

Reserved

Case :- SPECIAL APPEAL DEFECTIVE No. - 442 of 2016

Appellant :- Smt. Sadhna

Respondent :- State Of U.P. And 5 Ors.

Counsel for Appellant :- Vijay Kumar Singh, Hritudhwaj Pratap Sahi, Rahul Kumar

Counsel for Respondent :- C.S.C., A.K. Yadav, Anoop Trivedi, C.B. Yadav, Rajesh Kumar Mishra, Shashank Shekhar Singh

Present:

Hon'ble V.K. Shukla, J.

Hon'ble Arun Tandon, J.

Hon'ble P.K.S. Baghel, J.

Hon'ble Sunita Agarwal, J.

Hon'ble M.C. Tripathi, J.

Per : Hon'ble Pradeep Kumar Singh Baghel, J.

I have had the benefit of reading the erudite judgment of our learned Brother Tandon, J. I am unable to take the view expressed by him and most respectfully dissent.

A Division Bench of this Court in Special Appeal Defective No. 442 of 2016, Smt. Sadhna v. State of U.P. and others, has doubted the correctness of the decision of a Full Bench of this Court in the case of **Raesul Hasan v. State of U.P. and others**¹. The terms of reference have been extracted in the judgment of His Lordship Hon'ble Mr. Justice Arun Tandon, so they need not to be extracted again.

The Division Bench has doubted the correctness of the decision of **Raesul Hasan (supra)** on, amongst others, following reasons:

(a) If the choice to decide the year of recruitment within the promotion quota is left to the discretion of the Committee of Management, it may result in a situation where there would be two different years of recruitment for direct recruitment and

¹ 2015 (6) ADJ 778 (LB)(FB)

promotion quota.

(b) If the discretion is conferred upon the Committee of Management to club the vacancies, there is likelihood that promotional right of the teachers already working in the institution in L.T. Grade may be defeated at the whims of the Management.

(c) The impact of keeping the 'year of recruitment' as used in Rule 14 of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998² fluid at the instance of the Committee of Management has lost the attention of the Full Bench in **Raesul Hasan (supra)**.

(d) Whether the exercise under Rules 10 and 11 of the Rules, 1998 is a ministerial exercise or it confers a discretion upon the Management to decide as to which vacancy is to be filled by promotion and as to which vacancy is to be filled by direct recruitment.

In order to appreciate the rival stand on the issue it would be expedient to briefly notice the historical background of the statutory provision.

The Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982³ (U.P. Act No. 5 of 1982) received the assent of the President on 25th February, 1982. The object of the Act was to hold free and fair selection of the teachers and to raise the standard of education. By the enactment of this Act, the power of the Committee of Management for appointment of the Principal and teachers and their promotion, which was governed under the Uttar Pradesh Intermediate Education Act, 1921⁴ and the Regulations framed thereunder, was completely taken away from the Management

² Rules, 1998

³ Act, 1982 or Principal Act

⁴ Act, 1921

and it was vested in the Secondary Education Services Selection Board⁵. The provisions of the Act, 1982 were drastically amended from time to time. The details of those amendments are not relevant for the issue involved in the present case, hence they need not any elaboration. For the determination of the case, it will be necessary to set out the relevant statutory provisions.

Section 9 of the Act, 1982 enumerates the powers and duties of the Commission. Clause (a) thereof provides that it shall prepare guidelines on matters related to the method and promotion of teachers. Section 10 provides the procedure of selection by direct recruitment. It casts an obligation on the Management to notify the vacancies to the Commission. It enjoins that the Management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and notify the vacancies to the Board in such manner as may be prescribed. The procedure for selection by direct recruitment was also left to the rule-making authority. Section 11 of the Act, 1982 deals with panel of candidates. Chapter III of the Act, 1982 lays down the procedure of selection by promotion. Chapter III was inserted by U.P. Act No. 25 of 1998 (w.e.f. 20th April, 1998). Section 34 gives power to the Board to make or amend regulations with the previous approval of the State Government. Section 35 of the Act, 1982 empowers the State Government to make rules for carrying out the purposes of the Act.

Exercising the powers conferred by Rule 35 of the Act, 1982, the State Government made the Uttar Pradesh Secondary Education Services Commission Rules, 1983⁶. Rule 2(i) of the Rules, 1983 defines the 'year of recruitment' to mean a period of twelve months commencing from July 1 of a

⁵ Board

⁶ Rules, 1983

calender year. Rule 4 casts an obligation on the Management to determine and intimate the Commission, in the proforma given in Appendix 'A', the number of vacancies existing or likely to fall vacant during the year of recruitment. It also enjoins the Management to pay regard to the provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994⁷. Sub-rule (2) of Rule 4 of the Rules, 1983 provides that the statement of vacancies shall be sent by the Management to the Inspector by 15th September of the year of recruitment and the Inspector after verification shall forward it to the Deputy Director by 15th October. Sub-rule (3) provides that the Deputy Director shall forward it to the Commission by November 15. Sub-rule (5) of Rule 4 provides that if a vacancy occurs any time during the session or after the requisition, the Management is required to notify the vacancy to the Inspector within fifteen days of its occurrence. Sub-rule (6) puts a check on the Management as it provides that if the Management has failed to notify the vacancy by the date specified in the earlier part of the rule, the Commission would require the Inspector to notify the vacancy to the Commission.

As the present dispute is in respect of the promotion, the other parts of the Rules, 1983 which deal with the procedure for direct recruitment, preparation of panel and notification of the selected candidates are not relevant for our purposes.

Rule 9 of the Rules, 1983 provides the procedure for appointment by promotion. Rule-9 is set out at below:

"9. Procedure for appointment by promotion.—

(1) Where any vacancy is to be filled by promotion, all teachers working in L.T. or C.T. grade, who possess the minimum qualifications and have put in at least 5 years continuous service as teacher on the date of occurrence of vacancy shall be considered for promotion to the Lecturer or L.T. grade, as the case may be, without

⁷ Act, 1994

their having applied for the same.

Note.—For the purpose of this sub-rule, service rendered in any other recognised institution shall count for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers, referred to in sub-rule (1), and forward it to the Commission through the Inspector with a copy of seniority list, service records (including the character rolls) and a statement in the *pro forma* given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts and forward the list to the Commission.

(5) The Commission shall, after calling for such additional information as it may consider necessary, intimate the name of selected candidate or candidates to the Inspector with a copy to the Manager of the Institution.

(6) Within 10 days of the receipt of the intimation from the Commission under sub-rule (5), the Inspector shall send the name of the selected candidate(s) to the Manager of the concerned institution and the provisions of sub-rules (3) and (4) of Rule 8 shall *mutatis mutandis* apply."

