

NON-REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL No. 8334 of 2013

Anurag Kumar Singh & Ors.

.... Appellant(s)

Versus

State of Uttarakhand & Ors.

....Respondent(s)

With

CIVIL APPEAL No. 8335 of 2013

Shri Sharwan Kumar Tripathi & Ors.

.... Appellant(s)

Versus

State of Uttarakhand & Ors.

....Respondent(s)

J U D G M E N T

L. NAGESWARA RAO, J.

These Appeals are filed against the judgment of the High Court of Uttarakhand at Nainital by which a direction was issued to restrict the selection of Assistant Prosecuting Officers only to the number of posts that were advertised.

2. An advertisement was issued by the Uttarakhand Public Service Commission (hereinafter referred to as 'the Second Respondent') on 19.09.2009 for appointment to the posts of Assistant Prosecuting Officers. The number of posts notified were 38. It was mentioned in the advertisement that the number of posts may be increased or decreased by the State Government. A preliminary examination was contemplated in case there were a large number of applications. It was mentioned in the advertisement that the 'year of recruitment' was a period of 12 months commencing from the 1st day of July of the calendar year.

3. As a large number of candidates applied, a preliminary examination was conducted on 31.10.2010, the result of which was declared on 04.02.2011. The Third Respondent who was an applicant filed an application under the Right to Information Act, 2005 seeking information about the number of posts for which the preliminary examination was conducted. The Second

Respondent responded stating that the number of vacancies for which the selection was being held was 74. The Third Respondent filed a Writ Petition in the High Court of Uttarakhand at Nainital for a direction that only 38 posts of Assistant Prosecuting Officers which were advertised on 19.09.2009 should be filled up.

4. A counter was filed by the First Respondent stating that 37 additional posts of Assistant Prosecuting Officers were created by an order dated 25.08.2009. It was also stated in the counter that a requisition for additional 36 posts of Assistant Prosecuting Officers was sent to the Second Respondent. It was further stated that there was acute shortage of Assistant Prosecuting Officers and hence there was need for filling up of 74 vacant posts of Assistant Prosecuting Officers without delay.

5. The High Court allowed the Writ Petition. The High Court relied on Uttar Pradesh Prosecuting Officers Service Rules, 1991 (hereinafter referred to as 'the

Rules') to hold that the selection pursuant to an advertisement can be only for clear vacancies and anticipated vacancies but not for future vacancies. Referring to the definition of 'year of recruitment' in the Rules, the High Court held that vacancies that arose between 1st of July, 2008 and 30th of June, 2009 alone can be filled up. The High Court directed that selection should be confined to only 38 posts of Assistant Prosecuting Officers. A further direction was given by the High Court to the Second Respondent to commence the process of selection for the additional 36 vacancies which were requisitioned by the letter dated 06.01.2011.

- 6.** The Appellants would have been selected and appointed as Assistant Prosecuting Officers if the selection was for 74 posts. They are aggrieved by the judgment of the High Court. They have sought permission to file the above Appeals which was granted on 16.08.2012. We heard Mr. Harin P. Raval and Ms. Meenakshi Arora, learned Senior

Counsels appearing for the Appellants and Mr. Saurabh Trivedi, Counsel appearing for the First Respondent. Mr. Harin Raval submitted that there was only one Assistant Prosecuting Officer working in the State of Uttarakhand on the date of advertisement dated 19.09.2009. Mr. Raval took us through the material on record to show that more than 38 posts were available on the date of advertisement. He referred to the condition in the advertisement which enabled the State Government to vary the number of vacancies. He also referred to the pleadings to contend that a requisition was made to the Second Respondent for filling up the additional 36 vacancies as well. He submitted that the High Court went wrong in allowing the Writ Petition without taking into account the shortage of Assistant Prosecuting Officers in the State of Uttarakhand. Mr. Saurabh Trivedi, counsel appearing for the State supported the

Appellants and sought permission to fill up the additional 36 vacancies.

7. Thirty seven candidates were declared successful for being appointed as Assistant Prosecuting Officers by a Notification dated 26.06.2012. It is stated in the written submission filed by the First Respondent that 31 out of 37 candidates joined and were sent for training. Two candidates out of 31 resigned and the remaining 29 candidates were assigned postings as Assistant Prosecuting Officers.

