
(2013) 10 AHC CK 0058

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No's. 65848, 57361, 68475 of 2010, 35982 of 2011, 45198, 48840, 49527, 49771 and 50508 of 2013

Shri Prakash
Srivastava and Others

APPELLANT

Vs

State of U.P. and
Another

RESPONDENT

Date of Decision: Oct. 25, 2013

Citation: (2013) 11 ADJ 548 : (2014) 4 ALJ 5 : (2014) 1 ESC 353

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Advocate: Arvind Srivastava, G.K. Mishra, S.P. Srivastava, Abdul Majeed, S.R. Tripathi, V.P. Mishra, R.K. Singh, Ramesh Rai, S.K. Singh, Himanshu Shekhar, Anwar Hussain, Gulab Chandra, Vinod Kumar Srivastava, Salilendu Kumar Upadhyay, Radha Kant Ojha, Pankaj Kumar Ojha, Subodh Chandra Srivastava, B.B. Rai and Sunil Kumar, for the Appellant; Gautam Baghel, C.S.C., A.K. Sinha, Vivek Prasad Mathur, Pushpendra Singh and Sunil Kumar, for the Respondent

Final Decision: Disposed Of

Judgement

Sudhir Agarwal, J.

Heard learned counsel for petitioners, learned Standing Counsel appearing for respondent No. 1 and Sri A.K. Sinha, Advocate, who has put in appearance and advanced submissions on behalf of U.P. Public Service Commission (hereinafter referred to as "UPPSC") (respondent No. 2.). As requested and agreed by learned counsel for the parties, I proceed to hear and decide these matters at this stage, under the Rules of the Court.

2. Writ petitions No. 65848 of 2010, 57361 of 2010, 68475 of 2010 and 3982 of 2011 have arisen from a cause of action emanating from advertisement A-3/E-1/2008 dated 9th August 2008 and therefore, shall be dealt with collectively by referring hereinafter as "writ petitions-first set". Remaining five cases, i.e., writ petitions No. 45198 of 2013, 48840 of

2013, 49527 of 2013, 49771 of 2013 and 50508 of 2013 have arisen from advertisement No. A-4/E-1/2013 dated 19th August 2013 and therefore, are taken up collectively by referring as "writ petitions-second set". However, the issues and questions of law involved in both the sets, are common, hence all these matters have been heard together and are being decided by this composite order.

3. Advertisement No. A-3/E-1/2008 (hereinafter referred to as "Advertisement 2008" has been published by UPPSC in Employment News dated 9-15" August, 2008 for conducting Combined Subordinate Service Special Selection Examination-2008 (hereinafter referred to as "SSE-2008") and Combined Subordinate Service General Selection Examination 2008 (hereinafter referred to as "GSE 2008").

4. The aforesaid advertisement invited applications from such candidates who have completed 21 years of age and not above 35 years of age on 1.7.2008. In other words, the candidate must not have born before 2.7.1973 and after 1.7.1987. The relaxation of age is admissible to various categories, namely Scheduled Castes, Scheduled Tribes and Other Backward Classes etc. as per Government Orders issued from time to time. There is an exception in respect to those candidates, who may be applying for vacancies in Auditor (Co-operative Societies and Panchayat) and it is provided that the candidate, if eligible, with reference to maximum age on 1.7.2004, and has become overage due to non recruitment against vacancies in the aforesaid service in the years 2005, 2006 and 2007, such person(s) would be eligible to appear in the aforesaid two recruitments only in respect of vacancies in the service of Auditor (Co-operative Societies and Panchayat).

5. All the petitioners in "writ petitions-first set", having born before 2.7.1973, are ineligible, being overage. However, it is not in dispute that on 1.7.2004, they were eligible in respect to the maximum age but since there was no recruitment made in the years 2005, 2006 and 2007, hence, they became overage in the meanwhile.

