

# **Himanshu Shukla And Another vs State Of U.P. And 3 Others on 13 April, 2018**

**Author: Ashwani Kumar Mishra**

**Bench: Ashwani Kumar Mishra**

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 58

Case :- WRIT - A No. - 48664 of 2017

Petitioner :- Himanshu Shukla And Another

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Man Bahadur Singh,Ashok Khare

Counsel for Respondent :- C.S.C.,M.N. Singh

With

Case :- WRIT - A No. - 13741 of 2017

Petitioner :- Vipin Kumar Sharma

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Prabhakar Awasthi,Rajesh Kumar Singh

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 14886 of 2017

Petitioner :- Sivendra Pratap Singh

Respondent :- State Of U.P. And 3 Ors.

Counsel for Petitioner :- Siddharth Khare,Ashok Khare

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 26506 of 2017

Petitioner :- Rahul Singh And 24 Ors.

Respondent :- State Of U.P. And 2 Ors.

Counsel for Petitioner :- Seemant Singh

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 30489 of 2017

Petitioner :- Hemant Singh Yadav And Anr.

Respondent :- State Of U.P. And 2 Ors.

Counsel for Petitioner :- Seemant Singh

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 35405 of 2016

Petitioner :- Sheeba

Respondent :- State Of U.P. And 2 Ors.

Counsel for Petitioner :- Siddharth Khare,Sri Ashok Khare

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 41347 of 2017

Petitioner :- Gyanendra Kumar Singh And Another

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Man Bahadur Singh,Radha Kant Ojha

Counsel for Respondent :- C.S.C.,M.N. Singh

And

Case :- WRIT - A No. - 41348 of 2017

Petitioner :- Prakhar Chauhan And 2 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Man Bahadur Singh,Ashok Khare

Counsel for Respondent :- C.S.C.,M.N. Singh

And

Case :- WRIT - A No. - 5682 of 2018

Petitioner :- Monee Nayak

Respondent :- State Of U.P. And 2 Ors.

Counsel for Petitioner :- Sushil Kumar Pandey,Adarsh Singh,Indra Raj Singh,Sushil Kumar

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

And

Case :- WRIT - A No. - 5695 of 2018

Petitioner :- Neha Bajpai

Respondent :- State Of Up And 3 Others

Counsel for Petitioner :- Avadhesh Kumar Upadhyay,Rakesh Kumar

Counsel for Respondent :- C.S.C.,M.N. Singh

And

Case :- WRIT - A No. - 60855 of 2016

Petitioner :- Rashtrapati Shukla And 3 Ors.

Respondent :- State Of U.P. And 7 Ors.

Counsel for Petitioner :- Shantanu Khare,Ashok Khare

Counsel for Respondent :- C.S.C.

And

Case :- WRIT - A No. - 7072 of 2018

Petitioner :- Chandra Prakash Verma And 3 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Awadhesh Kumar Sharma, Awadhesh Kumar Sharma, Indresh Chandra

Counsel for Respondent :- C.S.C., M.N. Singh

And

Case :- WRIT - A No. - 7119 of 2018

Petitioner :- Mahendra Yadav

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Birendra Pratap Yadav, Krishna Kant Yadav

Counsel for Respondent :- C.S.C., M.N. Singh

And

Case :- WRIT - A No. - 7814 of 2018

Petitioner :- Satendra Kumar Dubey

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Man Bahadur Singh, Sr. Advocate M.D. Singh Shekhar

Counsel for Respondent :- C.S.C., M.N. Singh

And

Case :- WRIT - A No. - 8334 of 2018

Petitioner :- Shikha Malviya And Another

Respondent :- State Of U.P. And 03 Others

Counsel for Petitioner :- Saroj Kumar Yadav

Counsel for Respondent :- C.S.C., M.N. Singh, Nisheeth Yadav

And

Case :- WRIT - A No. - 9645 of 2018

Petitioner :- Sushil Singh

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Vashishtha Tiwari

Counsel for Respondent :- C.S.C., M.N. Singh

Hon'ble Ashwani Kumar Mishra, J.

1. The Governor of Uttar Pradesh in exercise of powers conferred by the proviso to Article 309 of the Constitution of India has made rules regulating recruitment and conditions of service of Assistant Teachers (Trained Graduates Grade), in Government Secondary Schools, known as the Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service Rules, 1983 (hereinafter referred to as 'the Rules of 1983'). The Rules of 1983, as they originally stood, contemplated a cadre of Trained Graduate Teachers, both for men and women at regional level. Posts in the cadre were to be filled by direct recruitment and also by promotion through the U.P. Public Service Commission (hereinafter referred to as 'the Commission'). The Commission was to invite applications for direct recruitment and subject the candidates having eligibility in terms of the rule to interview, and accordingly prepare a select list. The Rules of 1983 have been amended from time to time, which have a material bearing on the controversy raised in this bunch of writ petitions. As all these writ petitions involve common questions of law and fact, and have been heard together, therefore, are being disposed of by this common judgment.

2. At the outset, it would be appropriate to refer to the successive amendments made in the Rules of 1983. First Amendment to the Rules of 1983 was made vide notification dated 6th November, 1992. Rule 5 of the 1983 Rules, which provided for direct recruitment to be made in the cadre through the Public Service Commission, was substituted with direct recruitment to be made by selection committee, as specified. For promotions also the Commission ceased to have any role. Other amendments were also made with which the Court is not concerned as of now. Second Amendment in the Rules of 1983 was made vide notification dated 8th September, 2010. The qualifications prescribed for different posts in the cadre was amended. Rule 15, which provided for making of application to the Regional Deputy Director of Education, was amended to mean Regional Joint Director of Education. Recruitment procedure provided under the Second Amendment introduced in the Rules of 1983 remained intact.

3. Yet another notification was issued on 28.2.2014, incorporating amendment in the Rules of 1983 by way of Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service (Third Amendment) Rules, 2014. The maximum age for recruitment to the posts as provided in Rule 10 was increased from 32 to 40. Criteria for computation of quality point marks for selection by direct recruitment was altered. The weightage allocated for Postgraduate Degree was omitted. Rule 15 was also amended, which dealt with the manner of preparation of select list for selecting candidates by direct recruitment. With the changes brought about by the Third Amendment, recruitment to the cadre was to be made region-wise, with the appointing authority for direct recruitment being Regional Deputy Director of Education for the men branch and Regional Inspectress of Girl's Schools in respect of women branch.

4. Rules of 1983 were yet again amended vide notification dated 19th October, 2016 pursuant to Fourth Amendment Rules of 2016. Rule 3 was amended and the appointing authority for both men branch and women branch was substituted as Additional Director of Education, Secondary, U.P.

Allahabad. The regional cadre both for men and women branches, as it stood earlier, was substituted with a State cadre for men and women branches. The qualification for various posts were also prescribed. Rule 14, which provided for determination of vacancies to be filled during the course of year of recruitment, was required to be determined subjectwise for men and women branches. The procedure for direct recruitment was also modified. The selection committee also underwent a change.

5. The Rules of 1983 lastly came to be amended on 23rd August, 2017 by way of Fifth Amendment Rules of 2017. Sub-rule 3(c) was added to Rule 3, which defined 'Commission' as the 'U.P. Public Service Commission, Allahabad'. Rule 5 was also amended so as to provide for appointment by direct recruitment through the Public Service Commission. Rule 3(b) was omitted. Rule 10 was also amended and the maximum age for recruitment to the post covered under the Rules of 1983 was specified as 40 years. The procedure contemplated under Rule 15 was changed so as to ensure direct recruitment in the cadre to be made by the U.P. Public Service Commission. Such direct recruitment by the Commission is to be made on the basis of a written test and the consequential merit list prepared on the basis of the same. Such merit list is to be sent by the Commission to the appointing authority, who in turn was to make appointments therefrom. However, the appointing authority remained the same i.e. the Additional Director of Education.

