

(2014) 10 AHC CK 0089
In the Allahabad High Court
Case No : Service Bench No. 1503 of 2012

Akhilesh Kumar Kulshrestha

APPELLANT

Vs

Chancellor, Lucknow University

RESPONDENT

Date of Decision : 07-10-2014

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2014) 9 ADJ 613

Hon'ble Judges : V.K. Shukla, J;Brijesh Kumar Srivastava-II, J

Bench : Division Bench

Advocate : Y.S. Lohit, Advocate for the Appellant; Alok Mathur, S.P. Shukla and Brijesh Kumar Shukla, Advocate for the Respondent

Judgement

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V.K. Shukla, J.—Dr. Akhilesh Kumar Kulshrestha has approached this Court with the following prayer;

I. a writ, order or direction in the nature of certiorari by quashing the impugned orders dated 21.8.2012 & 26.9.2011 issued of the Chancellor and Vice-Chancellor respectively of Lucknow University and the resolution dated 16.9.2011 of the Executive Council of Lucknow University as contained as Annexure Nos. 1, 2 & 3 respectively.

II. a writ, order or direction in the nature of mandamus commanding the opposite parties by directing them to make absorption/regularization of the petitioner against the post of Lecturer as per provisions of Section 31(3)(c) of U.P. Act No. 23 of 2004 taking into account his service rendered in Lucknow University counting his services from 15.9.1984, as a Teacher/Lecturer of University in the letter and spirit of judgment/order dated 29.9.2010 of this Hon"ble High Court which has attained finality followed by consequential benefits of the same.

III. a writ, order or direction in the nature of mandamus commanding the

opposite parties by directing them to release and pay the salary to the petitioner from 1.4.2011 onwards and also to allow to work till his regularization/absorption of service.

IV. Any other suitable orders which the Hon''ble Court may deem fit and proper in the circumstances of the case may also be passed in favour of applicant.

Brief background of the case, as is emanating from the records, are that petitioner Dr. Akhilesh Kumar Kulshrestha was initially engaged on 15th of September, 1984 as Senior Research Assistant in the Department of Geology of University of Lucknow and his appointment in question was also approved by the Vice-Chancellor. At the said point of time the appointment in question was made in D.S.T. Project entitled "Palynostratigraphic study of Lower Gondwana Coal basins of India" sanctioned vide letter No. H.C.S./D.S.T./1204/81 dated June 26, 1984. Petitioner worked in the said project up till 5th of October, 1989 and, thereafter, petitioner was again engaged on the post of Research Associate under the scheme of CSIR in the Department of Geology from 13.7.1991 to 13.7.1996 and, thereafter, petitioner claims that from time to time he has been reappointed as Research Associate, under various schemes, funded by CSIR, UGC and Department of Science and Technology and petitioner continued to perform and discharge his duties as a Research Associate and petitioner in his wisdom thought that as he has put in such a long length of service, his claim should be considered for being regularized against the vacant post/newly created post and for making his dream come true, in the said direction, petitioner has been making repeated representations to the Vice-Chancellor, and as there has been inaction on the part of Vice-Chancellor, petitioner has made representation before the Chancellor under Section 68 of U.P. State Universities Act, 1973, and the Chancellor in his turn asked the University to take decision on the same. The Executive Council in its turn on 24.9.2000 resolved to non-suit the claim of petitioner. Petitioner questioned the validity of said action in Writ Petition No. 652 of 2000 (Dr. Akhilesh Kumar Kulshrestha v. University of Lucknow through its Vice-Chancellor). The said writ petition in question remained pending before this Court and ultimately it was decided on 29th of September, 2010 and this Court on the said date quashed the resolution dated 29.4.2000 passed by the Executive Council and directed the university concerned for considering absorption/regularization of the petitioner against the present or future vacancy in the cadre of teacher/lecturer of the university.

2. Complaining non-compliance of the order passed by this Court petitioner filed Contempt Petition No. 729 of 2011 and this Court summoned the Vice-Chancellor of the university concerned and, thereafter, the Vice-Chancellor has passed the order dated 26.9.2011 holding therein that petitioner Dr. Akhilesh Kumar Kulshrestha was not at all entitled to be offered substantive appointment under Section 31(3)(c) of the U.P. State Universities Act, 1973. After the said order in question was passed, petitioner has represented the matter before the Chancellor and the Chancellor also affirmed the said order on 21st of August,

2012 and same has impelled the petitioner to be once again before this Court.