6. Learned counsel for petitioners, contended that the last recruitment was made vide Advertisement No. A-1/E-1/2006 published in Employment News dated 18-24" February, 2006. Therein cut-off date in respect to maximum age was 1.7.2005. Subsequently, by way of corrigendum, the cut-off date was modified as 1.7.2004. 557 posts in different services were advertised and all eligible candidates, who were upto 35 years of age on 1.7.2004 participated in the aforesaid recruitment. Thereafter no further recruitment has been made till the advertisement of 2008 was published. It is contended that on account of non recruitment in the last three years, i.e. 2005, 2006 and 2007 despite availability of vacancies, respondents cannot make/render a number of candidates, like the petitioners, ineligible in the matter of age and, therefore, the cut-off date, as prescribed in the impugned advertisement is arbitrary. In the alternative, it is argued that all those, who were eligible in the recruitment year of 2005, 2006 and 2007, but could not be considered against vacancies available during that period due to non holding of any selection, should be treated eligible in the matter of age and should be allowed to participate in the aforesaid recruitment, in the same manner as the respondent No. 2 has allowed in

respect to the vacancies of Auditors (Co-operative Societies and Panchayat). It is also argued that the cut-off date, 1.7.2008 has been picked out arbitrarily and has no rationality or co-relation with the objective to be achieved and, therefore, even otherwise, arbitrary and violative of Article 14 of the Constitution.

7. Advertisement No. A-4/E-1/2013 dated 19th August 2013 (hereinafter referred to as "Advertisement 2013") has been published by U.P. Public Service Commission (for short "UPPSC") for holding a Combined Lower Subordinate Service (General Selection) Examination 2013 (for short "CLSS (GS) Examination-2013") and Combined Lower Subordinate Service for Physically Handicapped (Backlog/Special) Selection Examination-2013 (for short "CLSSPH (B/S) Examination-2013"). Para 12 thereof provides minimum and maximum age and says that on 1st July 2013, a candidate must have attained 21 years of age and should not be above 40 years of age. In other words, those who have born before 2nd July 1973 and after 1st July 1992 are not eligible. Usual age relaxation to reserved and other categories like Scheduled caste, Scheduled Tribe, Other Backward Class, Dependants of Freedom Fighters, Sportsmen, Handicapped persons etc. are admissible as per the relevant Government Orders holding the field.

8. All the petitioners in "writ petitions-second set" are above maximum age of 40 as on 1st July 2013. Their case is that vacancies were never advertised in the year 2010, 2011 and 2012 on account whereof petitioners became overage, therefore, they should be provided relaxation to the extent recruitment was not made in the concerned preceding years when petitioners were eligible.

9. Counter affidavit has been filed on behalf of respondent No. 2. It is said that so far as the Auditor/Lekha Parikshak (Co-operative Societies and Panchayat), there is a provision in the service rules applicable to above posts, requiring relaxation in the matter of maximum age in respect of the year in which no examination has been conducted but no similar provision exists in the applicable service rules of other posts, and, hence, benefit made applicable to Auditor/Lekha Parikshak could not be extended to other services. It is further said that after advertisement of 2006, Subordinate Service Selection Commission (hereinafter referred to as "SSSC") was constituted and, therefore, vacancies advertised in 2006 could not be filled in, despite advertisement, since recruitment was to be made by SSSC. The aforesaid body, however, could not commence its function, and, ultimately vacancies were reallocated to UPPSC in 2008. In that view of the matter, a fresh advertisement was published in 2008. The advertisement is consistent with the relevant statutory Rules admitting no relaxation, and, therefore, the same cannot be provided.

10. With respect to change in the cut-off date after advertisement made in 2006, the stand taken by respondent No. 2 is that the vacancies were received in 2004, but advertisement was published in 2006 and, therefore, initially cut-off date as 1.7.2006 was published, but, subsequently, after reconsideration, it was changed to 1.7.2004. However, in the Advertisement 2008, the vacancies advertised are pursuant to fresh requisition received by UPPSC at the end of 2007 or 2008, therefore, cut-off date advertised is

consistent with rules as applicable and available in 2008 and no relaxation or alternation is permissible on the part of respondent No. 2.