As can be seen from bare reading of the rule, one of the eligibilities for promotion is that a teacher must possess five years continuous service on the date of occurrence of vacancy and the Management is required to prepare a list of the teachers and forward it to the Commission through the Inspector with a copy of the seniority list, service record, etc. and the statement in the proforma given in Appendix 'A'. Sub-rule (4) of Rule 9 further enjoins the Inspector to verify the facts sent by the Management and forward the list to the Commission. It is relevant to note that under Rules 4 and 9 of the Rules, 1983, Appendix 'A' has been provided. It has material bearing for determination of the case, hence it would

be advantageous to reproduce entire Appendix 'A', which reads thus:

"APPENDIX A

(See Rules 4 and 9)

Requisition for the Recruitment of Candidates for appointment to the post of Teacher/Head of Institutions

(To be sent in quadruplicate)

1. (i) Name of Institution.
- (ii) Place—
- (iii) District—
- (iv) No. of Students : Class Section No.
- (v) Names of Subjects: High School/ Inter
- (vi) No. of Teachers.
- (2) (i) Name(s) of the post(s) for which selection is to be made—
- (ii) Number of posts—
- (iii) Qualification for the post(s)
- (iv) Pay scale of the post—
3. Where the post for which selection is to be made, is of Lecturer or L.T. Grade—
- (i) Total number of sanctioned posts—
- (ii) Number of posts already filled by—
 - (a) direct recruitment
 - (b) promotion
- (iii) Total number of vacancies determined by the Management to be filled by—
 - (a) direct recruitment
 - (b) promotion
- 3-A. Where the post for which selection is to be made is of Principal, names of two senior most teachers possessing requisite qualifications for the post of Principal, in order of seniority and their—
 - (a) educational qualifications,
 - (b) teaching experience,
 - (c) administrative experience, if any.

Note.—Copies of the service records (including

character rolls) shall be sent with the requisition.

4. Number of posts, if any, reserved for—

- (a) Scheduled Caste
- (b) Scheduled Tribe
- (c) Backward Class

5. *Names of all candidates eligible for promotion, their qualification and length of service from the date of regular appointment in the grade from which promotion is to be made

*To be filled in only where the post is to be filled by promotion.

6. Any other information that the Commission may desire to have—

Certified that the above information is correctly recorded and verified from the relevant documents.

Manager

Verified and forwarded to the Regional Deputy
Director of Education..... Region.

District Inspector of Schools/
Regional Inspectress of Girls Schools.

Forwarded to the Secretary, U.P. Secondary
Education Services Commission, Allahabad.

Deputy Director of Education
.....Region.”

An examination of the Appendix 'A' would show that in fact, it is a comprehensive information regarding all the details of the institution as the number of the sanctioned posts, number of vacancies determined by the Management to be filled by direct recruitment and promotion, educational qualification of teachers, teaching experience, number of students, names of subjects of High School/Inter, number of posts, if any, reserved for reserved candidates. In short, all the details are made available to the office of the Inspector, who maintains his own record. The Inspector can very easily verify the facts from his own record. Appendix 'A' has an important role as it would be clear from the subsequent Rules of 1995

and 1998 that there was no change in the format of Appendix 'A' as well as the requirements of sending the information under it.

In 1993 an amendment was made in the Principal Act by the U.P. Act No. 1 of 1993. By this amendment, under Section 2 of the Principal Act i.e. Act, 1982 a "sub-section (1)—year of recruitment" has been inserted. It provides that 'year of recruitment' means a period of twelve months commencing from first day of July of a calendar year. By the same amendment, in sub-section (3) of Section 14 of the Principal Act, after clause (e), Clauses (f), (g) and (h) were inserted. Clause (h) needs to be mentioned here which is in the following terms:

"(h) to obtain the periodical returns or other informations from institutions regarding strength of the teaching staff and the appointment, promotion, dismissal, removal, termination or reduction in rank of teachers."

By the same amendment of 1993, Section 15 of the Act, 1982 was substituted by a new Section 15, which lays down the procedure for selection of teachers. It casts an obligation on the Management to timely notify the vacancies.

On 08th August, 1995 the Uttar Pradesh Secondary Education Services Selection Boards (Amendment) Act, 1995 (U.P. Act No. 15 of 1995) was made which came into force on 28th December, 1994. By this amendment, Chapter II containing Sections 3 to 11 was inserted in the Act, 1982. Section 10 of the Act, 1995 provides the procedure of selection. A duty has been cast upon the Management to determine the number of vacancies existing or likely to fall vacant during the year of recruitment. By the same amendment, Section 15 of the Act, 1982 was deleted.

On 08th May, 1995 the Uttar Pradesh Secondary Education Services Commission Rules, 1995⁸ was framed by the State Government in exercise of its powers conferred by Section 35 of the Act, 1982. The salient features of the changes made are: (i) the 'year of recruitment' defined under sub-rule (i) of Rule 2 of the Rules, 1983 was deleted; as noted above by a separate amendment it was incorporated in the Act, 1982 by the U.P. Act No. 1 of 1993 by inserting Section 2(l), year of recruitment; (ii) a new Chapter being Part III was inserted which provides the procedure for recruitment. Rule 10 of the Rules, 1995 stipulates the source of recruitment and lays down that the posts of teachers of lecturers grade shall be filled (i) 50 per cent by direct recruitment, and (ii) 50 per cent by promotion from amongst the substantively appointed teachers of the trained graduates (L.T.) grade. A proviso is also appended to the said rule which has a material bearing in the present case. For convenience, Rule 10 of the Rules, 1995 is reproduced below:

"10. Source of recruitment.—Recruitment to various categories of teachers shall be made from the following sources:

- (a) Principal of an Intermediate College or Headmaster of a High School by direct recruitment.
- (b) *Teachers of lecturers grade.*—(i) 50 per cent by direct recruitment;
- (ii) 50 per cent by promotion from amongst substantively appointed teachers of the trained graduates (L.T.) grade;
- (c) *Teachers of trained graduates (L.T.) grade.*—(i) 50 per cent by direct recruitment;
- (ii) 50 per cent by promotion from amongst the substantively appointed teachers of Certificate of Teaching (C.T.) Grade:

Provided that if in any year of recruitment suitable eligible candidates are not available for

⁸ Rules, 1995

recruitment by promotion, the posts may be filled in by direct recruitment:

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post."

Rule 11 of the Rules, 1995, which deals with determination and notification of vacancies, is also relevant for the present dispute, hence it needs to be extracted for the convenience. It reads as follows:

"11. Determination and notification of vacancies.—(1) The Management shall determine the number of vacancies in accordance with sub-section (1) of Section 15 of the Act and notify them through the Inspector, to the Commission in the manner hereinafter provided.

(2) The statement of vacancies for each category of post to be filled in by direct recruitment or by promotion, including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent separately in quadruplicate in the *pro forma* given in Appendix "A" by the Management to the Inspector by July, 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturers grade, and groupwise in respect of vacancies of trained graduates (L.T.) grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Commission by July, 31 with a copy thereof to the Deputy Director :

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Commission in respect of any particular year of recruitment :

Provided further that in respect of the vacancies existing on the date of commencement of these rules as well as the vacancies that are likely to arise on July 30, 1995 the Management shall, unless some other dates are fixed under the preceding proviso, send the

statement of vacancies by June 15, 1995 to the Inspector and the Inspector shall send the consolidated statement in accordance with the sub-rule to the Commission by June 30, 1995.