3. In the present case pleadings inter-se parties have been exchanged and, thereafter, the matter has been taken up for final hearing and disposal with the consent of parties.

4. Shri Y.S. Lohit, learned counsel for the petitioner, submitted with vehemence that in the present case the Vice-Chancellor, the Executive Council and the Chancellor have tried to sit over the judgment of this Court, which is final and binding inter-se parties and in the facts of the case the reasons, that have been so recorded for non-suiting the claim of petitioner, on the face of it are unjustifiable and cannot be legally sustained. It has also been submitted that similarly situated incumbents have been extended the benefit of regularization and petitioner has been illegally left out merely at the whims and fancies of the Vice-Chancellor whereas he fulfilled the minimum eligibility criteria as per UGC Regulations and there has been no valid reason available on record to non-suit his claim, as has been done in the present case, as such, present writ petition deserves to be allowed.

5. The claim that has been set-up by petitioner has been resisted by Shri S.P. Shukla, Advocate, representing the University and Sri Brijesh Kumar Shukla, Advocate, representing the Chancellor, by contending that detailed and elaborate orders have been passed giving reasons as to why claim of petitioner has not been accepted as under the U.P. State Universities Act, 1973 and the First Statute of the Lucknow University, there is no such provision provided for extending the benefit of regularization and as far as Section 31(3)(c) is concerned, same is not at all applicable and attracted in the facts of the case and petitioner lacks the minimum eligibility criteria as provided for under Section 31(3)(c) of U.P. State Universities Act, 1973 read with Statute 11.05 (5)(a) as he has not to his credit good academic record, as such, present writ petition is liable to be dismissed.

6. Before proceeding to consider the respective arguments that have been so advanced, this Court at the very outset proceeds to note the earlier order passed by this Court on 29th of September, 2010 wherein resolution of the Executive Council dated 29.4.2000 has been turned down. Relevant extract of the said judgment is as follows:

"11. A plain reading of sub-section 19 of Section 2 of the Act shows that the teacher in relation to the provisions of this Act means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and includes a Principal or Director. Meaning thereby any person employed by the University for imparting instructions or guiding or conducting research, shall be deemed to be a teacher/ lecturer. It includes part time teachers. It has not been disputed that the petitioner was appointed though in various schemes formulated by the CSIR/

UGC/DST but the duties assigned to him was to impart instructions or guide to the students in the subject in question. The duty of the petitioner was same as of a teacher/lecturer. Hence, fairly safely he can be treated as a teacher/lecturer of the respondent University.

12. Next question cropped up is as to whether the petitioner can be extended benefit of Section 31.3(c) of the University Act. It is not disputed that the petitioner was selected in various schemes through a duly constituted selection committee and continued to discharge duties since 1984 with short breaks, hence it may be treated as artificial break. It appears from the record that the petitioner has been discharging duties under the funded schemes formulated by the CSIR/UGC/DST. in the respondent University. While working in the University, the petitioner is deemed to be an employee of the University and he seems to be entitled for the benefit of Section 31.3(c) of the Act. At the face of it, Section 31(3)(C) includes part time teachers/lecturers and appears to cover petitioner's case. However, benefit may be made available to the petitioner only in case the regular vacancy is available in the respondent University.

13. Subject to the observations made hereinabove, we are of the view that the petitioner shall be entitled for absorption/regularisation in the respondent University in case regular vacancy/sanctioned post is available in the cadre of teacher/lecturer in the department of Geology.

14. In view of the above, we allow the writ petition. A writ in the nature of certiorari is issued, quashing the impugned resolution dated 29.4.2000 passed by the Executive Council with consequential benefits. A writ of Mandamus is also issued directing the respondent University to reconsider the case of the petitioner for absorption/regularisation against the present or future vacancy in the cadre of teacher/lecturer expeditiously."

7. Pursuant to the decision of this Court the Executive Council has proceeded to consider the case of petitioner and proceeded to non-suit the claim of petitioner, by holding that petitioner is unsuitable for regular appointment and, thereafter, the Vice-Chancellor has considered the matter and in his opinion, qua the petitioner following position has emerged;

"On examining the matter of the petitioner in the light of the aforementioned provisions of Section 31(3)(c) of the Act the following position emerges out:

a. No post of Lecturer in Geology is, at present, available in the Geology Department. One post of Lecturer will fall vacant in 2012 by the result of retirement of a teacher. So far as a post of Lecturer in Geology sanctioned by the University Grants Commission. In 11th Five Years Plan is concerned, the same has not yet got the approval of the State Government;

b. The petitioner has not ever remained appointed as Lecturer/part-time Lecturer in the University as required under Section 31(3)(c) of the Act. He has remained appointed as Senior Research Assistant/Research Associate in Geology

