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**Central Administrative Tribunal
Cuttack Bench**

OA No. 904/2005

&

MA 439/2006

With

OA 324/2006

Cuttack, this the 7th day of December, 2006

Hon'ble Mr. Justice M.A. Khan, Vice Chairman (J)
Hon'ble Mr. V.K. Agnihotri, Member (A)

OA No. 904/2005

Sri Budhimanta Dash

...Applicant

OA 324/2006

Baishnab Prasad Sekhar Mohanty

...Applicant

Versus

Union of India & Ors.

...Respondents

Appearance: Shri M.M. Basu, counsel for applicants in both the OAs.

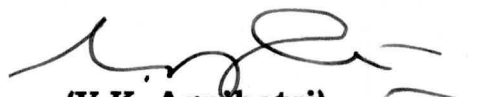
Shri S.B. Jena, counsel for R-1 & R-2 in OA No. 904/2005
and for R-1 in OA No. 324/2006

Shri A.K. Bose, counsel for R-3 & R-4 in OA No. 904/2005
and for R-2 & R-3 in OA No. 324/2006

Shri S.C. Samantray, counsel for R-4 in OA No. 324/2006

ORDER

1. To be referred to the Reporters or not? *yes*
2. To be circulated to outlying Benches of the Tribunal or not? *yes*


(V.K. Agnihotri)
Member (A)

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Hon'ble Mr. Justice M.A. Khan, Vice Chairman (J)
Hon'ble Mr. V.K. Agnihotri, Member (A)

OA No. 904/2005

Sri Budhimanta Dash
S/o late Banchanidhi Dash,
Working as Addl. Auditor General
of Co-operative Societies,
Orissa (Bhubaneswar)

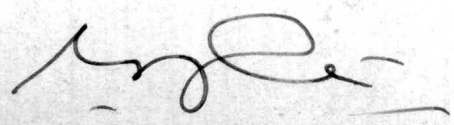
....Applicant

(By Advocate: Shri M.M. Basu)

Versus

1. Union Public Service UPSC through
The Secretary,
Dholpur House, Shahjahan Raod,
New Delhi.
2. Union of India represented by
The Secretary,
Ministry of Personnel, Public Grievances,
& Pensions,
Department of Personnel and Training,
North Block,
New Delhi.

(By Advocate: Shri S.B. Jena)



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3. Secretary,
Department of General Administration,
Government of Orissa,
Bhubaneswar.

4. Principal Secretary,
Government of Orissa,
Co-operation Department, Secretariat,
Bhubaneswar.

...Respondents

(By Advocate: Shri A.K. Bose)

OA 324/2006

Baishnab Prasad Mohanty
S/o late Chandra Sekhar Mohanty,
Vill. Keshpur, Via Chandakulat,
P.S. Pattamundai,
District Kendapara,
A/P Additional Director-cum-
Joint Secretary to Government of Orissa,
Information & Public Relation Department,
P.S. Capital, Distt. Khurda.

...Applicant

(By Advocate: Shri M.M. Basu)

Versus

1. Union of India represented by
The Secretary,
Ministry of Personnel, Public Grievances,
& Pensions,
Department of Personnel and Training,
North Block,
New Delhi.

(By Advocate: Shri S.B. Jena)

2. State of Orissa represented through
The Special Secretary to Govt. of Orissa,
General Administration Department,
Orissa Secretariat,
Bhubaneswar, Distt. Khurda.

3. State of Orissa represented through
Secretary to the Govt. of Orissa,



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Information & Public Relations Department,
Orissa Secretariat,
Bhubaneswar, Distt. Khurda,

(By Advocate: A.K. Bose)

4. Union Public Service UPSC through
The Secretary,
Dholpur House, Shahjahan Raod,
New Delhi.

...Respondents

(By Advocate: Shri S.C. Samantray)

ORDER

By Mr. V.K. Agnihotri, Member (A):

Since both these OAs relate to the appointment to the Indian Administrative Service (IAS, for short) through selection of Non-State Civil Service (NSCS, for short) Officers of the Government of Orissa, the vacancy years concerned in the two OAs are closely interlinked and the grounds for challenging the decisions of the respondents overlap, for the sake of convenience, these two OAs are being disposed of by this common order.

2. In order to put the contentions of both the parties in perspective and for better understanding of the issues involved in both the OAs, it would be appropriate to extract the concerned provisions of the Rules and Regulations of the Government of India relating to appointment of NSCS Officers to IAS. The Indian Administrative Service (Recruitment) Rules,



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1994 (Rules, for short) make the following provisions in this regard:-

"8. Recruitment by promotion or selection for appointment to State and joint Cadre.-

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(2) The Central Government may, in special circumstances and on the recommendation of the State Government concerned and in consultation with the UPSC and in accordance with such regulations as the Central Government may, after consultation with the State Governments and the UPSC, from time to time, make, recruit to the Service any person of outstanding ability and merit serving in connection with the affairs of the State who is not a member of the State Civil Service of that State but who holds a gazetted post in a substantive capacity.

9. Number of persons to be recruited under Rule 8.- (1) The number of persons recruited under Rule 8 in any State or group of States shall not, at any time, exceed $33\frac{1}{3}$ per cent of the number of senior posts under the State Government, Central deputation reserve, State deputation reserve and the training reserve in relation to the State or to the group of States, in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955:

Provided that the number of persons recruited under Sub-rule (2) of Rule 8 shall not at any time exceed fifteen per cent of the number of persons recruited under Rule 8.

Explanation.- For the purpose of calculation of the posts under this sub-rule, fractions, if any, are to be ignored."



3. To give effect to these Rules, the Government of India have issued the Indian Administrative Service (Appointment by Selection) Regulations, 1956, which were re-issued with various amendments in 1997 (Regulations, 1997 for short). Since we are concerned with the vacancy years 2004 and 2005, the Regulations, 1997 are relevant to us. The concerned provisions of these Regulations are as follows:-

“3. Determination of vacancies to be filled.- The Central Government shall, in consultation with the State Government concerned, determine the number of vacancies for which recruitment may be made under these regulations each year. The number of vacancies shall not exceed the number of substantive vacancies, as on the first day of January of the year, in which the meeting of the Committee to make the selection is held.

4. State Government to send proposals for consideration of the Committee.- The State Government shall consider the case of a person not belonging to the State Civil Service but serving in connection with the affairs of the State, who-

- (i) is of outstanding merit and ability; and
- (ii) holds a Gazetted post in a substantive capacity; and
- (iii) has completed not less than 8 years of continuous service under the State Government on the first day of January of the year in which his case is being considered in any post which has been declared equivalent to the post of Deputy Collector in the State Civil Service and propose the person for consideration of the



committee. The number of persons proposed for the consideration of the Committee shall not exceed five times the number of vacancies proposed to be filled during the year:

Provided that the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for the consideration of the Committee.

Provided also that the State Government shall not consider the case of a person, who having being included in an earlier select list, has not been appointed by the Central Government in accordance with the provisions of Regulation 9 of these regulations.

