

Reserved**AFR****Case :-** WRIT-A No.28394 of 2021**Petitioner :-** Lucknow Nagar Nigam Thru. Nagar Ayukt**Respondent :-** State Public Service Tribunal Thru. Chairman and another**Counsel for Petitioner :-** Vishal Kumar Upadhyay, Namit Sharma**Counsel for Respondent :-** Shikhar Anand,Amit Kumar,Birendra Kumar Yadav,Lalta Prasad Misra,M.K. Yadav,Satendra Jaiswal**connected with****Case :-** WRIT-A No.28396 of 2021**Petitioner :-** Lucknow Nagar Nigam Thru. Nagar Ayukt**Respondent :-** State Public Service Tribunal Thru. Chairman and another**Counsel for Petitioner :-** Vishal Kumar Upadhyay,Namit Sharma**Counsel for Respondent :-** Shikhar Anand,Birendra Kumar Yadav,Jag Mohan Singh, Lalta Prasad Misra,M.K.Yadav,Satendra Jaiswal**Hon'ble Attau Rahman Masoodi, J.****Hon'ble Brij Raj Singh, J.*****(Delivered by Brij Raj Singh, J.)***

1. Both the writ petitions under Article 226 of the Constitution of India have been filed seeking quashing of the impugned judgement and orders dated 16.08.2021 passed by the State Public Services Tribunal (for short "the Tribunal"), whereby the claim petitions filed by Rajesh Kumar and Sachin Kumar (hereinafter referred to as "the answering opposite parties no.2") impugning the orders dated 27.08.2016 along with consequential orders dated

08.09.2017 and 27.11.2019 cancelling their appointment letters, have been allowed.

Brief Facts:-

2. Nagar Nigam, Lucknow issued an advertisement to fill up 72 backlog posts for clerical cadre under Other Backward Class, Scheduled Caste and Scheduled Tribe categories, which includes 40 posts for Other Backward Class category, 27 posts for Scheduled Caste category and 5 posts for Scheduled Tribe category. In the advertisement, the requisite qualification has been prescribed that the candidate should have possessed Intermediate qualification with 25 words per minute Hindi typing speed. In pursuance of the aforesaid advertisement, answering opposite parties no.2 applied from Other Backward Class and Scheduled Caste category and cleared the written examination. Thereafter, call letters were issued to the answering opposite parties no.2 for typing test vide letter dated 13.10.2009. Answering opposite parties no.2 were successful in typing test and, therefore, they were called for interview on 12.4.2010 and 24.4.2010 respectively. Thereafter, select list was prepared by the selection committee and the cut off marks for selection was 32 for Other Backward Class and Scheduled Caste categories, whereas answering opposite parties no.2 had secured 24.14 and 30.86 marks respectively, therefore, they were not selected. However, surprisingly answering opposite parties no.2 were issued appointment letters on 26.2.2011 in spite of the fact that they were not selected and they were given the joining on 9.8.2011 and 6.9.2011 respectively.

3. An FIR at Case Crime No.588 of 2013, under Section 408 IPC, Police Station Hazratganj, District Lucknow came to be lodged on 28.12.2013 against the employees of the Nagar Nigam, who were involved in committing the fraud in issuing fake appointment letters to the answering opposite parties no.2 and others. On coming to know the factual situation that answering opposite parties no.2 were working though they were not selected, but their appointment letters were cancelled by the competent authority vide order dated 27.8.2016.

4. Aggrieved by the aforesaid orders, answering opposite parties no.2 filed Writ Petition Nos.21568 (SS) of 2016 and 22118 (SS) of 2016 respectively before this Court. The said writ petitions were disposed of by this Court vide order dated 28.9.2016 with the direction that answering opposite parties no.2 would be afforded an opportunity of hearing by issuing a show cause notice along with a copy of the select list and, thereafter, appropriate order would be passed. In compliance of the order dated 28.9.2016, show cause notices were issued to answering opposite parties no.2 on 27.10.2016, to which they filed reply on 13.12.2016 and 19.12.2016 respectively. After considering the reply and affording opportunity of hearing to answering opposite parties no.2, the competent authority passed the order on 8.9.2017, by which the order of cancellation of appointment letters of answering opposite parties no.2 were confirmed.

5. Feeling aggrieved against the orders passed by the competent authority, answering opposite parties no.2 preferred departmental appeals before the Commissioner,

Lucknow Division, Lucknow, which too were rejected vide order dated 27.11.2019. Answering opposite parties no.2 challenged the respective orders i.e. 27.8.2016, 8.9.2017 and 27.11.2019 before the Tribunal by way of Claim Petition Nos.2174 of 2019 and 2199 of 2019 respectively.

6. The Nagar Nigam filed written statement in the claim petitions by giving para-wise reply and after hearing the parties and perusing the material on record, the Tribunal allowed both the claim petitions by means of the impugned judgement/orders. Hence the present writ petitions have been filed by the petitioner.

Submissions on behalf of the petitioner

7. Sri S.C. Mishra, learned Senior Advocate assisted by Sri Namit Sharma, learned counsel for the petitioner has submitted that an advertisement was issued on 13.11.2008 for filling up 72 backlog posts of clerical cadre (40 for OBC category, 27 for SC category and 5 for ST category). He has further submitted that for Other Backward Class category, 4368 candidates appeared at the time of typing test, out of which 939 candidates were declared successful for interview. The interview was held and the names of 40 candidates figured in the select list prepared by the selection committee and the opposite party no.2 (Rajesh Kumar) was not selected as he scored 24.14 marks, which was below the cut off marks i.e. 32 marks. Similarly, 4701 candidates applied in the category of Scheduled Caste, out of which 1173 candidates were declared successful for interview, including opposite party no.2. However, after completion of

interview process, the final select list was prepared and 27 candidates were selected under the Scheduled Caste category and opposite party no.2 (Sachin Kumar) was not selected as he scored 30.86 marks, which was below the cut off marks i.e. 32 marks. It has further been submitted that average marks were awarded by calculating the marks given by all members of the committee.