Department under various schemes sponsored by CSIR/UGC/DST, that too with short breaks.

c. The Hon'ble High Court itself has mentioned under para 12 of its order, dated 29.9.2010 as "continued to discharge duties since 1984 with short-breaks, hence it may be treated as artificial break". As such, there has remained no continuity in services since December 31, 1997 as required under Clause (i) of Section 31(3) (c).

d. He has not been found to possess qualifications required for regular appointment to the post of Lecturer. He does not possess post graduate degree in relevant subject i.e. Geology. He passed M.Sc. examination in Botany subject in 1979 from Kanpur University. Besides, he did his Ph.D. degree in 1991, that too in Botany. As such, he is not possessed with the qualification, as required under clause-ii of Section 31(3)(c) of the Act. In reply of the University letter, dated 21.9.2011 for ascertaining his otherwise eligibility, his reply was received on 24.9.2011. He has furnished his B.Sc. mark-sheet in which he has secure 404/900 marks, which is lower than 50% marks required for possessing Good Academic Record to be appointed as a teacher in the University. As per Statute-11.01 (5)(a) good academic record is defined as under:

"For the purposes of this Statute:

(a) Good academic record for general or other backward classes category shall be as under:

"At least 50% marks in relevant graduate degree."

Such opinion has been affirmed by the Chancellor also.

8. It is true that this Court on earlier occasion while reading down the provision of Sub-section (19) of Section 2 of U.P. State Universities Act as well as the provisions of Section 31(3)(c) has concluded that petitioner has been discharging duties since 1984 under the funded schemes formulated by CSIR/UGC/DST in the University and while working in the University, the petitioner is deemed to be an employee of University and he seems to be entitled for the benefit of Section 31(3)(c) of Act qua the same it has been submitted on behalf of the University that as far as claim of petitioner under Section 31(3)(c) is concerned, same has been considered and petitioner has been non-suited being ineligible for substantive appointment, but the earlier judgment would be cited as precedent, whereas on the parameters of statutory provision holding the field, Senior Research Assistant/Research Assistant cannot be accepted as Lecturer/Part-time Lecturer for the purposes of Section 31(3)(c) of the Act, as they have never been appointed as Lecturer/Part-time Lecturer as per the provisions of U.P. State Universities Act, 1973 and the First Statutes framed thereunder, rather their engagement is under scheme/project funded by agencies such as UGC/CSIR/DST and, as such, situation be clarified and specially when the earlier judgment has been passed overlooking the binding two decisions on the subject and,

accordingly, said observations be held per incuriam

9. We are not at all sitting in appeal over the said judgment, and once it is being asked to take different view, then in normal course of business certainly judicial discipline warrants that the matter be referred to Larger Bench. However, in the facts of present case, as in reference of petitioner it has been accepted that earlier judgment has not been challenged, his claim has been considered on the parameters of Section 31(3)(c) of the Act and has been non-suited on account of non-fulfillment of eligibility criteria and request has been made to clarify the legal position in the backdrop of two Division Bench judgment that has not been cited/ noted on the earlier occasion, whereas the earlier judgments were based on the judgment of Apex Court having binding precedent and, accordingly, the observation made that duty of petitioner was same of a teacher/lecturer of University and while working in the University, the petitioner is deemed to be an employee of the University and seems to be entitled for the benefit of Section 31(3)(c) of the Act, be accepted as per incuriam, in the facts of case, is an issue to be addressed as benefit of said observation would be claimed by various similarly situated incumbents such as the petitioner, as has been observed by the University while passing the order.

10. To appreciate such submission, the statutory provisions as well as the decisions of co-ordinate Bench based on statutory provisions and judgment of Apex Court is being looked into.

11. To start, Section 31(3)(c) is being looked into and the same is as follows;

"31. Appointment of Teachers.--

.....

3(a).....

3(b).....