5. Preparation of a list of suitable officers by the Committee.- The Committee shall meet every year to consider the proposal of the State Government made under Regulation 4 and recommend the names of the persons not exceeding the number of vacancies to be filled under Regulation 3, for appointment to the Service. The suitability of a person for appointment to the service shall be determined by scrutiny of service records and personal interview.

Provided that no meeting of the Committee shall be held and no list for the year in question shall be prepared when-

(a) there are no substantive vacancies as on the first day of January of the year in the posts available for recruitment of persons under Sub-rule (2) to Rule 8 read with proviso to Sub-rule (1) to Rule 9 of the recruitment rules; or

(b) the Central Government in consultation with the State Government



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decides that no recruitment shall be made during the year to the substantive vacancies as on the first day of January of the year in the post available for recruitment under Sub-rule (2) of Rule 8 read with proviso to Sub-rule (1) to Rule 9 of the recruitment rules; or

(c) the UPSC either on its own or on a proposal made by the Central Government or the State Government, considers that it is not practicable to hold a meeting of the Committee during the year, in the facts and circumstances of each case.

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9. Power of the Central Government not to appoint in certain cases.- Notwithstanding anything contained in these regulations, the Central Government may not appoint any person whose name appears in the select list, if it is of the opinion that it is necessary or expedient so to do in the public interest.

Provided that no such decision shall be taken by the Central Government without consulting the Union Public Service Commission and without recording the reasons therefore."

OA No. 904/2005

4. In this OA the applicant has sought a direction from this Tribunal to the respondents to consider him for appointment to the IAS against NSCS Officers' vacancy and quash the impugned letter dated 04.06.2005 wherein it has been stated that two vacancies for the year 2005 are available for being filled up by NSCS Officers.



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5. The brief facts of the case are that the Government of India determined one vacancy for the year 2004 to be filled up by selection from among NSCS Officers of Orissa, vide their letter dated 21.04.2004. Thereafter, the Government of Orissa forwarded a proposal containing five names to the Union Public Service Commission (UPSC, for short), vide their letter dated 14.09.2004, to convene the Selection Committee Meeting (SCM, for short) for selection of an NSCS Officer for appointment to the IAS of Orissa Cadre. After examination of the proposal, it was observed that the State Government had not furnished a copy of the orders declaring the NSCS posts as equivalent to the post of Deputy Collector as laid down in the Regulations, 1997. The State Government had only furnished a certificate stating that the NSCS officers had completed 8 years of continuous service in a post equivalent to the post of Deputy Collector in the State Civil Service. In view of this, they were requested, vide UPSC's letter dated 14.10.2004, to furnish a copy of the order declaring the NSCS post as equivalent to the post of Deputy Collector. In the said letter, a reference was also made to a D.O. letter dated 10.03.2004 issued by the Secretary, UPSC, to the Chief Secretary, Government of Orissa, wherein the State Government had been requested to forward a copy of the order declaring NSCS post as equivalent to the post of Deputy Collector in the



State Civil Services while forwarding the proposal for convening the SCM in the case of NSCS officers.

6. In the meantime, the SCM was fixed for 03.12.2004. The State Government could not furnish the deficient documents even after reminders dated 08.11.2004, 18.11.2004 and 24.11.2004. Further vide UPSC's letter dated 25.11.2004, the State Government were again informed that the SCM scheduled for 03.12.2004 could not proceed in the absence of the said declaration of equivalence and that the SCM would stand postponed if the same was not made available by 30.11.2004. The State Government, vide letter dated 27.11.2004 informed that it would not be possible to issue orders declaring NSCS posts equivalent to the post of Deputy Collector by 30.11.2004. They, therefore, requested the UPSC to postpone the SCM scheduled for 03.12.2004. In view of this, the UPSC postponed the said SCM.

7. As per the provisions of the Regulations, 1997, the SCM for the year 2004 was required to be held by 31.12.2004. Since the deficient document was not received from the State Government up to 31.12.2004, no SCM could be held during the year 2004 for selection of NSCS officers for appointment to the IAS of Orissa Cadre. In the circumstances, in exercise of the powers conferred by Clause (c) of Regulation 5 of



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Regulations, 1997, the UPSC declared that it was not practicable to hold the SCM for selection of NSCS officers for appointment to the IAS of Orissa cadre during the year 2004. This decision was communicated to the Government of India as well as the State Government, vide the UPSC's letter dated 11.02.2005.

8. Thereafter, the Government of India (Department of Personnel & Training) determined two vacancies for appointment of NSCS officers to the IAS of Orissa Cadre by selection during the year 2005. In reply to further correspondence from the Government of Orissa on this, the DOP&T clarified, vide letter dated 05.07.2005, that since no SCM could be held in the year 2004, the unfilled vacancy had been carried forward to the year 2005. They also stated that there was no provision for preparation of year-wise select lists under Regulations, 1997; as such, it was not possible to prepare the select list of 2004.

9. The State Government forwarded a proposal to the UPSC vide their letter dated 30.08.2005 and also furnished a copy of order dated 11.01.2005 declaring NSCS posts equivalent to that of Deputy Collectors. After receipt of all the relevant documents, the UPSC fixed the SCM on 24th and 25th November, 2005.




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10. In the meanwhile, through an interim order of this Tribunal dated 24.11.2005, it was ordered that the Selection Committee in its meeting to be held on 24.11.2005 and 25.11.2005 shall recommend not more than one officer for promotion to the cadre of IAS pending final decision in this OA and that any appointment made under NSCS Officers quota on the recommendation of the Selection Committee shall be subject to the outcome of this OA.

11. On a request of the learned counsel for the applicant, this Tribunal, in its order dated 16.10.2006, decided to hear the arguments in this OA along with OA No. 324/2006 since similar questions of law and facts were involved in the two OAs.

12. Respondent no. 3 (Government of Orissa) filed MA No. 439/2006 on 27.07.2006 stating that in view of the interim order of this Tribunal even though the Selection Committee met on 24.11.2005 and decided to select NSCS Officers to fill up the two vacancies in the year 2005, no appointment could be made. It was, therefore, prayed that interim order be suitably modified so that respondent nos. 1 to 3 can take further necessary action on the basis of the recommendations of the Selection Committee. This MA will also stand disposed of in terms of the order in this OA.





13. The applicant belongs to the Orissa Co-operative Service of the State Government, which is NSCS. His date of birth is 05.01.1950 and hence he was below 54 years on 01.01.2004. He has stated that the IAS Cadre of the Orissa Government comprises 61 posts, of which 9 posts are to be filled up by promotion of NSCS Officers. It has been further averred that all the 9 posts were being held by the officers of NSCS till the year 2003, when Shri R.N. Swain passed away. Thus, one out of the nine posts fell vacant. As per the prescribed procedure, a panel of 5 officers belonging to NSCS was sent for selection by the Selection Committee to be convened by respondent no. 1. The applicant was found suitable for the post and hence invited to attend the interview, scheduled to be held on 03.12.2004, which was later arbitrarily postponed by respondent no. 1.