8. Learned counsel for the petitioner has further submitted that answering opposite parties no.2 managed their appointment letters by playing fraud in connivance with certain employees of the department, against whom an FIR was also lodged. The appointment letters obtained by the answering opposite parties no.2 are fraudulent papers and on the basis of which they cannot claim any right to continue in service because they were not selected in the merit list. It has also been submitted that learned counsel for the answering opposite parties no.2 has wrongly relied upon the U.P. Procedure for Direct Recruitment for Group 'C' Post (Outside the Purview of the U.P. Public Service Commission) Rules, 2002 and amended in 2003 (hereinafter referred to as "the Rules, 2002") for the present recruitment as the Municipal Corporation is an autonomous statutory body having its own Act i.e. Uttar Pradesh Municipal Corporation Act, 1959 (for short "the Act, 1959") and the Rules i.e. Uttar Pradesh Nagar Mahapalika Sewa Niyamavali, 1962 (for short "the Rules, 1962"), which are holding the field for selection.

9. Lastly, it has been submitted by the learned counsel for the petitioner that 72 backlog vacancies have been filled

up in pursuance of the procedure envisaged under Section 107(3) of the Act, 1959 read with Rule 17 of Rules, 1962. The selection is based on the basis of transparent open procedure as per statutory requirement and standard. The answering opposite parties no.2 were not successful in the selection and their names do not find place in the select list, therefore, their appointment *de hors* the Rules and they cannot claim any right to continue in the department in absence of valid appointment letters.

10. In support of his contentions, learned counsel for the petitioner has placed reliance on the following judgements:-

1. *Vivek Kaisth and another vs. State of Himachal Pradesh and others*, reported in (2023) SCC;
2. *Rakhi Ray and others vs. High Court of Delhi and others*, reported in (2010) 2 SCC 637;
3. *Mukul Saikia and others vs. State of Assam and others*, reported in (2009) 1 SCC 386; and
4. *The State of Uttar Pradesh vs. Karunesh Kumar and others*, reported in (2022) SCC Online SC 1706

Rival submissions on behalf of opposite parties no.2

11. Dr. L.P. Misra, learned counsel for opposite parties no.2 has submitted that answering opposite parties no.2 have not committed any fraud or misrepresentation, rather they were issued the appointment letters and thereafter they joined their services. Their names also figured in the seniority list and they had worked for more than five years in the department. Services of answering opposite parties

no.2 have been dispensed with on the ground that they were not selected and their names do not find place in the select list though answering opposite parties no.2 had appeared in interview after passing out the written examination and they were also issued the appointment letters.

12. Learned counsel for opposite parties no.2 has further submitted that the Tribunal has passed well reasoned orders after summoning the records of the selection committee and the Tribunal found that answering opposite parties no.2 were appointed as per the terms and conditions enumerated in the advertisement and as per the provisions of the Rules, 2002. Learned counsel has also submitted that the selection was held as per the Rules, 2002 and as per the terms and conditions mentioned in the advertisement.

13. Learned counsel for answering opposite parties no.2 by placing reliance on the advertisement dated 13.11.2008, has submitted that in the advertisement itself, it is mentioned that the selection will be made in accordance with Rules, 2002. He has further submitted that procedure for selection by the petitioner was adopted under Rules, 2002 and the petitioner has not produced any relevant record indicating that any selection had taken place as per the Rules, 2002.

14. The other argument advanced by the learned counsel for the opposite parties no.2 is that the opposite parties no.2 had worked for more than five years in the department and they did not play any fraud, therefore, they are entitled to continue their services. The appointment

letters were issued and the opposite parties no.2 were placed in the tentative seniority list.

15. In support of his contention, learned counsel for the opposite parties no.2 has placed reliance on the following judgements:-

1. Civil Appeal Nos.429-430 of 2021, Anmol Kumar Tiwari and others Vs. The State of Jharkhand and others, decided on 18.02.2021;

2. Civil Appeal Nos.5318-5319 of 2023, Vikas Pratap Singh and others Vs. The State of Chhattisgarh and others, decided on 9.7.2013;

3. Md. Zamil Ahmed Vs. State of Bihar and others, 2016 (34) LCD 3085

16. We have heard learned counsel for the petitioner and the learned counsel for the opposite parties no.2.

17. For ascertaining the correct facts and proper decision of the cases, we have summoned the original record pertaining to the selection in question and the same has been perused.

Analysis on the submissions of the learned counsel for the petitioner

18. The argument of learned counsel for the petitioner that the answering opposite parties no.2 have no right to continue in the department as they were not selected, has force for the reason that after perusing the original record, we noticed that in the final select list, 40 candidates were recommended from the Other Backward Class category and 27 candidates from the Scheduled Caste category, in which

names of answering opposite parties no.2 did not figure. The appointment letters issued to the opposite parties no.2 are fictitious documents and the same were obtained in connivance with the officials of the Municipal Corporation. Once opposite parties no.2 were not selected and their names did not find place in the final select list, there was no occasion to issue the appointment letters to continue them in the department for more than five years.

