

Neutral Citation No. - 2024:AHC-LKO:36164

Reserved On: 02.05.2024

Delivered on:-10.05.2024

Court No. - 6

Case :- WRIT - A No. - 3396 of 2024

Petitioner :- Mohammed Faizan And Others

Respondent :- State Of U.P. Thru. Prin.Secy. Addl. Chief Secy. Deptt. Of Appointment Lko. And Others

Counsel for Petitioner :- Prateek Shrivastava, Avinash Singh Vishen

Counsel for Respondent :- C.S.C., Gaurav Mehrotra

Hon'ble Abdul Moin, J.

1. Heard Sri Avinash Singh Vishen, Advocate assisted by Sri Nishant Pandey, Prateek Srivastava and Vedant Srivastava, learned counsel for the petitioners, Sri Ashwani Kumar Rathore, learned Standing counsel appearing on behalf of the respondents no. 1, 3 & 4 and Sri Gaurav Mehrotra, Advocate assisted by Sri Utsav Mishra, learned counsel for the respondent no. 2.
2. Instant writ petition has been filed praying for the following main reliefs:-

"(i) Certiorari quashing the Executive order/letter titled as "शासनादेश संख्या- 1003- /47- का-3-2020-13 /17/2020 dated 20.11.2020; in so far as it grants permission to hold preliminary Eligibility Test without notification of vacancies, in contravention of the UPSSSC Act; as contained in Annexure No. P1 to this writ petition.

(ii) Certiorari quashing the Preliminary Eligibility Test Advertisement dated 01.08.2023 by means of which it has been made mandatory that recruitment to all Group "C" Posts for the year 2023-2024 will be based on the result of PET 2023, to the extent of its application for the post of Junior Analyst (Drug) as contained in Annexure No. P2 to this writ petition.

(iii) Certiorari quashing the clauses of the impugned Advertisement No. 05-परीक्षा/2024 कनिष्ठ विश्रलेषक (औषधि) dated 22.02.2024; in so far as it related to the imposition of arbitrary and illegal eligibility criteria of qualifying Preliminary Eligibility Test 2023 for recruitment on the post of Junior Analyst (Drug); as contained in Annexure No. P3 to this writ petition.

(iv) Mandamus commanding the Opposite Party No. 2 to allow the petitioners to participate in the selection process for the post of

Junior Analyst (Drug) in pursuance of Advertisement No. 05-परीक्षा/2024 कनिष्ठ विश्लेषक (औषधि) dated 22.02.2024 without imposing on the condition of having qualified PET."

3. Bereft of unnecessary details, the case set forth by the learned counsel for the petitioners is that the petitioners are graduates holding a degree in Bachelor of Pharmacy and possesses the requisite qualification for being appointed on the post of Junior Analyst (Drug).
4. The petitioners state that the impugned advertisement dated 22.02.2024, a copy of which is annexure 3 to the writ petition, has been issued by the Uttar Pradesh Subordinate Service Selection Commission (hereinafter referred to as "Commission") inviting applications for the post of Junior Analyst (Drug) specifying that only those candidates can apply who have appeared in the Preliminary Eligibility Test-2023 (Hereinafter referred to as "PET").
5. The contention is that the PET-2023 advertisement, a copy of which is annexure 2 to the writ petition had been issued inviting applications from the candidates to appear in the said examination as a two level examination system has been introduced by the Commission for appointment on various posts as fall under the Commission.
6. The said advertisement has been issued considering the Government order dated 20.11.2020, a copy of which is annexure 1 to the writ petition which has permitted the Commission to hold PET.
7. The argument is that service rules namely the Uttar Pradesh Food Safety and Drug Administration Department Analyst (Food & Drug Laboratory) Service Rules, 2017 (hereinafter referred to as "Rules, 2017") are the rules governing the post of the petitioners, which give the procedure of recruitment in part-V which provides in Rule 16 of the Rules, 2017, a copy of which is annexure 8 to the writ petition, that the direct recruitment on the post of Junior Analyst (Drug) in the service shall be made in accordance with the Uttar Pradesh Direct Recruitment to Group C Post (Mode & Procedure) Rules, 2015 (hereinafter referred to as "Rules, 2015") and further defines in Rule 3 (b) & (k) that the Appointing Authority for

the post in question means the Commissioner, Food Safety & Drug Administration Department Uttar Pradesh and the Subordinate Commission means the Commission. It is contended that the posts in question have only been created vide notification dated 30.11.2023, a copy of which is annexure 9 to the writ petition which, so far as it pertains to the post in question at Serial No. 5 of the chart, are 306 in number. The PET examination having taken place, as per the advertisement issued in August, 2023, cannot govern the posts which have been created subsequently in November, 2023 and as such, the condition of a candidate to appear in the examination to be conducted by the Commission to have appeared in the PET would not govern the case of the petitioners who are all candidates for the said post which have been created subsequently.