14. The applicant has stated that this OA has been filed against the action of the respondents in not calling him for the interview subsequently held on 24.11.2005 and 25.11.2005 for appointment of NSCS officers to the IAS. The main contentions of the applicant in the OA are as follows:-

- (i) By letter dated 22.11.2004 of the Government of Orissa, the applicant was directed to appear for an interview before the Selection Committee on 03.12.2004. He was informed, vide letter dated



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29.11.2004, that the said interview was postponed. Thereafter, he has not received any intimation about the next date of interview.

- (ii) In letter dated 04.06.2005 of the State Government, it was indicated that two vacancies for the year 2005 were available for appointment of NSCS officers to the IAS. This is not the correct position of vacancies since one vacancy pertains to the year 2004 only and another one pertains to the year 2005. Further, in the said letter, an embargo was put that the candidates should not have attained the age of 54 years by 01.01.2005 and, in view of this, the applicant was not called for the interview held on 24th and 25th November, 2005.
- (iii) In the proviso to Regulation 4 (iii) of Regulations, 1997, it is indicated that the State Government shall not consider the case of a person if he has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for consideration of the Committee. In the matter of the applicant, since the decision was already taken to consider him in 2004, the embargo relating to age could not have been imposed in 2005.



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- (iv) When the applicant was called for interview, there was only one vacancy; the subsequent vacancy has nothing to do with the case of the applicant. There is no reason why the Government should club both the vacancies together and thereby eliminate the eligible candidate for a vacancy which arose in 2003 (as on 01.01.2004). The action of respondent no. 1 in not calling the applicant for interview on 24.11.2005 is due to non-application of mind and because of wrong interpretation of Regulations, 1997.
- (v) That the delay in the interview was caused by some delay in declaring the post held by the applicant as equivalent to the post of Deputy Collector. This should not have led to postponement of the interview for selection when admittedly the post was equivalent to that of a Deputy Collector. Further, several other officers were selected earlier without insisting on this declaration. Insisting on such a declaration in the case of the applicant is discriminatory.
- (vi) The respondent no. 1 hurriedly fixed up the interview on 24.11.2005 with a view to depriving the applicant of having his say before the appropriate Forum.



15. In the reply filed by respondent no. 1 (UPSC) and adopted by respondent no. 2 (Union of India), it has been stated that the UPSC, being a Constitutional Body under Articles 315 to 323 part XIV (Services under the Union and the States) Chapter-II of the Constitution, discharge its functions and duties assigned to them under Article 320 of the Constitution of India. Further, by virtue of the provisions made in the All India Services Act, 1951, separate Recruitment Rules have been framed for IAS/IPS/IFS. In pursuance of these Rules, IAS (Appointment by Promotion) Regulations, 1955 (Regulations, 1955 for short) and Regulations, 1997 have been made. The Selection Committee constituted in accordance with the provisions of Regulations, 1997 presided over by the Chairman/Member of the UPSC makes selection of NSCS officers for appointment to the IAS in accordance with provisions of the said Regulations.

16. Appointment by selection of NSCS officers to the IAS is one of the modes of recruitment specified in the Rules *ibid*. The other two modes are (1) by direct recruitment through the Civil Services Examination, and (2) appointment by promotion of State Civil Service Officers. Each of these modes of recruitment is done through different selection procedures. Direct recruitment to the IAS is made through written examination and interview tests. In the case of appointment by promotion,

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State Civil Service officers qualify for consideration for promotion to the IAS after they have put in a minimum of 8 years' service in the post of Deputy Collector. In the matter of appointment by selection, NSCS officers are appointed to the IAS only if they are of outstanding merit and ability in addition to fulfilling the eligibility criteria laid down for appointment by promotion. Under the Scheme of Regulations, 1997, the role of the State Government is limited to the submission of a list of officers of outstanding merit and ability, who fulfil the eligibility conditions as specified in Regulations, 1997. Thereafter, the Selection Committee determines the relative merit of the officers selected.

17. It has been further averred that as per Rule 8 (2) of the Rules, the mode of appointment to the IAS under Regulations, 1997 i.e. induction of NSCS officers into IAS, is to be resorted to only in special circumstances. This mode of induction to the IAS does not confer any right of consideration/appointment to the NSCS officers, and is to be resorted to only in special circumstances that the State Government have NSCS officers of outstanding merit and ability and that the State Government desires to earmark vacancies to be filled up by these officers. According to the provisions of Regulation 3 of Regulations, 1997 the number of vacancies, against which selection is made each



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year for appointment to the IAS, is determined by the Government of India (Department of Personnel & Training) in consultation with the State Government. Thereafter, the State Government forwards the names of the NSCS officers, who are of outstanding merit and ability and who hold a Gazetted post in a substantive capacity and have completed not less than 8 years of continuous service under the State Government in any post declared equivalent to the post of Deputy Collector, under Regulation 4 of Regulations, 1997. The UPSC, as per its due process and procedures, scrutinizes the records of the officers and corresponds with the State and Central Government, if necessary, for ensuring that the proposal is complete before placing the same before the Selection Committee for preparation of the Select List.

18. The SCM has to be convened by the 31st December of the year in which the State Government forwards a proposal for filling up the vacancies existing on the first day of January of that year. In case the SCM is not convened by the 31st December of the year in which the State Government forwards a proposal, the recruitment action for that year under Regulations, 1997 becomes infructuous and the UPSC invokes Regulation 5(c) of Regulations, 1997 stating that it was not practicable to hold the meeting of the Committee during the




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year. Thereafter, the selection process starts afresh for the next year as there is no provision for preparation of year-wise select lists in Regulations, 1997 and the crucial date of eligibility is reckoned with reference to the 1st January of that year.

19. Since the SCM for the year 2004 in respect of NSCS officers of Orissa could not be held by 31st December of 2004, the last date for holding the meeting under the Regulations, 1997, because the deficient documents could not be furnished by the Government of Orissa by the 31st December of 2004, therefore, in exercise of the powers conferred by Clause (c) of Regulation 5 of Regulations, 1997, the UPSC declared that it was not practicable to hold the SCM for selection of NSCS officers for appointment to the IAS of Orissa Cadre during the year 2004.


20. Since the recruitment process for selection of NSCS officers in the year 2004 thus became infructuous on account of the SCM having not been held by 31st December, 2004, the last date for holding the meeting under Regulations, 1997, any subsequent action to recruit NSCS officers could only be with reference to the subsequent year and, as such, the crucial date of eligibility had also to be reckoned with reference to that year. Invocation of Regulation 5 (c) by the UPSC for a particular year indicates that no select list can be prepared for that year. The





Hon'ble Supreme Court has also concurred with the decision of the UPSC in this matter in SLP (C) No. 11708/2003 filed by the **Union of India v. Sh. G. Limbadri Rao & Ors.** and SLP (C) No. 8891 of 2003 filed by **Government of India v. Sh. B. Nanji Reddy & Ors.**

21. It has been further submitted that the provisions of Regulations, 1997 are distinct from those of the Regulations, 1955. Under Regulations, 1955, a State Civil Service officer has a right to be considered for promotion to the IAS with reference to his position in the seniority list of the State Civil Service, subject to fulfillment of the other eligibility criteria laid down in the said Regulations. On the contrary, a NSCS officer has no such immutable right to be considered for appointment to the IAS in the order of any seniority list of the Service to which he belongs, under Regulations, 1997. As already stated earlier, appointment by selection is to be resorted to only in special circumstances. As such, the scheme of appointment of NSCS officers by selection under Regulations, 1997 is not akin to the scheme of consideration of SCS officers for promotion to the IAS under Regulations, 1955. In view of this, Regulations, 1997 do not provide for year-wise preparation of select list for selection of NSCS officers for appointment to the IAS as in the case of State Civil Service Officers. This is evident from the fact that



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while the Government of India, vide amendment dated 25.07.2000, amended Regulations, 1955 providing for preparation of year-wise select lists, no such amendment was carried out in the Regulations, 1997. In view of this, the contentions of the applicant are baseless.