19. The argument of learned counsel for the petitioner that the selection has been held in pursuance of the provisions contained in Section 107 of the Act, 1959 read with Rule 17 of Rules, 1962, has also force as the law is settled that a thing should be done in a manner it is provided to be done under law and no other manner. The Municipal Corporation is a legal entity and has got its own Act and the Rules, wherein the procedure for selection is envisaged leaving no scope to opposite parties no.2 to claim that the selection was required to be done in consonance with Rules, 2002.

20. In the case of ***Vivek Kaisth*** (supra), which has been relied upon by the learned counsel for the petitioner, it is provided that the appointment can only be made against the vacancies which have been advertised and not beyond. Paragraphs 32, 33 and 34 of the aforesaid case are extracted herein-below:-

"32. In Rakhi Ray & Ors. v. High Court of Delhi & Ors. (2010) 2 SCC 637, the practice of making appointments on future vacancies from the waiting list was held to be wrong. "In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy

which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more”³.

33. We are referring to the position of law on “waiting list” because one of the arguments of the appellants (in connected appeals) before us is that, since in any case there was a direction in Malik Mazhar-2 for having a “waiting list”, therefore the names of those two appellants ought to have been considered as names from the “waiting list”. In our opinion, this cannot be done, as the question would still remain whether selection/appointment can be made on vacancies, which were never advertised, apart from the fact that this would in any case go against the very concept of a ‘waiting list’ that we have explained above. The vacancies on which the appointments have been made could not be anticipated Para 12 at the time of advertisement (February 1st, 2013), and hence these vacancies were not advertised. These two vacancies were in fact, created on 18.03.2013 i.e., after the notification of vacancies on 01.02.2013. These were the “future vacancies”, which earlier could fall under the “C” category given in Malik Mazhar but were deleted in Malik Mazhar-2. These vacancies technically could only be filled next year and should have been notified by January 15th, 2014 as per the directions in Malik Mazhar. The argument of the appellants (in connected appeals), particularly against the present appellants, that had there been a waiting list they could have been considered for appointment in that category for these vacancies, in our opinion, is a complete misunderstanding of the concept of a “waiting list”.

34. To sum up the position of law as it stands, once clear and anticipated vacancies have been advertised, appointments can only be made on these vacancies. Vacancies which could not be anticipated before the date of advertisement, or the vacancies which did not exist at the time of advertisement, are the vacancies for the future i.e., next selection process. Malik Mazhar mandates yearly selection/appointment on the post of Civil Judge (Junior Division). There is a time line fixed, and ‘vacancies’ have to be declared on January 15th of each year. The process has to be completed by October of the same year. Once this is followed, as it ought to be, the object sought to be achieved (under the guidelines given in Malik Mazhar), of timely filling of judicial vacancies is achieved.”

21. The second case which has been relied upon by the learned counsel for the petitioner is ***Rakhi Ray*** (supra), in which it is held that any appointment made beyond the number of vacancies advertised, is without jurisdiction. Paragraphs 7, 10, 11, 12 and 13 of the aforesaid case are extracted herein below:-

"7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide Union of India & Ors. v. Ishwar Singh Khatri & Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors. (1994) Supp 2 SCC 591; State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors AIR 1994 SC 736; Prem Singh & Ors. v. Haryana State Electricity Board & Ors. (1996) 4 SCC 319; and Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors. AIR 1996 SC 976).

10. In State of Punjab v. Raghubir Chand Sharma & Ors. AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:- "With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment

either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.”

11. In Mukul Saikia & Ors. v. State of Assam & Ors. AIR 2009 SC 747, this Court dealt with a similar issue and held that “if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised”. The Select List “got exhausted when all the 27 posts were filled”. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The “currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies” and said course is impermissible in law.

12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

13. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room.”

22. Similar view has been taken in the case of *Mukul Saikia* (supra), in which the Supreme Court has reiterated the legal position to the extent that the State cannot appoint more persons than the number of vacancies advertised. Paragraphs 33, 43 and 44 of the aforesaid case are extracted herein-below:-

"33. At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and

advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The selection list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17.07.2000 below the persons who have been appointed on merit against the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularization of the private respondents.

"43. Annexure-1 attached to Service Order, 1994 contains class of posts, cadre of posts, cadre strength, scale of pay and qualifications & experience for the service. At serial No. 3, in Class II the total cadre strength of CDPOs has been shown as 68 in the pay scale of Rs.1635-3950/-. Column 6 of Annexure I prescribes that 40 per cent of the posts of CDPOs have to be filled up by promotion from amongst the persons who have rendered 10 years of continuous service in the cadre of ACDPOs/Assistant Superintendent Homes and Allied Cadre and 60 per cent by direct recruitment. The private respondents, no doubt, were appointed on ad hoc basis and admittedly they have not completed 10 years of continuous service in the cadre of ACDPOs, but the State of Assam, with the approval of the Cabinet, decided to regularize the services of the appellants as a special case by giving relaxation under para 11 of the Service Order. Therefore, the decision of the Cabinet pursuant whereof the State Government issued Notification cannot be held to be arbitrary and irrational. The appellants fall in different categories and they have no enforceable right to challenge the regularization of the private respondents who have been regularized against the vacancies meant for promotional quota. In their writ petition, they have prayed for their appointment because their names were included in the select list by the APSC against the direct quota. The State Government appointed 27 persons in order of merits out of the select list prepared by the APSC, as such the appellants being

selectees cannot claim appointment as a matter of right in excess to the advertised vacancies.