Explanation.—For the purposes of this sub-rule the word groupwise in respect of the trained graduates (L.T.) grade means in accordance with the following groups, namely :

- (a) *Language Group*.—This group consists of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic;
- (b) *Science Group*.—This group consists of the subjects of Science and Mathematics;
- (c) *Art and Craft group*;
- (d) *Music Group*;
- (e) *Agriculture Group*;
- (f) *Home Science Group*;
- (g) *Physical Education Group*; and
- (h) *General Group*.—This group consists of the subjects not covered in any of the foregoing groups.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of a teacher occurs, the Management shall, within fifteen days of its occurrence, notify the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Commission.

(4) Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 15 of the Act and notify them to the Commission in the manner and by the date referred to in the said sub-rule. The vacancies notified to the Commission under this sub-rule shall be deemed to be notified by the Management of such institution."

On a plain reading it becomes clear that the Commission was authorised to make the direct recruitment as well as

promotion and the Management was required to send the details of the vacancies, on the proforma given in Appendix 'A', by July 15 of the year of recruitment. It further requires the Inspector to forward the details after verification from the record of his office and prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of trained graduates (L.T.) grade within a time-frame. Sub-rule (4) of Rule 11 of the Rules, 1995 provides that if the Management does not notify the vacancies within the time frame or fails to notify them, the Inspector is empowered to determine the vacancies on the basis of the record of his office and notify them to the Commission, and such vacancies sent to the Commission shall be deemed to be notified by the Management.

Rule 14 of the Rules, 1995 deals with the procedure for recruitment by promotion. It states that where any vacancy is to be filled by promotion, all the eligible teachers shall be considered for promotion irrespective of the fact whether they have applied or not. The eligibility was the qualification prescribed for the post and the teacher must have completed five years continuous service as such on the first day of the year of recruitment. The Management, under sub-rule (3) of Rule 14, is under obligation to send a copy of the seniority list, service records and other information with the list of teachers on the proforma given in Appendix 'A', and the Inspector after verifying the fact shall forward it to the Commission under sub-rule (4) thereof. Rule 14 of the Rules, 1995 is as under:

"14. Procedure for recruitment by promotion.—(1) Where any vacancy is to be filled by promotion all teachers working in trained graduates (L.T.) grade or Certificate of Teaching (C.T.) grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T.) grade, as the case may be,

without their having applied for the same.

Note.— For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2). The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (3), and forward it to the Commission through the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the *pro forma* given in Appendix "A".

(4) Within three weeks of the receipt of the list from the management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Commission.

(5) The Commission shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as it may consider necessary. The Commission shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Deputy Director.

(6) Within ten days of the receipt of the panel from the Commission under sub-rule (5), the Inspector shall send the name of the selected candidate to the management of the institution which has notified the vacancy and the management shall accordingly on authorization under its resolution issue the appointment order in the proforma given in Appendix 'E' to such candidate."

As can be seen that for the first time a proviso was inserted in Rule 10 of the Rules, 1995 stipulating that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled by direct recruitment. This proviso was not there in the Rules, 1983.

By the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998 [U.P. Act No. 25 of 1998] (w.e.f. 20th April, 1998) Chapter III dealing with the procedure

of selection by promotion has been inserted in the Act, 1982. Under the newly inserted Section 12, which deals with the procedure of selection by promotion, in each region a statutory Selection Committee has been constituted under the Chairmanship of the Regional Joint Director of Education. It also comprises of senior most Principal of Government Inter College in the region as Member and the concerned District Inspector of Schools as Member-Secretary. For the first time, the power of the Commission for promotion was taken away by the amending Act, 1998 and it was entrusted to the Regional Level Committee.

The State Government vide notification dated 13th July, 1998 framed a new set of rules being the Rules, 1998, namely, the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 in exercise of its powers conferred by Section 35 of the Act, 1982. In the Rules, 1998, Rule 10 of the Rules, 1995 was retained with minor changes but both the provisos to Rule 10 were retained without any change. In the Rules, 1998 the rule-making authority has made a conscious departure from the earlier Rules of 1983 and 1995 in respect of the procedure for promotion. Sub-rule (4) of Rule 11 again puts a check on the Committee of Management that if it fails to notify the vacancies by the date specified in sub-rule (2), the Inspector shall send it to the Board and it shall be deemed to be notified by the Management. In the Rules, 1998, Rule 14 of the Rules, 1995 was retained with a significant change of inserting the word "regular" between the words "continuous service". Thus, fresh requirement is that a teacher who has completed five years continuous regular service on the first day of the year of recruitment shall be considered for promotion to the Lecturer's grade. It is apt to reproduce Rule 14 of the Rules, 1998, which reads as under:

"14. Procedure for recruitment by promotion.—

(1) Where any vacancy is to be filled by promotion all teachers working in trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same.

Note.—For the purposes of this sub-rule, regular service rendered in any other recognized institution shall be counted for eligibility unless interrupted by removal, dismissal, or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorization under its resolution issue the appointment order in the proforma given in Appendix 'F' to the such candidate."

The Division Bench in **Sadhna case (supra)** has expressed its apprehension that if the choice to decide the year of recruitment within the promotion quota is left at the

discretion of the Committee of Management, which has to be done in every recruitment year in terms of the proviso to Rule 10 of the Rules, 1998, the Management can misuse it. It has further raised the issue that the Management cannot club the vacancies for the recruitment years and there is likelihood of promotional right of the teachers already working in the institution 'defeated at the whims of the Management'.

The issue whether the vacancies can be clubbed or not, fell for consideration before the Supreme Court in the case of **Balbir Kaur and another v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and others**⁹. In the said case, the Supreme Court had the occasion to consider the construction of Sections 2(l), which defines the year of recruitment, 10 and 11 of the Act, 1982 and Rule 11(2) (a) of the Rules, 1998. In paragraphs-38, 39 and 40 of the judgment the Supreme Court dwelt upon the ambit and scope of Rules 10 and 11 of the Rules, 1998 and the year of recruitment as defined under Section 2(l) of the Act, 1982. Their Lordships in paragraphs- 38, 39 and 40 of the judgment ruled thus:

"38. It was then contended by learned counsel for the respondents that under Section 10 of the Principal Act, vacancies are to be notified in respect of each year of recruitment and if the vacancies are clubbed together, the basic purpose of notifying the vacancies every year in terms of the said section will get frustrated, which cannot be permitted in law. According to the learned counsel, since the vacancies have to be notified each year it would naturally mean that they are also to be filled up each year from amongst the eligible candidates available in respect of that recruitment year. Therefore, the person who became eligible subsequently could not be considered in respect of the vacancies occurring in respect of the earlier recruitment year. The stand of the learned counsel is that in the present recruitment, the Board wrongly clubbed all such vacancies by taking recourse to the second proviso to Rule 11(2)(a) of the 1998 Rules. Learned counsel asserts that in the light of clear

⁹ (2008) 12 SCC 1 : 2008 (3) ESC 409 (SC)

provision of Section 10 of the Principal Act, the said rule cannot be resorted to.