22. It has been further stated that as regards the contention of the applicant relating to earlier acceptance of certificate of equivalence issued by the State Government, the UPSC used to consider officers for selection based on a certificate furnished by the State Government that the officers proposed were holding posts equivalent to the post of Deputy Collector in the State Civil Service. However, in certain cases, the selections made by the UPSC on the basis of such certificates were challenged in the courts and the selections made by the UPSC were set aside by the Courts. For instance, the Jabalpur Bench of the Tribunal, vide order dated 27.02.2004, in the case of **M.P. Administrative Service Association & Anr. v. Union of India & Ors.**, 2004 (3) AISLJ 321 (OA Nos. 597/1998, 514/1998 and 80/1999) set aside the selection made by the Selection Committee for appointment of NSCS offices to the IAS of Madhya Pradesh Cadre during the year 1998. One of the reasons cited by the Tribunal for setting aside the selection was that the NSCS posts had not been declared equivalent to the



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post of Deputy Collector in the State Civil Service. In view of this, the UPSC, vide D.O. letter dated 10.03.2004, requested all the State Governments to pass orders declaring NSCS posts equivalent to the posts of Deputy Collectors in the State Civil Service so that the candidates recommended by the State Government fulfilled all the eligibility criteria laid down in Regulations, 1997. In view of this, the contention of the applicant is baseless.

23. It has been further stated that as regards the contention of the applicant that meeting of the SCM in 2005 was hurriedly fixed, the proposal for convening the SCM in this case was received from the State Government on 09.09.2005 and the UPSC fixed the SCM on 25th November, 2005 at Bhubaneswar, which was intimated to the State Government on 31.10.2005. However, due to rescheduling of flights, the SCM was re-fixed on 24th and 25th November, 2005. The SCM was held as scheduled, as neither a copy of OA nor any intimation about the interim direction of the Tribunal was received in the UPSC or brought to notice of the UPSC. As such, the contention is baseless and the Tribunal may appreciate that the applicant is trying to interpret Regulations, 1997 in a subjective manner and it is, therefore, necessary that the submissions of the



Government of India be taken into consideration as they are the nodal Ministry for the interpretation of Regulations, 1997.

24. In the counter reply filed on behalf of respondent no. 3 (Government of Orissa) it has been averred that in pursuance of Regulations, 1997 the State Government had determined one vacancy to fill up one post under NSCS category for the year 2004. This vacancy had been approved by the Government of India vide their letter dated 21.04.2004. In pursuance of the aforesaid Regulations the State Government recommended the cases of following five officers of NSCS, who were nominated by a Preliminary Scrutinizing Committee constituted for the purpose.

1. Sri Baishnab Prasad Mohanty, Orissa Information Service
2. Sri Budhimanta Dash, Orissa Cooperative Service
3. Sri Jaladhar Rout, Orissa Cooperative Service
4. Sri Kabindranath Khatei, Orissa Finance Service
5. Sri Subhendu Kumar Mishra, Orissa Finance Service

25. Accordingly, a proposal was sent to the UPSC to convene the SCM, vide the State Government letter dated 14.09.2004, for selecting one NSCS officer out of the above five for appointment to the IAS.



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26. It has been further averred that after receipt of the proposal the UPSC insisted upon the State Government to furnish a copy of the order declaring the NSCS posts as equivalent to the post of Deputy Collector, vide their letter dated 14.10.2004. In previous years the State Government used to certify that the officers recommended by the State Government had completed 8 years of continuous service under the State Government in the post equivalent to the post of Deputy Collector. In the year 2004 too such a certification had been made by the State Government, vide their proposal dated 14.09.2004, sent to the UPSC. Further, a detailed clarification was also furnished to the UPSC vide the State Government letter dated 11.11.2004.

27. The UPSC, vide their letter dated 08.11.2004, informed that the date of the SCM has been fixed for 03.12.2004 at 11.00 hours in the office of the UPSC. UPSC further intimated to invite the members of the SCM as well as the eligible NSCS officers to attend the interview on 03.12.2004 at New Delhi. Accordingly, the State Government, vide their letter dated 18.11.2004, informed the NSCS officers to attend the interview at New Delhi on the scheduled date and time.

28. It has been further stated that UPSC vide their letter dated 18.11.2004, again insisted on the State Government to furnish



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a copy of the orders declaring the NSCS posts as equivalent to the post of Deputy Collector. In reply to the above, the State Government again submitted a certificate in respect of completion of 8 years of continuous service in the post equivalent to the Deputy Collector in the State Civil Service, vide their letter dated 25.11.2004. In spite of furnishing the certificate, the UPSC further insisted on the State Government to submit a specific order declaring the NSCS posts equivalent to the Deputy Collector, otherwise the meeting would stand postponed. In this connection, it has been further averred that the procedure of declaring the equivalence of the NSCS posts to that of the Deputy Collector was a completely new and time taking process on the part of the State Government, as the post of Deputy Collector does not exist in the State Government, which has been re-designated as Orissa Administrative Service Class-II. However, views of the State Law Department and other cadre controlling Departments were collected in the matter. As such, it was not possible to issue such an order before the scheduled date of SCM. Accordingly, the State Government, vide its letter dated 27.11.2004, expressed their inability to issue the order within a short time and requested the UPSC to postpone the meeting. The State Government, vide its letter dated 29.11.2004, further clarified the difficulty in issuing the Office Order regarding declaration of equivalence of NSCS posts to



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that of the Deputy Collector and requested to re-consider the matter. But the UPSC, vide their letter dated 02.12.2004, intimated the State Government that the SCM has been postponed. Accordingly, the State Government informed the candidates regarding the postponement of the meeting.

29. It has been further averred that considering the need of the UPSC, the State Government issued an Office Memorandum dated 11.01.2005 and declared 29 NSCS of the State as equivalent to the post of Deputy Collector in the State Civil Service for the purpose of selection to the IAS only and requested the UPSC to convene the postponed SCM preferably in the 3rd week of February, 2005. The UPSC, vide their letter dated 11.02.2005, clarified that as the requisite information/documents were not received from the State Government by 31.12.2004, it was not possible for them to hold the SCM during the year 2004.