3(c) Any teacher of the University who was appointed as Lecturer/part time Lecturer on or before December 31, 1997 without reference to the Selection Committee by way of a short term or part time arrangement in accordance with the provisions for the time being in force for such appointment, may be given substantive appointment by the Executive Council, if any substantive vacancy of the same cadre and grade in the same department is available if such teacher:-

(i) is serving as such on December 31, 1997 continuously since such initial appointment by way of short term/part time arrangement;

(ii) possessed the qualifications required for regular appointment to the post under the provisions of the relevant Statutes in force on the date of the substantive appointment;

(iii) has been found suitable for regular appointment by the Executive Council;

A teacher appointed by way of short term/part time arrangement as aforesaid

who does not get substantive appointment under this clause shall cease to hold such post on such date as the Executive Council may specify."

A perusal of Section 31(3)(c) of the Act clearly shows that benefit of substantive appointment can be given to a teacher of the University, who had been appointed as a Lecturer/Part-time Lecturer on or before 31.12.1997.

Chapter X of Statutes of the University of Lucknow deals with classification of teachers and provides for as follows;

"Section 31 & 49(d)

10.01. In the Faculties of Arts, Science, Law, Commerce, Education and Fine Arts, there shall be following classes of teachers:

- (1) Professor
- (2) Reader and
- (3) Lecturer

10.02. Teachers of the University shall be appointed in the subjects on whole time basis in the scales of pay approved by the State Government:

Section 31 & 49(d)

Provided that part-time lecturers may be appointed in subjects in which, in the opinion of the Academic Council such lecturers, are required in the interest of teaching or for others reasons. Such part-time lecturers may receive salary ordinarily not exceeding one-half of the initial salary of the scale for the post to which they are appointed. Persons working as Research fellows or as Research Assistants may be called upon to act as part-time lecturers.

Section 31 & 49(d)

10.03. The Executive Council may on the recommendations of the Academic Council appoint:

- (1) Professors of academic eminence and outstanding merit on special contract in accordance with the Ordinances in that behalf.
- (2) Honorary Emeritus Professors who shall:
 - (a) deliver lectures on special subject;
 - (b) guide research;
 - (c) be entitled to be present in meetings of the Board of Faculty concerned and to take part in its discussions but will not have the right of vote;
 - (d) be provided with facilities for study and research in the libraries and laboratories of University as far as possible; and
 - (e) be entitled to attend all convocations:

Provided that a person shall not, merely by virtue of holding the post of a Professor in the Department as an Honorary Emeritus Professor, be eligible to hold an office in the University or in any Authority or Body thereof.

Section 21(i)(xvii), 31 & 49(0)

10.04. Instructors or Teaching Research Assistants may be appointed by the Executive Council on such terms and conditions as may be provided for in the Ordinances.

Section 31 & 49(0)

10.05. (a) The Principal and other teachers of associated colleges shall be employed on whole time basis in the scales of pay approved by the State Government.

(b) Subject to the provisions of clause (iv) of Statute 21.02 the proportion of part-time teachers shall not exceed at any time one fourth of the strength of the full time teaching staff in the department concerned.

Provided that where the number of teachers in a department is less than four the appointment of one part-time teacher may be permitted by the Vice-Chancellor.

Section 49(0)

10.06. No part-time teacher in a associated college shall hold any other office in that college."

12. Statute 10.01 provides that Professors, Readers and Lecturers shall be the class of Teachers of the University. Statute 10.02 provides that a teacher of the University shall be appointed in the subject on whole time basis in the scales of pay approved by the State Government. The proviso to Statute 10.02, however, stipulates that part time Lecturers may be appointed in subjects in which in the opinion of the Academic Council, such Lecturers are required in the interest of teaching or for other reasons and that such part time Lecturers may receive salary ordinarily not exceeding one half of the initial salary of the scale for the post to which they are appointed. It is, therefore, clear that for making appointments of part time Lecturers, the Academic Council of the University has to take a decision that such Lecturers are required in the interest of teaching or for other reasons and then an appointment has to be made.

13. There is specific provision under Statute 10.04 where Teaching Research Assistants may be appointed by the Executive Council on such terms and conditions as may be prescribed in the ordinance.

14. At this juncture this Court takes notes of two earlier Division Bench judgments of this Court, wherein Research Associates have not been accepted as Lecturer/Part-time Lecturer of the University and have been treated as a separate class. In the case of Dr. Vimla Vyas v. University of Allahabad (Writ Petition No. 26067 of 2002) 2004 RD 1145, Division Bench of this Court held as

follows;

"The sole question that arises for our consideration is whether the petitioner is entitled for a substantive appointment to the post of Lecturer in the Chemistry Department of the University under Section 31(3)(c) of the Act. A bare perusal of the aforesaid sub-section clearly indicates that for claiming the benefit a teacher of the University should have been appointed as a Lecturer on or before 30th June, 1991 without reference to the Selection Committee by way of a short-term arrangement in accordance with the provision for the time being in force for such appointments provided the other requirements were fulfilled. Thus it is only a teacher of the University who was appointed as a Lecturer on or before 30th June, 1991 on a short-term arrangement who could be given a substantive appointment subject to the fulfillment of the other conditions.