8. The other argument is that the Commission is governed by the provisions of the Uttar Pradesh Subordinate Services Selection Commission Act, 2014 (hereinafter referred to as “Act, 2014”), a copy of which is annexure 5 to the writ petition. Section 2 of the Act, 2014 provides that the provisions of the Act, 2014 shall apply in relation to direct recruitment to all Group C posts; the appointing authority, as per Section 4 (a) of the Act, 2014, is defined as in relation to any service of post means the authority empowered to make appointment to such service of post. Section 17 of the Act, 2014 provides that the appointing authority shall determine and intimate to the Commission the number of vacancies to be filled through the Commission during the course of the year of recruitment. As per Section 18 of the Act, 2014, the Commission shall, after intimation of vacancies under Section 17, is required to hold an examination and interview or both. Further, Section 16 of the Act, 2014 provides that the Commission shall, with the previous approval of the State Government, make regulations for the convenient transaction of its business including performance of its functions. Section 23 of the Act, 2014 provides that the Commission may, with the previous approval of the State Government, make or amend regulations relating to discharge of its functions and that the regulation made under sub Section (1) of Section 23 of the Act, 2014, shall not be

inconsistent with the provisions of the Act, 2014 or the rules made thereunder.

9. It is contended that in pursuance to the provisions of Sections 16 & 23 of the Act, 2014, the Regulations namely the Uttar Pradesh Subordinate Services Selection Commission (Procedure & Conduct of Business) Regulations, 2015 (hereinafter referred to as “Regulations, 2015”) have been issued, a copy of which is annexure 15 to the writ petition. Clause 2 (a) of the Regulations, 2015 provides that the Act would mean the Act, 2014; Clause 2 (e) provides that the Commission means the Uttar Pradesh Subordinate Services Selection Commission. Clause 6 provides that the Commission shall make selection of candidates by competitive examination or by interview or by both in accordance with the provisions of the relevant service rules /regulations and that the Commission may, with the prior approval of the Government, hold a combined competitive examination for a group of posts and may also take a preliminary test or examination for screening of candidates.

10. Placing reliance on the provisions of Section 17 (1) of the Act, 2014, the argument of the learned counsel for the petitioners is that when the appointing authority is the authority empowered to make appointment to such service of post and in the case of the petitioners, when the appointing authority of the petitioners is the Commissioner, Food Safety & Drug Administration as such, the commencement of recruitment shall only take place where the appointing authority i.e the Commissioner has determined and intimated to the Commission the number of vacancies to be filled through the Commission which in the instant case are 361 in number and thus there cannot be any occasion for the Commission to have prescribed in the advertisement dated 22.02.2024 the condition of the candidates to have qualified/appeared in the PET so as to be eligible for appearing in the said examination.

11. The further argument is that though the impugned Government order dated 20.11.2020 gives the permission to the Commission to hold the PET without notification of vacancies yet the same would be violative of the

provisions of Act, 2014 more particularly when the appointing authority is the Commissioner as per Rules, 2017. Further, once there is no provision in the Act, 2014 for holding of any preliminary test or PET, as in this case as such, even if any permission has been sought by the Commission in terms of Regulations, 2015 from the State Government for holding of a PET and same has been granted by the State Government, the same would be patently violative of the provisions of the Act, 2014 and thus the Government order dated 20.11.2020 as well as the PET advertisement and the advertisement issued by the Commission prescribing pre-condition of appearing in PET, merits to be quashed.

12. Placing reliance on the step wise process for holding of an examination for filling in the said post, as indicated in paragraph 25 of the writ petition, the further argument of the learned counsel for the petitioners is that considering the provisions of Section 17 of the Act, 2014 read with Rule, 14 of the Rules, 2017 it is only when the determination of the vacancies has been made by the appointing authority and intimated to the Commission that the process of recruitment shall start and thus there cannot be any occasion for the Government to have approved the pre-condition of a candidate to have appeared /qualified in the PET so as to be eligible for appearing in the examination for the post in question which would also be clearly beyond the provisions of the Act, 2014. It is also contended that the impugned Government order has been issued in contravention to the provisions of the Act, 2014 and would fall within the ambit of being excessive delegation. It is also argued that qualifying in the PET is not part of the Rules, 2017.

13. In support of his arguments, learned counsel for the petitioners has placed reliance on the following judgments under the following heads:-

Executive orders cannot violate statutory provisions

1. B.N.Nagarajan & Ors Vs. State of Karnataka reported in 1979 (4) SCC 57
2. Vijay Singh & Ors Vs. State of U.P & Ors reported in 2004 SCC Online All 1656

3. Anurag Mehrotra Vs. State of U.P reported in 2021 SCC OnLine All 913.

Advertisement cannot be repugnant to the statutory Act, Rules & Regulation

1. Ashish Kumar Vs. State of Uttar Pradesh & Ors reported in (2018) 3 SCC 55

2. Renu Vs. District and Session Judge, Tis Hazari reported in 2014 (14) SCC 50

Excessive Delegation

1. Shri Sita Ram Sugar Company Limited and Anr Vs. Union of India reported in 1990 (3) SCC 223

2. Kerela State Electricity Board Vs. Thomas Joseph reported in 2022 INSC 1293.

Equality is a positive concept

1. Gursharan Singh Vs. New Delhi Municipal Committee reported in 1996 (2) SCC 459

14. Placing reliance on the aforesaid judgments as well as the arguments, as raised above, it is prayed that the impugned Government order, the PET advertisement dated 01.08.2023 and the advertisement dated 22.02.2024 so far as it imposes conditions of having qualified/appeared in the PET-2023 be quashed and the petitioners be permitted to participate in the selection process for the post of Junior Analyst (Drug) in pursuance to the said advertisement.