11. Rejoinder-affidavit has also been filed wherein, besides other, it is pointed out that even in the advertisement published in 2006, the cut-off date related back to 1.7.2004 when the requisition were received. There is no occasion not to follow the same principle in respect of the vacancies in question, most of which are same for which, requisition was received in 2004 and the advertisement was published, but no recruitment could be made for one or the other reason, not attributable to the petitioners.

12. With respect to advertisement 2013 also, the stand taken by respondent No. 2 is that maximum age of 40 years has been prescribed in view of amendment made in U.P. Recruitment of Service (Age Limit) Rules, 1972 which was amended by 10th Amendment Rules 2012 vide notification dated 6th June 2012 and thereunder maximum age has been increased from 35 to 40 years. In respect of other arguments, regarding relaxation in age, it is contended that since there is no provision for such relaxation or concession under the existing Rules applicable to various services, the same cannot be granted.

13. The crux of the argument advanced on behalf of the petitioner is that the period during which no recruitment has been made by respondents, thereby the candidates became ineligible in the matter of age, though they were otherwise eligible during the said period, they cannot be allowed to suffer for that reason and should be given relaxation in age. Against this stand of petitioners, the case set up by respondents is that such relaxation is not permissible under the Rules, hence, cannot be granted.

14. When inquired from learned counsel for UPPSC as to which provision it has followed for determining cut off date with respect to age, he has referred to a general rule, namely, U.P. Public Service Commission (Relaxation of Age Limit) Rules, 1992. He contended that since the aforesaid Rules have overriding effect, the same has been observed and followed for the purpose of fixation of cut off date with respect to age in the aforesaid examinations in question. He, however, did not dispute that recruitment for service in various departments is sought to be made by advertisements in question, by holding a combined selection. It is in these circumstances, the rival submissions have to be examined and scrutinized to find out as to who is at fault, if at all, or advertisements suffer with no error.

15. I have heard learned counsels for parties and perused the record.

16. Advertisement 2008 is for about 900 vacancies-300 in respect of SSE 2008 and 600 in respect of GSE 2008. It proposes for recruitment for vacancies in about 16 Departments and details of services of respective departments, as communicated by UPPSC, vide letter dated 8th December 2010, (Annexure RA-1 to rejoinder affidavit in writ petition No. 65868 of 2010) are as under:

17. It is not disputed at the bar by the learned counsel for the parties that all the services in different departments for which combined recruitment is being held by UPPSC, there are several sets of Rules, governing individual services, dealing with recruitment and conditions of service. In the present case, I am concerned with relevant provision relating to age. Though the respondents were directed repeatedly to place before this Court relevant service rules in respect of each and every service for which recruitment is under process vide advertisements in question, but despite repeated directions they have placed before this Court, Service Rules of only 15 services though in all there are 16 and more services for which combined recruitments are under process. These 15 services of which Rules made available are:

18. I find that in all these Rules there is independent separate provisions dealing with age, minimum and maximum for recruitment to the concerned service. The "year of recruitment" in all the above Rules, has been defined as 12 calendar months commencing from 1st July 2013. The individual provision in the aforesaid set of rules run as under:

1. The U.P. Jail Executive Subordinate (Non Gazetted) Service Rules 1980.

10. A candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of more than 27 years on January 1 of the year in which recruitment is to be made, if the posts are advertised during the period January 1 to June 30 and on July 1 if the posts are advertised during the period July 1 to December 31:

Provided that the upper age limit in the case of candidate belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be notified by the Government from time to time shall be granted by such number of year, as may be specified.

2. The U.P. Food and Civil Supplies (Supply Branch) Subordinate Service Rules 1980 as amended by U.P. Food and Civil Supplies (Supply Branch) Subordinate Service (First Amendment) Rules 1993

10. A candidate for direct recruitment must have attained the age of 21 years on 1st July of that calendar year in which, advertisement for direct recruitment is advertised by the Commission and must not beyond 32 years.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English translation by Court)

3. U.P. Subordinate (Cooperative and Panchayat) Audit Service Rules, 1980:

8. Age. A candidate for direct recruitment must be 21 years of age but not beyond 28 years on 1st January of that calendar year, if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December of that calendar year.

The upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes, dependants of freedom fighters and such other categories, as may be notified by the Government, shall be greater by as many years, as may be specified.