44. It is well settled law that filling up of the vacancies over and above the number of vacancies advertised would be violative of Articles 14 and 16 of the Constitution of India. Mere inclusion of the appellants in the select list of the direct appointees does not confer any right on them to be appointed against the vacancies reserved for promotees."

23. The argument advanced by the learned counsel for the petitioner that the Tribunal travelled beyond the pleadings of the claim petitions filed by opposite parties no.2 as there was no pleading in the claim petitions that the selection ought to have been done in consonance with Rules, 2002, is also acceptable as we have already discussed above that the Municipal Corporation has got its own enacted provisions, in which the selection procedure for appointment is provided; thus there is no reason to subscribe to the view that the selection ought to have been held in accordance with the provisions of Rules, 2002, which are applicable to the employees of the State Government.

24. So far the impugned judgement/order passed by the Tribunal in regard to exercise of its jurisdiction is concerned, we find that the Tribunal travelled beyond the pleadings of the claim petitions filed by opposite parties no.2 as there was no pleading in the claim petitions that the selection ought to have been done in consonance with Rules, 2002. It is settled law that relief should be based on pleadings. If a Court considers or grants a relief for which no prayer or pleadings was made depriving the other party of an opportunity to oppose or resist such relief, it would lead to miscarriage of justice.

25. Hon'ble Supreme Court in the case of ***Mrs. Akella Lalitha Vs. Sri Konda Hanumantha Rao and another***, (2022) Live Law (SC) 638 (Civil Appeal Nos.6325-6326 of 2015, decided on 28.07.2022), while dealing with the question of jurisdiction and while considering the judgements of the Supreme Court in regard to question of jurisdiction, held as under:-

"..... It is settled law that relief not found on pleadings should not be granted. If a Court considers or grants a relief for which no prayer or pleading was made depriving the respondent of an opportunity to oppose or resist such relief, it would lead to miscarriage of justice.

16. In the case of ***Messrs. Trojan & Co. Ltd. Vs. Rm.N.N. Nagappa Chettiar***, AIT 1953 SC 235, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:-

"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

17. In the case of ***Bharat Amratlal Kothari & Anr. Vs. Dosukhan Samadkhan Sindhi & Ors.***, AIR 2010 SC 475 held:

"Though the Court has very wide discretion in granting relief, the Court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

26. In view of the aforesaid settled legal position, we find that the Tribunal has erred in traversing beyond the

pleadings though the Court has very wide discretion in granting relief, which does not imply, that it can grant a relief beyond what was prayed by the party before it ignoring and keeping aside the norms and principles governing grant of relief. Therefore, to that extent also, the impugned judgement/order passed by the Tribunal is liable to be set aside.

27. The last argument advanced by the learned counsel for the petitioner that answering opposite parties no.2 had participated in the selection, therefore, they cannot be allowed to challenge the selection proceedings, seems to have force as the case set up before us is not a case that the conditions of recruitment were in any manner violated or there was any thing wrong with the selection or the eligibility of any candidate. It is settled principle that a person should be estopped to challenge the selection proceedings in case he participated in the selection held validly. The said view has been expressed by the Supreme Court in the case of **Karunesh Kumar** (supra). Paragraph 21 of the aforesaid case is extracted herein below:-

"21. A candidate who has participated in the selection process adopted under the 2015 Rules is estopped and has acquiesced himself from questioning it thereafter, as held by this Court in the case of Anupal Singh (supra):

"55. Having participated in the interview, the private respondents cannot challenge the Office Memorandum dated 12-10-2014 and the selection. On behalf of the appellants, it was contended that after the revised Notification dated 12-10-2014, the private respondents participated in the interview without protest and only after the result was announced and finding that they were not selected, the private respondents chose to challenge the revised Notification dated 12-10- 2014 and the private

respondents are estopped from challenging the selection process. It is a settled law that a person having consciously participated in the interview cannot turn around and challenge the selection process.

56. Observing that the result of the interview cannot be challenged by a candidate who has participated in the interview and has taken the chance to get selected at the said interview and ultimately, finds himself to be unsuccessful, in Madan Lal v. State of J&K [(1995) 3 SCC 486 : 1995 SCC (L&S) 712], it was held as under : (SCC p. 493, para 9) “9. ... The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.”

57. In K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345], it was held as under : (SCC p. 426, para 73) “73. The appellant-petitioners having participated in the interview in this background, it is not open to the appellant-petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper.”

58. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792], it was held as under : (SCC p. 107, para 19) “19. In Chandra Prakash Tiwari v. Shakuntala Shukla [(2002) 6 SCC 127 : 2002 SCC (L&S) 830]

xxx xxx xxx It was further observed : (SCC p. 149, para 34) ‘34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not “palatable” to him, he cannot turn round and subsequently contend that the process of

interview was unfair or there was some lacuna in the process.”

59. Same principle was reiterated in Sadananda Halo v. Momtaz Ali Sheikh [(2008) 4 SCC 619 : (2008) 2 SCC (L&S) 9] wherein, it was held as under : (SCC pp. 645-46, para 59) “59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgment in Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] The Court also referred to the judgment in Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644], where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise.”