15. Per contra, Sri Gaurav Mehrotra, learned counsel appearing on behalf of the respondent no. 3 has raised a preliminary objection after the learned counsel for the petitioners had addressed on the entire issue that the advertisement dated 01.02.2024 indicating the condition for the candidates to have qualified/appeared in the PET-2023, has already been upheld by the writ Court vide judgment and order dated 04.03.2024 and upon a challenge being raised to the said judgment by filing **Special Appeal No. 57 of 2024 Inre; Ekta Singh and 3 Ors Vs. State of U.P and Ors** even the Division Bench of this Court by means of detailed judgment and order dated

03.04.2024 has upheld the judgment of the writ court as well as the advertisement dated 01.02.2024 and thus the writ petition filed by the petitioners deserves to be dismissed on this ground alone.

16. Placing reliance on the judgment of this Court passed in Special Appeal No. 193 of 2022 in re: **Smt. Vijay Laxmi vs. State of U.P. and others** which in turn had challenged the writ Court judgment and order dated 29.04.2022 passed in Writ- A No. 2460 of 2022 whereby the challenge raised to the Government order dated 20.11.2020 had been negated by the writ Court, the argument of Sri Gaurav Mehrotra, learned counsel for the respondent no. 3 is that once the writ Court has already upheld the validity of the Government order dated 20.11.2020 which judgment in turn has been upheld by the Division Bench of this court consequently, this Court may follow the judgment passed by the Division Bench of this Court in the case of **Smt. Vijay Laxmi (supra)**. It is also contended that the Government order dated 20.11.2020 had also been challenged in a bunch of petitions of which leading being **Writ-A No. 25 of 2022 Inre; Jyoti Kumar Vs. State of U.P and Ors** and the validity of the Government order dated 20.11.2020 has been upheld with the said writ petition being dismissed by the writ Court vide judgment and order dated 14.10.2022. It is argued that when the validity of the Government Order has been upheld, consequently, the instant petition again challenging the same government order, may be on new grounds, would not be maintainable. In this regard, reliance has been placed on the Constitution Bench judgment of the Apex Court in the case of **Ambika Prasad Mishra vs. State of U.P. and others- 1980(3) SCC 719**.

17. Responding to the said preliminary objection, learned counsel for the petitioners argues that despite the aforesaid Division Bench judgment in the case of **Smt. Vijay Laxmi (supra) & Jyoti Kumari (supra)**, as the Division Bench has not considered the provisions of Section 17 & 18 of the Act, 2014 which was not an argument which had been advanced before the writ Court and the Division Bench of this Court consequently, the doctrine

of sub-silentio and per incuriam would be attracted as laid down by the Apex Court and as such, the petitioners are perfectly entitled to raise a challenge to the said Government order on new grounds which are now available to them.

18. In this regard, reliance has been placed on the following judgments:-

1. MCD Delhi Vs. Gurnam Kaur reported in 1989 (1) SCC 101
2. State of U.P Vs. Synthetic Chemicals Ltd reported in 1991 (4) SCC 139.
3. Hyder Consulting UK Ltd. Vs. State of Orrisa reported in 2015 (2) SCC 189

19. Sri Avinash Singh Vishen, learned counsel for the petitioners also states that though the Commission can hold PET but only after following the provisions of Section 18 of the Act, 2014.

20. On merits, the argument of Sri Mehrotra is that the Regulations, 2015 empower the Commission to make selection of candidates by competitive examination or by interview in accordance with the provisions of relevant service rules/regulations and that in terms of sub Clause (2) of Clause 6 of the Regulations, 2015, the Commission may, with the prior approval of the Government, hold a combined competitive examination for a group of posts and may also take a preliminary test or examination for screening of candidates. Sub Clause (5) (6) of Clause 6 of the Regulations, 2015 also provide that the Commission may hold a preliminary examination/screening test for finding out suitable candidates for admission to main examination and that the preliminary examination shall mean a screening test to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion, as fixed by the Commission, in each category for admission to the main examination.

21. Considering the provisions of Clause 6 of Regulations, 2015, a request had been sent to the State Government for holding of a combined competitive examination which has been accorded by the Government by

means of the Government order dated 20.11.2020 and as such there is no illegality or infirmity in the same. Further, once the approval has been accorded by the State Government consequently, a PET examination is being conducted every year for the purpose of preparation of the eligible candidates in order to make them appear in the main examination in the ratio of 1:15 as has been provided in the advertisement dated 22.02.2024 more particularly Clause 10 of the said advertisement.

22. Sri Mehrotra further argues that when the Commission was empowered in terms of Clause 6 of the Regulations, 2015 to hold a preliminary test for screening of candidates and the same has been approved by the State Government and no challenge has been raised to the provisions of Clause 6 of the Regulations, 2015 as such, it cannot be said that the Government order is bad in the eyes of law.

23. The further argument of Sri Mehrotra is that Rule 16 of the Rules, 2017 provides for direct recruitment for the post in question to be made in accordance with the Rules, 2015. Rule 2 of Rules, 2015 itself provides that these rules shall have effect notwithstanding anything to the contrary contained in any other service rule made by His Excellency the Governor. Rule 3 of the Rules, 2015 apply to direct recruitment for Group-C post under the rule making power. Further, Rule 8 of the Rules, 2015 also provides that the procedure for direct recruitment, syllabus etc. shall be as prescribed by the Commission from time to time with the approval of the Government and thus, it is the provisions of the Act, 2014 read with the Regulations, 2015, the Rules, 2015 read with Rule, 2017 which empower the Commission to have formulated the condition of PET with the prior approval of the State Government as correctly accorded vide Government order dated 20.11.2020 and thus there is illegality or infirmity in the same.