Provided further that if any candidate, on the basis of his age, is entitled to appear at any examination, in a particular year, when no examination was conducted, he will be deemed entitled to appear at the next subsequent examination on the basis of his age.

(English Translation by Court)

4. The U.P. Cooperative Department, Class III-Subordinate Service Rules, 1977.

11. A candidate for direct recruitment must be 18 years of age but not beyond 27 years on 1st January of that calendar year, if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December of that calendar year.

Provided:

(i) The upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes, and such other categories, as may be notified from time to time shall be greater by as many years, as may be specified.

(ii) In case of those candidates who are in Government Service or in the service of U.P. Cooperative Union, from before, the upper age limit shall be greater by five years.

(English Translation by Court)

5. The U.P. Transport Taxation (Subordinate) Service Rules 1980

10. For recruitment, a candidate must be 21 years of age but not beyond 28 years on 1st January of that calendar year, if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December of that calendar year.

Provided the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes, and such other categories, as may be notified by the Government from time to time shall be greater by as many years, as may be specified.

(English Translation by Court)

6. The U.P. Sugar Department Subordinate Service Rules, 1981

10. Age. A candidate for direct recruitment must be 21 years of age but not beyond 28 years on 1st January of that calendar year, if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December of that calendar year.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

7. The U.P. Entertainment and Betting Tax Inspectors Service Rules 1982

10. Age. A candidate for direct recruitment must be 21 years of age but not beyond 28 years on 1st January of that calendar year, if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December of that calendar year.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

8. The U.P. (Local Fund Audit) Subordinate Service Rules 1985

Age. 10. A candidate for direct recruitment must be 21 years of age but not beyond 30 years on 1st January of the year, succeeding the year in which vacancies are advertised.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

9. The U.P. Food and Civil Supplies (Marketing Branch) Subordinate Service Rules 1980 as amended by The U.P. Food and Civil Supplies (Marketing Branch) Subordinate Service (First Amendment) Rules 1993

Age. 10. For direct recruitment on any post in any service, a candidate must be 21 years of age but not beyond 30 years on 1st January of the calendar year, in which vacancies are advertised by the Commission.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

10. The U.P. Subordinate Excise Service Rules, 1992

10. Age-A candidate for direct recruitment on any post in any service, must have attained the age of 21 years and must not have attained the age of more than 32 years on the first day of July of the calendar year in which the vacancies are advertised or notified, as the case may be:

Provided that the upper age limit shall in case of the candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by such number of years, as may be specified.

11. The U.P. National Saving Directorate, Auditors Cadre Service Rules, 1994

Age-10. For direct recruitment, it is necessary for a candidate to have attained the age of 21 years but not beyond 32 years on the first day of the recruitment year-

Provided that in case of the candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, the upper age limit shall be greater by such number of years, as may be specified.

(English Translation by Court)

12. The U.P. National Saving Directorate, Additional District Saving Officers Service Rules 2004

Age-10. For direct recruitment on any post in any service, it is necessary for a candidate to have attained the age of 21 years but not beyond 35 years on the first day of July of the calendar year in which vacancies are advertised for direct recruitment:

Provided that in case of the candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be notified by the Government from time to time, the upper age limit shall be greater by such number of years as may be specified.

(English Translation by Court)

13. The U.P. Child Development and Nutrition (Pushtahar) (Group "I" and Group-II Service Rules, 1996

10. Age-For direct recruitment, it is necessary for a candidate to have attained the age of 21 years but not beyond 32 years on the first July of the calendar year in which the vacancies are advertised by the Commission for direct recruitment-

Provided that in case of the candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, the upper age limit shall be greater by such number of years, as may be specified.

(English Translation by Court)

14. The U.P. Food and Civil Supplies (Weight and Measurement) Service Rules 1981.

10. A candidate for direct recruitment must be 21 years of age but not beyond 28 years on 1st January of the recruitment year if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

15. The U.P. Subordinate Cooperative Service Rules 1979.

9. A candidate for direct recruitment must be 21 years of age but not beyond 27 years on 1st January of the recruitment year if the posts are advertised during the period from 1st January to 30th June, and on 1st July, if the posts are advertised during the period from 1st July to 31st December. Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories, as may be notified by the Government from time to time, shall be greater by as many years, as may be specified.