Analysis of the arguments made on behalf of the opposite parties

28. For the sake of convenience, it would be proper to have a look at the enacted provisions of the Municipal Corporation, which are applicable to the selection of Class-III and other employees. For ready reference, Section 107 of the Act, 1959 is quoted below:-

"107. Appointment of posts. - (1) 21[Appointments to the post of Deputy Municipal Commissioner, Assistant Municipal Commissioner, 22[Mukhya Abhiyanta, Nagar Swasthya Adhikari, Mukhya Nagar Lekha Parikshak and to other posts as the Mayor may specify, shall be made by the Mayor] after consultation with the State Public Service Commission in the manner prescribed and not otherwise]:

Provided that the appointment of Nagar Swasthya Adhikari shall preferably be made out of officers of the Public Health Department of the State Government whom the State Government may be agreeable to send on deputation and in such case consultation with the Public Service Commission shall not be necessary.

(2) 23[Appointments to the posts not included in the posts referred to in subsection (1)] per mensem shall be made after consultation with the State Public Service

Commission in the manner prescribed and not otherwise.] The authority to appoint such officers and servants of the Corporation shall vest (a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and (b) in respect of all other officers and servants, in the Municipal Commissioner.

(3) All other appointments except those specified in sub-sections (1), (2) and (5) shall be made in accordance with the recommendations of a Selection Committee constituted under sub-section (4) and authority to make such appointments shall vest - (a) in respect of those officers and servants who are immediately subordinate to the Mukhya Nagar Lekha Parikshak, in the Mukhya Nagar Lekha Parikshak, and (b) in respect of all other officers and servants, in the Municipal Commissioner.

(4) The Selection Committee referred to in sub-section (3) shall consist of the Municipal Commissioner or his nominee, the Mukhya Nagar Lekha Parikshak and Head of the Department for which the appointment is to be made. The Municipal Commissioner and, in his absence, the member designated by him for the purpose, shall be the Chairman of Selection Committee:

[Provided that the Committee referred to above which may be substituted in connection with the appointments of officers and servants immediately subordinate to the Municipal Commissioner or the Mukhya Nagar Lekha Parikshak, shall consist of the Municipal Commissioner or the Mukhya Nagar Lekha Parikshak, as the case may be, as Chairman and two other officers of the Corporation who shall be nominated by the Executive Committee as members.] (5) Appointments to posts in the engineering, 25[public health and other departments of the Corporation carrying scales of pay lower than the scales of pay of the posts referred to in sub-section (3)] shall be made by the Heads of the departments concerned specified under Section 112 subject however to any bye-laws made by the Corporation in this behalf. (6) In the case of any difference of opinion between the appointing authority and the State Public Service Commission a reference shall be made by the Municipal Commissioner to the State Government whose decision shall be final."

29. Rule 17 of Rules, 1962 is worth to be mentioned and the same is quoted below:-

"17. By direct recruitment-- Where appointment to a post under sub-section (3) of Section 107 is to made by direct recruitment, the Selection Committee constituted under

sub-section (4) of the said Section shall decide whether the selection shall be made by holding an interview or a written examination or both."

30. The argument of Dr. L.P. Mishra, learned counsel for the answering opposite parties no.2 that the selection in question is to be held in the light of Rules, 2002 and amended Rules, 2003, cannot be appreciated for the reason that the Municipal Corporation is a separate entity and it has got its own statutory provisions i.e. Act, 1959 and the Rules, 1962. We cannot also appreciate the fact that the selection should be made in accordance with Rules, 2002 for the reason that it is settled law that a thing should be done in a manner it is provided to be done under law and no other manner. Once the selection in the Municipal Corporation has taken place, the Rules framed by the State of Uttar Pradesh cannot be made applicable as there is complete scheme provided under Section 107 of the Act, 1959. Section 107(4) of the Act, 1959 postulates that the selection committee referred to in sub-section (3) of Section 107 of the Act, 1959 shall make the selection after considering the merit.

31. From perusal of the original record, it transpires that for Other Backward Class category, 4368 candidates applied, out of which 939 candidates were declared successful, in which name of opposite party no.2 (Rajesh Kumar) also finds place. However, after completion of interview process, the final select list was prepared by the selection committee and 40 candidates were selected and the lowest merit of the last candidate was 32 marks, whereas opposite party no.2 obtained 24.14 marks. Similarly, in the case of opposite

party no.2 (Sachin Kumar), 4701 candidates applied in the category of Scheduled Caste, out of which 1173 candidates were declared successful for interview, including opposite party no.2. However, after completion of interview process, the final select list was prepared and 27 candidates were selected and the lowest merit of the last candidate was 32 marks, whereas opposite party no.2 obtained 30.86. Thus, both opposite parties no.2 were not selected. For ready reference, the select lists of candidates of Other Backward Class (40) and Scheduled Caste (27) categories are quoted below:-

Select List of OBC candidates

<i>Sl.No.</i>	<i>Name and Father Name</i>		<i>Average Marks</i>
1.	<i>Sri Manoj Kumar Verma S/o Sri S.P. verma</i>	<i>775/4055</i>	<i>38.28</i>
2.	<i>Sri Pankaj Kumar Verma S/o Deep Narain Verma</i>	<i>191/1001</i>	<i>36.14</i>
3.	<i>Km. Renu Verma D/o Late Jai Prakash Verma</i>	<i>321/1575</i>	<i>35.00</i>
4.	<i>Sri Imran Ahamd S/o Sri Israr Husain</i>	<i>21/127</i>	<i>34.85</i>
5.	<i>Sri Mohd. Javed S/o Sri Mohd. Razi</i>	<i>300/1478</i>	<i>34.42</i>
6.	<i>Sri Muneshwar Singh Yadav S/o Sri Mohan Lal Singh Yadav</i>	<i>872/4352</i>	<i>34.00</i>
7.	<i>Sri Tafzeel Ahmad Siddiqui S/o Sri Shabbuir Ahmad</i>	<i>827/4268</i>	<i>33.85</i>
8.	<i>Sri Vinay Kumar Yadav, S/o Sri Ram Krishna Yadav</i>	<i>20/126</i>	<i>33.71</i>
9.	<i>Sri Ramnjeet Kumar Singh S/o Sri Ram Lakhan Verma</i>	<i>552/2862</i>	<i>33.16</i>
10.	<i>Sri Ashish Sharma, S/o Sri Avinash Chandra Sharma</i>	<i>731/3749</i>	<i>32.85</i>
11.	<i>Sri Awadhesh Kumar Yadav S/o Sri Tej Pal Yadav</i>	<i>97/505</i>	<i>32.71</i>