6. Petitioners before this Court in this bunch of writ petitions have applied, pursuant to advertisements issued during the currency of Second, Third and Fourth Amendment in Rules of 1983 for direct recruitment to be made against posts in the cadre. Their grievance is that recruitment initiated as per the rules then in force have not been concluded, and the State has arbitrarily discontinued the recruitment process, midway. The action of the State in now proceeding to fill up such left over seats by a fresh advertisement dated 15.3.2018, in accordance with the Fifth Amendment Rules, is challenged. The grounds of challenge to the aforesaid action essentially are that the Rules amended subsequently cannot be given a retrospective effect, and that the State's decision to abort the ongoing recruitment process is otherwise vitiated, being arbitrary, irrational and actuated by political considerations which lack bona fide. The details of recruitment process initiated and discontinued, with reference to the year of advertisement, is enumerated hereinafter.

#### Advertisement of 2011

7. In Writ Petition No.35405 of 2016, petitioner Sheeba had applied for appointment to the post of Assistant Teacher in Sanskrit, in Gorakhpur Region, pursuant to advertisement published in employment news dated 29.1.2011-4.2.2011. Selection was based upon quality point marks secured by an applicant. Petitioner's quality point marks worked out to 86.23. She did not qualify for being called in the first counselling and her turn came in the second counselling held on 24.9.2012, in the office of Principal, DIET, Gorakhpur. Petitioner claims to have participated in it for the recruitment to be made against 04 posts of Assistant Teacher in L.T. Grade in Sanskrit. Only 04 candidates participated, including the petitioner. It is stated that two candidates who had participated in first counselling were issued appointment letters, but they did not join. No appointment was made pursuant to the second counselling. In the first counselling the last selected candidate had secured 91.36 quality point marks. Since no decision was taken in respect of petitioner's claim, as such she

approached this Court by filing Writ Petition No.17505 of 2016, which came to be disposed of permitting the petitioner to make a representation before the Director of Education, and the same was to be examined as per law. Petitioner was given an opportunity of hearing on 30th June, 2016. Her claim ultimately came to be rejected by the Director of Education (Secondary), vide order dated 18.7.2016. As per the order, 08 persons were called in the unreserved category in the first counselling but first 06 candidates failed to turn up. Appointment letters were issued to persons at serial nos.7 and 8, but they too did not join. Petitioner was placed at serial no.40 in the order of merit when she was called in the second counselling. It is mentioned in the order of Director that while selection proceedings were under progress, general elections got notified in December, 2011, and on account of model code of conduct, the recruitment process had to be stalled. Thereafter a ban was imposed in the matter of making of appointment. Although on 19.11.2012 a direction was issued to conclude the recruitment in respect of remaining vacancies by 15th December, 2012, but it could not materialize. The recruitment process remained incomplete. The order of the Director also states that a fresh advertisement got issued in the year 2014, in which left over seats of 2011 recruitment were also included, and since the proceedings initiated in 2014 remained pending, as such the petitioner cannot be appointed. The order of Director also recites that name of petitioner Sheeba was at serial no.40, while 31 persons higher in merit (between 90.88 to 86.33 quality point marks) were still available. Petitioner's claim was accordingly rejected observing that in case she is considered for appointment, right of 31 candidates higher in merit would be adversely affected.

#### Advertisement of 2014

8. After the Third Amendment was introduced in the Rules vide notification dated 28.2.2014, a Government Order was issued on 22nd July, 2014 initiating process for filling up 6645 posts of Assistant Teacher in the cadre. Vacancies were advertised region-wise, in employment news dated 6th October to 12th October, 2014. As per the details brought on record, 6403 posts were advertised, against which 1952 selected candidates have actually joined and are working. A supplementary counter affidavit has been filed by the State bringing on record the break up of posts, region-wise. Petitioners in Writ Petition Nos.14886 of 2017 and 60855 of 2016 were applicants pursuant to the aforesaid advertisement. Their grievance is that entire posts advertised have not been filled up, although counselling was conducted in different rounds. Petitioner Shivendra Pratap Singh in Writ Petition No.14886 of 2017 states that he had applied for appointment to the post of Assistant Teacher in L.T. Grade for Science/Math in Moradabad Region, and his quality point marks was 75.25. The petitioner was instructed to appear for counselling vide notice dated 20th October, 2015, and that he actually participated in it on 4.11.2015. The cut-off marks for being invited in third counselling in the category of unreserved candidates was notified as 74.43 marks. As against 05 vacant posts to be filled, the select list contained name of only 03 persons and two remaining posts were left vacant. As per the petitioner, he was at serial no.5 while one Yash Agarwal was at serial no.4, who had 75.26 marks. The claim of Yash Agarwal was not considered as his testimonials had not been verified. Petitioner, therefore, approached this Court by filing Writ Petition No.56284 of 2016, which was directed to be considered by the Joint Director, vide order dated 29.11.2016 passed in Writ Petition No.56284 of 2016. The Joint Director of Education has rejected the representation stating that the last selected candidate in the first/second counselling had secured 75.36 marks, while petitioner's merit was below it. The order further mentioned that on account of Fourth

Amendment introduced in the Rules of 1983, the recruitment process initiated in the year 2014 has been brought to an end, and therefore, petitioner cannot be considered for appointment. It is this order of Joint Director dated 8th March, 2017, which is under challenge before this Court in the Writ Petition No.56284 of 2016. Similar grievances are raised by other petitioners, who have applied pursuant to the advertisement issued in October, 2014.

#### Advertisement of 2016

9. The Rules of 1983 were then amended on 19.10.2016, and a Government Order was issued on 5.12.2016 intimating that previous recruitment exercise had concluded and a fresh process was to start to fill up 9342 posts of Assistant Teacher in the cadre. An advertisement pursuant to such Government Order was then issued on 19th December, 2016. Applications were submitted pursuant to the advertisement issued, but results were not declared. Apparently, soon after entertaining of applications, online, the model code of conduct got introduced as the State Legislative Assembly elections were notified. The recruitment process was not pursued. A new political dispensation formed the Government on 19th March, 2017. Petitioners have brought on record a newspaper report published in Hindi daily newspaper 'Dainik Jagran' dated 22nd March, 2017, as per which the Additional Director of Education had informed the Media that result of recruitment exercise undertaken to fill up 9342 posts was in advance stage and result was likely to be declared within a week. Results, however, were not announced. Instead, according to petitioners, in a meeting of State officials chaired by Deputy Chief Minister on 12th May, 2017, a decision was taken to conduct written examination through the Commission after changing the recruitment rules. Intent of the Government to cancel the recruitment, therefore, was apparent. This was followed with filing of an affidavit by Additional Chief Secretary, Government of U.P. before this Court on 25th July, 2017 in Special Appeal (Defective) No.361 of 2017 on similar lines. A Cabinet decision thereafter was taken on 17.8.2017 to make temporary arrangements for filling up 9437 posts, including 9342 posts already advertised, by way of deputation/re-employment. A Government Order was, accordingly, issued on 21.8.2017 for the purpose. However, an interim order has been passed by this Court on 19.9.2017 in Writ Petition No.41348 of 2017, restraining the Government from filling up the posts, as per the Government Order dated 21.8.2017. The Rules of 1983 were amended on 23.8.2017, as per which the selections were now to be made by U.P. Public Service Commission on the basis of written test. The Additional Director thereafter sent requisition to the Commission for filling up of the post on 5th September, 2017. It is thereafter that a decision was taken by the State to discontinue the recruitment process initiated in December, 2016, vide Government Order dated 31st October, 2017. A subsequent advertisement has also been issued by the Public Service Commission on 15.3.2018, which is challenged by way of amendment in the leading petition of Himanshu Shukla. The action of State in cancelling the recruitment exercise initiated in December, 2016, on account of subsequent amendment in Rules is the subject matter of challenge by the petitioners who were applicants against advertisement issued in 2016.