8. The recruitment to posts of Assistant Prosecuting Officers is governed by the Uttar Pradesh Prosecuting Officers Service Rules, 1991. Rule 3 (1) defines 'year of recruitment' as a period of 12 months commencing from the 1st day of July of calendar year. The requisition made by the First Respondent to the Second Respondent on 17.11.2008 was for selection of 38 Assistant Prosecuting Officers. The year of recruitment for conducting selection would be between 1st July, 2008 and 30th June, 2009. As stated earlier,

only 38 posts were notified in the advertisement. As per the advertisement the Government could vary the number of posts to be filled up. Such power could have been exercised by the Government only to the extent of posts that arose between 1st July, 2008 and 30th June, 2009. The Second Respondent filed a counter in this Court in which it was stated that the advertisement issued on 19.09.2009 was for 38 posts and that it was only on 06.01.2011 that the Government intimated 36 additional posts to be filled up. The letter dated 25.08.2009 of the Chief Secretary, State of Uttarakhand was relied upon by the Appellants to contend that additional vacancies were created and they were available to be filled up.

- 9.** It is clear from the pleadings and the various documents filed by the Appellants that no additional posts were created between 1st July, 2008 and 30th June, 2009. It is significant that the Rules refer to the recruitment year. It is a well-accepted principle of service law that only the number of vacancies that are

advertised can be filled up. If the advertisement gives liberty to the Government to vary the number of posts, such power cannot be exercised for filling up future vacancies. If additional posts were created during the recruitment year i.e. between 1st July, 2008 and 30th June, 2009, the Government could have directed the Second Respondent to include those posts also in the selection list that was made pursuant to the advertisement dated 19.09.2009.

10. This Court in **Prem Singh and Ors. v. Haryana State Electricity Board reported in (1996) 4 SCC 319 at paragraph 25** held as follows:

"From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the

advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the Court may not, while exercising its extra-ordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.”

It was further held by this Court that strictly speaking the authorities were not justified in making appointments to posts more than those advertised. This Court also found that only actual vacancies were taken into account without considering the anticipated vacancies that were likely to arise due to retirement, etc. As appointments were already made, taking into account the peculiar facts and circumstances, this Court approved the appointments beyond those advertised only to the extent of vacancies

which arose because of death and retirement, etc. The appointments that were made to future vacancies were declared as invalid.

11. Pursuant to the directions issued by the High Court in the impugned judgment, 37 persons were declared selected for appointment. In view of the interim order passed by this Court in the above Appeals, selection to the remaining posts was not held. Seven years have passed after the advertisement was issued on 19.09.2009. A large number of persons would have become eligible for selection to the post of Assistant Prosecuting Officers. They have a right to be considered for appointment guaranteed under Articles 14 and 16 of the Constitution of India. There would be an infraction of such right if the additional posts are not filled up by a fresh selection. The attempt made by the First and Second Respondents to fill up the additional posts is contrary to the Rules. After a careful consideration of the matter, we are of the opinion that the Appellants cannot be selected and

appointed to the additional posts that were not advertised on 19.09.2009 and were created after the relevant recruitment year ending on 30.06.2009.

12. We have examined the possibility of granting relief to the Appellants by taking into account the facts and circumstances of this case. The Appellants participated in the selection which was initially for 38 posts which later increased to 74 posts. They could not be appointed due to the judgment of the High Court which directed the selection to be only for 38 posts. In view of there being no fault on the part of the Appellants, we examined whether we could exercise our judicial discretion to direct their appointments. We realise that any such direction given by us for their appointments would be contrary to the Rules. Judicial discretion can be exercised by a Court only when there are two or more possible lawful solutions. In any event, Courts cannot give any direction contrary to the Statute or Rules made thereunder in exercise of judicial discretion. It will be

useful to reproduce from Judicial Discretion (1989) by

Aharon Barak which is as follows:

“Discretion assumes the freedom to choose among several lawful alternatives. Therefore, discretion does not exist when there is but one lawful option. In this situation, the judge is required to select that option and has no freedom of choice. No discretion is involved in the choice between a lawful act and an unlawful act. The judge must choose the lawful act, and he is precluded from choosing the unlawful act. Discretion, on the other hand, assumes the lack of an obligation to choose one particular possibility among several.”

- 13.** As we have held that the selection pursuant to the advertisement dated 19.09.2009 should be confined only to posts that were advertised, the additional posts that were created after the expiry of the recruitment year shall be filled up by issuance of an advertisement afresh. In view of the shortage of Assistant Prosecuting Officers in the State of Uttarakhand, we direct the authorities to expedite the process of selection.

14. For the aforementioned reasons, the judgment of the High Court is upheld and the Civil Appeals are dismissed.

.....J.
[SHIVA KIRTI SINGH]

.....J.
[L. NAGESWARA RAO]

New Delhi,
October 5, 2016



JUDGMENT