In the instant case, the petitioner in the year 1980, was merely doing Post Doctoral Fellowship till the year 1982 when she worked as a Pool Officer under a Scheme of the CSIR though her placement was in the Chemistry Department of the Allahabad University. From 1985 the petitioner worked as a Research Associate under the University Grants Commission though her placement was also in the Department of Chemistry. The petitioner may have been taking some classes in the Chemistry Department because under the provisions of Statutes 10.2 of the Statutes of the University, persons working as Research Fellows or Research Associates could be called to give lectures, but such working cannot be termed an appointment as a teacher or as a Lecturer by the University.

Presumably, it is for this reason that the petitioner kept silent from 1991 when Section 31(3)(c) was introduced up till the year 2003 by not claiming the benefit of this sub-section and on the other hand claimed the benefit of Section 31(3)(b) of the Act throughout but this claim was given up at the time of hearing of the petition. It is only by means of the amendment application moved on 13th February, 2003 that the petitioner for the first time claimed the benefit of Section 31(3)(c) of the Act. We make it clear that we are not rejecting the claim of the petitioner under Section 31(3)(c) on the ground of delay but the long silence from 1991 till 2003 clearly shows that the petitioner herself was doubtful about her claim under Section 31(3)(c) of the Act.

The claim of the petitioner for services as an Assistant Director in the Academic Staff College of the University cannot be accepted because she was appointed as such only in 1995 whereas the cut-off date prescribed under Section 31(3)(c) is 22nd November, 1991. Even otherwise, we are of the considered opinion that such an appointment will also not enable the petitioner to claim the benefit of Section 31(3)(c) of the Act, as it cannot be an appointment as a Lecturer in the Department of Chemistry in the University by way of short-term arrangement. The Chancellor of the University also elaborately dealt with this aspect in his order dated 31st January, 2003 and we are unable to find any infirmity in the said order."

15. Thereafter once again in the case of Dr. Narendra Kumar Pandey and others v. Registrar, University of Allahabad and others, 2006 (10) ADJ 528 (DB), a Division Bench of this Court exhaustively dealt with the matter and after noticing the statutory provisions concluded that Research Assistants are not entitled for the benefit of Section 31(3)(c) of the Act. Relevant extract of the said judgment is as follows;

"13. To understand why the provisions of Section 31(3)(c) of the Act were substituted w.e.f. 20th May, 2004 we have to fall back on the statement of objects and reasons mentioned for amending the Act and the same are as follows:

"Section 31 of the Uttar Pradesh State Universities Act, 1973 provides for the appointment of teachers in a State University. There is no provision for ad hoc appointment of a teacher in a State University in the said Act but sub-sections (6) and (8) of Section 13 the said Act provided for the appointment of Lecturers in the University by way of short term arrangement in matters of urgency and leave vacancies. Under these provisions Lecturers were appointed in certain Universities and the terms thereof were also extended from time to time. On persistent demand by the said Lecturers the Uttar Pradesh State Universities (Amendment) Act, 1992 (U.P. Act No. 1 of 1992) was enacted to provide for giving substantive appointment to such Lecturers as were appointed on or before June 30, 1991 by way of short term arrangement without reference to the Selection Committee constituted in accordance with the provisions for the time being in force and who were continuously serving as such from the date of their initial appointment subject to the availability of substantive vacancies and for abolishing the system of appointment of teachers by way of short-term arrangement. Thereafter provisions for the appointment of part time Lecturers were made by certain Universities in their Statutes for such subjects as were, in the opinion of Academic Council thereof, necessary in the interest of teaching or for other reasons. Such part time Lecturers were entitled to get pay not exceeding half of the initial pay of the posts to which they were appointed. Although the State Government had issued instructions in G.O. No. 1685/70-1-2000-15(40)-2000, dated October 9, 2000 to the Universities to omit the provisions relating to the appointment of the part time Lecturers from the Statutes, but were not complied with by the Academic Council of certain Universities in the interest of imparting education. It was, therefore, decided to amend the said Act to provide for giving substantive appointment by the Executive Council to such teachers of the University who were appointed as Lecturer/part time Lecturer on or before December 31, 1997 without reference to the Selection Committee by way of short-term or part time arrangement subject to the availability of substantive vacancy."