24. Heard learned counsels for the contesting parties and perused the records.

25. From the arguments as raised by the learned counsels for the contesting parties and perusal of record, it emerges that all the petitioners are aspirants for the selection for the post of Junior Analyst (Drug). The advertisement for the same has been issued by the Commission on 22.02.2024. However, a condition has been imposed in the said advertisement that only those candidates can appear in the said examination who have qualified the PET 2023 or have appeared in the same. In turn the said condition is based on the Government Order dated 20.11.2020 per which permission has been granted to hold the PET.

26. The preliminary objection as raised by Sri Gaurav Mehrotra, learned counsel appearing for the Commission, is that the validity of the Government Order dated 20.11.2020 has been upheld in a bunch of petitions namely **Jyoti Kumari (supra) & Vijay Laxmi (supra)** consequently the instant petition again challenging the Government Order dated 20.11.2020 would not be maintainable.

27. The response of learned counsel for the petitioners is that the aforesaid judgments would be hit by the principle of sub-silentio and per incurium keeping in view the judgments of the Apex Court in the cases of **Gurnam Kaur (supra)**, **Synthetic Chemicals Ltd. (supra)** and **Hyder Consulting UK Ltd. (supra)**.

28. Placing reliance on the aforesaid judgments, the argument of learned counsel for the petitioners is that the writ Court & Division Bench judgment of this Court in the case of **Jyoti Kumari (supra) & Vijay Laxmi (supra)** respectively would be judgments which have been given in ignorance of the terms of the Act, 2014 and the Regulations, 2015 and consequently as this aspect of the matter has not been considered in the Division Bench judgments accordingly the judgments would be hit by the principle of sub-silentio and would be per incurium.

29. In order to consider the preliminary objection, the Court will have to see as to what the judgments of **Jyoti Kumari (supra) & Vijay Laxmi (supra)** have held.

30. The Division Bench of this Court in the case of **Jyoti Kumari (supra)** while considering the Government order dated 20.11.2020 has held as under:-

"The petitioners in the present bunch of petitions claims to have been working on the post of Health Worker (female)/ANM (Auxiliary Nurse Midwife) in different districts of the state of Uttar Pradesh on contract basis and have sought to challenge the legality & validity of the Government order dated 20.11.2020, to the extent it grants approval to the Uttar Pradesh Subordinate Services Selection Commission for holding two-level/phase examination system for Group "C" post including the post of Health Worker (female).

.....It is the case of the petitioners that the said PET being conducted by the Uttar Pradesh Subordinate Services Selection Commission is in complete violation of the Uttar Pradesh Medical Health and Family Welfare Department, Health workers and Health Supervisors (Male & Female) Non-gazette service Rules, 2018 relating to experience relaxation, direct recruitment etc. The petitioners have also grounded their writ petition on the order dated 10.08.2021 passed by the state government, wherein, although the state government rejected the proposal of the Health Department for exemption/relation of the PET for the post of Health Worker (female) as selection process has already commenced, but has allegedly assured that the said proposal shall be considered in future and as such it has been alternatively prayed that permission may be granted to the petitioners to appear in the written test in pursuance to the advertisement dated 15.12.2021 for the post of Health worker(female).....

This court has given its anxious thoughts to the issue involved in the present writ petition and finds that the issue in the present case has been already dealt with earlier by a coordinate bench of this court, as has been rightly pointed by the Ld. Counsel for the respondents. The said judgment dated 04.02.2022 squarely applies to the four corners of the facts of the present case. The said judgement can be profitably curled in as follows:

"..... The Court may, first of all, refer to the Uttar Pradesh Medical, Health and Family Welfare Department Health Workers and Health Supervisors (Male and Female) Non-Gazetted, Service Rules, 2018 (hereinafter referred to as "the Rules, 2018").

Part-V of the said Rules deals with the procedure for recruitment. As per Rule 14 contained therein the appointing authority is required to determine the number of vacancies to be filled during the course of the year of recruitment etc and the number of vacancies to be filled through the Commission are required to be intimated to it. Rule 15(a) of the Rules, 2018 reads as under: -

"15. (a) Direct recruitment to the Posts of Health Worker (Male) and Health Worker (Female) shall be made in accordance with the Uttar Pradesh direct recruitment to Group "C" Posts (Mode and Procedure), Rules, 2015, as amended from time to time."

Clause (b) and (c) of Rule 15 of the Rules, 2018 deal with weightage to a person who is working as Auxiliary Nurse Midwife on contract basis which is not relevant for the purposes of this case.

In view of Rule 15 (a) of the Rules, 2018 direct recruitment to the posts of Health Worker (Female) is to be made in accordance with the Uttar Pradesh Direct Recruitment to Group 'C' Posts (Mode and Procedure), Rules, 2015, (hereinafter referred to as 'the Rules, 2015') as amended from time to time. The Court may, therefore, straightaway referred to these Rules of 2015. Rule 8(1) of the Rules, 2015 deals with the procedure for direct recruitment and it reads as under:-

"8(1) The procedure for direct recruitment, the syllabus, marks of written examination/interview and the rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government." Now, as per Rule 15 (a) of the Rules, 2015 Procedure for Direct Recruitment etc shall be such as prescribed by the Commission from time to time with the approval of the Government.