30. For the year 2005, the State Government assessed one vacancy in the selection quota of IAS caused due to superannuation of Shri Jagdish Prasad Dash, IAS (NSCS-85) on 31.07.2004. As such, the State Government, under, Regulation 3 of Regulations, 1997, requested the Central Government for approval of one vacancy to be filled up by the NSCS officers during the year 2005 besides the proposal already approved for



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one vacancy of 2004. The Central Government decided that the selection from amongst NSCS officers of Orissa during the year 2005 may be made up to two posts and communicated to the State Government, vide their letter dated 17.05.2005. Accordingly, the State Government took steps for filling up two vacancies for the year 2005.

31. It has been further stated that the Government of India decided to fill up two vacancies for the year 2005 by clubbing the vacancies of the year 2004 and 2005. According to the provision of Regulation 4 (iii) of Regulations, 1997, the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for the consideration of the SCM. As per the above criteria and, keeping in view the Regulation 4, the State Government in General Administration Department (GAD, for short) requested all Departments of Government to sponsor the names of not more than 3 eligible NSCS officers, who have not attained 54 years as on 01.01.2005, for being considered for appointment to IAS by selection. The name of the applicant could not come into the zone of consideration as he had already attained the age of 54 years⁵² on 05.01.2005, his date of birth being 05.01.1950. As a



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result the applicant was not called for interview held by the UPSC on 24th & 25th November, 2005.

32. It has been further averred that the applicant made an application to the Chief Secretary, Orissa with a request to persuade the UPSC to consider the proposal for 2004 and 2005 vacancies separately and allow him to compete for the vacancy of 2004 as he was not eligible for the year 2005. While forwarding the representation of the applicant to the Central Government, the State Government, vide its letter dated 22.06.2005, proposed that the Government of India may prepare year-wise eligibility lists based on one vacancy for each year, as was being done in the case of State Civil Service Officers under Regulation 5 of Regulations, 1955. The Government of India rejected the proposal of the State Government on the ground that there was no provision for preparation of year-wise select lists for NSCS officers for promotion to IAS.

33. It has been further stated that according to the first proviso of Regulation 4 (iii) of Regulations, 1997, the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for consideration of the SCM. Hence, for the reason stated above,



the case of the applicant did not come in the zone of consideration.

34. In his rejoinder, in addition to reiterating and elaborating on the arguments already advanced by the applicant in his OA, he has submitted that in the event it is not practicable to hold a meeting of the committee during a year the selection process has to begin afresh next year and the crucial date of eligibility is reckoned with reference to the first day of January of the year when the vacancy arose. Except Regulation 9 of Regulations, 1997, there is no provision not to appoint a person already short-listed against a vacancy. There is neither any provision to carry forward a vacancy, and the statement made by respondent no. 1 merely amounts to depriving eligible candidates, duly recommended in a particular year against a vacancy, from being considered, when Regulation 5 of Regulations, 1997 is specific that the SCM shall meet every year to consider the proposal of the State Government made under Regulation 4.

35. It has been further averred that the findings of the Jabalpur Bench of this Tribunal in **M.P. Administrative Service Association & Anr. v. Union of India & Ors.** (supra) are not binding on this Bench of the Tribunal nor the State of Orissa nor the Union of India. Such a decision being neither a



ratio nor a judicial precedent, is only enforceable against the State of Madhya Pradesh that too subject to the results of Writ Petitions, if any, preferred by such State under Article 32 or Article 227 of the Constitution of India or appeal provided in Section 28 of the Administrative Tribunals Act, 1985.

OA No. 324/2006

36. In this OA, the applicant has challenged the procedure adopted by the respondents, particularly respondent no. 2 (Government of Orissa), in making selections to fill up the vacancies in the IAS through NSCS Officers and sought quashing of the letter dated 18.11.2005 through which he was asked to appear for interview before the Selection Committee on 24.11.2005.

37. Brief facts of the case are that after the cancellation of the SCM for the year 2004, the Government of India (Department of Personnel & Training) determined existence of two vacancies for appointment of NSCS officers to the IAS of Orissa Cadre by selection during the year 2005. In reply to further correspondence from the Government of Orissa on this, the DOP&T clarified, vide letter dated 05.07.2005, that since no SCM could be held in the year 2004, the unfilled vacancy of year 2004 had been carried forward to the year 2005. They also



stated that there was no provision for preparation of year-wise select lists in Regulation, 1997; as such, it was not possible to prepare the select list of 2004.

38. The State Government forwarded a proposal to UPSC, vide their letter dated 30.08.2005, and also furnished a copy of the order dated 11.01.2005 declaring NSCS posts equivalent to that of Deputy Collectors. After receipt of all the relevant documents, the UPSC fixed the SCM on 24th and 25th November, 2005.

39. The Selection Committee, which met on 24th and 25th November, 2005, considered the case of the applicant along with nine other NSCS officers proposed by the State Government as the zone of consideration for two vacancies was 10. After examination of their service records and interviewing them, the Selection Committee selected two officers suitable for appointment to the IAS. The applicant was, however, not selected. The observations of the State Government/ Government of India on the recommendations of the Selection Committee under Regulation 6 & 6A of Regulations, 1997 have not yet been reviewed and the select list is yet to be approved by UPSC.

40. In the meantime Shri Budhimanta Dash, another NSCS officer of Orissa, filed OA No. 904/2005 before the Tribunal with



similar contentions. The Tribunal, vide their interim order dated 24.11.2005, directed as follows:-

"I direct that the Selection Committee which is holding its meeting on 24.11.2005 and 25.11.2005 shall recommend not more than one officer for promotion to the cadre of IAS pending final decision in this OA and any appointment made under NSCS quota on the recommendation of this Selection Committee shall be subject to the outcome of this OA."

41. However, when the SCM was held on 24.11.2005, neither a copy of this OA nor any intimation about the interim direction of the Tribunal had been received in UPSC or brought to the notice of UPSC. Not aware of the above orders of the Tribunal, the Selection Committee selected two officers against the two available vacancies. Subsequently, a reply detailing all these facts was also filed before the Tribunal in OA No. 904/2005. As mentioned above, the select list prepared by the Selection Committee at its meeting held on 24.11.2005, has not been approved so far, as the State Government and the Central Government have not yet sent their observations under Regulation 6 & 6A of Regulations, 1997.

42. The applicant has contended that Regulations, 1997 came into force w.e.f. 01.01.1998. The respondent no. 4 convened SCMs from 1998 onwards and selected many incumbents, who were appointed to the IAS without the necessity of declaring



NSCS cadre posts equivalent to the post of Deputy Collector. The selection in 2004 could not be held due to the insistence of the UPSC to declare such NSCS Cadre posts equivalent to the post of Deputy Collectors without any ostensible reasons and, as a result, the applicant was prevented from facing selection in 2004 for which he was lawfully entitled to. For the year 2005, the vacancies of 2004 and 2005 were clubbed, whereas the Regulations prescribe that vacancy, for each year, will be considered separately. Thus no select list was prepared for 2004.

