002 and 2004 should have been filled in that year from

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amongst SCS Category Officers or it was permissible to the respondents to carry forward these vacancies in the year 2005?

To answer this question, we first take note of the reasons because of which these vacancies could not be filled in the said years which are as follows:-

<i>Year</i>	<i>Number of vacancies</i>	<i>Reasons</i>
2001	1	Vacancy remaining unfilled in respect of Shri S.V.S. Saxena due to non-availability of integrity certificate.
2002	2	One vacancy remaining unfilled in respect of Shri Data Din Passi, who was not appointed due to non-expunction of adverse remarks and in the absence of integrity certificate. The other due to death of Shri Swaran Kumar Upadhyay, who died on 01.01.2002 before appointment notification dated 21.02.2005.
2004	7	Vacancies determined for non-SCS Officers remaining unfilled as no specific and formal proposal was moved for filling them up by the State Government.

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In so far as, vacancies of 2001 and 2002 are concerned, these were not filled up only because of non-availability of integrity certificate or non-expunging of adverse remarks. Taking into all these facts, the Tribunal has directed that if certain individuals were selected in a particular year but, on account of non-availability of integrity certificate, etc., their names had to be carried forward in terms section proviso (2) read with first proviso (3) of the Regulations 1955. We do not find any infirmity in these directions in the facts of this case.

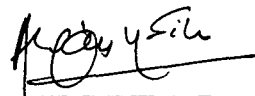
Coming to the vacancies of the year 2004, we may first indicate the second factual circumstances which is highlighted by the respondents before us, before going into the legal aspects of this issue. It was pointed out by Mr. Arora, learned Additional Advocate General appearing for the State of UP that in the year 2000, in a similar circumstance three vacancies remained unfilled which were carried forward to the next year. This action of the Government was challenged by one Dr. Vishram Singh Yadav who filed OA No. 80/2002 before the CAT Lucknow Bench, Lucknow. The said bench decided that OA vide judgment dated 09.07.2003 directing that the vacancies of the year 2000 should be filled by conducting review DPC for that year. This judgment of the Tribunal was initially challenged by filing writ petition in the High Court of Judicature at Allahabad, sitting at Lucknow. However, when the Government could not succeed in getting the stay of the aforesaid judgment, the directions

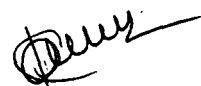
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contained in that judgment were implemented by holding review DPC. Accordingly, a proposal was submitted vide letter dated 26.12.2004 determining the vacancies of the year 2000 and 2001. This proposal was submitted by the State of UP to the Central Government which was accepted by the Central Government and vacancies of the year 2000 were reverted back to that year and communication in this behalf dated 27.04.2004 was sent by the Central Government to the State of UP. Accordingly the notification dated 15.02.2005 was issued by the Government of India, Department of Personnel & Training, Ministry of Personnel, Public Grievances & Pensions and the vacancies were filled by holding review DPC for that year. Even this act of the petitioners would, according to us, estopped the petitioner from raising the contention that they cannot now hold review the DPC. Legally also, such a direction is perfectly valid as it is in tune with the principle of law laid down by the Supreme Court in the case of *Union of India & Others v. Vipinchandra Hiralal Shah reported in (1996) 6 SCC 721* where the Court held that the Selection List for promotion of IAS should be prepared year wise and if these are unfilled vacancies in a particular year, Notional Select List is to be prepared separately for that year and all the eligible officers falling within the zone of consideration in that particular year are to be considered for promotion to the post. This issue, therefore, is no longer res integra and stands authoritatively answered by the aforesaid judgment.

Thus, we do not find any merit in any of the contentions raised by the petitioner in this petition. The petition is accordingly dismissed.

At this stage, Mr. Arora, appearing for the State of UP informs us that because of the pendency of this writ petition not only the vacancies of the years 2001, 2002 and 2004 but even of subsequent years have not been filled up. He further informs us that as of today there are 106 vacancies which are to be filled under this promotion quota and this is seriously affecting the functioning of the administration. In view thereof, we direct the petitioner as well as the State Government to carry out exercise of filling up of the vacancies by convening review DPC within a period of two months from today.


A.K.SIKRI, J


SURESH KAIT, J

February 05, 2009
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For, u/s 151 CPC
(Extension of Time)

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