Now, in this very context, the Court may refer to U.P. Subordinate Services Selection Commission (Procedure & Conduct of Business), Regulation, 2015 (hereinafter referred to as 'the Regulation, 2015') which have been made by the U.P. Subordinate Services Selection Commission, with the prior approval of the State Government, in exercise of powers conferred by Section 16 and 23 of the U.P. Subordinate Services Selection Commission Act, 2014. Now, Regulation 6 of the said Regulation, 2015 deals with the procedure for selection of candidates. The Regulation 6 of the Regulation, 2015 is quoted hereinbelow:

"(1) The Commission shall make selection of candidates examination or by interview or by both through objective or other form of test in accordance with the provisions of the relevant service rules/regulations.

(2) The Commission may with the prior approval of the Government, hold a combined competitive examination for a group of posts and may also take a preliminary test or examination for screening of candidates.

(3) The Commission shall advertise the vacancies through the Print media or Electronic media or both and invite applications from eligible candidates. Manner of inviting application forms includes online submission of application forms through Internet as prescribed by the Commission. Applications received in response to advertisement shall be scrutinized by the office in the manner determined from time to time.

(4) In making selection by competitive examination or interview including preliminary examination or test, the Commission may take recourse to modern testing aids including the use of computers at one or more stages of selection viz the stages of receipt and processing of applications, issue of call letters, evaluation of answer books, issue of interview letters and processing of results under the close supervision of one or more officers of the Commission to be nominated by the Chairperson.

5) Notwithstanding anything to the contrary contained in relevant Service Rules or Government orders regarding recruitment, the Commission may hold preliminary examination/screening test for finding out suitable candidates for admission to main examination or interview, as the case may be.

(6) Preliminary examination shall mean screening test to be conducted by the

Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved and unreserved for admission to the main examination or interview, as the case may be.

(7) Preliminary examination shall be conducted in the manner prescribed in the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rules, 1986 as amended from time to time, which is deemed to be adopted for the said purpose. The marks obtained by the candidates in the preliminary examination/screening test shall not be counted for determining final order of merit.

(8) The Commission shall fix the place, dates and time of examination which includes preliminary examination/ screening test and main examination, as the case may be.

(9) The centers of examinations shall be fixed with prior approval of the Commission.

(10) All arrangements for such examinations shall be made by the Controller of Examination cum Joint Secretary in consultation with the Secretary and in accordance with such directions as may be issued by the Commission in that behalf."

On a bare reading of the above quoted Regulation 6, it is clear that the Commission is empowered to take a preliminary test or examination for screening of candidates with the prior approval of the Government. Sub-regulation (5) of the Regulation 6, in fact, goes on to state that notwithstanding anything contained in relevant service rules or government orders regarding recruitment, the Commission may hold preliminary examination/ screening test for finding out suitable candidates for admission for main examination or interview, as the case may be.

Sub-regulation (6) of Regulation 6 says that the preliminary examination shall mean screening test to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved and unreserved for admission to the main examination or interview, as the case may be.

Sub-regulation (7) of Regulation (6) says that preliminary examination shall be conducted in the manner prescribed in the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Eligibility Test Rules, 1986 as amended from time to time, which is deemed to be adopted for the said purpose. The marks obtained by the candidates in the preliminary examination/ screening test shall not be counted for determining final order of merit.

Thus, the only argument raised by Sri A.P. Srivastava, learned counsel for the petitioner that there is no provision for holding a preliminary test is belied from the provisions quoted hereinabove. It is not his case that prior approval of the Government has not been taken before holding such preliminary test, nevertheless, as informed by Sri Mehrotra such prior approval has been taken and is referred in the letter of the Commission dated 22.07.2021.

This apart, learned counsel for the Commission also informs the Court that though the petitioners have annexed a letter of Additional Chief Secretary, Medical & Health dated 07.07.2021 requesting the Commission to do away with the provision for Preliminary Eligibility Test for the post of Health Workers (Female) for which the Auxiliary Nurse Midwife are eligible for being considered, what the petitioners have not disclosed is that based on this, the Commission had sought guidance from the Karmik Department of the State

Government vide its letter dated 22.07.2021 and Karmik Department of the State Government informed the Commission with a copy of the decision to the Additional Chief Secretary, Medical & Health that the proposal of the department for doing away with the preliminary eligibility test cannot be accepted at this stage when the selection/ examination has already been set in motion.

Be that as it may, in view of the discussion already made, as no other ground has been pressed by learned counsel for the petitioner before this Court and there is a provision under which the preliminary test could be held by the Commission, the post being within the purview of the Commission and there being no dispute in this regard, the petition fails and is dismissed." Further, this court has been informed that an intra-court appeal had been filed against the aforesaid order of the Ld. Coordinate bench, which was also dismissed vide an order dated 09.03.2022 passed in Special Appeal No. 94 of 2022, wherein the Hon'ble Division bench has by upholding the Judgment passed by the Ld. Single Judge has inter-alia concluded:

"....For the reasons disclosed and discussion made above, we are in complete agreement with the judgment passed by the learned Single Judge which is under challenge herein. The special appeal is, thus, dismissed."

