

(2010) 12 AHC CK 0222

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 10712, 49209, 50170, 51212, 58508, 59542, 59989, 62798, 63575 and 63599 of 2010

Dr. Archana Mishra and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1), 16(4B), 335
Uttar Pradesh Higher Education Services Commission Act, 1980 — Section 12, 13, 60A
Uttar Pradesh Higher Education Services Commission Rules, 1981 — Rule 7, 8
Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 3(1), 3(2), 3(5)
Uttar Pradesh State Universities Act, 1973 — Section 31

Citation : (2011) 2 ADJ 1

Hon'ble Judges : Sunil Ambwani, J; Jayashree Tiwari, J

Bench : Division Bench

Judgement

1. We have heard Shri P.S. Baghel, Senior Advocate assisted by Shri Gautam Baghel and Shri Rajiv Mishra for the Petitioners. Shri S.G. Hasnain, Additional Advocate General assisted by Shri Pankaj Saxena, Standing Counsel appears for the State Respondents. Shri H.N. Singh appears for UP Higher Education Service Commission. Shri B.D. Mandhyan, Senior Advocate assisted by Shri Satish Mandhyan; Shri Ashok Khare, Senior Advocate assisted by Shri V.K. Singh and Shri Shailendra have appeared for the newly impleaded private Respondents.

2. All the Petitioners are serving as honorary Lecturers in the aided Degree Colleges in the State of Uttar Pradesh affiliated to the respective Universities under the U.P. State Universities Act, 1973. They were appointed under a Scheme provided in the Government Order dated 7.4.1998, by the Committees of Management of the respective Colleges after advertisement and selection by the Selection Committees for one academic session at a time, until joining of the regularly selected candidates, whichever is earlier. Most of these teachers working on honorarium have obtained interim orders from this Court to continue

till the joining of the regularly selected candidates. In, Anurag Tripathi and Ors. v. State of UP and Ors. Writ Petition No. 5210 of 2007 with which 167 other Writ Petitions were clubbed, it was held by final judgment dated 4.4.2008 that the Petitioners will continue to work as honorarium teachers as per provisions of the Government Order dated 7.4.1998 till regularly selected candidates join. It was made categorically clear that these teachers are not entitled to absorption/regularisation. The Court also directed the Director of Higher Education to fill up all the vacancies on the post of Lecturers by regularly selected candidates.

3. In SLP (Civil) No. 884 of 2004 along with six Special Leave Petitions filed by the teachers serving on honorarium under the Government Order dated 7.4.1998 against the judgment of this Court in Malvika Shekhar v. Director, Higher Education, U.P. and Ors. Writ Petition No. 44332 of 2003 dated 29.9.2003, the Supreme Court, by its order dated 28.4.2008, issued directions to the High Court to take decision afresh, and until then status quo be maintained. The Writ Petition No. 44332 of 2003 was filed by Malvika Shekhar with a prayer to allow her candidature till regularly selected candidate joins. The writ petition is still pending.

4. By these writ petitions, the Petitioners have prayed for quashing the Advertisement No. 41, issued by the U.P. Higher Education Service Commission in the year 2008 inviting applications for selection and regular appointment of Lecturers in Government aided Degree Colleges in the State of U.P. The advertisement is confined to the selections on 337 reserved posts including 305 for Scheduled Castes and 32 for Scheduled Tribes in 34 subjects. In Writ Petition No. 10712 of 2010 on 17.3.2010 the Court passed following orders:

Learned standing counsel appears for Respondent Nos. 1 and 2, Smt. Archana Singh appears for Respondent Nos. 3 and 4. All the Respondents are granted four weeks time to file counter affidavit. Rejoinder affidavit within two weeks thereafter. It is stated that the advertisement is in teeth of the judgment of Dr. Vishwajeet Singh and Ors. v. State of U.P. and Ors. (2009) 4 ADJ 373 along with other connected petitions decided on 20.04.2009. The judgment has been challenged by the State of U.P. in the Supreme Court. The SLP is still pending.

As an interim measure we provide that the selections and appointments will be subject to the result of the writ petition.

5. The Commission proceeded with the selections subject-wise and has completed the selections for 21 subjects, for which the results have been declared and that the list has been sent to the Director, Higher Education for issuing placement orders. The majority of the persons selected have been issued placement orders.

6. In Dr. Archana Mishra and Ors. v. State of UP and Ors. Writ Petition No. 51212 of 2010 the Court by its order dated 25.8.2010 summoned the Director of Education (Higher Education), Allahabad and Secretary/Joint Secretary, U.P. Higher Education Service Commission, Allahabad to appear on 26.8.2010 and

that on 26.8.2010 the following order was passed staying the progress in pursuance to the Advertisement No. 41 and placement. We are informed that after the order dated 26.8.2010, the selection process for 13 subjects and further placements have been stayed. The interim order dated 26.8.2010 is quoted as below:

Pursuant to the orders of this Court dated 25.08.2010, the concerned Joint Director of Higher Education and the Officiating Secretary, U.P. Higher Education Services Commission are present in the Court.