10. The arguments on behalf of petitioners have been advanced mainly by Sri Ashok Khare and Sri M.D. Singh 'Shekhar', learned Senior Advocates assisted by Sri Man Bahadur Singh and other learned counsels. The submission proceeds on the premise that recruitment process initiated on each occasion was required to be concluded as per the rules then enforced, and that the State



Government was not justified in cancelling the process on account of change made in the recruitment rules. Contention is that change in recruitment rules can at best apply prospectively, and if it is to be made the basis to scuttle the ongoing recruitment process then it would amount to giving it retrospective application, which is impermissible in law. Learned Senior Counsels would argue that none of the amendments brought in the rules have otherwise been given a retrospective effect. It is also submitted that the decision to cancel the recruitment exercise initiated in December, 2016 is vitiated in law, as the decision is taken by a new political dispensation only to suit its own convenience. Learned Senior Counsels with vehemence have urged that much before the cancellation of recruitment process on 31st October, 2017, the State had given up the recruitment process. The chronology of events have been cited in order to show that the decision to amend the Rules was taken earlier, and the vacancies previously advertised were also intimated to the Commission, and only after all such decisions were taken without any conscious decision by then to cancel the recruitment, the State at last has issued Government Order dated 31.10.2017. Submission is that such action on part of the State is wholly arbitrary.

11. Arguments have also been advanced stating that the respondents have been taking shifting stands before this Court, inasmuch as in the first counter affidavit filed by the State in the leading writ petition, the reason given to cancel the recruitment is disclosed in para 9, as per which there was change in the qualification, and that belated applications were entertained pursuant to court orders justifying cancellation. Change in rules was also cited as a reason. However, in the supplementary counter affidavit, it is stated that the decision to amend the Rules was taken in view of the observations of this Court made in Special Appeal (Defective) No.361 of 2017. Various anomalies in the recruitment undertaken pursuant to advertisement of 2014 have also been highlighted as being the reason for amending the Rules and scraping the recruitment process.

12. In the decision taken by the Government on 31st October, 2017 to cancel the recruitment exercise initiated in December, 2016, the reason indicated is the change in Rules. The petitioners, therefore, have highlighted the inconsistent stand of State taken before this Court to submit that State action is arbitrary. Impugned action is also alleged to be colourable exercise of power amounting to malice in law. Directions have, therefore, been sought for recruitment process initiated in each recruitment drive to be concluded as per the Rules then enforced, and to fill all advertised posts.

13. Sri Ashok Khare, learned Senior Counsel, has also submitted that decision of the State to cancel the recruitment exercise is hit by the doctrine of proportionality. Submission is that the cases of those persons who had secured appointment on the strength of fraud ought to have been segregated, and that claim of other persons was liable to have been considered. Cancelling the entire recruitment was not required, as per the petitioners. Reliance is placed upon a judgment of the Apex Court in Raghbir Singh Vs. General Manager, Haryana Roadways, Hissar, 2014 (10) SCC 301, in which following observations are made in paras 38 to 40:-

"38. Having regard to the facts and circumstances of this case, we are of the view that it is important to discuss the Rule of the 'Doctrine of Proportionality' in ensuring preservation of the rights of the workman. The principle of 'Doctrine of

Proportionality' is a well recognised one to ensure that the action of the employer against employees/workmen does not impinge their fundamental and statutory rights. The above said important doctrine has to be followed by the employer/employers at the time of taking disciplinary action against their employees/workmen to satisfy the principles of natural justice and safeguard the rights of employees/workmen.

39. The above said "Doctrine of Proportionality" should be applied to the fact situation as we are of the firm view that the order of termination, even if we accept the same is justified, it is disproportionate to the gravity of misconduct. In this regard, it would be appropriate for us to refer to certain paragraphs from the decision of this Court in the case of Om Kumar and Ors. v. Union of India<sup>[12]</sup>, wherein it was held as under:-

"66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Hence the Court deals with the merits of the balancing action of the administrator and is, in essence, applying 'proportionality' and is a primary reviewing authority.

67. But where, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In G.B. Mahajan vs. Jalgaon Municipal Council] AIR 1991 SC 1153 ). Venkatachaliah, J. (as he then was) pointed out that 'reasonableness' of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata's Cellular vs. Union of India AIR 1996 SC 11, Indian Express Newspapers vs. Union of India (: [1986]159 ITR 856(SC) ), Supreme Court Employees' Welfare Association vs. Union of India and Anr. (1989) II LLJ 506 SC ) and UP. Financial Corporation v. GEM CAP (India) Pvt. Ltd. ( [1993]2 SCR 149 ), while Judging whether the administrative action is 'arbitrary' under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a Wednesbury review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies."

40. Additionally, the proportionality and punishment in service law has been discussed by this Court in the Om Kumar case (supra) as follows:-

"69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of 'arbitrariness' of the order of punishment is questioned under Article 14.

In this context, we shall only refer to these cases. In *Ranjit Thakur vs. Union of India* (1988CriLJ158), this Court referred to 'proportionality' in the quantum of punishment but the Court observed that the punishment was 'shockingly' disproportionate to the misconduct proved. In *B.C. Chaturvedi v. Union of India*: (1996)ILLJ1231SC), this Court stated that the Court will not interfere unless the punishment awarded was one which shocked the conscience of the Court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in *Ganayutham*.""

14. Petitions are opposed by the State as also the Public Service Commission on the ground that none of the petitioners have acquired any vested right to be considered for appointment merely on the strength of an application made for recruitment. It is submitted that right to be considered for appointment is subject to the rules framed, and the State is well within its right not to proceed with the ongoing recruitment exercise, and thereby to cancel it. So far as the advertisement issued in the year 2011 is concerned, it is contended that no person lower in merit to petitioners has been appointed and the action of respondents is not arbitrary on facts. It is also submitted that merely because vacant positions are available would not mean that employer is under an obligation to fill up all vacancies. Submission is that process was given up in the year 2012 itself and such posts have been included in the next recruitment exercise initiated in the year 2014, and it would not be possible to consider petitioners' claim against advertisement issued in 2011. It is also contended that persons much higher in merit were otherwise available, and therefore, no mandamus can be issued to appoint petitioners.

15. Sri P. K. Pandey, learned Additional Chief Standing Counsel has relied upon para 4 of the supplementary counter affidavit in order to contend that State experienced difficult scenario pursuant to second advertisement issued, inasmuch as large number of candidates had applied on the basis of forged academic records. Although recruitment was made in excess of 6000 posts, but only 1952 candidates joined their posts; 1198 candidates were found to have applied on the basis of fraudulent educational certificates and FIR was lodged against 956 of them. 3411 candidates did not join presumably on account of either their selection being based on fraudulent academic records or

due to selection in other regions. It is contended that all such aspects necessitated change in the recruitment rules. The Fourth Amendment, therefore, was introduced on account of which the recruitment on regional basis was substituted with a centralized recruitment for the entire State. It is also submitted that in none of the cases petitioners before this Court have been discriminated and the action of the State is not arbitrary. It is also contended that merely on the strength of their applications filed pursuant to advertisement for recruitment, no right was otherwise acquired by any of the petitioners. The respondents have in fact selected persons against the advertised vacancies pursuant to recruitment exercise of 2014, whose candidature was not disputed. In 2014 recruitment, all 6000 posts were filled up, but about 3500 posts remained vacant for the reasons already noticed above. It was not a case of cancellation of entire recruitment. The doctrine of proportionality, therefore, has no applicability in the facts and circumstances of the present case.