14. A bare perusal of the objects and reasons clearly indicate that the Legislature was conscious of the fact that teachers are appointed under Section 31 of the Act and there is no provision of ad hoc appointment of a teacher but sub-section (6)

and (8) of Section 13 does provide for appointment of Lecturer in the University by way of short-term arrangement in matters of urgency and leave vacancies. It was on account of persistent demands made by such Lecturer for giving substantive appointment that Act No. 1 of 1992 was enacted. Subsequently the provisions for appointment of part time Lecturers was made by certain Universities in their Statutes for such subjects as were, in the opinion of the Academic Council, necessary in the interest of teaching or for other reasons and although the State Government had issued directions vide Government Order dated 9th October, 2000 to omit the provisions relating to appointment of part time Lecturers from the Statutes but they were not complied with. It was, therefore, decided to amend the said Act for giving substantive appointment to such teachers of the University who were appointed as Lecturer/part time Lecturer on or before 31st December, 1997 without reference to the Selection Committee by way of short-term or part time arrangement subject to availability of substantive vacancy.

15. It also needs to be mentioned that sub-section (6) and (8) of Section 13 of the Act was amended by U.P. Act No. 1 of 1992 so that the Vice-Chancellor was divested of the power of making any appointment of a teacher of the University under these Sections. Thus, only the part time Lecturers or such Lecturers who were appointed under sub-section (6) and (8) of Section 13 prior to 22nd November, 1991 could be given the substantive appointment under Section 31(3)(c) of the Act. It also needs to be emphasized that appointment of teachers in the University, teachers of a Associated or Affiliated College is made under Section 31 of the Act on the recommendation of a Selection Committee in the manner provided in the other sub-sections. The constitution of the Selection Committee has been provided for in Section 31(4) of the Act. Section 31(10) of the Act clearly provides that no selection for any appointment under Section 31 shall be made except after advertisement of the vacancy in at least three issues of two newspapers having adequate circulation in Uttar Pradesh. It is, therefore, more than apparent that what Section 31(3)(c) of the Act has dispensed with is the requirement of the recommendation of the Selection Committee. It does not dispense with the provisions of Section 31(10) of the Act which provides that no selection for any appointment under Section 31 shall be made except after advertisement of the vacancy in at least three issues of two newspapers having adequate circulation in Uttar Pradesh. In the present case, there is nothing on the record to indicate that the petitioners had been appointed as Guest Lecturers after advertisement of the vacancies in the manner provided for under Section 31(10) of the Act. This is what was also emphasized by this Court in the case of Birendra Bahadur Singh (*supra*).

16. In the case of Yogendra Singh Rawat and others v. Hemwati Nandan Bahuguna Garhwal University and others, (1993) 3 UPLBEC 1699, this Court while interpreting the provisions of Section 31(3)(c) of the Act, again emphasized this fact:

"Apart from this, the question for consideration is whether the petitioners who had been given short term ad hoc appointment are entitled to get substantive appointment. The procedure for making appointment is that a vacancy has to be advertised in accordance with sub-section (10) of Section 31 of the Act, which provision has been held to be mandatory by two Division Benches of our Court in Dr. R.C. Gupta v. Chancellor, 1983 UPLBEC 519 and Dr. Sudhir Chandra v. Chancellor, 1983 UPLBEC 110. In absence of advertisement there is violation of Article 16 of the Constitution and appointments so made are rendered illegal."

17. The Appeals filed against the said decisions in the Supreme Court were dismissed by a detailed judgment in the case of Yogendra Singh Rawat and Others Vs. Hemwati Nandan Bahuguna Garhwal University and Others, and the relevant portion of the judgment is quoted below:

".....Thereafter the High Court addressed itself to the question if the appellants who had been given short-term ad hoc appointments were entitled to substantive appointments. It noted that procedure for making appointments was that the vacancy had to be advertised in accordance with sub-section (10) of Section 31 of the Act and in the absence of the advertisement there would be violation of Article 16 of the Constitution and any such appointments would be rendered illegal."

18.....

19.....

20.....

21. Such being the position, the benefit of Section 31(3)(c) of the Act as amended w.e.f. 20th May, 2004 cannot be given to the petitioners as there is nothing on the record to indicate that they had been appointed as part time Lecturers in accordance with the procedure prescribed under the Act and the Statutes of the University and nor is there anything on the record to indicate that the petitioners had been appointed after due advertisement of the vacancy. The evidence on record, on the contrary, indicates that the petitioners had been appointed merely as Research Assistants."