43. It has been further averred that the Government of Orissa, vide letter dated 04.06.2005, requested various Departments to recommend the names of not more than three eligible officers of NSCS for being considered for appointment to the IAS by selection during the year 2005. The Finance Department recommended 4 names in violation of the specific direction of the State Government. The Selection Committee selected two officers from those four names recommended by the Finance Department for appointment to the IAS. Thus, it appears that the selection was made with a view to consider the fourth officer against a vacancy, side-tracking other eligible competent officers.



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44. It has been further stated that in OA NO. 904/2005, filed by Shri Budhimjanta Das, the Tribunal had given an interim direction on 24.11.2005 that the Selection Committee shall not recommend more than one officer for promotion to the IAS pending final decision in the OA and that any appointment made under NSCS quota on the recommendation of this Selection Committee shall be subject to the outcome of the OA. Despite this embargo, the UPSC had recommended two persons for appointment to the IAS which, however, is yet to materialize.

45. In the counter filed on behalf of the respondent no. 4 (UPSC) and adopted by respondent no. 1 (Union of India) it has been stated that the vacancies for the year 2005 were determined by the Government of India, Department of Personnel & Training (DOPT, for short). The proposal for convening SCM for selection of NSCS officers for appointment to the IAS for the year 2004 was not accompanied by an order declaring posts of NSCS as equivalent to the post of Deputy Collector. As this order could not be made available till 31.12.2004, the UPSC invoked Regulation 5 (c) of Regulations, 1997 with regard to the select list 2004. Further, as Regulations, 1997 does not provide for preparation of year-wise select lists, the vacancy of 2004 was carried over to 2005, by the Government of India, and accordingly no separate select list was prepared for 2004.



46. It has been further submitted that, as already pointed out, the provisions of Regulations, 1997 which govern selection of NSCS officers to the IAS, are distinct from those of Regulations, 1955. A State Civil Service officer has a right to be considered for promotion to the IAS with reference to his position in the seniority list of the State Civil Service, subject to fulfillment of the other eligibility criteria laid down in the Regulations. On the contrary, a NSCS officer has no such immutable right to be considered for appointment to the IAS in the order of any seniority list of the Service to which he belongs, under Regulations, 1997. Further, appointment by selection is to be resorted to only in special circumstances. As such, the scheme of appointment of NSCS officers by selection under Regulations, 1997 is not akin to the scheme of consideration of SCS officers for promotion to the IAS under Regulations, 1955. In view of this, Regulations, 1997 does not provide for year-wise preparation of select list for selection of NSCS officers for appointment to the IAS as in the case of State Civil Service Officers. This is evident from the fact that while the Government of India vide amendment dated 25.07.2000, amended Regulations, 1955 providing for preparation of year-wise select lists, no such amendment was carried out in the Regulations, 1997. In view of this and further submissions made by the





Government of India, the Tribunal may reject the contention of the applicant as baseless.

47. It has been further submitted that the Tribunal had passed an interim order on 24.11.2005 in OA No. 904/2005 filed by Budhimanta Das directing that the Selection Committee which was holding its meeting on 24.11.2005 and 25.11.2005 should recommend not more than one officer for promotion to the Orissa cadre of IAS pending final decision in this OA and any appointment made under NSCS quota on the recommendation of the Selection Committee would be subject to the outcome of the OA. However, the UPSC had no information about this OA, nor about the interim order dated 24.11.2005, when the Selection Committee met on 24.11.2005 and 25.11.2005 to prepare the select list of 2005 for selection of NSCS officers to the IAS. As a result, the Selection Committee recommended two officers for selection to the IAS. However, the said select list has not yet been approved by the UPSC as the observations of the State Government and Government of India under Regulation 6 & 6A of Regulations, 1997 are still awaited.

48. In the reply filed on behalf of respondent no. 2 (Government of Orissa) it has been stated that the State Government assessed one vacancy in the selection quota of IAS caused due to superannuation of Shri Jagdish Prasad Dash,



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IAS (NSCS-85) on 31.07.2004. As such, the State Government, under Regulation 3 of Regulations, 1997, requested the Central Government for approval of one vacancy to be filled up by the NSCS officers during the year 2005, besides the proposal already approved for one vacancy of 2004. But the Central Government decided that the selection from amongst NSCS officers of Orissa during the year 2005 may be made up to two posts and communicated this to the State Government vide their letter dated 17.05.2005. Keeping in view Regulation 4 of Regulations, 1997, the State Government in GAD requested all Departments of Government to sponsor the names of not more than 3 eligible NSCS officers, who have not attained 54 years as on 01.01.2005 for being considered for appointment to IAS by selection.

49. It has been further submitted that the State Government had to recommend the names of 10 eligible NSCS officers to the UPSC for considering their names for promotion to IAS. The State Government held a meeting on 23.08.2005 of the Preliminary Scrutinizing Committee for recommending a panel of names of NSCS to be considered by the Selection Committee for appointment to the IAS by selecting during the year 2005. The Committee scrutinized the cases of 13 officers



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recommended by six different departments of the Government and prepared a list of 10 eligible officers.

50. It has been further averred that it is nowhere forbidden by Regulations, 1997 to recommend 4 officers of a particular NSCS for considering their eligibility. As stated earlier, out of 13 NSCS officers of the State which were recommended by the various administrative departments of the State, the Preliminary Scrutinizing Committee found 4 officers of the State Finance Service eligible to be considered by the SSCM. The name of the applicant was also included in the list of 10 names recommended for consideration of SCM. Hence, the averment of the applicant that the consideration was discriminatory is not true and is liable to be rejected.

51. The applicant has not filed a rejoinder in this OA.

OA No. 904/2005 & OA No. 324/2006

52. In the course of final arguments, Shri M.M. Basu, the learned counsel for both the applicants in OA No. 904/2005 as well as OA No. 324/2006 stated that the State Government, which is represented by the GAD in the Government of Orissa, is the final authority to decide whether or not the post held by a NSCS Officer is equivalent to that of a Deputy Collector in the State Civil Service. The UPSC has no *locus standi* to question



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the decision of the State Government and hence had no authority to postpone the SCM scheduled to be held on 03.12.2004. In this context, he cited the decision of the Hon'ble Supreme Court in **Shri Durgacharan Misra v. State of Orissa & Ors.**, 1987 (2) U.J. (S.C.) 657, wherein it was held that the UPSC, being an advisory body, must follow its mandate. It cannot prescribe additional requirements for selection. He further cited the judgments of the Hon'ble Supreme Court in **L. Chandra Kumar v. Union of India & Ors.**, AIR 1997 (SC) 1125 and **Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.**, AIR 2002 (SC) 1598, to argue that law declared by the Supreme Court shall be binding on all Courts.

53. Referring to the counter replies filed by the respondents in OA 904/2005 the learned counsel stated that there is no denial that no recruitment was made between 1998 and 2003, because there was no formal declaration of equivalence. It has also not been denied that there was a vacancy in the year 2004. There is no denial that the applicant was eligible for consideration during the relevant year. It has also not been denied that Government sent the name of the applicant for consideration. It is also a fact that the GAD did issue a certificate regarding 8 years continuous service of the NSCS officers in posts equivalent to the post of Deputy Collector, which was sent to



the UPSC. He further stated that the letter postponing the meeting, scheduled to be held on 3.12.2004, should have stated reasons for the postponement. Moreover, UPSC should have communicated cancellation of the SCM for the year 2004 in 2004 itself. Since they communicated this cancellation, vide their letter dated 11.02.2005, it should be applicable to the year 2005. The learned counsel further stated that from the language of Regulation 4 of Regulations, 1997, it is clear that the declaration has to be made in case of individuals and not for services i.e. class or group of persons.