39. We do not find much substance in the contention. Section 2(l) of the Principal Act, as amended by the U.P. Secondary Service Commission and Selection Board (Amendment) Act, 1992 defines "year of recruitment" to mean a period of twelve months commencing from 1st day of July of a calendar year. Section 10 of the Principal Act prescribes the procedure for determination of number of vacancies and directs the management to determine the number of vacancies, "existing or likely to fall vacant during the year of recruitment". On a bare reading of the provision, it is manifestly clear that when a selection is held in a "year of recruitment" then all the existing vacancies and the vacancies likely to fall vacant during the year of recruitment are clubbed and notified. Moreover, Section 11 of the Principal Act also contemplates preparation of a panel of the selected candidates with respect to the vacancies notified under Section 10(1) thereof.

40. It is clear that though it may be desirable for better administration, but neither Section 10 nor Section 11 of the Principal Act nor the 1998 Rules as such mandate that selection or determination of vacancies must be yearwise and, therefore, all the vacancies which are "existing or which are likely to fall vacant during the year of recruitment" can be clubbed irrespective of the year of occurrence of the vacancy. Moreover, second proviso to Rule 11(2)(a) also contemplates that the vacancies existing on the date of commencement of these Rules as well as the vacancies which are likely to arise on 30-6-1998, shall be included in the consolidated statement by the management and sent to the Board for making selection which shows that all the existing vacancies irrespective of the year of occurrence can be clubbed for being filled up together by the Board. In this view of the matter, it cannot be said that Rule 11(2)(a) is in conflict with the provisions of Section 10(1) of the Principal Act, as is sought to be pleaded on behalf of the respondents. We have, therefore, no hesitation in endorsing the view taken by the High Court that the Board and the Management have not committed any error in clubbing vacancies which were existing on the date of selection."

A careful reading of the above paragraphs clearly indicates that similar argument was raised before the Supreme Court that under Section 10 of the Principal Act the vacancies

are to be notified in each year of recruitment. It was argued that in terms of Rule 10 the vacancies have to be notified each year. Thus, the vacancies cannot be clubbed together. The said contention was rejected by the Supreme Court considering the scope of the year of recruitment, and Section 10 of the Principal Act and Rule 11 of the Rules, 1998, and held that all the vacancies which are existing or which are likely to fall vacant during the year of recruitment can be clubbed irrespective of the occurrence of year of vacancy. From the view expressed by the Supreme Court, it is manifestly clear that the Supreme Court has considered the scope of the aforesaid provisions, which are under consideration before this Court also. Hence, the law laid down by the Supreme Court has a binding precedent under Article 141 of the Constitution of India. This Court cannot wriggle out from the law laid down by the Supreme Court in the aforesaid three paragraphs by resorting to any interpretation.

The Supreme Court in the case of **Dashrath Rupsingh Rathod v. State of Maharashtra and another**¹⁰ has held that if the Supreme Court interprets any statutory provision then it is binding under Article 141 of the Constitution of India in all the factual and legal situations. The Supreme Court observed as under:

“**10.** It is axiomatic that when a court interprets any statutory provision, its opinion must apply to and be determinate in all factual and legal permutations and situations....”

In **Union of India and others v. Dhanwanti Devi and others**¹¹, the Supreme Court has laid down the law about the ratio of the judgment. The relevant part of the judgment is extracted herein-below:

¹⁰ (2014) 9 SCC 129

¹¹ (1996) 6 SCC 44

“9. Before advertizing to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that *Hari Kishan Khosla case*¹² is not a binding precedent nor does it operate as *ratio decidendi* to be followed as a precedent and is *per se per incuriam*. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of *stare decisis*. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its *ratio decidendi*.

10. Therefore, in order to understand and appreciate the binding force of a decision it is always

¹² 1993 Supp (2) SCC 149

necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents...."

It is trite that even the obiter of the Supreme Court is binding on the High Courts. Even for the subsequent Benches of the Supreme Court, the obiter of the earlier Bench has a persuasive value. Reference may be made to the judgment of the Supreme Court in **Oriental Insurance Company Ltd. v. Meena Variyal**¹³, wherein the Supreme Court held thus:

"An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority."

One of the questions arose before the Supreme Court in **Balbir Kaur (supra)** was also in respect of the scope of same provisions. The Supreme Court has expressed its view that it may be desirable for better administration but neither Section 10 nor Section 11 of the Principal Act i.e. Act, 1982 nor the Rules, 1998 lay down that it is mandatory that selection or determination of the vacancies must be yearwise and they cannot be clubbed. In view of the clear law laid down by the Supreme Court, no other interpretation by this Court is possible. The judicial discipline demands that the law laid down by the Supreme Court in respect of the same provision must be followed. I am in respectful agreement with the view expressed by the Full Bench of this Court in **Raesul Hasan (supra)** that followed the law laid down by the Supreme Court in **Balbir Kaur (supra)**.

Another issue which deserves consideration is whether, if the judgment of **Raesul Hasan (supra)** is accepted as

¹³ (2007) 5 SCC 428

correct, there would be two different year of recruitment one for direct recruitment and another for promotion. In that event the Management can play mischief by keeping promotion quota vacant for a long time and there can be cases where the Management deliberately modifies a requirement in the name of extending benefit to some candidate/teachers, who may be desirous of seeking promotion, otherwise not eligible within the year of recruitment. The Management can withhold such information.

A close look at the scheme of the Act, 1982 and the Rules would show that the said submission is based on assumption. The provisions of the Act and the Rules provide enough check and balance as discussed in the later part of this judgment.

The amendments mentioned above clearly indicate the intention of the legislature/ rule-making authority as the words "on the date of occurrence of the vacancy" of the Rules, 1983 were deleted in the Rules, 1995. It is also important to bear in mind that the definition of the 'year of recruitment' was deleted in the Rules, 1995 and it was incorporated in Section 2(I) of the Act, 1982. Lastly, the power of promotion was taken away from the Board and it was entrusted to a Selection Committee constituted under Section 12 of the Act, 1982 by inserting said section in Chapter III of the said Act by the amending Act of 1998. These changes clearly articulate the intention of the legislature/rule-making authority, which cannot be ignored simply because the Management can keep a vacancy for an indifferent period to show favour to its favourite candidate.

In fact, the above mentioned legislative changes in the Act, 1982 as well as in the Rules made thereunder clearly indicate that it was a conscious and glaring departure from the Rules, 1983 and the Rules, 1995. These changes made by the legislature must be given its due significance. These

amendments cannot be nullified by adopting a construction which is not permissible in the law if the language of the statute is plain and simple.

While amending these rules, the legislature/ rule-making authority has applied its mind. If its intention in carrying out the amendments had been misunderstood by this Court or found ambiguous or it was leading to absurdity or against the intention of the legislature/ rule-making authority, it was expected that the legislature would step in and rectify the situation by making appropriate amendment in the Act or the Rules. This amendment is in operation for more than 19 years.

It is trite that the real purpose in construing a statute is to ascertain the intention of the legislature. The legislature speaks its mind by use of correct expression which has to be given effect to. If there is ambiguity in the language of the provision, only then the Court can interpret the provision. If the language is clear and unambiguous, there is no need to look somewhere else to discover the intention or meaning. If the literal construction leads to absurdity, only in that case external aids to construction can be resorted to.

It is a well-settled that if an enactment is capable of one meaning only, the Court will prefer its literal meaning irrespective of the consequences. The Court cannot read any word to statute or read into it, which are not there, and it is not the duty of the Court to assume that there is defect or omission in the words used by the legislature or correct it or make up assumed deficiency.