For the purposes of making submission, certain factual issues are to be noticed first before mentioning other facts.

It has been admitted that vacancies so advertised are not college wise/subject wise rather after getting requisition of the vacancies from all the Colleges, they have been clubbed by forming one unit , they have been advertised.

It has been further admitted that after the selection at the time of placement, provisions as contained in Section 13 U.P. Higher Education Services Commission Act, 1980 is to be followed and if that is to be strictly taken care, advertisement by getting vacancies of particular College/subject sorted out, the placement of the candidates by following the principle of reservation may not be in a position of being placed, as placement is to be made strictly in accordance with the merit and in the light of the option given in the application form.

Argument of Sri Baghel, learned senior counsel in this petition and Sri Mishra and Sri Arti Raje, learned Counsel who also appears in the earlier petition are present is that apart from other decided cases on the point since long, recently Division Bench of our own Court given in the case of Dr. Vishwajeet Singh reported in 2009(2) ESC 1387(All) has clearly laid down that advertisement has to be subject wise/college wise and it is in that light after ascertainment of the vacancies principle of reservation if that may be applicable/available is to be applied.

Sri Baghel further points out that the Division Bench judgment has been further approved by the Full Bench of this Court in the case of Hira Lal reported in 2010(3) ESC 2091.

Submission is that so far as judgment of this Court in the case of Dr. Vishwajeet Singh(supra)is concerned, although SLP was filed before the Apex Court in the year 2009 itself and now on 6.8.2010, leave has been granted and hearing has been expedited but no interim order either at the first stage or at while grating leave has been granted.

Submission is that it may not be proper to argue that no stay of the order was prayed.

Be as it may, while entertaining the matter and granting leave , no stay was given by the Apex Court.

By the Division Bench judgment of this Court given in the case of Dr. Vishwajeet Singh(supra), the advertisement No. 36 and 37 by which, advertisement of the post of Lecturers were advertised although for general category on clubbing to be formed one unit was finally quashed.

Submission is that so far as present advertisement is concerned, irrespective of the vacancies which are said to be back log vacancies, various factors are to be placed by the Respondent that whether those vacancies was ever advertised and otherwise also, apart from other aspect various aspects as noted above, i.e. the availability of particular number of post in the subject in a college for making selection is to be noted and has to be found out/observed before applying principle of reservation.

Sri Baghel lastly placed before this Court the observation made by Full Bench of this Court in the case of Hira Lal (supra) as is contained in para/34 of the aforesaid judgment.

It is ruled in the aforesaid Full Bench decision that for applying reservation of vacancies, in accordance with U.P. Act No. 4 of 1994, number of posts in the cadre if is less than five, then that may not apply and at the same time, in the second part of the aforesaid paragraph, the judgment given in the case of Dr. Vishwajeet Singh(supra) has been approved.

Be as it may, as pursuant to the orders of this Court dated 17.03.2010 passed in writ petition No. 19712 of 2010, Respondents claim that the selection process for 21 District is complete and now the only placement is to be done and accordingly, placement process is also be finalised by getting themselves executed at the level of the Management.

After hearing aforesaid and on a notice of these facts, we are of the view that henceforth, all the Respondents are to stay their hands in respect to the progress pursuant to the advertisement No. 42 and placement, if any has taken place, that will not be given effect without taking leave of this Court.

As requested by all, let the matter be posted in the week commencing 13.09.2010 along with similar matters and also the writ petitions No. 19712 of 2010 and writ petition No. 50170 of 2010.

In the meantime, this Court directs that both sides are to complete their pleadings so that looking into the urgency and involvement of large number of candidates, both sides, matter may be finally decided.

7. Pleadings have been exchanged and the parties were heard.

8. Shri P.S. Baghel, learned Counsel for Petitioners submits that the U.P. Higher Education Service Commission (in short the Commission) is proceeding to hold the selections in violation of the Division Bench judgment of this Court in Dr. Vishwajeet Singh v. State of UP and Ors. 2009 (2) EXC 1387 annexed to the writ petition as Annexure No. 8. He submits that in Dr. Vishwajeet Singh's case the

selection for 467 vacancies in the Advertisement No. 37 was quashed, and a direction was issued that before declaring the result against the remaining 371 carry forwarded vacancies the Director of Higher Education shall re-determine the number of vacancies against which the select list be issued by applying reservation and roster, subject-wise and college-wise.

9. In Dr. Vishwajeet Singh's case the Petitioners had challenged Advertisement No. 37 dated 9.7.2003 published on 16.7.2003 and also the Government Orders dated 3.7.2003 and 17.4.2003. The Advertisement No. 37 invited applications for 838 posts of Lecturers in different subjects in various Post Graduate Colleges and Graduate Colleges in the State of UP by special recruitment to fill up carry forward and backlog vacancies of reserved category candidates. All the posts were reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates. The applications were called separately for selections for different subjects. The Court formulated the following questions to be decided by it:

(i) Whether 467 vacancies, which were available because of retirement, resignation and death up to 30.6.2003, could have been included and reserved for Scheduled Castes, Schedule Tribes, Other Backward Classes only along with 371 carry forward vacancies in advertisement No. 37 of 2003 ?