This court is also in complete agreement with the reasoning and discussion given by the Ld. Single Judge and the Hon'ble Division Bench of this Court in Judgment dated 04.02.2022 passed in Writ A 96 of 2022 (Smt. Mridul and Others V/s State of U.P & Ors.), which was upheld vide order dated 09.03.2022 in Special Appeal No. 74 of 2022. Further, as far as the specific argument of the Ld. Counsel of the petitioner that his contention relating to the relaxation of age in view of rule 10 of the service rules, 2018 is concerned, this court finds that this court in Judgment dated 07.05.2022 in Special Appeal No. 193 of 2022 (Vijay Laxmi and Others V/s State of U.P & Ors.), has already dealt the said aspect vividly at paragraph 8,9 and 10 as follows:

"8. The appellant-petitioners had assailed the Advertisement dated 25-05- 2021 and 15-12-2021 mainly on the ground that the maximum age prescribed in the Advertisement violates the provision contained in Rule 10 of the Uttar Pradesh Medical, Health and Family Welfare Department Health Workers and Health Supervisor (Male and Female) non-Gazetted, Service Rules, 2018 (hereinafter referred to as "Rules of 2018"), which provides as under:-

"A candidate for direct recruitment must have attained the age of eighteen years and must not have attained the age of more than forty years on the first day of July of the calendar year in which vacancies for direct recruitment are advertised: Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be notified by the Government from time to time shall be greater by such number of years as may be specified. Provided further that the upper age limit for such candidates who was 4 working as auxiliary Nurse Midwife in the medical, Health and Family Welfare Department, by the government, Uttar Pradesh on contract basis and who possess the qualification prescribed in the rule-8(2) of these rule shall be greater by such number of completed years of services as they have rendered on contract basis subject to be maximum of five years for enabling them to become eligible for being considered for direct recruitment."

9. The learned counsel for the appellant-petitioners contended that as per the second Proviso appended to the aforesaid Rule 10 of the Rules of 2018, Health Worker (Female) are entitled to get a relaxation in the upper age limit of the

number of completed years of service rendered on contractual basis, upto the maximum of 5 years. He submitted that paragraph-6 of the Advertisement dated 25-05-2021 provides that a candidate who has completed the age of 40 years, will not be eligible for appearing in PET and this condition violates Rule 10 of the Rules of 2018.

10. Rejecting the aforesaid submission, the learned Single Judge held that a perusal of Condition No. 6 of the Advertisement reveals that it specifically mentions that a candidate would be entitled to get relaxation in the upper age limit as per the Regulations / Government Orders issued from time to time. It further clarifies that a candidate, who has qualified the PET, would be entitled to get relaxation in the age limit as per the service Rules applicable to the concerned post. Therefore, the submission of the Appellants-petitioners, that the advertisement provides for the upper age limit of 40 years which violates Rule 10 of the Rules 2018, is unacceptable as paragraph-6 of the Advertisement clearly states that relaxation in upper age limit would be admissible as per the relevant service rules / Government Orders."

Thus, this court is of the considered opinion that all the issues raised by the petitioner stands decided by this court in one matter or the other and the issues raised are no longer res integra. Moreover, this court cannot be oblivious of the law of precedents, which forms the foundation of administration of Justice and it has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law. The Hon'ble Supreme court in the case of Sant Lal Gupta and Ors. vs. Modern Co-operative Group Housing Society Ltd. and Ors., (2010)13SCC336, held that it was neither desirable nor permissible by the coordinate Bench to disapprove the earlier judgment and take view contrary to it. A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. A bench must follow the decision of a coordinate bench and take the same view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench.

To the same effect is the judgment of the Apex Court reported in the State of Punjab and another versus Devans Modern Breweries Ltd. and another, (2004) 11 SCC 26, wherein paragraph 339 laid down the following: - "339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

In view of the above, this court does not find any merits in the present writ petition and as such the same is accordingly dismissed in the above terms. There shall be no order as to costs. "

31. The Division Bench of this Court in the case of **Vijay Laxmi (supra)** while considering the special appeal filed challenging the judgment of the writ Court passed in Writ-A No. 2460 of 2022 Inre; Smt. Vijay Laxmi Vs. State of U.P and Ors wherein the challenge raised to the Government order dated 20.11.2020 had been negated and while considering the Government order dated 20.11.2020 has held as under:-

*"2. By means of this intra-court appeal under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952, the appellant-petitioner seeks to challenge the judgment and order dated 29.04.2022 passed by the learned Single Judge dismissing Writ A No. 2460 of 2022 filed by the appellant-petitioner challenging the advertisement issued on 25-05-2021 for holding a Preliminary Eligibility Test (PET) for preparing a shortlist of candidates for making selections to various Group C posts under the State Government, and the advertisement issued on 15-12-2021 for holding the main examination for making selections to the posts of Health Worker (Female)/Auxiliary Nurse Midwife (ANM). **The petitioners further challenged the validity of a Government Order dated 20-11-2020, whereby the Government laid down the procedure for making applications and holding a two-tier examination for making recruitment to various Group C posts as also the order dated 10-08-2021 passed by the State Government which recites that as the selection process by holding PET had already started, it will not be proper to separate the posts of Health Worker (Female) from the selection process as per the proposal of the Health Department and this proposal can be considered in future.** The appellant-petitioner also challenged the notification dated 05-04-2022 issued by the UPSSSC, whereby the candidates who had scored even '0' marks in the Preliminary Eligibility Test (PET) were declared qualified on the basis of their normalized score. The appellant-petitioners sought a direction to allow them to appear in the main examination for the post of Health Worker (Female) which was scheduled to be held on 08-05-2022.*

17. The learned counsel for the appellant-petitioners next submitted that the Government Order dated 20-11-2020 provides that instead of total marks obtained, only percentile score should be declared and the candidates of the main examination should be short listed on that basis. However, the appellant-petitioners have themselves submitted that subsequently on 05-04-2022, an information was issued by the UPSSSC stating that all such candidates as had obtained a positive normalized score (more than "0") in the PET 2021, have been shortlisted for appearing in the main examination. His submission is that Condition No. 3 of the Advertisement dated 25-05-2021 provides that a merit wise short listing of the candidates will be done on the basis of their score in the PET and it does not refer to normalization score.