A survey of law on this subject would be necessary. Some of the judgments of the Supreme Court need to be referred to illuminate the above principle.

A recent decision in **Smita Subhash Sawant v.**

Jagdeeshwari Jagdish Amin and others¹⁴ is in point in this connection. The Court held thus:

“**31.** It is a settled principle of rule of interpretation that the court cannot read any words which are not mentioned in the section nor can substitute any words in place of those mentioned in the section and at the same time cannot ignore the words mentioned in the section. Equally well settled rule of interpretation is that if the language of a statute is plain, simple, clear and unambiguous then the words of a statute have to be interpreted by giving them their natural meaning. (See *Principles of Statutory Interpretation* by G.P. Singh, 9th Edn., pp. 44-45.)...”

In **Rohitash Kumar and others v. Om Prakash Sharma and others**¹⁵ the Supreme Court has held that if there is some defect in the phraseology used in the statute, it is not open to the Court to add or amend or by construction make up for the deficiencies. It is not permissible for the Court to twist the clear language of the enactment in order to avoid any real or imaginary situation. In the garb of interpreting the provision, the Court does not have the power to add or subtract even a single word. The relevant parts of the judgment, being paragraphs-27, 28 and 29 as are material, are extracted below:

“**27.** The court has to keep in mind the fact that, while interpreting the provisions of a statute, it can neither add, nor subtract even a single word. The legal maxim “*A verbis legis non est recedendum*” means, “from the words of law, there must be no departure”. A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The court cannot proceed with the assumption that the legislature, while enacting the statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to *add and amend*, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it

¹⁴ (2015) 12 SCC 169

¹⁵ (2013) 11 SCC 451

must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, *cannot add words* to a statute, or *read words into* it which are not part of it, especially when a literal reading of the same produces an intelligible result.....

28. The statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The courts have to administer the law as they find it, and it is not permissible for the court to twist the clear language of the enactment in order to avoid any real or imaginary hardship which such literal interpretation may cause.

29. In view of the above, it becomes crystal clear that under the garb of interpreting the provision, the court does not have the power to add or subtract even a single word, as it would not amount to interpretation, but legislation."

(emphasis supplied)

In **Orissa Public Service Commission and another v. Rupashree Chowdhary and another**¹⁶ the Supreme Court has held that if the words of the statute are clear and unambiguous, then the Courts are bound to give effect to that meaning regardless of consequences. Paragraph-13 of the judgment reads thus:

"13. When the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences, for the Act speaks for itself. There is no ambiguity in the language of Rule 24 leading to two conclusions and allowing an interpretation in favour of the respondent which would be different to what was intended by the statute. Therefore, no rounding off of the aggregate marks is permitted in view of the clear and unambiguous language of Rule 24 of the Rules under consideration."

(emphasis supplied)

The Supreme Court in **State through Central Bureau of Investigation v. Parmeshwaran Subramani and**

¹⁶ (2011) 8 SCC 108

another¹⁷ has held that if a provision has been omitted by the legislature, the Court cannot read something into the provisions. It is not the duty of the Court to enlarge the scope of legislation as it will amount to rewrite the legislation and the Court cannot add words on the assumption that there is defect or omission in the words used by the legislature, correct or make up assumed deficiency. The relevant part of the judgment reads thus:

"18. It is settled law that where there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to undertake any exercise to read something into the provisions which the legislature in its wisdom consciously omitted. Such an exercise if undertaken by the courts may amount to amending or altering the statutory provisions.

19. In a plethora of cases, it has been stated that where the language is clear, the intention of the legislature is to be gathered from the language used. It is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The court cannot add words to a statute or read words into it which are not there. The court cannot, on an assumption that there is a defect or an omission in the words used by the legislature, correct or make up assumed deficiency, when the words are clear and unambiguous. Courts have to decide what the law is and not what it should be. ..."

(emphasis supplied)

In **Nelson Motis v. Union of India and another**¹⁸ the Court held that the Court is not concerned with the consequences if it gives effect to the plain meaning of the statute which indicates the intention of the legislature. The Court held thus:

"8. The language of sub-rule (4) of Rule 10 is absolutely clear and does not permit any artificial rule

¹⁷ (2009) 9 SCC 729

¹⁸ (1992) 4 SCC 711

of interpretation to be applied. It is well established that if the words of a statute are clear and free from any vagueness and are, therefore, reasonably susceptible to only one meaning, it must be construed by giving effect to that meaning, irrespective of consequences. The language of the sub-rule here is precise and unambiguous and, therefore, has to be understood in the natural and ordinary sense. As was observed in innumerable cases in India and in England, the expression used in the statute alone declares the intent of the legislature. In the words used by this Court in *State of U.P. v. Dr. Vijay Anand Maharaj*¹⁹, when the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the act speaks for itself. Reference was also made in the reported judgment to Maxwell stating:

“The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words.”

In **Union of India v. Sankalchand Himatlal Sheth and another**²⁰ the Supreme Court observed as under:

“**11.** The normal rule of interpretation is that the words used by the legislature are generally a safe guide to its intention. Lord Reid in *Westminster Bank Ltd. v. Zang*²¹ observed that “no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act”. Applying such a rule, this Court observed in *S. Narayanaswami v. G. Panneerselyam*²² that “where the statute's meaning is clear and explicit, words cannot be interpolated”. But, if the provision is clear and explicit, it cannot be reduced to a nullity by reading into it a meaning which it does not carry...”

In **Nyadar Singh v. Union of India and others**²³ the Supreme Court held as under:

“**23.** It is true that where statutory language should be given its most obvious meaning — 'to accord with how a man in the street might answer the problems posed by the words' — the statute must be

¹⁹ (1963) 1 SCR 1 : AIR 1963 SC 946 : 45 ITR 414

²⁰ (1977) 4 SCC 193

²¹ 1966 AC 182

²² AIR 1972 SC 2284, 2290: (1972) 3 SCC 717, 726 (Para 19).

²³ (1988) 4 SCC 170

taken as one finds it. Considerations relevant to interpretation are not whether a differently conceived or worded statute would have yielded results more consonant with fairness and reasonableness. Consequences do not alter the statutory language, but may only help to fix its meaning."

In the case of **The State of Rajasthan v. Mrs. Leela Jain and others**²⁴ a decision taken under the Municipal Law was final. However, from a proviso under the Act the State Government had interfered in the municipal affairs. The Supreme Court did not agree with the interpretation made by the High Court to curtail the power of the State Government. The Supreme Court held thus:

"(16).That is an aspect which appealed greatly to the learned Judges of the High Court and as we have pointed out earlier, forms the main reasoning on which they have arrived at the construction of the proviso. Though we are not unmindful of the consequences and implications of this construction, we consider that it would not be proper to take these factors into consideration where the words of the statute are clear and what we have stated earlier should suffice to show that, in our opinion the opposite construction is not reasonably open without doing violence to the language of the enactment either by omitting the words "or other Municipal authorities" altogether or by rewriting the section so as to achieve the desired result. We do not conceive this to be the function of a Court of construction but that it must be left to other organs of Government. We, therefore, consider that the learned Judges of the High Court were in error in holding that the State Government had no power to entertain the revision against the order of the President of the Municipal Council and to quash it on that ground."