(English Translation by Court)

19. More or less all the Rules aforesaid are *pari materia*, as is evident from a bare perusal thereof.

20. Though every service governed by distinct set of Rules has inbuilt provision, laying down minimum and maximum age required for recruitment but there is another set of Rules, namely, U.P. Recruitment of Service (Age Limit) Rules, 1972 (hereinafter referred to as the "Rules 1972") which controls the maximum age for recruitment to all services and posts which are under the Rule making power of the Governor. It goes without saying that all these Rules have been framed under the purported exercise of power under Article 309 of Constitution of India. Initially, maximum age provided under Rule 2 of Rules

1972 was 30 years which was extended to 32 years by U.P. Recruitment to Services (Age Limit) (8th Amendment) Rules 1991. Thereafter it was extended to 35 years by U.P. Recruitment to Services (Age Limit) (10th Amendment) Rules 2012. Rule 4 of Rules 1972 declares to give overriding effect to the said sets of Rules over any other contrary service Rules and Rule 6 provided the basis for computation of age. These two provisions read as under:

4. Overriding effect of the rules.-

(1) Notwithstanding anything to the contrary contained in the relevant Service Rules, these rules shall have effect in all cases except in cases where advertisements for Recruitment have been issued before February 24, 1983.

(2) If advertisements have issued or applications have been invited for selection to any post before the promulgation of the Uttar Pradesh Recruitment to Services (Age Limit) (Second Amendment) Rules 1983, computation of age will be made from the same date which was specified in the advertisement or in the order inviting applications.

6. Computation of age.--Notwithstanding anything to the contrary contained in any service rules, for the services and posts, whether within or outside the purview of the Public Service Commission, a candidate must have attained the minimum age and must not have attained the maximum age, as prescribed from time to time, on the first day of July of the calendar year in which vacancies for direct recruitment are advertised by the Public Service Commission or any other recruiting authority, or as the case may be, such vacancies are intimated to the Employment Exchange.

Provided that nothing in the rule shall apply to a case where such advertisement or intimation has been made before the commencement of the Uttar Pradesh Recruitment to Services (Age Limit) (Fifth Amendment) Rules, 1984.

(emphasis supplied by Court)

21. Learned counsel for the parties have not disputed that in view of overriding effect, given to Rules 1972, vide Rule 4, the provision relating to age, in the individual Rules of various services and posts, to the extent they prescribe maximum age, if inconsistent with Rules 1972, the latter shall prevail. In other words, maximum age prescribed in Rules 1972 shall hold the field for any recruitment to service or post which is under the Rule making power of the Governor. In view thereof and looking to Rule 2 of the Rules 1972 as it existed at the time of advertisement made in 2008 and 2013 both, none could point out that there is any infraction of any provision of Rules 1972 or that maximum age prescribed vide advertisements 2008 and 2013 is in derogation or inconsistent to what has been provided in Rules 1972. In other words, 1 it could not be shown that the maximum age prescribed in the advertisement is inconsistent to Rule 2 of Rules 1972 as it existed at the time of respective advertisements in question. In that view of the matter, I do not find any justification whatsoever to declare the relevant para of advertisements in

question, providing maximum age for candidates, ultra vires.

22. However, that by itself will not give quietus to the dispute. It is admitted by the respondent Commission in its counter affidavit that after 2006 advertisement, no further recruitment upto 2008 (when the impugned advertisement of 2008 in the writ petitions-first set published) was made. Thereafter again no further recruitment took place till 2012 when the impugned advertisement referred to in the second set of writ petitions was published.

23. Existence of vacancies in the various Departments during the year when no recruitment took place, is also not in dispute though the number may vary. The UPPSC is also not averse to consider proposition of giving relaxation to those candidates in the matter of maximum of age limit, who were eligible on 1st July of the years when recruitment did not take place despite availability of vacancies, but has expressed its inability stating that there is no provision for such relaxation under the Rules. So far as the State of U.P. is concerned, it has chosen not to file counter affidavit and to contest the matter. Learned Standing Counsel however, has adopted arguments and stand taken by the UPPSC.