16. So far as the recruitment exercise initiated in December, 2016 is concerned, it is submitted that except for entertaining applications none of the applications were processed and the recruitment remained non-starter. Learned State Counsel submits that in the context of a challenge laid by one of the applicants on account of his non-selection, despite vacant positions existing pursuant to 2014 advertisement, the matter was examined by a Division Bench of this Court in Special Appeal Defective No.361 of 2017. The Additional Chief Secretary of the State on 25.7.2017 informed the Court that the State proposes to have the recruitment made through the Public Service Commission on the basis of written examination. This stand of the State was taken on record and the appeal was disposed of taking note of such stand and for further action in accordance with amended procedure. The rules thereafter got amended on 23.8.2017 and the requisition was also sent. The State Government on the basis of such materials thereafter took a conscious decision to cancel the vacancies advertised in the year 2016 and to fill it up pursuant to a fresh recruitment exercise undertaken in accordance with the amended rules.

17. This Court, upon conclusion of arguments by the parties, directed the learned Additional Chief Standing Counsel to produce original records on the basis of which the Government Order dated 31.12.2017 has been issued. The records have been produced and shall be dealt with later.

18. On the basis of respective submissions advanced this Court finds that following issues arise for consideration in the present bunch of petitions:-

(i) Whether the petitioners have acquired any right of appointment pursuant to advertisement issued for recruitment, or to be considered for appointment, in accordance with the rules existing on the date of advertisement?

(ii) Whether the decision of State in discontinuing the recruitment exercise initiated in the year 2011, 2014, 2016 is arbitrary?

(iii) Whether the State action in advertising the post after cancellation of previous recruitment, and filling it up with the amended rules is justified? Or would it amount to retrospectively applying the amended rules?

19. A Constitution Bench of the Apex Court in *Shankarsan Dash vs. Union of India and others*: 1991 AIR (SC) 1612 had the occasion to examine the right of a selected candidate to be appointed against the post advertised. This judgment is consistently followed and has acquired the status of *locus classicus* on the issue. The matter was referred to the Constitution Bench in view of conflict of opinion on the question whether a selected candidate has an indefeasible right to be considered for appointment. The controversy had arisen in the context of appointment of Shankarsan Dash, who had cleared the Union Public Service Commission Examination held in October, 1977. Certain selected candidates had not joined and consequently 12 vacancies in general category remain unfilled. The appellant contended that he was entitled to be appointed against one of the vacancies. The Apex Court repelled this plea in para 7 of the judgment in *Shankarsan Dash (supra)*, which is reproduced hereinafter:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Others*, [1974] 1 SCR 165; *Miss Neelima Shangla v. State of Haryana and Others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899."

20. What flows from the judgment is that even a successful candidate does not acquire indefeasible right to be appointed and that it could be legitimately denied. The notification inviting application for appointment has been held only to be an invitation to the qualified candidates to apply for recruitment. On their mere applying or selection they do not acquire any right to the post. In the absence of any relevant rule, the State is under no legal duty to fill up all or any of the vacancies. Such right of employer is, however, hedged with the condition that State action is not arbitrary in any manner. The decision of employer, if is otherwise not arbitrary and has been taken for valid reasons, no interference with the State action is warranted. The judgment in *Shankarsan Dash (supra)* continues to hold the field and there can be no doubt that petitioners merely on account of making of application for appointment do not acquire any right of appointment to the post.

21. The question as to whether the employer had the right to stop the recruitment process and to issue a fresh advertisement based upon the changed recruitment criteria came up for consideration of the Apex Court in *Jai Singh Dalal and others Vs. State of Haryana and another*: 1993 Supp (2) SCC 600. A Three Judge Bench of the Apex Court, relying upon the judgment in *Shankarsan Dash (supra)*, observed as under in para 7:-

"7. It is clear from the above pleadings that in 1990 the State Government resolved to resort to special recruitment to the Haryana Civil Service (Executive Branch) invoking the proviso to Rule 5 of the Rules. Pursuant thereto, it issued the notifications dated December 20, 1990 and January 25, 1991. The names of the candidates were forwarded by the State Government to the HPSC for selection. The HPSC commenced the selection process and interviewed certain candidates. In the meantime, on account of an undertaking given by the Advocate-General to the High Court at the hearing of C.W.P. No. 1201 of 1991 and allied Writ Petitions, the State Government was required to forward the names of the candidate belonging to two other departments of the State Government. Before it could do so, the new Government came into power and it reviewed the decision of the earlier Government and found the criteria evolved by the earlier Government unacceptable and also noticed certain infirmities in the matter of forwarding the names of eligible candidates. It, therefore, resolved to rescind the earlier notifications of December 20, 1990 and January 25, 1991. It will thus be-seen that at the time when the Writ Petition which has given rise to the present proceedings was filed, the State Government had withdrawn the aforesaid two notifications by the notification dated December 30, 1991. The stage at which the last mentioned notification came to be issued was the stage when the HPSC was still in the process of selecting candidates for appointment by special recruitment. During the pendency of the present proceedings the State Government finalised the criteria for special recruitment by the notification of March 9, 1992. Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State Government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High Court granting a mandamus or any other writ of the type sought by the appellants. The law in this behalf appears to be well-settled. In the State of Haryana v. Subash Chander Marwaha and Ors. (1974) SCR 165, this Court held that the mere fact that certain candidates were selected for appointment to vacancies pursuant to an advertisement did not confer any right to be appointed to the post in question to entitle the selectees to a writ of mandamus or any other writ compelling the authority to make the appointment. In that case, an advertisement was issued stating that there were 50 vacancies in the Haryana Civil Service (Judicial Branch). An examination was held by the HPSC and 40 candidate passed the said examination with the required minimum 45% marks. Their names were published in the Government Gazette. The State Government, the appointing authority, made seven appointments out of the said list in the order of merit. Respondents, who ranked 8, 9 and 13 respectively in that list, did not get an appointment although there were vacancies. The reason for not appointing the respondents was that in the view of the State Government, which was incidentally identical to that of the High Court, candidates getting less than 55% marks in the examination should not be appointed as Subordinate Judge in the interest of maintaining high standards of competence in judicial/ service. Respondents 1 to 3 challenged this decision on the ground that the State Government was not entitled to pick and choose only seven out of them for

appointment, because to do so Tanta mounted to prescribing a standard which was not contemplated. The State Government on the other hand contended that the rules did not oblige them to fill in all the vacancies and it was open to them to appoint the first seven candidates in the interest of maintaining high standards. It was further contended that there was no question of picking and choosing and since the rules did not preclude it from selecting from the list the candidates for appointment to set a higher standard, the State Government could not be said to have infringed, any legal right of the selectees for appointment. In the background of these facts this Court came to the conclusion that the mere fact that the candidates were chosen for appointment in response to the advertisement did not entitle them to appointment. To put it differently, no right had vested in the candidates on their names having been entered on the select list and it was open to the Government for good reason not to make the appointments therefrom and fill in the vacancies. In a recent decision in *Shankarsan Dash v. Union of India*, the Constitution Bench of this Court reiterated that even if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do/not acquire any indefeasible right to appointment against the existing vacancies, It was pointed out that ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. The State is under no legal duty to fill up all or any of the vacancies by appointing candidates selected for that purpose. Albeit, the State must act in good faith and must not exercise its power mala fide or in an arbitrary manner. The Constitution Bench referred with approval the earlier decision of this Court in *Subash Chander's case*. Therefore, the law is settled that even candidates selected for appointment have no right to appointment and it is open to the State Government at a subsequent date not to fill up the posts or to resort to fresh selection and appointment on revised criteria. In the present case the selection was yet to be made by the HPSC. Therefore, the petitioners cannot even claim that they were selected for appointment by the HPSC. The selection process had not been completed and before it could be completed the State Government reviewed its earlier decision and decided to revise the eligibility criteria for appointment. It is, therefore, clear from the settled legal position that the petitioners had no right to claim that the selection process once started must be completed and the Government cannot refuse to make appointments of candidates duly selected by the HPSC."