12.	<i>Sri Amit Kumar Yadav, S/o Sri Hoshiyar Singh</i>	<i>461/2421</i>	<i>32.71</i>
13.	<i>Sri Ravindra Singh, S/o Sri Narottam Singh</i>	<i>823/4256</i>	<i>32.71</i>
14.	<i>Sri Vinod Kumr Yadav S/o Sri Radhey Shyam Yadav</i>	<i>205/1038</i>	<i>32.57</i>
15.	<i>Sri Akhilesh Kumar Yadav, S/o Sri Ram Singh Yadav</i>	<i>221/1108</i>	<i>32.57</i>
16.	<i>Km. Geeta Yadav D/o Sri Attar Singh Yadav</i>	<i>371/1888</i>	<i>32.57</i>
17.	<i>Sri Omkar Rajbhar, S/o Late Chandrika Rajbhar</i>	<i>424/2168</i>	<i>32.57</i>
18.	<i>Sri Chand Babu S/o Late Munna</i>	<i>917/969</i>	<i>32.57</i>
19.	<i>Sri Rajeev Kumar S/o Sri Shanker lal</i>	<i>527/2722</i>	<i>32.50</i>
20.	<i>Sri Rishabh Pal S/o Sri Ram Chandra Pal</i>	<i>311/1511</i>	<i>32.42</i>
21.	<i>Sri Arjun Yadav S/o Sri Brahma Deen Yadav</i>	<i>570/2936</i>	<i>32.33</i>
22.	<i>Sri Pankaj Kumar S/o Sri Jamuna Prasad</i>	<i>18/113</i>	<i>32.28</i>
23.	<i>Sri Jailendra Singh S/o Sri Ram Das Verma</i>	<i>581/2996</i>	<i>32.16</i>
24.	<i>Sri Ramakant S/o Sri Pyare Lal</i>	<i>398/2074</i>	<i>32.14</i>
25.	<i>Sri Ajay Kumar Yadav S/o Sri Balak Ram Yadav</i>	<i>496/2588</i>	<i>32.14</i>
26.	<i>Sri Raj Kishore Yadav S/o Sri Ram Charan Yadav</i>	<i>814/4228</i>	<i>32.14</i>
27.	<i>Smt. Neelam Sahu W/o Sri Mohan Kumar Sahu</i>	<i>816/4235</i>	<i>32.14</i>
28.	<i>Km. Reena Singh D/o Sri Natha Singh</i>	<i>17/108</i>	<i>32.00</i>
29.	<i>Sri Jitendra Sharma S/o Sri Rajendra Kumar Sharma</i>	<i>133/651</i>	<i>32.00</i>
30.	<i>Sri Kishan Kumar Verma S/o Sri Ram Shanker Verma</i>	<i>248/1315</i>	<i>32.00</i>
31.	<i>Sri Ayoob S/o Sri Chhotey Lal</i>	<i>380/1955</i>	<i>32.00</i>
32.	<i>Sri Anuj Gupta S/o Sri Shiv Kumar Gupta</i>	<i>397/2071</i>	<i>32.00</i>
33.	<i>Sri Sarvesh Pal</i>	<i>573/2947</i>	<i>32.00</i>

	<i>S/o Sri Ram Kishan Pal</i>		
34.	<i>Sri Santosh Kumar Yadav S/o Sri Ram Naresh Yadav</i>	<i>610/3195</i>	<i>32.00</i>
35.	<i>Sri Ashutosh Gupta S/o Sri Ram Autar</i>	<i>820/4252</i>	<i>32.00</i>
36.	<i>Km. Shabnam Siddiqui W/o Abdul Ali</i>	<i>838/4284</i>	<i>32.00</i>
37.	<i>Km. Mamta Gaur D/o Sri Manni Lal</i>	<i>849/4311</i>	<i>32.00</i>
38.	<i>Sri Suresh Singh Chauhan S/o Late Dirja Singh Chauhan</i>	<i>919/4117</i>	<i>32.00</i>
39.	<i>Sri Satyendra Kumar S/o Sri Siya Ram</i>	<i>936/1954</i>	<i>32.00</i>
40.	<i>Sri Amar Nath Verma S/o Sri Purushottam Verma</i>	<i>939/677</i>	<i>32.00</i>