24. In the absence of any provision whatsoever, I have no manner of doubt that a candidate cannot compel the employer to fill up a vacancy, as and when it occurred, and/or complain that he has some kind of vested right for process of recruitment, having not conducted with respect to the vacancy in the year when it was available and he was also eligible in the matter of age but become overage due to inaction on the part of respondents in initiation of recruitment process or non holding of any recruitment by recruiting agency. Similar arguments have been discarded in [Sanjay Agarwal Vs. State of Uttar Pradesh, High Court of Judicature at Allahabad \(U.P. Higher Judicial Service Examination 2000\)](#), . The Division Bench held:

(40) Moreover, Rule 12 provides for age which is independent and is not subject to other rules. Therefore, Rule 12 would apply on its own irrespective of whether determination of vacancies took place at regular intervals as envisaged in Rule 8 or not. Any other view would make Rule 12 subordinate to Rule 8 though the rule framing authority has not said so and, therefore, any attempt by this Court to relax rigour of Rule 12 with reference to Rule 8 would amount to legislation which this Court is neither supposed to do nor should do. Learned counsel for the petitioners could not show any provision whereunder Rule 12 could have been relaxed by the authorities. In the absence of any provision for relaxation, by judicial interpretation or by judicial exercise such relaxation cannot be granted. In [Food Corporation of India and Others Vs. Bhanu Lodh and Others](#), , the Apex Court held that rigor of statutory provisions cannot be relaxed giving a total go-bye to the statute.

(41) Further a person if fulfils requisite educational and other qualifications does not possess a fundamental or legal right to be considered for appointment against any post or vacancy as soon as it is available irrespective of whether the employer has decided to fill

in the vacancy or not. The right of consideration does not emanate or flow from existence of the vacancy but commences only when the employer decides to fill in the vacancy and the process of recruitment commences when the notification or advertisement of the vacancy is issued. So long as the vacancy is not made available for recruitment, no person can claim that he has a right of consideration since the vacancy exists and therefore, he must be considered. We have not been confronted with any statutory provision or authority in support of this contention that the petitioners have a right of consideration on mere existence of vacancy. On the contrary, we are of considered view that the right of consideration would come in picture only when the vacancy is put for recruitment, i.e., when the advertisement is published. That being so, the right of consideration commences when the recruitment process starts. The incumbent would obviously have right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. It is also obvious that if there is any inconsistency between the advertisement and Rules, the statutory rules shall prevail. In Malik Mazhar Sultan (supra), the Apex Court has clearly held that recruitment to the service could only be made in accordance with the Rules and not otherwise.

(42) Recently a similar claim for relaxation in respect to the period when no recruitment was held, pertaining to recruitment of U.P. Judicial Services came up for consideration before a Full Bench of this Court in Sanjay Kumar Pathak v. State of U.P. and others (writ petition No. 65189 of 2006) decided on 25.5.2007, and it held that unless permitted by the Rules no relaxation can be claimed. The Court also observed as under:

Nobody can claim as a matter of right that recruitment on any post should be made every year.

(43) In view of the above discussion, it is held that Rule 8 makes it obligatory for the Court to make periodical recruitment but any deviation in compliance thereof for just and valid reasons would not give any advantage or consequence to the candidates who failed to participate in selections due to delay in recruitment by becoming overage or otherwise ineligible. Issue No. 2 is answered accordingly. Similarly, issue No. 3 is answered in negative, i.e., the petitioners are not entitled for any relaxation on account of selection not held during certain period as contemplated under Rule 8 of 1975 Rules.