16. Senior Research Assistants/Research Assistants, who have been appointed under the scheme/project funded by CSIR/UGC/DST and are working in University departments/national laboratories/and institutes, do not fulfill the parameter of teacher of University, as has been defined above, as specific criteria has been provided for with different eligibility criteria in the matter of selection and appointment of teachers. Lecturers and Part-time Lecturers constitute a separate class in themselves for being considered for substantive appointment under Section 31(3)(c) of the Act. Once such are the parameters that have been fixed for offering substantive appointment to Lecturer/Part-time Lecturer, the scope and ambit of consideration for substantive appointment under Section 31(3)(c) of the Act cannot be enlarged by judicial fiat by including within its fold

Senior Research Associate/Research Associate merely because they have been engaged in teaching also. Interpretation of law adopted by Bench inconsistent with earlier reasoned decision delivered by co-ordinate Bench has been held to be per incuriam judgment, as per the Apex Court in the case of Commissioner of Sales Tax, J and K and Others Vs. Pine Chemicals Ltd. and Others, . Contrary view taken has to be accepted as per incuriam as here the two binding precedent of this Court of co-ordinate Bench in the case of Dr. Vimla Vyas (Supra) and Dr. Narendra Kumar Pandey (Supra) based on the judgment of Apex Court in the case of Yogendra Singh Rawat and others v. Hemwati Nandan Bahuguna Garhwal University and others, 1993 (3) UPLBEC 1699, has not only been ignored but totally inconsistent view has been taken and entire statutory provision has not been adverted to namely the provision dealing with classification of teachers. The earlier judgment has to be treated as per incuriam qua the observations, that have been so made, as per the judgment of Apex Court in the case of M.P. Rural Road Development Authority and Another Vs. L.G. Chaudhary Engineers and Cont., . View to the similar effect has been expressed in the case of Ratiram Vs. State of M.P., , that where there is a binding precedent and when in ignorance of the same decision has been given, the concept of per incuriam would come into play. Apex Court in the case of U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, , has followed the case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, , wherein also, it has been held that when there is decision of co-ordinate Bench, the Bench could use its discretion only when there is no declared principle found. Here we have exercised our discretion as on the subject there has been declared principle that has not at all been taken note of and, accordingly, we hold the observations made that duty of Senior Research Associate/Research Associate is the same as that of Teacher/Lecturer of University, while working in University, and he is deemed to be an employee of University and seems to be entitled for benefit of Section 31(3)(c), to be per incuriam .

17. Qua the case in hand this Court is proceeding with the presumption that Section 31(3)(c) is applicable/attracted. This Court on the earlier occasion had given directives for consideration of claim of petitioner and, accordingly, claim of petitioner has been considered. One of the essential pre-requisite terms and conditions for being offered substantive appointment is that a candidate should possess qualifications required for regular appointment to the post. Section 31(3) (c) is very very categorical and specific as it clearly proceeds to mention that the incumbent concerned should possess the qualification required for regular appointment to the post under the provisions of the relevant statutes in force on the date of the substantive appointment and has been found suitable for regular appointment by the Executive Council.

18. This Court at this juncture takes note of the eligibility criteria of teachers of University. Statute 11.01 falling under Chapter XI provides for as follows;

"11.01(1) The following shall be the minimum qualification for the post of

lecturer in other branches of knowledge excluding teaching-training (Lecturer in B.Ed/M.Ed.)-

Good academic record with 55% marks in relevant subject at postgraduate level or "B" grade in seven point scale. Besides, he should have cleared National Eligibility Test or State Level Eligibility Test.

(5) For the purposes of this Statute:

(a) Good academic record for general or other backward classes category shall be as under:

"At least 50% marks in relevant graduate degree"

19. Petitioner in the present case intends to be appointed on substantive basis as Lecturer in Geology and as per Statute 11.01 petitioner is required to have good academic record with 55% marks in relevant subject at post-graduate level and apart from this he is required to have at least 50% marks in relevant graduate degree, as for the purposes of the said statute good academic record has been defined accordingly.