54. In respect of OA No. 324/2006, the learned counsel for the applicant stated that the carrying over the vacancy of the year 2004 to 2005 and making the selection accordingly in 2005 was bad. The whole process is also vitiated on account of the treatment accorded to the Department of Finance vis-à-vis other departments of the Government of Orissa insofar as the Finance Department was permitted to forward 4 names for consideration as against the three prescribed in the letter of GAD dated 04.06.2005. Thus out of the 10 names sent to the UPSC as against 2 vacancies, as per norms, 4 were from the Finance Department and only 6 were from the rest of the Departments. He also challenged the postponement of the SCM in the year 2004 as in OA No. 904/2005.



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55. Shri A.K. Bose, learned counsel for respondent no. 3 in OA No. 904/2005 and respondent no. 2 in OA NO. 324/2006 (Government of Orissa) invited attention to the orders of the Coordinate Bench at Jabalpur in **M.P. Administrative Service Association & Anr. v. Union of India & Ors.** (supra), wherein it was held that the declaration of equivalence has to be a formal declaration. He quoted the following rulings of the Tribunal in this regard:

"25. For considering equivalence, the pay scale is not the only criterion but it is one of the ingredients to declare that the post held by Non-SCS Officers is equivalent to that of the Deputy Collector. The State Government has taken the contention in their reply that while recommending the names under Non-SCS quota, it is ensured that the officers recommended have completed eight years of service in a capacity which is at least equivalent to that of the Deputy Collector. It only shows that there is no declaration of equivalency..."

26. ...The meaning of the word "declare" as per Black's dictionary is as under:-

"To make known, manifest, or clear. To signify, to show in any manner either by words or acts. To publish; to utter; to announce clearly some opinion or resolution. To solemnly assert a fact before witnesses e.g. where a testator declares a paper signed by him to be his last will and testament,"

27. Admittedly, there is no declaration as prescribed under the said rules. The underlying idea in framing the said Rules is



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to "declare" that any person adversely affected can challenge the legality and validity of the selection of the officers who have been considered under Non-SCS quota. In case of SCS officers, the aggrieved persons, who are in the seniority list, can challenge the legality and validity of the selection. Since there is no strict compliance of Regulations 3 and 4 of the said regulations, the selection and then appointment of respondent Nos. 4 & 5 made by the official respondents is illegal, bad in law & contrary to rules and regulations."

56. The learned counsel for the Government of Orissa further stated that an order of the Jabalpur Bench of the Tribunal is also an order of this Bench. This order of the Jabalpur Bench has not been challenged by the State Government, Central Government and the same has, therefore, attained finality. It is no doubt true that prior to 2004, the State Government used to issue certificates as provided in the statement attached with Annexure R-3/4 (Counter of respondent no. 3 in OA No. 904/2005). However, after the receipt of direction from UPSC based on the order of the Jabalpur Bench of this Tribunal, the procedure has been changed and accordingly O.M. dated 11.01.2005 was issued by the Government of Orissa declaring 29 NSCS officers of the State as equivalent to the post of Deputy Collector in the State Civil Service.

57. As regards the clubbing of the vacancies of the year 2004 and 2005, he pointed out that from a comparative reading of the



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Regulation 5 of Regulations, 1997 and Regulation 5 of Regulations, 1955, it is clear that the latter envisages preparation of year-wise panels whereas the former does not. He finally added that there are certain situations where nobody can be blamed since there are no *mala fides*. However, some heart burnings is bound to be caused.

58. Shri S.B. Jena, learned counsel for respondent nos. 1 and 2 in OA No. 904/2005 and for respondent no. 1 in OA No. 324/2006, stated that the Union of India has not filed a separate counter and has adopted the counter filed by the UPSC. He stated that the applicant has raised two points, firstly, that the UPSC had no authority to postpone the meeting scheduled to be held on 3.12.2004 and, secondly, that the UPSC has no *locus standi* to question the declaration/certificate of equivalence issued by the State Government. As regards the first point, he invited attention to clause (c) of Regulation 5 of Regulations, 1997 which gave the authority to UPSC to decide whether to hold an SCM during a particular year or not. As regards the UPSC questioning the declaration/certificate of equivalence issued by the State Government, he concurred with Shri A.K. Bose, the learned counsel for the State Government of Orissa, that after the issue of the order of the Jabalpur Bench in ***M.P. Administrative Service Association & Anr. v. Union of India***



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& Ors. (supra), certificate issued by the State Government in the past was not considered to be adequate. The Jabalpur Bench of this Tribunal decided the case on 27.02.2004. In pursuance thereof the UPSC had immediately issued a circular dated 10.03.2004 and the proposal of the State Government regarding selection of NSCS officers in the year 2004 was sent subsequently on 14.09.2004.

59. The learned counsel for UPSC/UOI further stated that the applicant has not sought any relief with regard to relaxation of age nor has he challenged the letter dated 10.03.2004 issued by the UPSC in pursuance of the order of the Jabalpur Bench of this Tribunal. The applicant has also not attributed any *mala fides*. In any case, he has not been singled out for any discriminatory treatment. It so happens that he has become overage in the meanwhile.

60. Shri S.C. Samantray, the learned counsel for the UPSC in OA No. 324/2006, reiterated the averments of Shri S.B. Jena that there was no need to prepare year-wise panels for filling up of vacancies in terms of Regulations, 1997. He further pointed out that the interim order of the Tribunal dated 24.11.2005 was not received by the UPSC on 24.11.2005 and hence the SCM was held in which 2 persons were selected out of a list of 10 sent by the State Government. As regards the allegation of



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discriminatory treatment made by the applicant with reference to nomination of 4 persons of the Finance Department, the applicant himself was not personally affected insofar as his name was included in the list. He further reiterated the arguments advanced by Shri S.B. Jena with regard to the order of the Jabalpur Bench of this Tribunal in ***M.P. Administrative Service Association & Anr. v. Union of India & Ors.*** (supra).

61. We have given our anxious consideration to the protracted arguments of the learned counsel for the various parties in both the OAs and perused the material on record as well as the citations relied upon by the parties concerned.