(Emphasis supplied by Court)

22. The issue was examined again by the Apex Court in *State of Bihar and others vs. Secretariat Assistant Successful Examinees Union*: (1994) 1 SCC 126. The judgment in *Shankarsan Dash* (supra) was reiterated in following words in para 8 and 9 of the judgment:-

"8. It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not

amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary. (See Shankarsan Dash v. Union of India [(1991) 3 SCC 47 : 1991 SCC (L&S) 860 : (1991) 17 ATC 95] and Babita Prasad v. State of Bihar [1993 Supp (3) SCC 268 : 1993 SCC (L&S) 1076 : (1993) 25 ATC 598 : (1992) 3 Scale 361] .)

9. We are, therefore, of the opinion that the directions given by the High Court for appointment of the empanelled candidates according to their position in the merit list against the vacancies till 1991 were not proper and cannot be sustained. Since, no examination has been held since 1987, persons who became eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudicially affect them for no fault of theirs. At the same time, the callousness of the State in holding the examination in 1987 for the vacancies advertised in 1985 and declaring the result almost three years later in 1990 has caused great hardship to the successful candidates. The State was expected not to act in such a leisurely manner and treat the matter of selection for appointment to services in such a casual manner. We must record our unhappiness on this state of affairs. There is no justification for holding the examination two years after the publication of advertisement and declaring the result almost three years after the holding of the examination and not issuing any fresh advertisement between 1985 and 1991 or holding examination for making selections. We expect the State Government to act in a better manner, at least, hereinafter and since Mr Rao, the learned senior counsel has shared our concern and assured us of advising the State Government accordingly, we say no more on that aspect at this stage."

23. In State of Madhya Pradesh vs. Raghuveer Singh Yadav: (1994) 6 SCC 151, a similar controversy, on facts had again arisen. The Apex Court held that the State had the right to change the recruitment criteria and advertise the post to be filled as per amended rules. The argument advanced that amended rules have no retrospective application was specifically repelled in para 4 and 5 of the judgment, which are extracted hereinafter:-

"4. For recruitment to the posts of Inspectors, Department of Weights and Measures in the State of M.P., an advertisement was issued on 27-7-1987 calling for applications from eligible candidates. The qualification prescribed for eligibility was degree in Arts or Commerce or Science or Engineering or Diploma in Engineering. It would appear that written examinations were held and results were declared on 26-8-1989. Thereafter, the Board issued interview cards to the successful candidates. In the meanwhile, the Government amended the rules by M.P. Standard of Weights and Measurement (Enforcement) Rules, 1989 in consultation with Government of India and Public Service Commission and altered the eligibility qualification for appointment to those posts by presenting degree in Science with Physics as a subject or Degree in Engineering or Technology or Diploma in Engineering. The respondents challenged the amended rules on the ground that having issued the notification for filling up the posts of Inspectors with Degree of Arts and Commerce the State had to proceed with the recruitment only as per the qualification prescribed in the



notification and the subsequent amendment to the rules should not stand in the way of the Recruitment Board to consider the claims on the basis of marks secured in the examination and also interview to be held. In other words the amended rules have no retrospective operation. This contention found favour with the Tribunal and accordingly the Tribunal allowed the application.

5. It is not in dispute that Statutory Rules have been made introducing Degree in Science or Engineering or Diploma in Technology as qualifications for recruitment to the posts of Inspector of Weights and Measures. It is settled law that the State has got power to prescribe qualifications for recruitment. Here is a case that pursuant to amended Rules, the Government has withdrawn the earlier notification and wants to proceed with the recruitment afresh. It is not a case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered of their claims according to the rules then in vogue. The amended Rules have only prospective operation. The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules."

24. In view of the discussions made above, it is obvious that the petitioners do not acquire any right of appointment against the post advertised. Since the State also has the right to cancel the recruitment process, even prior to its conclusion, for valid reasons, the petitioners cannot compel the State to complete the recruitment process, once initiated, as per the rules operating on the date of advertisement. The first question is answered accordingly.

25. Coming to the second question formulated for consideration, it would be appropriate to take up the three recruitment exercise separately so as to examine the legality of State action in cancelling the process even before all advertised posts were filled. So far as the recruitment exercise initiated in 2011 is concerned, it transpires from the record that after the advertisement was issued selection proceedings were actually undertaken. As the cadre of Assistant Teacher was regional, the posts were advertised region-wise. In case of petitioner Sheeba (supra), she was an applicant for the post of Assistant Teacher in L.T. Grade for Sanskrit and had applied for consideration in several regions, including Gorakhpur. She could not make in the first counselling on the basis of her merit. She was called for counselling in second round, but was neither selected nor appointed. Pursuant to a direction issued by this Court her claim was examined by the Director of Education vide order dated 20.7.2016. The order of the Director records that 4 unreserved seats of Assistant Teacher in Sanskrit were available. In the first counselling two candidates were selected but they did not join. Petitioner in the second counselling was placed at serial no.40 and 36 persons with higher merit were available. The selection apparently was stalled due to the elections of the State Legislative Assembly in the State and thereafter due to the ban imposed on recruitment. The ban was thereafter lifted and instructions were issued to complete the process of recruitment by 15.12.2012 vide order dated 19.11.2012. The recruitment, however, could not be concluded by 15.12.2012. The process was not

carried any further and the left over vacancies were included in the fresh recruitment exercise initiated in the year 2014, after Third Amendment was introduced in the Rules of 1983.

26. Although it is demonstrated on record that four vacancies were available, but that alone would not be a ground to issue a writ of Mandamus for the petitioner to be appointed or to hold the State action as arbitrary. No person lower in merit to petitioner had been appointed. Claim of 36 candidates with higher merit cannot be lightly brushed aside even if they had not appeared in the second counselling. The mere fact that only two persons appeared in the second counselling would not result in creation of any right of appointment in them, inasmuch as the petitioner cannot claim any status higher than a selected candidate, who too has no indefeasible right to be appointed. The action of State in not filling up the remaining advertised vacancies is otherwise not shown to be arbitrary or discriminatory in any manner. The Director has observed that there were about 36 persons higher in merit, whose superior claim would stand ignored if petitioner is appointed. In such circumstances, I am of the opinion that no exception can be taken to the decision of Director in not considering petitioner's claim for appointment. Posts otherwise were included in the new recruitment exercise initiated in the year 2014.

27. The matter needs to be examined from another angle. The recruitment rules had been amended in 2014. There was nothing wrong if State had decided not to pursue the advertisement any further, after the recruitment rules had been amended and the posts were advertised afresh.

28. The decision of the State, therefore, not to proceed further with recruitment notification issued in January, 2011 would clearly be justified both for the reason of long lapse of time and also due to change of rules. The State action cannot thus be termed as arbitrary.

29. In the recruitment exercise initiated in 2014 not only the advertisement was made but the recruitment also followed. Such recruitment was based upon the quality point marks awarded to the candidates on the basis of their High School, Intermediate and Graduation Degree as well as Training Qualification. The State has brought on record facts in the form of a chart specifically giving details of recruitment made pursuant to such exercise, region-wise. Para 4 of the counter affidavit filed to the amendment application is extracted hereinafter:-

"4. That the contents of para 3 of the affidavit are not admitted as stated, hence denied. Due to the advertisement of posts at the regional level, each candidate submitted applications in all 18 regions and due to the top merit, the same candidate was selected in several regions. After verification of academic records of the candidates selected in the counselling amongst the advertised posts, about 1952 candidates joined their posts 1198 candidates were found fraudulent and FIRs were lodged against 956 candidates. 3411 candidates did not join their posts on account of selection of candidates based upon fraudulent academic records on top merit in several regions. The region-wise details are as under:-

Sl. No. Name of Region.

No. of posts advertised ( except Arts and Physical Education subjects) No. of candidates joined.

Name of Candidates found fraudulent on verification of academic records.