20. Petitioner has less than 50% marks at graduate level, as such, as per the statute he lacks good academic record and apart from this he has to his credit Masters Degree, Botany subject of the year 1979 from Kanpur University and he has further to his credit Ph.D. Degree and that too in Botany. Petitioner is not having Masters Degree in the subject of Geology, which is the relevant subject to his credit. Petitioner thus lacks the minimum eligibility criteria prescribed under the first statutes of Lucknow University for being offered substantive appointment and to meet this situation, it is being submitted that under UGC Regulation 2010 the qualification provided for Lecturer is good academic record with at least 55% at the Masters Degree level and same is possessed by the petitioner and, in view of this, to say that petitioner is not qualified is uncalled for and Paleobotany is common subject in B.Sc., M.Sc. in Botany and Geology and Paleobotany is covered in Paleontology and Stratigraphy in M.Sc. (Geology), which includes animal fossils (PaleoGeology) and plant fossils (Paleobotany) and, accordingly, petitioner should be held eligible.

21. Counsel for petitioner has placed reliance on the judgment of Apex Court in the case of Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others, and Dr. Rajbir Singh Dalal Vs. Chaudhari Devi Lal University, Sirsa and Another, , to buttress such submissions.

22. Both these judgments would not at all improve the case of petitioner, as in the case of Neelima Misra (Supra), where recommendation of selection committee has been turned down by the Executive Council, Apex Court opined that where selection committee after recording satisfaction on qualification recommends a candidate, then if Executive Council intends to differ, then it must give reasons and it cannot override recommendation and appoint candidate of his own choice. Here no such situation is there, as there is complete unanimity in

the view of Executive Council, Vice-Chancellor and the Chancellor that petitioner lacks the minimum eligibility criteria. Similarly in the case of Rajbir Singh Dalal (Supra), Apex Court ruled that academic experts have regarded Political Science and Public Administration to be one discipline. Geology and Botany till date have not at all been accepted by academic experts as one discipline, and merely because Paleobotany is a common subject in between the two, it cannot be said that they are one and the same discipline.

23. Fixing of eligibility criteria is under the realm of policy decision and it is for the employer to decide as to what eligibility criteria should be prescribed for the candidates and once under the U.P. State Universities Act, 1973 as well as under the First Statute of the Lucknow University for the post of Lecturer in Geology the eligibility is Masters Degree and petitioner is not at all having Masters Degree in the subject of Geology, then petitioner cannot claim and insist that he should be accepted as eligible. Paleobotany may be a common subject but that does not mean that you possess Masters Degree in Geology. Apex Court in the case of State of Rajasthan and Others Vs. Lata Arun, , has clearly ruled that it is not for the Courts to decide as to whether a particular educational qualification possessed by candidate should or should not be recognized as equivalent. UGC Regulations are binding and whatever eligibility criteria has been fixed there same cannot be lowered and diluted as it prescribes the minimum qualifications for appointment but in case under the provisions of U.P. State Universities Act, 1973 and the First Statute framed thereunder the eligibility criteria for being appointed as Lecturer has been provided for and the said eligibility criteria is in addition to the minimum eligibility criteria fixed by UGC and said qualification is not at all fulfilled by the incumbent concerned, then incumbent concerned cannot claim as a matter of right that one should be offered appointment merely because petitioner is fulfilling the qualification, as is provided for under the UGC Regulation. Petitioner has to fulfill the requisite qualification as is envisaged under the First Statute of Lucknow University. Apex Court further in the case of State of Gujarat and Others Vs. Arvindkumar T. Tiwari and Another, , has clarified the legal position by mentioning that appointing authority is competent to fix higher score for offering substantive appointment, as fixing of eligibility criteria for a particular post is exclusive domain of legislature/executive and further caution has been given that a person who does not fulfill even the requisite minimum qualification cannot claim to be appointed, for the reason that his appointment would be contrary to statutory rules.

24. Lacking eligibility cannot be cured at any stage and appointing such persons would be a serious illegality and not mere irregularity, such a person cannot approach the Court for any relief for the reason that he does not have a right to be enforced through Court. Once such are the parameters provided for, then no relief or reprieve can be given to petitioner by this Court. Viewed from all perspective substantive appointment cannot be given to petitioner.

25. Lastly petitioner's counsel submitted that 54 incumbents have been

regularized on the same date vide Resolution No. 1 of the Executive Council dated 29.4.2000. Specific reply has been given that said incumbents were part-time teachers and were of different category and were falling within the parameters laid down for extending substantive appointment, whereas petitioner was a Research Assistant employed on projects and not in the mainstream of teaching and lacking essential qualification. Writ petition sans merit and same is dismissed, accordingly.