25. Similar argument was considered by another Division Bench in [Dr. Rajeev Ranjan Misra and Others Vs. The State of U.P., The Chairman U.P. Public Service Commission and The Director Homoeopath Govt. of U.P.](#), and it was held:

In our view, Rule 14 nowhere contemplates an annual selection obligatory on the part of the respondents. On the other hand what it provides that the appointing authority shall determine the number of vacancies to be filled during the course of the "year" as also the number of vacancies reserved for various categories under Rule 6 which shall be filled in through Commission on intimation being sent. It only provides that for the purpose of

determination of vacancy, the appointing authority shall take into notice "year" as the unit in which the selection process is being undertaken, meaning thereby the vacancies shall not include anticipated vacancies after the "year" when the recruitment process would commence. The existing vacancies as well as the vacancies likely to arise in the course of the year" would only be considered and determined by the appointing authority. The year of recruitment" has also been defined under Rule 3(j) of 1990 Rules as under:

3(j) "Years of Recruitment" means a period of twelve months commencing from the first day of July of a calendar year.

Besides, Rule 4 sub-Rule 2 proviso empower the Governor to leave any vacant post unfilled or in abeyance without entitling any person to compensation. The appointing authority under 1990 Rules is the Governor meaning thereby the power under Rule 4 of the proviso is conferred upon the appointing authority and this shows that he is not obliged to fill in the vacancies as and when and immediately on their occurrence.

In order to accept the contention of the petitioner we will have to read in Rule 14, the words "every year" instead of "course of year" which is not permissible since this Court will not legislate but only interpret and implement the law as enacted by the competent authority. Where the language of statute is clear and unambiguous, the Court will not interpret the statute which may result in adding or subtracting any word or phrase in the provision of the statute but would simply interpret and implement the provision as it is. Rule 10 nowhere leaves any doubt that as and when the recruitment shall be made, the incumbent must fulfil the age limit of 21 years to 35 years on the first day of the "calendar year" in which vacancies are advertised by the Commission. It excludes any other contingency for the purpose of age limit and the only incident to apply cut-off date for age is the "calendar year" in which the vacancies are advertised by the Commission. The principle laid down under Rule 10 of 1990 Rules is consistent with the legal principles well known in service jurisprudence that, for the purpose of direct recruitment no person in open market has a right of consideration unless and until the vacancy is offered to be filled in accordance with law by the competent authority. As soon as a post fell vacant, it would not give or confer any right upon an individual, who fulfil other qualifications, to claim right of consideration for employment against such post for the reason that the employer can always keep a post unfilled. A prospective candidate cannot compel the employer to consider him for employment even though the post has not been made open for recruitment and selection.

26. The proposition laid down in Sanjay Agarwal (Supra) was also followed in [Sunil Kumar Pandey and Others Vs. State of U.P. and Others](#), .

27. However, the above consideration may not strictly apply to the present case inasmuch as, the Governor in exercise of power under proviso to Article 309 of Constitution has published and promulgated another set of Rules, i.e., Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules 1992 (hereinafter

referred to "Rules 1992"), published vide notification dated 23rd July 1992. It is a small set of Rules having only three provisions. Rule 2 contains certain definitions. I propose to quote Rules 1 and 3 thereof hereunder:

1. (i) These rules may be called the Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules, 1992.

(2) They shall come into force at once.

(3) They shall apply to all civil services and posts under the rule making power of the Governor under proviso to Article 309 of the constitution.

3. Notwithstanding anything to the contrary in any rule-regulating the maximum age of recruitment to a service or post in connection with the affairs of the State relaxation in the maximum age-limit may be granted by the Governor in favour of a candidate or a class of candidates.

Provided that in the case in which recruitment is made through the Commission, that body shall be consulted before the relaxation is granted.

28. The power of relaxation in the matter of maximum age limit has been conferred upon the Governor, vide Rules 1992. The only requirement with respect to recruitment made through UPPSC is that such body shall be consulted before relaxation is granted. It is not the case of the respondents that the circumstances, as arisen in the present case, due to non holding of recruitment in various years, resulting in rendering a large number of candidates like the petitioners, ineligible for no fault on their part, has been considered by competent authority, so as to examine whether power of relaxation can justifiably be exercised under Rules 1992 or not. For the purpose of recruitment, where UPPSC is involved, its consultation is necessary and before this Court UPPSC has admitted that it is not averse to the idea of such relaxation provided such a provision exists.