No. of FIRs lodged against the candidates found fraudulent on verification of academic records.

No. of cancelled appointment letters due to non joining of posts.

Bareilly Aligarh

-

Kanpur Lucknow Meerut Varanasi Jhansi

-

Chtrakoot Dham

-

Azmagarh

-

Devipatan Gorakhpur Saharanpur Agra Allahabad Moradabad Mirzapur Faizabad Basti Although 6376 selections were made, region-wise, but pursuant to it 3411 candidates did not join on account of their selection either being based upon fraudulent academic records or for the reason that such candidates were selected simultaneously in different regions. FIR was lodged against 956 candidates. The facts disclosed in the chart have not been questioned. What is stated is that State was under an obligation to fill up the left over post from the remaining applicants.

30. The facts, as have been brought on record by the State, are disturbing. Recruitment herein was to be made against the post of Assistant Teachers in Government Inter Colleges. The fact that substantial chunk of applicants had claimed appointment on the basis of manipulated and forged records is distressing. The examination process itself, nevertheless, had not been cancelled by the State. As a matter of fact 1952 persons regarding whom there were no issue relating to their credentials were appointed. The remaining post could not be filled on account of reasons, which apparently were beyond the control of the State. It is but natural that recruitment would run into trouble where majority of the selected candidates are reported to have used forged and fabricated educational certificates. Allegation of State action being arbitrary in not filling up the left over seats is noticed only to be rejected. The candidates pursuant to such advertisement had otherwise not

acquired any right of appointment against the unfilled vacancies. The State action in not being able to fill up remaining vacancy on account of turbulence faced in recruitment exercise, as highlighted above, would clearly take it out of the ambit of arbitrariness. Reasons did exist on record for the State not to proceed further as various disputes and criminal proceedings remained pending. Sufficiency or otherwise of the reasons necessitating stalling of process need not be examined, in view of the law settled. The doctrine of proportionality also cannot be pressed into service to buttress petitioners' grievance.

31. The unfilled vacancies from 2014 advertisement had been included in the next recruitment exercise initiated in December, 2016. The rules have otherwise been altered by way of Fourth Amendment in the rules so as to have the recruitment on a centralized basis, instead of regional basis, as it stood earlier. The fact that same set of persons had applied in different regions was also a factor which led to difficulty faced in concluding the recruitment itself. The decision to make recruitment state-wise is neither challenged nor is otherwise shown to be arbitrary. In such circumstances, if the posts advertised in 2014 and had remained vacant were included in the next advertisement issued in December, 2016, no case for interference would be made out. Action of State on such count cannot be termed unreasonable or violative of Article 14 of the Constitution of India.

32. This leads us to the last recruitment initiated in the year 2016. Substantial arguments advanced were centered on this aspect. A Government Order dated 5.12.2016 was issued for filling 9342 vacancies of the Assistant Teachers in various government institutions. Consequential advertisement was issued on 19.12.2016. By then the Rules of 1983 has been amended vide Fourth Amendment in the rules on 19.10.2016. Online applications were received from 26.12.2016 to 26.1.2017. No result, however, was declared. Petitioners contend that decision of State not to declare result and cancel the process, in the facts and circumstances is wholly mala fide and arbitrary.

33. A press report has been brought on record as Annexure-6 in the Writ Petition No.48664 of 2017 (Himanshu Shukla and another vs. State of U.P. and others), as per which, the Additional Director of Education issued a press brief on 21.3.2017, stating that process of finalizing result is in advance stage and it would be declared within a week. The results, however, were not declared. The reason for not doing so has been seriously attacked by the petitioners, stating that the Additional Director was the appointing authority and once he has made a statement that results would be declared within a week, there was no reason for not declaring the result; that the political dispensation changed in the State and for political reasons a contrary decision was taken in a meeting held on 12.5.2017, in the presence of Deputy Chief Minister and a special invitee from Haryana; that the Additional Chief Secretary of the department concerned in his personal affidavit had indicated change in the process and also about proposal to amend rules; that the rules were amended on 23.8.2017 but no decision was taken by then to abandon the recruitment exercise initiated in the year 2016. No such decision was otherwise taken till sending of requisition to the Commission, for filling up such posts by way of written examination on 5.9.2017.

34. State has denied all such allegations and has attempted to justify its decision to abort the process and to initiate fresh recruitment exercise on the basis of amended rules.

35. So far as making of statement by the Additional Director is concerned, the newspaper report at best would go to show that applications received pursuant to recruitment advertisement issued in December, 2016 were being processed. This would not make any difference. Neither any select list was in fact published nor the petitioners were selected. The newspaper report is otherwise not acceptable in evidence.

36. Petitioners have stated in the writ petition that decision not to proceed pursuant to advertisement dated 19th December, 2016 is actuated on account of political considerations. Pleadings in that regard are made in paras 19 to 22 of the writ petition of Himansu Shukla. In paras 19 of the writ petition, reference is made to a letter of the Director of Education (Secondary) addressed to the Chief Standing Counsel of the Allahabad High Court dated 1.8.2017. This letter was sent in response to the communication of the Chief Standing Counsel asking for instructions in writ petition filed by one Hemant Singh Yadav, for declaration of his result pursuant to advertisement dated 19th December, 2016. The Director of Education has clarified that in a meeting held on 12th May, 2017, the issue was examined at the highest level and a decision was taken to have the recruitment conducted by the U.P. Subordinate Service Selection Board or U.P. Secondary Education Service Selection Board and for amending the rules, accordingly. The letter further records that comments of the U.P. Public Service Commission have been called for in the matter. This letter demonstrates that the State Government was examining the issue in a meeting convened by Senior State Functionaries, wherein it was resolved to have the selections conducted through an independent recruitment agency. Such deliberations and considerations by the Deputy Chief Minister, who apparently holds the relevant portfolio of department of education, lies in the realm of policy making and is clearly permitted in law. Holding of such a meeting or taking a decision to get the examination conducted through the Public Service Commission or to change the rules and invite views of the Commission are, therefore, matters falling within the jurisdiction of State to which no objection can be taken.

37. Para 20 of the writ petition of Himanshu Shukla then refers to filing of an affidavit by the Additional Chief Secretary of the State before this Court in Special Appeal (Defective) No.361 of 2017.

38. It appears that a Writ Petition No.5213 of 2016 (Garima Mishra and others Vs. State of U.P. and others) was filed against cancellation of recruitment exercise initiated in the year 2014. It was contended that no rhyme or reason existed for cancellation of results, and that petitioner's candidature for appointment is liable to be considered. The writ petition was dismissed vide following orders passed on 26.2.2016:-

"I have heard learned counsel for the petitioner and learned Standing Counsel.

The Supreme Court in the case of Shankarsan Dash v. Union of India, AIR 1991 SC 1612, has held that a candidate does not have vested right for issuance of a direction upon the employer to make an appointment. Even a candidate, who is in the select list, does not have such vested right. The employer can keep the post vacant. The decision of the Supreme Court in Shankarsan Dash (supra) has consistently been

followed by the Supreme Court and this Court.

In view of the above, I find that no direction can be issued to declare the result of subject Art. As regards, the relief sought by the petitioner for Music subject is concerned, in view of the above instructions of the learned Standing Counsel, no cause of action survives. The writ petition is accordingly, disposed of.

No order as to costs."

39. The order of learned Single Judge was challenged by filing Special Appeal (Defective) No.361 of 2017. An order was passed by the special appeal bench on 7.7.2017, which reads as under:-

"Put up on Tuesday i.e. 11.7.2017 to enable the Director of Secondary Education to inform the Court as to whether a comprehensive system of evaluating the quality point marks to be awarded to the applicants in the subjects of arts and music in Government Inter Colleges have been taken due care of and that there shall not be any difficulty in getting the selections held now in accordance with the aforesaid within a time frame to be fixed by the Court."