Select List of SC candidates

<i>Sl.No.</i>	<i>Name and Father Name</i>		<i>Aggregate Marks</i>
1.	<i>Sri Kunwar Mahendra Bhushan S/o Sri Kunwar Kailash Bhushan</i>	<i>1080/4587</i>	<i>37.85</i>
2.	<i>Sri Sunil Kumar S/o Sri Pramod Kumar</i>	<i>1079/4586</i>	<i>37.28</i>
3.	<i>Sri Budhi Ram S/o Late Sanehi Ram</i>	<i>1078/4585</i>	<i>37.14</i>
4.	<i>Sri Pradeep Chandra S/o Sri Ram Awadh</i>	<i>519/2309</i>	<i>37.00</i>
5.	<i>Smt. Ratna Singh D/o Sri Rajesh Singh</i>	<i>884/3821</i>	<i>36.71</i>
6.	<i>Km. Reema D/o Brij Lal</i>	<i>1068/4550</i>	<i>36.57</i>
7.	<i>Sri Birendra Kumar S/o Sri Ram Asrey Prasad</i>	<i>672/2901</i>	<i>35.57</i>
8.	<i>Sri Rahul Kumar Kannaujia S/o Sri Vanshidhar Kannaujia</i>	<i>1067/4549</i>	<i>35.28</i>
9.	<i>Km. Rekha Kumari D/o Sri Chandra Bhan</i>	<i>1148/4701</i>	<i>34.57</i>
10.	<i>Sri Prem Sagar S/o Sri Chavinath Prasad</i>	<i>17/56</i>	<i>33.80</i>
11.	<i>Sri Sarvesh Kumar S/o Sri Jialal</i>	<i>835/3569</i>	<i>33.00</i>

12.	<i>Sri Akhileshwar Chand S/o Sri Baleswar Prasad</i>	<i>601/2595</i>	<i>32.85</i>
13.	<i>Sri Dinesh Gautam S/o Sri Hawaldar Gautam</i>	<i>615/2644</i>	<i>32.85</i>
14.	<i>Sri Rakesh Kumar S/o Late Ashok Kumar</i>	<i>1142/4692</i>	<i>32.85</i>
15.	<i>Sri Ajay Kumar S/o Sri Indramani</i>	<i>814/3501</i>	<i>32.82</i>
16.	<i>Sri Shailendra Kumar S/o Sri Dileep Kumar</i>	<i>1146/4698</i>	<i>32.82</i>
17.	<i>Sri Pawan Kumar S/o Sri Prabhu Nath</i>	<i>955/4095</i>	<i>32.42</i>
18.	<i>Km. Saroj Gautam D/o Sri Ram Das Gautam</i>	<i>527/2344</i>	<i>32.33</i>
19.	<i>Sri Kuldeep Chaudhary S/o Sri Kailash Chand Chaudhary</i>	<i>207/1117</i>	<i>32.28</i>
20.	<i>Km. Nishi Priya D/o Sri Sankher</i>	<i>243/1256</i>	<i>32.28</i>
21.	<i>Sri Narendra Kumar S/o Sri Ram Kailash</i>	<i>791/3409</i>	<i>32.28</i>
22.	<i>Km. Kusum Saroj D/o Sri Hari Ram</i>	<i>232/1223</i>	<i>32.14</i>
23.	<i>Km. Neetu D/o Sri Sanvley</i>	<i>382/1802</i>	<i>32.14</i>
24.	<i>Sri Vineet Kumar S/o Sri Vansi Lal</i>	<i>489/2200</i>	<i>32.00</i>
25.	<i>Sri Prem Nath S/o Sri Satya Narain</i>	<i>939/4024</i>	<i>32.00</i>
26.	<i>Sri Ajay Singh S/o Sri Ram Kesh Pankaj</i>	<i>972/4163</i>	<i>32.00</i>
27.	<i>Sri Alok Kumar Sonkar S/o Sri Rakesh Chandra Sonkar</i>	<i>1029/4376</i>	<i>32.00</i>

32. In view of the aforesaid, it cannot be appreciated that the advertisement provides that the selection should be based in pursuance of the Rules, 2002 for the reason that the advertisement itself indicates that the selection in the office of the State Government will be made in accordance with Rules, 2002 and amended Rules, 2003. We have

already held that the Municipal Corporation is a separate statutory body, which has got its own Act and the Rules and the same are holding the field for recruitment. Therefore, we hold that the selection was done in accordance with the enacted provisions of the Municipal Corporation.

33. Further, the argument of Dr. L.P. Mishra, learned counsel for opposite parties no.2 that selection is based on Rules, 2002 and there is no select list in pursuance of the selection held under Rules, 2002, is also fallacious because we have perused the original record produced by the Municipal Corporation and found that all the candidates appeared before the selection committee and their tabulation chart indicates the marks obtained by each candidate, which have neither been doubted nor questioned. The answering opposite parties no.2 are rather claiming the benefit of same selection beyond what they are entitled to.

34. It is the admitted case that answering opposite parties no.2 had appeared in the interview and secured 24.14 and 30.86 marks respectively, whereas the last selected candidate obtained 32 marks; thus they were not part of the select list of 40 candidates of Other Backward Class and 27 candidates of Scheduled Caste categories.

35. The other argument of learned counsel for opposite parties no.2 that answering opposite parties no.2 had worked for more than five years on the basis of the appointment letters issued to them without any fraud being played, therefore, they have right to continue, we take

judicial note of the fact that they were not selected and their names do not figure in the select list. The appointment letters appear to be based on false representation or collusion, which is within the ambit of fraudulent act done by the employees of the Municipal Corporation, who were at the helm of affairs.