18. However, we find that Condition No. 8 of the Advertisement provides that if the test is conducted in more than one shifts, normalization method will be applied. Information in this regard was already been given to the candidates by means of a notification dated 22-05-2019 issued by the UPSSSC. The said notification further stated that the decision in this regard by the UPSSSC will be

final. It is not the case of the Appellants-Petitioners that the PET was not conducted in more than one shifts. Therefore, we are unable to accept the aforesaid submission of learned counsel for the appellant-petitioners.

19. For the reasons aforesaid, we do not find any reason to interfere in the judgment and order dated 29.04.2022 passed by the learned Single Judge which is under appeal herein. The special appeal being devoid of merit, is hereby dismissed. "

32. It is thus apparent that two Division Benches of this Court have upheld the validity of the Government order dated 20.11.2020.

33. However, learned counsel for the petitioners has cited the under noted judgments to argue that the aforesaid Division Bench judgment would be hit by the doctrine of Sub Silentio and would be Per Incuriam. For the sake of convenience, the judgments cited on behalf of the petitioners and the relevant observations are reproduced below:-

1. MCD Delhi Vs. Gurnam Kaur reported in 1989 (1) SCC 101
2. State of U.P Vs. Synthetic Chemicals Ltd reported in 1991 (4) SCC 139.
3. Hyder Consulting UK Ltd. Vs. State of Orrisa reported in 2015 (2) SCC 189

34. The Apex Court in the case of **Gurnam Kaur (supra)** has held as under:-

"11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das' case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the Court on the question or not whether any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a

PG NO 939 pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio. "

35. The Apex Court in the case of **Synthetic Chemicals Ltd. (supra)** has held as under:-

"39. But the problem has arisen due to the conclusion in the case of Synthetic and Chemicals (supra). The question was if the State legislature could levy vend fee or excise duty on industrial alcohol. The Bench answered the question in the negative as industrial alcohol being unfit for human consumption the State legislation was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the VIIth Schedule. While doing so the Bench recorded the conclusion extracted earlier. It was not preceded by any discussion. No reason or rationale could be found in the order. This gives rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is per incuriam and is liable to be ignored.

40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium.' English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (1944 IKB 718 Young v. Bristol Aeroplane Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey, [1962] 2 SCR 558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.

41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of

law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.*, [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gumam Kaur*, [1989] 1 SCC 101. The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *Shama Rao v. State of Pondicherry*, AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

42. Effort was made to support the conclusion, indirectly, by urging that the State having raised same objections by way of review petition and the same having been rejected it amounted impliedly as providing reason for conclusion. Law declared is not that can be culled out but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation. In the order of brother Thommen, the extracts from the judgment of the Constitution Bench quoted in extenso demonstrate that the question of validity of levy of sales and purchase tax was neither in issue nor was it raised nor is there any discussion in the judgment except of course the stray argument advanced by the learned Attorney General to the following effect.

"But alcohol not fit for human consumption are not luxury and as such the State Legislatures according to Attorney General will have no power to levy tax on such alcohol."

Sales tax or purchase tax under Entry 54 is levied on sale or purchase of goods. It does not contemplate any distinction between

luxury and necessity. Luxuries are separately taxable under Entry 62. But that has nothing to do with Entry 54. What prompted this submission is not clear. Neither there was any occasion nor there is any constitutional inhibition or statutory restriction under the legislative Entry nor does the taxing statute make any distinction between luxuries and necessities for levying tax. In any case the Bench did not examine it nor did it base its conclusions on it. In absence Of any discussion or any argument the order was founded on a mistake of fact and, therefore, it could not be held to be law declared. The Bench further was not apprised of earlier Constitution Bench decisions in Hoechst Chemicals v. State of Bihar, AIR 1983 SC 1019 and Ganga Sugar Mill v. State of U.P., [1980] 1 SCR 769 which specifically dealt with the legislative competence of levying sales tax in respect of any industry which had been declared to be of public importance. Therefore, the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol with utmost respect fell in both the exceptions, namely, rule of sub-silentio and being in per incurium, to the binding authority of the precedents."

36.The Apex Court in the case of **Hyder Consulting UK Ltd. (supra)** has held as under:-

"46. Before I consider the correctness of the aforementioned decisions, it would be necessary to elaborate upon the concept of "per incuriam". The latin expression per incuriam literally means 'through inadvertence'. A decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the Court of record. As regards the judgments of this Court rendered per incuriam, it cannot be said that this Court has "declared the law" on a given subject matter, if the relevant law was not duly considered by this Court in its decision. In this regard, I refer to the case of State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, wherein Justice R.M. Sahai, in his concurring opinion stated as follows:

"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. ..."

47. Therefore, I am of the considered view that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per

incuriam may apply. The said principle was also noticed in the case of Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356."