62. As far as OA 904/2005 is concerned, the main plank of arguments of the applicant is that in terms of Regulation 4 of Regulation, 1997, the State Government is competent to decide which officers belonging to NSCS should be recommended for being considered for selection to the IAS. The UPSC has no *locus standi* to question the decision of the State Government. Moreover, having accepted the certificate issued by the State Government in this regard till 2003, there is no reason why in the year 2004 a separate declaration was sought. The respondents, on the other hand, have argued that in terms of the order of the Jabalpur Bench of this Tribunal in ***M.P. Administrative Service Association & Anr. v. Union of India***



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& Ors. (supra), which has now achieved finality, the UPSC, which was a party to that OA, had necessarily to comply with the direction of the Tribunal. The order of the Tribunal in the said case is quite clear that pay scale is not only the criteria for declaring equivalence. Moreover, declaration is also required for the reason of transparency in decision making of the Government. In the event of a declaration any person adversely affected can challenge the legality and validity of the selection of officers who had been considered under NSCS selection. Even otherwise the declaration, as ultimately issued by the State Government by their O.M. dated 11.01.2005, is only a declaration relating to the services which are considered equivalent to the post of Deputy Collector in the State Civil Service. The further issue relating to nomination of persons, who conform to the requirements prescribed in Regulation 4 of Regulations, 1997, still remains. The certificate heretofore issued by the State Government, strictly speaking, was neither a declaration nor a confirmation of the fact that the applicant met all the criteria prescribed in Regulation 4 of Regulations, 1997 as can be seen from the certificate issued in the present OA, which reads as follows:-

“Certified that all the eligible NSCS officers in the zone of consideration have completed 8 years of continuous service under State Government as on 01.01.2004 in the post



63. equivalent to the post of Deputy Collector in the State Civil Service and are holding that post in substantive capacity."

63. Significantly, there is no mention here that officers recommended are of outstanding merit and ability, which is the first criterion in terms of Regulation 4 of the Regulations, 1997.

64. The second objection taken by the applicant relates to the postponement of the SCM scheduled to be held on 03.12.2004. It has been stated that, in the first place, UPSC could not have arbitrarily decided to call off the meeting and, secondly, if they had to do so, they should have done it in the year 2004 itself. In actual fact, the postponement of the meeting was conveyed only on 11.02.2005. In this context, it is to be seen that Clause (c) of Regulation 5 of Regulations, 1997 reads as follows:-

"5. Preparation of a list of suitable officers by the Committee.-

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Provided that no meeting of the Committee shall be held and no list for the year in question shall be prepared, when...

(c) The UPSC either on its own or on a proposal made by the Central Government or the State Government, considers that it is not practicable to hold a meeting of the Committee during the year, in the facts and circumstances of each case."



65. In our opinion this provision gives adequate authority to the UPSC to decide *suo motu* not to hold the SCM if it is not practicable to do so. In the present case, it has been stated that in the absence of the declaration of equivalence, in the context of the order of the Jabalpur Bench in ***M.P. Administrative Service Association & Anr. v. Union of India & Ors.*** (supra), it was not practicable to hold the meeting and hence it was called off. We also do not consider that it was necessary for the UPSC to issue a speaking order in this regard for being communicated to all concerned.

66. The other significant averment made by the applicant is that it was incorrect on the part of the respondents to carry over the vacancies meant for NSCS officers in the year 2004 to the year 2005 and that year-wise panels for the years 2004 and 2005 should have been prepared. In this context, the learned counsel for the respondents have pointed out that a comparison of the corresponding provisions in this regard in Regulations, 1995 and Regulations, 1997 show that whereas in the former year-wise panels are envisaged, by exclusion of a similar provision in the latter such a dispensation is not intended. We find that a perusal of Regulation 5 of the two Regulations indeed highlights this difference. Regulation 5 of Regulations, 1955, *inter alia*, reads as follows:-



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“Number of members of the State Civil Service to be included in the list shall be determined by the Central Government in consultation with the State Government concerned; and shall not exceed the number of substantive vacancies as on the first of January of the year in which the meeting is held, in the posts available for them under Rule 9 of the recruitment rules.” (Emphasis supplied.)

Regulation 5 of Regulations, 1997, on the other hand, states as follows:-

“The Committee shall meet every year to consider the proposal of the State Government made under Regulation 4 and recommend the names of the persons not exceeding the number of vacancies to be filled under Regulation 3, for appointment to that service.”

67. On a composite reading of the Regulations, 1997 along with Rule 8 (2) of the Rules *ibid.*, it would appear that recruitment by selection is not on all fours with recruitment by promotion. Rule 8(2) of the Rules *ibid.*, clearly states that recruitment by selection is to be done in special circumstances.

68. Moreover proviso to rule 9 (1) of the Rules *ibid.*, further, does not fix a definite quota for NSCS officers but only states that it shall not at any time exceed 50% of the number of persons recruited under Rule 8 of the Rules *ibid.*



69. Taking the totality of facts and circumstances of the case into consideration, we do not find any irregularity in the procedure adopted by the Union Public Service Commission, the Central Government and the State Government with regard to the proceedings relating to the consideration of the applicant for selection to the IAS against vacancies meant for NSCS officers. We, therefore, do not consider it necessary to interfere with the decision of the concerned authorities.


70. As far as OA No. 324/2006 is concerned, admittedly the applicant was called for and appeared before the Selection Committee. Even though the result of the SCM has been withheld, perhaps the applicant apprehends that he may not be selected. Against this backdrop, the doctrine of *estoppel* by conduct may not be applicable but that does not bar the contention as regards the right to challenge an appointment upon due participation at the interview/selection. Thus, when a candidate appears at the examination without protest and is subsequently found to be not successful in examination, question of entertaining a petition challenging the said examination would not arise as decided by the Hon'ble Supreme Court in the case of **Chandra Prakash Tiwari & Ors. v. Shakuntala Shukla & Ors.**, 2002 (6) SCC 127, in the light of an earlier ruling in the case of **Om Prakash Shukla v.**

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Akhilesh Kumar Shukla & Ors., 1986 (Supp) SCC 285. It is not the case of the applicant that he had appeared before the Selection Committee under protest.

71. As regards the averment of the applicant that among the candidates short-listed for the selection there was excess representation from the Finance Department, in the first place, as pointed out by the learned counsel for the respondents, it did not do the applicant any harm insofar as his name was included in the short-list. Moreover, it is for the State Government to decide which officers will be short-listed taking into account the criteria prescribed in Regulation 4 of Regulations, 1997 *ibid*.


72. Further, with regard to the plea relating to carry over of the vacancies meant for the year 2004 to the year 2005, we have already dealt with in the context of OA No. 904/2005 earlier.

73. Taking the totality of facts and circumstances of the case into consideration, we do not find any irregularity in the procedure adopted by the Union Public Service Commission, the Central Government and the State Government with regard to the proceedings relating to the consideration of the applicant for selection to the IAS against vacancies meant for NSCS officers.



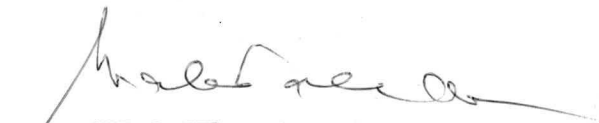
We, therefore, do not consider it necessary to interfere with the decision of the concerned authorities.

74. In the result, we find that OA 904/2005 and OA 324/2006 are without merit. They are accordingly dismissed. The interim order of this Tribunal dated 24.11.2005 is also vacated. There will be no order as to costs.



(V.K. Agnihotri)
Member (A)

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(M.A.Khan)
Vice Chairman (J)