36. Now, we have to discuss the ratio of case laws cited by the learned counsel for the opposite parties no.2.

37. The first case which has been relied upon by the learned counsel for opposite parties no.2 is **Anmol Kumar** (supra). Paragraphs 8 and 9 of the judgement are extracted herein-below:-

"8. On behalf of the Writ Petitioners, it was argued that though the selections initially were made on the basis of preference to the 3 categories of posts that were advertised. It was later found that the select list should have been prepared on the basis of merit and thereafter, preference has to be taken into account. Having realized the mistake that was committed, the authorities revised the select list pursuant to which the appointment of the Writ Petitioners was cancelled. By the time a decision was taken to revise the select list and cancel their appointments. The Writ Petitioners had completed their training and had worked for a considerable period of time. According to them, the High Court correctly granted relief to the Writ Petitioners by taking into account the fact that they were not responsible for the irregularities committed in the preparation of the initial select list.

9. Two issues arise for our consideration. The first relates to the correctness of the direction given by the High Court to reinstate the Writ Petitioners. The High Court directed reinstatement of the Writ Petitioners after taking into account the fact that they were beneficiaries of the select list that was prepared in an irregular manner. However, the High Court found that the Writ Petitioners were not responsible for the irregularities committed by the authorities in preparation of the select list. Moreover, the Writ Petitioners were appointed after completion of training and worked for some time. The High Court was of the opinion that the Writ Petitioners ought to be

considered for reinstatement without affecting the rights of other candidates who were already selected. A similar situation arose in Vikas Pratap Singh's case (supra), where this Court considered that the Appellants-therein were appointed due to an error committed by the Respondents in the matter of valuation of answer scripts. As there was no allegation of fraud or misrepresentation committed by the Appellants therein, the termination of their services was set aside as it would adversely affect their careers. That the Appellants-therein had successfully undergone training and were serving the State for more than 3 years was another reason that was given by this Court for setting aside the orders passed by the High Court. As the Writ Petitioners are similarly situated to the Appellants in Vikas Pratap Singh's case (supra), we are in agreement with the High Court that the Writ Petitioners are entitled to the relief granted. Moreover, though on pain of Contempt, the Writ Petitioners have been reinstated and are working at present."

38. In the aforesaid case of **Anmol Kumar** (supra), it appears that the appellants were declared successful in the select list. However, after investigation by high level committee, it was found that there was bungling in the selection and the select list was prepared wrongly by ignoring the merit of the candidates. The unsuccessful candidates filed writ petitions before the High Court and during pendency of the writ petition, 42 candidates were appointed on the basis of the original select list, which was later on cancelled. The appellants were ousted from the selected list, therefore, the Court came to the conclusion that they did not commit any fraud and on the basis of wrong selection, they were appointed. Therefore, it was noted that an error was committed by the department and the Court had allowed the candidates to continue their services on the analogy that the appellants could not be made to suffer on account of the wrong being committed by the department. Thus, the said case is not applicable in the

present case for the reason that answering opposite parties no.2 have not been selected and their names do not find place in the final select list of candidates of Other Backward Class and Scheduled Caste categories.

39. The second case relied upon by the learned counsel for opposite parties no.2 is ***Md. Zamil Ahmed*** (supra). Paragraph 22 of the aforesaid judgement is extracted herein-under:-

"22. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration and nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State."

40. In the aforesaid case, it was noted that petitioner was given appointment under the Dying-in-Harness Rules by the department and after fifteen years of service, his appointment was cancelled on the ground that he was brother of the deceased, therefore, he does not come within the definition of the "dependent of the deceased". In the aforesaid background, the Court came to the conclusion that

after fifteen years of service, the termination was not justified because the department had considered his claim and issued appointment letter. The appellant did not commit false representation by suppressing material fact. Thus, the facts of the aforesaid case are also not applicable to the facts of the present case.

Finding:

41. Having considered the arguments advanced by the learned counsel for the parties and going through the record and analysis arrived by us in the preceding paragraphs, we summarise our findings in the following manner:-

1. Since answering opposite parties no.2 were not selected and their names did not figure in the final select list, they cannot claim their right to continue in the department on the basis of appointment letters issued to them, which are fraudulent documents as the same were issued to the answering opposite parties no.2 in connivance with the officials of the Municipal Corporation, against whom an FIR was also lodged; therefore, such appointment letters were rightly cancelled by the Corporation after affording opportunity of hearing.

2. The department filled up the number of backlog vacancies of different categories, which were advertised, therefore, the answering opposite parties no.2 have no right to claim appointment in respect of their categories beyond the number of advertised vacancies in view of the law laid down by the Supreme Court in the cases of *Vivek Kaisth* (supra), *Rakhi Ray* (supra) and *Mukul Saikia* (supra),

particularly when their names did not figure in the final select list.

3. Admittedly, answering opposite parties no.2 appeared in the selection process validly held and were unsuccessful, therefore, they have no right to claim benefit beyond the advertised vacancies in view of the law laid down by the Supreme Court in the case of *Karunesh Kumar* (supra).

4. The argument of learned counsel for the answering opposite parties no.2 that selection should be made in accordance with Rules, 2002, is misplaced because Municipal Corporation has got its own statutory Act, 1959 and Rules, 1962, wherein complete scheme and selection is envisaged and said Rules, 2002 are applicable only to the employees of the State Government and not to the employees of the Municipal Corporation.

42. In view of the aforesaid discussions and conclusion, both the writ petitions are *allowed* and the impugned judgement and orders dated 16.08.2021 passed by the Tribunal in Claim Petition Nos.2174 of 2019 and 2199 of 2021 are hereby set aside; consequently, both the claim petitions filed by the answering opposite parties no.2 are dismissed. Consequences to follow.

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(Brij Raj Singh, J.) (Attau Rahman Masoodi, J.)

Order Date :- 15th March, 2024
Rao/-