40. Since the charge of Secretary of the department of Secondary Education was with Additional Chief Secretary (Secondary Education), Government of U.P., Lucknow, as such a personal affidavit was filed by the Additional Chief Secretary. Paras 10 to 14 of the affidavit of Additional Chief Secretary reads as under:-

"10. That from the above noted procedure for selection of L.T. Grade Teachers of Art and Music subject, the marks of academic qualification as well as training was the basis, but now days a lot of questions have been raised about High School and intermediate Examinations, and as such, it was held proper to select the candidates for the post of L.T. Grade Teachers on the basis of written examination in place of academic and training marks of the candidates.

11. That in view of the aforesaid, it was proposed to amend existing Rules, 1983 to incorporate the procedure of written examination to be conducted by Uttar Pradesh Public Service Commission for selection of candidates for the post of L.T. Grade Teachers.

12. That for the aforesaid purpose, a draft of 5th Amendment of 2017 in existing Rules, 1983 has been prepared, but before finalization/promulgation of the same, it was forwarded vide letter dated 24.7.2017 to the Uttar Pradesh Public Service Commission, Allahabad for its opinion/recommendation within a period of 3 days if possible. Further on telephone, request has been made by the deponent to the Secretary of Uttar Pradesh Public Service Commission, Allahabad to complete the proceedings at their ends within 10 days, and as such, it is expected that the opinion/recommendation of the Commission may be obtained within 10 working

days. A photocopy of the letter dated 24.7.2017 is being filed herewith and marked as Annexure No.02 to this affidavit.

13. That it is further submitted that after obtaining recommendation/approval of the Commission, the matter of amendment in Rules, 1983 shall be placed before the Hon'ble Council of Ministers for its approval and that is expected to be completed within a period of 2 weeks thereafter.

14. That it is also relevant to submit here that the selection of the candidates against the vacancies advertised is expected to start in the month of September, 2017 under the new procedure after completing the above noted proceedings within the time stipulated for the same."

41. It would also be appropriate to notice that in view of the stand taken by the Additional Chief Secretary of the State before this Court, Special Appeal (Defective) No.361 of 2017 was finally disposed of by this Court, vide following orders dated 25.8.2017:-

"1. This intra court appeal is directed against the judgment and order dated 26.02.2016 passed in Writ Petition No. 5213 of 2016 (Garima Mishra and others Vs. State of U.P. and others). The writ court has recorded that the State Government had taken a decision to cancel the entire selections on the post of Assistant Teacher in L.T. Grade for Government Inter Colleges in the subject of Art on the ground that the advertisement was published under a mistake and further that mere selection confers no right. In respect of the post of Assistant Teacher in L.T. Grade in the subject of Music it has been recorded that the results are under preparation and shall be declared in near future. The Writ Court accordingly disposed of the writ petition refusing to grant any relief in respect of the post of Assistant Teacher in L.T. Grade in the subject of Art.

2. Today, an affidavit has been filed on behalf of the State Authorities wherein it has been categorically stated that the Rules pertaining to the appointment on the post of L.T. Grade Teacher in Government Inter Colleges have since been amended vide Notification dated 23rd of August, 2017 and that all attempt shall be made to fill up the vacancies strictly in accordance with the Amended Rules as early as possible. It has been further stated that steps are being taken to make transfer of teachers to fill the posts which are lying vacant so that the work of teaching in the Government Inter Colleges does not suffer. Letter of the Director of Education dated 23rd of August, 2017 has also been brought on record.

3. In view of the aforesaid developments and in view of the findings recorded by the learned Single Judge, we find no good ground to interfere with the judgment and order of the learned Single Judge.

4. The Appeal lacks merit and is accordingly dismissed.

5. At this stage, counsel for petitioner-appellant, has submitted that if the Respondents are not proceeding with the selection process, they are under obligation to refund the fees which they had realized from the writ petitioners.

6. The appellants for refund of the fees deposited with the Respondents may make an application before the Respondent No. 3. If such application is made by the appellants, the same shall be considered by the Respondent No. 3 at the earliest possible within four weeks from the date of making of such application along with certified copy of this order in accordance with law."

42. It was thereafter that a cabinet decision was taken on 17th August, 2017 for incorporating change in the rules of recruitment, so as to have the recruitment in question made through Public Service Commission. The Rules of 1983 have been amended on 23rd August, 2017 as a result of which the recruitment for the post of Assistant Teacher in Government Inter Colleges is now to be made through U.P. Public Service Commission. On 5.9.2017 requisition for filling up 9892 posts of Assistant Teacher, which included 9327 posts advertised on 19th December, 2016 and also 565 posts, which have come into existence during the years 2017, 2018 or are due in 2019. A Government Order was also issued on 21st August, 2017 for the posts to be filled till then by deputation. The Government Order dated 21.8.2017 has been stayed by this Court in Writ Petition No.41348 of 2017. From the facts, noticed above, it appears that the issue of recruitment to the post of Assistant Teacher in the Government institutions was the subject matter of due deliberation, which has resulted in a conscious decision taken by the State to have the post filled by way of recruitment conducted by way of written test conducted by the Public Service Commission. The question is as to whether this action is arbitrary?

43. The amendment made in the Rules of 1983 by way of Fifth Amendment vide notification dated 23rd August, 2017 is not under challenge. The thrust of petitioner's submission is that the amendment cannot be enforced retrospectively. For such purposes, petitioners have placed reliance upon the Apex Court judgments in A.A Calton v. The Director of Education, (1983) 3 SCC 33; P. Mahendra and others Vs. State of Karnataka and others, AIR 1990 SC 405; N.T. Devin Katti and others Vs. Karnataka Public Service Commission and others, (1990) 3 SCC 157; Director, SCTI For Medical Science & Technology and another Vs. M. Pushkaran, (2008) 1 SCC 448; and Tej Prakash Pathak and others Vs. Rajasthan High Court and others, (2013) 4 SCC 540. Reliance is also placed upon a Full Bench judgment of this Court in Santosh Kumar Singh Vs. State of U.P. and others, reported in 2015 (33) LCD 2402, wherein the ratio laid down in A.A. Calton has been followed.

44. There is no dispute on the legal proposition canvassed on behalf of petitioners that amendment introduced in the Rules of recruitment cannot be given retrospective effect, unless the rules itself specifically permits it. The Principle that once the Game has commenced, the rules of Game cannot be changed in between is too well settled to be questioned. The question that arises on the facts of the case is as to whether State is justified in evolving a new policy for recruitment; amending the rules; cancelling the on-going recruitment process and undertaking the recruitment afresh as per the amended rules?



45. Before proceeding further, it would be appropriate to notice the concern express by the Additional Chief Secretary in his affidavit before this Court in para 10, which is extracted above. The recruitment as per Rules of 1983 were based upon quality point marks calculated on the basis of a candidate's performance in High School, Intermediate, Graduation and Training. Schedule to Rule 15(2) lays down the criteria for determining the quality point marks, which reads as under:-

"ifj'k"V ^?k^^ ¼fu;e 015 ¼42½ nsf[k;s½ lh/kh HkrhZ }kjk p;u ds fy, xq.koÜkk fcUnq %& ijh{kk dk uke xq.koÜkk fcUnq 1&gkbZLdwy vadks dk izfr'kr 2&b.VjehfM,V vadks dk izfr'kr x 2 3&Lukrd mikf/k vadks dk izfr'kr x 4 vU;

4&izf'k{k.k %& ¼4d½ fl)kUr ¼4[k½ fØ;kRed 5&LukrdksÜkj mikf/k izFke Js.kh f}rh; Js.kh r`rh; Js.kh

46. The post graduation qualification has been done away with in the Fourth Amendment to the Rules of 1983. Marks secured by a candidate in the High School and Intermediate, therefore, assumes significance. The Additional Chief Secretary has stated in Para 10 before this Court that questions are being raised about High School and Intermediate examinations, as such it was held proper to select candidate on the basis of written examination to be held by the Commission in place of academic performance and training marks. The Court also cannot shut its eye to what is widely reported in newspapers about High School and Intermediate Examinations conducted by the U.P. Board. In the High School and Intermediate Board Examination of the year, it was widely reported that on account of stringent checks placed against copying in Board Examinations, more than 11 lacs students have left the exam. This is a serious matter. Although, it would not be appropriate to express any doubts on the credibility of marks awarded by the Board, but the concern express by the Additional Chief Secretary in para 10 cannot be said to be unfounded. If the State, therefore, decides to have the merits of candidate examined by way of written examination conducted by U.P. Public Service Commission, then such a policy decision cannot be said to be irrational, discriminatory or arbitrary.