29. In the present case, the provision conferring power of relaxation upon the Governor exists, but it has not been attended or deliberated to see whether it should be exercised at all, in one or the other way or not. It is no doubt true that the competent authority is not bound to relax the rule, relating to maximum age, but once it possesses the power to do so, in a given case, where the circumstances so justify, it would be appropriate on its part to at least apply its mind and pass appropriate order as to whether such relaxation should be granted or not. It is more so necessary when out of several services in one such service, such relaxation has been granted with reference to an individual service rules of such service. In some of the writ petitions, the petitioners have claimed to have made representations to UPPSC, requesting for relaxation in the matter of maximum age, in the light of fact that the petitioners became overage during the period, when despite existence of vacancies no recruitment was held, but those representations, have not been disposed of for the reason that the power is to be exercised not by the UPPSC but the Governor. In my view, UPPSC instead of turning the blind eye to such representations

ought to have referred the same to the competent authority, in the context of Rules 1992, so as to be considered by it, within a reasonable time. That would have helped not only in expeditious recruitment but also consideration of grievance of petitioners and alike other candidates, by respondent competent authority, i.e. Governor.

30. When a power is vested in a particular authority, to do or not to do something, it is not obliged to do by exercising a power in a particular way but when a request is made and the circumstances are brought to its notice, justifying exercise of such power, at least there must be an application of mind on the part of competent authority to find out whether such power should be exercised or not, and its extent, etc.

31. It was faintly suggested on behalf of respondent No. 2 that Rules 1992 may not be attracted with respect to such services which are to be governed by individual sets of rules, framed after 1992. The suggestion is thoroughly misconceived. A bare reading of Rule 3 makes it clear that Rules 1992 have been given overriding effect over any contrary provision, regulating maximum age of recruitment to service or post, in connection with the affairs of the State.

32. Non-obstante clause in Rule 3 of Rules 1992, in a very wide and unequivocal term, provides that any rule, contrary, shall not bar the power of relaxation of Governor under Rules 1992. Thus, it is Rule 3 of 1992 Rules which shall prevail over contrary rule, if any. Furthermore, it provides overriding effect over not only the existing contrary rules, operating at the time of notification of Rules 1992, but overriding effect given thereunder by declaration is general and applicable to all Rules contrary thereto.

33. It is in these circumstances, I am clearly of the view that in the peculiar facts and circumstances of these cases, it would be in the fitness of things that the Governor ought to have examined the question of granting relaxation in the maximum age limit to the extent of non holding of recruitment for vacancies occurring during the concerned year(s) when no recruitment held and, and, thereby rendering certain candidates overage and ineligible in the matter of age. By exercising its power and considering entire facts and circumstances in accordance with law, whether relaxation is granted or not is a different thing, but at least the matter should have been examined by him. Since recruitment in the present case has to be made through UPPSC, such exercise of power shall be done by the Governor in consultation with UPPSC.

34. It goes without saying that this Court has not required the competent authority to exercise power in a particular manner, but it shall be open to it, to exercise the same in the manner it finds appropriate, but at least, such consideration must be there with application of mind in compliance of Rules 1992.

35. Resultantly, all these writ petitions are disposed of by directing the competent authority under Rule 3 of 1992 Rules to consider whether there should be relaxation in the matter of maximum age to such candidates who were otherwise eligible on 1st July of

the year but due to non-advertisement of vacancies/non recruitment, they could not apply and became overage. The aforesaid decision shall be taken in consultation with the UPPSC as required by proviso to Rule 3 of 1992 Rules. Such exercise shall be completed expeditiously, preferably within two months from the date of presentation of a certified copy of this order before the competent authority.

36. In the meantime, UPPSC is directed either to permit provisionally all such candidates to appear in recruitment/selection in question who were eligible on 1st July of the year(s), in which recruitment did not take place, subject to final decision taken by competent authority under Rules 1992, as directed above, and/or to defer recruitment pursuant to the advertisements 2008 and 2013, till the aforesaid decision is taken and thereafter to abide by such decision. In the facts and circumstances of the case, however, there shall be no order as to costs.