In the case of **State of Uttar Pradesh and others v. Dr. Vijay Anand Maharaj**²⁵ by referring to certain passages in Maxwell on the Interpretation of Statutes and in Crawford on Statutory Construction, the Supreme Court held thus:

"(8). ...Crawford says that a liberal construction

²⁴ AIR 1965 SC 1296 : (1965) 1 SCR 276

²⁵ AIR 1963 SC 946 : (1963) 1 SCR 1

does not justify an extension of the statute's scope beyond the contemplation of the Legislature. The fundamental and elementary rule of construction is that the words and phrases used by the Legislature shall be given their ordinary meaning and shall be construed according to the rules of grammar. When the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. It is a well recognized rule of construction that the meaning must be collected from the expressed intention of the Legislature. So construed, there cannot be two possible views on the interpretation of the first part of the section...."

Applying those principles in the present case, from a careful reading of Section 2(l) of the Act, 1982, Rules, 10, 11 and 14 of the Rules, 1998 it is evident that the words are clear and unambiguous, hence they have to be given their literal and ordinary meaning. The language of the aforesaid rule is so simple that they admit only one meaning. They also unmistakably show the intention of the legislature. By inserting Section 12 in the Principal Act and Rule 14 of the Rules, 1998 it is clear that Board's one of the functions regarding promotion of teacher was taken away from it and it was entrusted to a new statutory Committee. The detailed procedure is laid down in Rule 14. Any construction with reference to proviso to Rule 10 will make whole scheme unworkable. The legislature/ rule-making authority has deliberately and purposely used the words 'year of recruitment' in Rule 14 of the Rules, 1998.

The Court cannot read the words "year in which vacancy occurred" in Rule 14. This will amount re-writing Rule 14, which is not permissible under the law as held by the Supreme Court in the cases referred above.

During the course of submission, much emphasis has been laid on the proviso to Rule 10, which provides that in case the promotion quota is not complete, the post shall be treated

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the latter intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

The Supreme Court in the case of **The Commissioner of Income-Tax, Mysore, Travancore-Cochin and Coorg, Bangalore v. The Indo Mercantile Bank Limited**²⁷ has held as under:

"10. ...The proper function of a proviso is that it qualifies the generality of the main enactment, by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. "It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as

²⁷ 1959 Supp (2) SCR 256 : AIR 1959 SC 713

proviso". Therefore it is to be construed harmoniously with the main enactment. (Per Das, C.J.) in *Abdul Jabar Butt v. State of Jammu & Kashmir*²⁸. Bhagwati, J., in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*²⁹ said:

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other".

11. Lord Macmillan in *Madras & Southern Mahratta Railway Co. v. Bezwada Municipality*³⁰ laid down the sphere of a proviso as follows:-

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms".

The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also *Corporation of The City of Toronto v. Attorney-General for Canada*)³¹"

In **Prakash and others v. Phulavati and others**³² the Supreme Court has held as under:

"19. Interpretation of a provision depends on the text and the context.³³ Normal rule is to read the words

²⁸ (1957) S.C.R. 51, 59

²⁹ (1955) 2 S.C.R. 483, 493

³⁰ (1944) L.R. 71 I.A. 113, 122

³¹ (1946) A.C. 32, 37.

³² (2016) 2 SCC 36

³³ RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424, p. 450, para 33

of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given.³⁴ In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given.³⁵

20. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied.³⁶

21. Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters.³⁷ Object of interpretation is to discover the intention of legislature.”

As noted above, the language of Rules 10 and 14 of the Rules, 1998 is absolutely clear and free from any vagueness as they are susceptible to only one meaning.

With effect from 27th July, 1998 by the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998 (U.P. Act No. 25 of 1998) once again important amendments have been made in the Principal Act of 1982. By the said amendment, after Section 11 of the Principal Act, Chapter III was inserted containing Section 12. Both the amendments in the Principal Act and the Rule 14 of the Rules, 1998 are very significant for our purposes.

For the first time, the procedure for promotion was completely changed. The Board is completely divested of its one of its powers to make promotion of teachers. By inserting Section 12 in the Principal Act a separate procedure is provided whereunder a Selection Committee is constituted in each region under the Chairmanship of the Regional Joint Director.

³⁴ *Kehar Singh v. State (Delhi Admn.)*, (1988) 3 SCC 609 : 1988 SCC (Cri) 711

³⁵ *District Mining Officer v. TISCO*, (2001) 7 SCC 358

³⁶ *S. Sundaram Pillai v. V.R. Pattabiraman*, (1985) 1 SCC 591

³⁷ *Keshavji Ravji & Co. v. CIT*, (1990) 2 SCC 231 : 1990 SCC (Tax) 268

In the Rules, 1998, Rule 14 of the Rules, 1995 was retained except a change by adding word 'regular'. These changes clearly show the intention of the legislature to take away the power of promotion from the Board.

It is noteworthy that in 1998 the power of promotion has been taken away from the Board. The proviso to Rule 10 has been retained in the subsequent amendment but the intention of the legislature was clear that the power of promotion has been taken away from the Commission from the Board and a separate statutory selection committee has been constituted. Thus, the subsequent development clearly indicates that the purpose of the year of recruitment in the promotion can be separated from the direct recruitment. The proviso to Rule 10 was relevant when both the powers of the direct recruitment and promotion were entrusted to the Board, but as mentioned above, in 1998 both the powers of direct recruitment and promotion are now with the Board and the separate statutory authority has been constituted under Section 12 of the Principal Act.

As regards the apprehension that the Committee of Management can misuse its power, the said apprehension is misconceived on two grounds:

(I) that if the literal meaning is clear then the Court cannot resort to any other principle of interpretation whether it likes or not the consequences. As held by the Supreme Court, the Courts are not concerned with the consequences, it is domain of the legislature to amend the law but under the garb of the interpretation the Court cannot legislate.

(II) A careful reading of the schemes of the Act and the Rules clearly indicates that the Committee of Management has not been given unfettered power under the Act and the Rules

regarding the determination of the vacancies and sending requisition to the Board or the Committee constituted under Section 12 of the Act, 1982 for promotion. Rule 6 of the Rules, 1998 clearly indicates that if the Management fails to send the requisition within the time-schedule, the Board can ask the Inspector to send the requisition directly to the Board and it shall be deemed to be sent by the Committee of Management. The legal fiction provided in Rule 6 clearly indicates the intention of the legislature that the Committee of Management has not been given freehand in respect of determination of the vacancies for direct recruitment as well as for promotion.

It is also significant to mention that Appendix 'A' has not been changed right from the Rules, 1983, Rules, 1995 and the Rules, 1998. The details which are required to be submitted in the format of Appendix 'A' are very important. A complete reading of Appendix 'A' would show that all the necessary information regarding the number of sanctioned posts, details of the teachers, seniority list, the qualification of the teachers, subjects in High School/ Inter, strength of students, etc.. In brief almost all the information are with the Inspector of the schools. The Inspector from his records can easily find out about the eligibility of the teachers for promotion, date of vacancy and the vacancies likely to fall in a recruitment year.