47. Learned counsel for the petitioners, during the course of submission, have also pointed out recent incidents questioning the credibility of recruitment undertaken by the Public Service Commission also. No doubt this Court had to intervene to maintain transparency in the matter of holding of examination by the Commission but for such reasons, the institutional integrity and competence of the Commission itself cannot be put to question. It remains a constitutional body and the constitutional faith reposed in its functioning in the matter of undertaking recruitment cannot be doubted, or easily questioned by isolated acts of abrasion.

48. Although recruitment based on quality point marks has been held to be a valid criteria for recruitment, but it ultimately remains a matter of policy for the State to choose as to what would be the appropriate procedure to be followed for the purpose. The decision of State to have the recruitment made based upon written test conducted by the Commission cannot be said to be arbitrary.

49. The recruitment initiated pursuant to advertisement dated 19th December, 2016 has not culminated in creation of any vested right in the petitioners. They are mere applicants pursuant to advertisement and have no right to the post. The State for bona fide reasons can always take a decision not to proceed further pursuant to the previous advertisement, and to have the recruitment exercise undertaken afresh, after amending the rules.

50. Law relating to retrospective application of rules, as have been cited before this Court, will have no applicability in the present case. To cancel the recruitment and to undertake it afresh, on the basis of rules amended is not the same as retrospectively applying the recruitment rules. A fresh game starts here, and it can be played on the basis of rules already changed before its commencement.

51. In somewhat similar facts and circumstances, the Hon'ble Supreme Court in State of A.P. and others Vs. D. Dastagiri and others, (2003) 5 SCC 373 had observed as under in paras 4 and 5:-

"4. In the counter affidavit filed on behalf of the respondents in Civil Appeal No. 915/2000, in paragraph 16 it is stated that the process of selection was cancelled at the last stage, i.e., before publishing the list of selected candidates on the sole ground that the State Government wanted to introduce prohibitor and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In paragraph 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list was remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables. It is not the case of the respondent that there was any malafide on the part of the appellants in refusing the appointment to the respondents after the selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as Excise Constables, was arbitrary. In the light of the facts that we have stated above, when it was open to the Government to take a policy decision, we fail to understand as to how the respondents can dub the action of the Government as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection

and publication of select list, mere concession or submission made by the learned Government Pleader on behalf of the appellant-State cannot improve the case of the respondents. Similarly, such a submission cannot confer right on the respondents, which they otherwise did not have.

5. Under these circumstances, we find it difficult to sustain the impugned judgment and order. However, having regard to the peculiar facts and circumstances of the case and that the respondents had the benefit of the order of the High Court, we think it is just and appropriate that as and when any fresh selection takes place to the post of Excise Constables, the respondents may apply for regular recruitment. In that event, age-bar will not be put against them put, they shall satisfy other eligibility conditions and requirements, including qualification."

52. So far as the exact reason responsible for discontinuance of previous recruitment exercise initiated in December, 2016 is concerned, the stand of State, as taken before this Court in the counter affidavit, is not consistent. Sri M.D. Singh 'Shekhar', learned Senior Counsel is right in contending that the respondents have initially taken a stand in para 9 that previous recruitment exercise had to be discontinued due to change in qualification and also for belated entertainment of applications. This fact stated in the affidavit of Additional Director of Education is not found to be correct on facts. The Court, therefore, records its displeasure at the casual manner in which such a stand is taken before the Court. However, in the same paragraph, reference is made to the Fifth Amendment made in the Rules of 1983 vide notification dated 23rd August, 2017 and for need to have fresh recruitment as per it. The Government Order dated 31st October, 2017, whereby the earlier recruitment process undertaken was cancelled, referred to the proposal of the department dated 23rd October, 2017. On the direction of this Court, the original records have been produced, which contains the letter of Director of Education dated 23rd October, 2017 addressed to the Additional Chief Secretary of the State. Relevant portion of the letter reads as under:-

"mDr ds laca/k esa ;g Hkh mYys[kuh; gS fd esa moizo v/khuLFk f'k{kk ¼izf'kf{kr Lukrd Js.kh½ lsok fu;ekoyh] 1983 ^;Fkk la'kksf/kr^^ ¼iape la'kks/ku&2017½ ds vuqiky esa lgk;d v;/kid ,yoVho xzsM ds fDr inksa dks lh/kh HkrhZ ds ek;/e ls lkekU; p;u fd;s tkus vf/k;kpu izsf"kr fd;s tkus ds QyLo:i 'kklu ds i= la[;k & 1142@iUnzg& 2&2016&34¼100½@2011 fnukad 05 fnlEcj] 2016 }kjk moizo v/khuLFk f'k{kk ¼izf'kf{kr Lukrd Js.kh½ lsok fu;ekoyh] 1983 ^;Fkk la'kksf/kr^^ ¼prqFkZ la'kks/ku½ esa mfYyf[kr O;oLFkk ds vUrZxr lgk;d v;/kid ,yoVho xzsM ¼iq:"k@efgyk laoxZ½ ds fDr 9342 inksa dks lh/kh HkrhZ ds ek;/e ls Hkjs tkus gsrq vku ykbu vkosnu i= csolkbM&www.upsear.in ij fnukad 26-12-2016 ls fnukad 26-01-2017 rd vkeaf=r vkosnu i=ksa dks laKku esa ysrs gq, p;u izfO;k dks lekIr fd;s tkus ds laca/k esa ;Fkk'kh/kz vkns'k iznku djus dk d"V djsaA"

53. The materials placed on record before this Court clearly shows that a policy decision was taken by the State to have the recruitment undertaken for the post by way of written examination conducted by the Public Service Commission. This decision apparently was based upon the assessment that written test conducted by the Commission would more accurately reflect the merit

of a candidate. The past experience in conduct of examination based on the quality point marks also appears to have weighed with the State, as the reason for change of policy. Such materials would clearly justify a departure in policy for ascertaining merit of candidate based on written test conducted by the Commission in place of quality point marks. The consequential amendment in Rules is otherwise not challenged. The decision of State, therefore, to discontinue the previous recruitment process and to advertise the vacancy afresh, based upon amendment in the rules would clearly lie in the realm of policy decision to be taken by the State, which is neither irrational nor discriminatory or arbitrary. The petitioners otherwise have not acquired any right to be considered for recruitment under the previous rules. It is also not a case of retrospectively applying the amendment made in recruitment rules. Objections raised in that regard, therefore, fails.

54. Before concluding it would also be appropriate to observe that the State action under challenge once finds approval of a Division Bench of this Court in Special Appeal (Defective) No.361 of 2017, there would otherwise be no impediment before the State or the Public Service Commission in proceeding with the recruitment process as per the Fifth Amendment in the Rules. The Court hopes and trusts that the aforesaid recruitment exercise shall be taken up with utmost priority, so as to conclude the entire process, at the earliest possible.

55. Writ petitions, accordingly, fail and are dismissed. However, there shall be no order as to costs.

Order Date :- 13.4.2018 Anil/Ashok Kr.

(Ashwani Kumar Mishra, J.)