37. On the other hand, the Constitution Bench judgment of the Apex Court in the case of **Ambika Prasad Mishra (supra)** has held as under:-

*"Thus we get the statutory perspective of agrarian reform and so, the constitutionality of the Act has to be tested on the touchstone of Art 31A which is the relevant protective armour for land reform laws. Even here, we must state that while we do refer to the range of constitutional immunity Art. 31A confers on agrarian reform measures we do not rest our decision on that provision. Independently of Art. 31A, the impugned legislation can withstand constitutional invasion and so the further challenge to Art. 31A itself is of no consequence. The comprehensive vocabulary of that purposeful provision obviously catches within its protective net the present Act and, broadly speaking, the antiseptic effect of that Article is sufficient to immunise the Act against invalidation to the extent stated therein. The extreme argument that Art. 31A itself is void as violative of the basic structure of the Constitution has been negated by my learned brother, Bhagwati, J. in a kindred group of cases of Andhra Pradesh. The amulet of Art. 31A is, therefore, potent, so far as it goes, but beyond its ambit it is still possible, as counsel have endeavoured, to spin out some sound argument to nullify one section or the other. Surely, the legislature cannot run amok in the blind belief that Art. 31A is omnipotent. We will examine the alleged infirmities in due course. It is significant that even apart from the many decisions upholding Art. 31A, Golak Nath's case decided by a Bench of 11 Judges, while holding that the Constitution (First Amendment) Act exceeded the constituent power still categorically declared that the said amendment and a few other like amendments would be held good based on the doctrine of prospective over-ruling. The result, for our purpose, is that even Golak Nath's case has held Art. 31A valid. The note struck by later cases reversing Golaknath does not militate against the vires of Art. 31A. Suffice it to say that in the Kesavananda Bharati's case. Article 31A was challenged as beyond the amendatory power of Parliament and, therefore, invalid. But, after listening to the marathon erudition from eminent counsel, a 13 Judges Bench of this Court upheld the vires of Article 31A in unequivocal terms. **That decision binds, on the simple score of stare decisis and the constitutional ground of Art. 141. Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high-pressure advocacy, cannot persuade us to re-open, what was laid down for the guidance of the nation as a***

solemn pre-position by the epic Fundamental Rights case. From Kameshwar Singh and Golak Nath (supra) through Kesavananda (supra) and Kanan Devan to Gwalior Rayons and after Art. 31A has stood judicial scrutiny although, as stated earlier, we do not base the conclusion on Art. 31A. Even so, it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blowup. This, if permitted, may well be a kind of judicial destabilisation of State action too dangerous to be indulged in save where national. crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shakeup. It is surely wrong to prove Justice Roberts of the United States Supreme Court right when he said.

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket good for this day and train only.. It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion. should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions".

6. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority "merely because it was badly argued, inadequately considered and fallaciously reasoned". And none of these misfortunes can be imputed to Bharati's case (supra). For these reasons, we proceed to consider the contentions of counsel on the clear assumption that Art. 31A is good. Its sweep is wide and indubitably embraces legislation on land ceilings. Long years ago, in Ranjit v. State, a Constitution Bench, speaking through Hidayatullah, J., dwelt on the wide amplitude of Art. 31A, referred to Precedents of this Court on agrarian reform vis a vis Art. 31A and concluded that equitable distribution of lands, annihilation of monopoly of ownership by imposition of ceiling and regeneration of the rural economy by diverse planning and strategies are covered by the armour of Art. 31A.

(emphasis by the Court)

38. From a perusal of the judgments of the Apex Court in the cases of **Gurnam Kaur (supra), Synthetic Chemicals Ltd. (supra) and Hyder Consulting UK Ltd. (supra)**, it emerges that where a judgment has been

passed in ignorance of any law or statute or when a particular point of law involved in the decision is not perceived by the court then the said decision would not be binding.

39. On the other hand, the Constitution Bench of the Apex Court in the case of **Ambika Prasad Mishra (supra)** has held that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high-pressure advocacy would not persuade to re-open what was laid down in the earlier judgments.

40. Incidentally, the judgment of the Apex Court in the case of **Ambika Prasad Mishra (supra)** is a Constitution Bench judgment which has not been considered by the Apex Court in the latter judgments in the cases of **Gurnam Kaur (supra)**, **Synthetic Chemicals Ltd. (supra)** and **Hyder Consulting UK Ltd. (supra)** which incidentally are the judgments rendered by 3 Hon'ble Judges, 2 Hon'ble Judge, and 3 Hon'ble Judges respectively and thus whatever grounds are being taken by the learned counsel for the petitioners to raise a challenge to the Government Order dated 20.11.2020 cannot be considered now more particularly keeping in view the Division Bench's judgment of this Court in the case of **Vijay Laxmi (supra) & Jyoti Kumari (supra)** wherein the challenge to the said Government Order has been repelled.

41. Keeping in view the aforesaid discussion and the principle of law laid down by the Constitution Bench in the case of **Ambika Prasad Mishra (supra)** it is thus apparent that the petitioners cannot be permitted to raise challenge to the same Government order, may be on new grounds, more particularly when the validity of the said Government order has been upheld by a Division Benches of this Court in the case of **Vijay Laxmi (supra) & Jyoti Kumar (supra)** and the said judgments would be binding on this Court.

42. Accordingly, the preliminary objection as raised by learned counsel for the Commission is upheld and the writ petition is dismissed.

Order Date :- 10/05/2024

Pachhere/A. Katiyar

(Abdul Moin, J.)