In addition to above, the Board in respect of the direct recruitment and the Joint Director of Education for the promotion have the power under the provisions of the Act and the Rules to ask the Inspector to submit additional information, which they need in respect of the direct recruitment and promotion.

Hence, in view of the scheme of the Act and the Rules it is evident that the intention of the legislature is not to give freehand to the Management. It has to send only information

to the Inspector and it does not have any authority either in the Principal Act or in the Rules for promotion of a teacher. Its simple duty is to send all the information of the teachers who are eligible for promotion irrespective of the fact whether they have applied or not.

In view of the above scheme, if any vacancy occurs in the promotion quota and any teacher in the institution is eligible for promotion in terms of Rule 14, then he has to be considered for promotion. In case the Management does not send the requisition, there are two options open to the Inspector: (i) he can ask the Management to send the information, and (ii) in case it does not send, he can forward the name of the eligible candidates to the Committee under Section 12 of the Act on the basis of the records of the institution as mentioned in sub-rule (6) of Rule 4 of the Rules, 1998.

Insofar as the judgment of the Full Bench of this Court in the case of **Prashant Kumar Katiyar v. State of U.P. and others**³⁸ is concerned, the said Full Bench was called upon to answer the following questions:

"(a) Whether a dependent can claim appointment against a post of teacher even after the post has been requisitioned to the selection Board in view of the Regulations 101 to 106 of Chapter III of the Regulations framed under the Intermediate Education Act merely because he has qualifications for the same, specifically when on the date of requisition, no such application for compassionate appointment was pending.

(b) Whether Article 16 of the Constitution of India will be applicable to the teachers working in recognized Intermediate Colleges which are under the private management even if aided by the State Government.

(c) Whether the judgment of the Division Bench of this Court in the case of *Ved Prakash (Supra)* lays down the correct law."

³⁸ (2013) 2 UPLBEC 971

Later on one more question was added by the Full Bench under Chapter VI, Rule 6 of the Allahabad High Court Rules, 1952. The said question reads as under:

"(c) Whether the judgment of the Division Bench of this Court in the case of *Ved Prakash (supra)* is in direct conflict with the Division Bench judgment in the case of *U.P. Secondary Education (supra)*, and which of the two decisions lay down the law correctly."

A perusal of the said questions indicates that the issue involved in the present case regarding the promotion in terms of Rule 14 of the Rules, 1998 was not before the said Full Bench. In fact, the Full Bench was called upon to resolve the conflicting decisions of two Division Benches in **Ved Prakash v. Hari Krishna Singh and others, Special Appeal No. 30 of 2011**, decided on 19th January, 2011 at Lucknow Bench, and **U.P. Secondary Education Services Selection Board Allahabad v. State of U.P. and others, Special Appeal No. 146 of 2010**, decided on 21st January, 2011. The dispute decided by the Division Benches was in respect of the candidates who have been selected by the Board on the posts of Lecturers and Assistant Teacher against Advertisement No. 1 of 2009, but they were not appointed by the Management for multiple reasons. They prayed for their appointment, alternatively for their adjustment under Rule 13(5) of the Rules, 1998. Another issue raised before the Full Bench was regarding the compassionate appointment. The Full Bench answered the aforesaid questions in the following terms:

"94. In view of what has been said above, our answer to the questions (a) and (c) referred to us is as follows:-

(A) The claim of a dependant as per the third proviso to Section 16 of the 1982 Act read with Regulations 101 to 107 of Chapter III of the Regulations framed under the 1921 Act can be considered for compassionate appointment on the post of an Assistant Teacher (TGT grade) against a vacancy that has been notified for being filled up by direct recruitment under the 1982 Act

read with the 1998 Rules framed thereunder upto the stage of the last date for receipt of application forms under the advertisement, but not thereafter till the selections are completed by the Board followed by appointments under the provisions aforesaid.

(B) The law regarding the claim of compassionate appointment as expounded in the case of *Ved Prakash (supra)* is overruled to extent as indicated above in (A) and explained in the body of the judgment.

(C) The view taken by the learned Single Judge in the case of *Raja Ram (supra)* and affirmed by the division bench in the case of *U.P. Secondary Education Services Selection Board, Allahabad (supra)* stands modified to the extent as indicated in (A) hereinabove in so far as it relates to compassionate appointments only.

(D) The view expressed by the learned Single Judge in *Raja Ram's case (supra)* and affirmed by the division bench in *U.P. Secondary Education Services Selection Board (supra)* in so far as it relates to other modes of appointment is approved and the judgements to that extent are affirmed.

(E) The interpretation, the scope and applicability of Rule 13(5) of the 1998 Rules as affirmed in the case of *U.P. Secondary Education Services Selection Board (supra)* is upheld as laying down the law correctly by confining its applicability to the vacancies that are subject matter of the same advertisement and not to such vacancies that were notified but not subject matter of the same advertisement."

From the nature of the questions referred to the Full Bench and the answer to the reference it is abundantly clear that there was no issue involved in respect of the promotion and the year of recruitment referred to in Rule 14 of the Rules, 1998. A careful reading of the entire judgment would show that there is not even a reference of Rule 14 of the Rules, 1998, which deals with the promotion. Hence, any observation made in the decision of the Full Bench in **Prashat Kumar Katiyar (supra)** has no binding precedent in the issue involved in the case in hand.

In addition to above, the Full Bench has not considered

the judgment of **Balbir Kaur (supra)** of the Supreme Court, wherein Rules 10 and 11 of the Rules, 1998 have been considered and the Court has expressed its opinion that the vacancies of the different year of recruitment can be clubbed together. The judgment of the Supreme Court in **Balbir Kaur (supra)** has escaped the notice of the Full Bench. As regards some observations of the Full Bench in respect of Rule 11 and the year of recruitment are concerned, at the highest it is not a ratio of the judgment. Since the issue of the year of recruitment viz-a-viz Rule 14, which deals with promotion, was not before the Full Bench, its any observation is mere an obiter.

The Supreme Court has considered the issue that when a judgment is binding, elaborately in the case of **Dalbir Singh and others v. State of Punjab**³⁹. Following passage is, in this regard, apposite:

"22. ...According to the well-settled theory of precedents every decision contains three basic ingredients:

- (i) finding of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;
- (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and
- (iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi⁴⁰. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the

³⁹ (1979) 3 SCC 745

⁴⁰ R.J. Walker & M.G. Walker: The English Legal System, Butterworths, 1972. 3rd Ed.. pp. 123-124.

principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of *Qualcast (Wolverhampton) Ltd. v. Havnes*⁴¹ it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgement is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

It is a trite that a decision ordinarily is a decision in the case before the Court while the principle underlying the decision would be treated as a binding precedent, but not every observation. A decision takes its colour from the questions involved in the case in which it is rendered. The scope of precedent cannot be expanded unnecessarily beyond the issue involved in that case. Reference may be made to the judgment of the Supreme Court in **Prakash Chandra Shah v. State of Gujarat**⁴². Applying these principles of law, I regret my inability to lend concurrence to the aforementioned view in **Prashant Kumar Katiyar (supra)**.

The next question which merit consideration is whether intention of the legislature/ rule-making authority is to give different meaning to the 'year of recruitment' in the Act and the Rules or it should be given same meaning. The Full Bench in **Raesul Hasan (supra)** dwelt upon this issue elaborately and has followed the judgments of the Supreme Court.

In this regard it is worthwhile to refer to the judgment of the Supreme Court in **Harish Chandra Ram v. Mukh Ram Dubey**⁴³. The Supreme Court has given a hypothetical example, which is in the line of reasoning given in **Balbir Kaur**

⁴¹ LR 1959 AC 743 : (1959) 2 All ER 38

⁴² (1986) 1 SCC 581

⁴³ 1994 Supp (2) SCC 490

(supra). Paragraph-6 of the judgment is relevant for our purpose and it reads thus:

"6. Take another illustration. Suppose Public Service Commission advertises for direct recruitment in the year 1980, but actually selects the candidates in 1984. Whether 1980 would be the recruitment year? Answer would be no. Second advertisement was made in 1985 and recruitment was made in 1990. The second recruitment year is 1990 and not 1985. It is thus clear that the recruitment year is the year in which recruitment takes place, but not each three successive years in which the vacancy exists. The same yardstick would apply to fill in the reserved vacancy. Dereservation will be considered only at the end of third recruitment year provided reserved candidates are not available, or considered at the recruitment and found not fit for promotion or carried forward for three successive recruitment years. Then the matter should be placed before the competent authority for consideration for dereservation of the reserved posts and a resolution or order should be made dereserving the posts. Then those alone reserved posts or vacancies will be thrown open for recruitment by the general candidates."

(emphasis supplied)

Similar issue regarding year of recruitment also fell for consideration before the Supreme Court in **State of U.P. v. Sangam Nath Pandey**⁴⁴.

As noticed by the Supreme Court in **Balbir Kaur (supra)**, it would be an ideal situation that the Board will complete the recruitment every year, which is the clear intention of the legislature, but the past experience reveals that from 1982, when the Board was established, it could never achieve the said object. The Board is not able to complete the process of recruitment in a year of recruitment. It takes average 2-3 years to complete the process of recruitment, sometimes for years together the recruitment is stopped for one or another reason. Thus, on the ground of practical difficulties on multiple reasons, the vacancies go on accumulating, hence over emphasis on the compliance of the

⁴⁴ (2011) 2 SCC 105

provisions to complete the entire recruitment process in a year of recruitment will make the statute unworkable. Regard may be had to the fact that there is no scheme in the Act, Rules or in the provisions of the Act, 1921 to prepare the seniority list in the promotion quota on the basis of the yearwise vacancy. In absence of any such provision in the aforesaid provisions of the Act, 1982, Act, 1921 and the Rules made under the Act, 1982 the clubbing of vacancies of different years of recruitment cannot be held to be illegal.

During the course of hearing the Court had requested the learned Additional Advocate General to produce the original record to ascertain the intention of the rule-making authority to incorporate the year of recruitment in Section 2(l) of the Act, 1982 and under the Rules 1995 and the Rules, 1998.

The learned Additional Advocate General has failed to produce any record. He has filed an affidavit of the Principal Secretary, Secondary Education, Government of U.P.. In the said affidavit it is mentioned that for the appointment on different posts in the State, the Personnel Department of the State Government issued a Government order dated 20th August, 1993, whereby a procedure has been laid down for the selection. It is mentioned that the Personnel Department has issued another Government order dated 19th May, 2001. Relevant part of Para-11 (iv) and (v) of the affidavit has a material bearing in this regard hence it reads thus:

“(iv) That the Personal Department has issued a Government Order dated 19.5.2001, Para 2 (1) of the said Government Order reads as under:

“प्रथम जुलाई से प्रारम्भ होने वाली बारह माह की अवधि जिसे एक चयन वर्ष कहा जाता है, में घटित रिक्तियों हेतु यथासंभव एक ही चयन सम्पन्न किये जाने की नीति है । अतः चयन के लिए एक चयन वर्ष में भरी जाने वाली सभी रिक्तियों की गणना की जाय, जिसमें अनुसूचित जाति, जनजाति व अन्य आरक्षित वर्गों के लिए उनके निर्धारित कोटे के अनुसार अलग अलग रिक्तियां भी अवधारित की जाय तथा चयन के समय उससे चयन समिति को अवगत कराया जाये ।”

(v) That it is pertinent to mention here that at the time of promulgation of Uttar Pradesh Secondary Education Services Selection Commission Rules, 1995, while submitting the proposal 'first day of year of Recruitment' has not mentioned on the note sheet of the file, but it appears that at the time of English Drafting of the said Rule the Legislative Department, taking into the consideration of the provisions contained in different Government Orders issued by Personal Department, has inserted the provisions of Rule 14(1) on the strength of U.P Act No. 1 of 1993."

It is evident from the aforesaid affidavit that the intention of the rule making authority is very clear. It wanted to bring uniformity in all the Government Departments including the Education Department in respect of the year of recruitment.

The use of word "यथासम्भव" (as far possible) would show that recruitment in the same recruitment year is not a mandatory and is a directory as held by the Supreme Court in **Balbir Kaur (supra)**, which has held that it would be ideal to hold the selection in the same recruitment year but if it is not possible then there is nothing illegal to club the vacancies. The interpretation of the aforesaid rule in **Prashant Kumar Katiyar (supra)**, thus, does not reflect correctly the intention of the rule making authority.

In addition to above, the judgment of the Full Bench in **Raesul Hasan (supra)** has not been challenged by the State or any aggrieved person. The said judgment has attained finality. **Smt. Sadhana (supra)** case has not pointed out that the judgment of **Raesul Hasan (supra)** is *per incuriam* and any statutory provision or any binding precedent has escaped its notice.

For all the reasons mentioned herein-above, I am of the view that the judgment in **Raesul Hasan (supra)** does not need any reconsideration. It has correctly laid down the law.

In view of the reasons mentioned above, my answer to the questions referred to this Bench is as follows:

(A) The Full Bench in the case of **Raesul Hasan (supra)** has laid down the correct law.

(B) There is no provision under the Act, 1982 or the Rules for the yearwise selection. Since the vacancies can be clubbed, the recruitment year is in the year when recruitment takes place. The Court cannot substitute the words "year in which the vacancy occurred" for the words "year of recruitment".

(C) The effect of proviso to Rule 10 of the Rules, 1998 is that if in the year of recruitment no eligible candidate under the promotion quota is available, the post can be filled by the direct recruitment. But in case recruitment does not take place, the vacancies can be clubbed and eligibility of a candidate can be determined on the first day of the year of recruitment when it takes place.

(D) The scheme of the Act and the Rules shows that there is sufficient safeguard to prevent any such abuse of the provisions by the Management.

(E) As held by the Supreme Court in **Balbir Kaur (supra)** vacancies can be clubbed, hence, a teacher who fulfills the norms of eligibility on the first day of the year of recruitment has to be considered and not on the first day of the year 'when vacancy occurs'.

Date :- 30th May, 2017
SKT/Digamber

(P.K.S. Baghel, J.)