(ii) Whether 467 vacancies were rightly reserved only for Scheduled Castes, Schedule Tribes, Other Backward Classes without they having been earlier advertised or offered to General Category candidates ?

(iii) What is a unit for applying the Rules of Reservation according to 1994 Act and the roster framed thereunder ?

(iv) Whether the reservation is to be applied by consolidating all the vacancies of the Lecturers in different degree colleges/ postgraduate colleges ?

(v) Whether in case, each college is treated to be a separate unit, the reservation is to be applied by clubbing all the sanctioned posts of Lecturers in a college or the reservation and roster are to be applied subject-wise ?

(vi) Whether advertisement No. 37 is in accordance with 1994 Act and whether the number of carry forward vacancies i.e. 371 have been correctly determined ?

(vii) What is the minimum number of posts in a cadre for applicability of roster issued under Sub-section (5) of Section 3 of 1994 Act?

10. After extensive discussion running into about 100 paragraphs and considering legal position with the help of several judgments of the Supreme Court, and this Court, the Division Bench held that questions of vacancies remaining unfilled shall arise only when a recruitment is held for filling up the vacancies. The word "unfilled" u/s 3 (2) of U.P. Public Service Reservation for Scheduled Caste, Scheduled Tribe and Other Backward Classes Act, 1994 (in short the Act of 1994), has to be given meaning as per scheme of the Act of

1994, and the context, in which it has been used. Unless steps are taken under Sub-section (1) of Section 3 for recruitment, Sub-section (2) shall have no application. The backlog vacancies are thus, those vacancies, which were earlier advertised for filling it but could not be filled up. The Court thus held that since 467 vacancies came into existence upto 30.6.2003 could not have been reserved only for the candidates belonging to reserved categories, as they were never advertised earlier and hence both reserved category candidates and general category candidates have a right to participate in the selections. It was open to the State to determine the reserved vacancies out of 467 and proceed to advertise the same both for general and reserved categories. The advertisement clubbing both the vacancies violates Articles 14 and 16(1) of the Constitution of India.

11. The Court then examined the scheme of U.P. State Universities Act, 1973 and Section 12 of the U.P. Higher Education Service Commission Act, 1980 (in short the Act of 1980), and the scheme of selections, and held relying upon the reasoning given judgment of Supreme Court in Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, and State of Uttar Pradesh Vs. Dr. Dina Nath Shukla and another, in which it was held that in the State Universities, the provisions of the Act of 1994 have to be applied by clubbing all the posts of Lecturers, Readers and Professors but reservation has to be applied subject-wise. Although all the posts of Lecturer in a University are in a common pay scale but that cannot be basis for clubbing of the posts of Lecturers and applying the reservation and roster on all the posts together, rather the reservation has to be applied subject-wise (para-43).

12. The Court thereafter in Dr. Vishwajeet Singh's case considered the provisions of the UP State Universities Act, 1973 providing for faculties in great detail and found that each College is referred to as a faculty. The concept of different subjects, and different departments is very much present in the Statutes qua the degree college and post graduate college (para-47), and that the provisions thus contemplated the concept of departments and subjects in affiliated colleges also (para-50). The Court held in para-52 that the selection is contemplated subject-wise in regard to teachers of degree colleges/post graduate colleges.

13. The Court thereafter went on to consider in Dr. Vishwajeet Singh's case that if the reservation has to be applied on percentage, and in accordance with the roster provided u/s 3 (1) of the Act of 1994, there should be, according to the roster, at least five posts in the concerned subject in a College to apply reservation. The Court relied upon the judgment in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, and the judgment in R.S. Garg v. State of UP and Ors. (2006) SCC 430 and thereafter examined if the reservation is applicable to one, two and three posts and concluded that in accordance with the roster. It held that there have to be at least five posts before the roster can be made applicable. The judgment in State of UP v. Pawan Kumar Tiwari 2005 (2) SCC 10 was also examined in coming to

the same conclusion. The Court thus finally gave directions quashing that Advertisement No. 37, in so far as it advertises 467 vacancies, which arose upto 30.6.2003 due to death, resignation or retirement. The advertisement, in so far as it advertised 371 carry forward vacancies, was maintained. The Director of Higher Education was required to re-determine the number of vacancies against which select list was to be issued by applying reservation and roster subject-wise and college-wise. The declaration, it was directed, shall be confined only to those vacancies which were carry forward vacancies and were advertised earlier by Advertisement No. 29 and could not be filled up. The candidates, whose name are included in the select list, were required to give fresh choice. The exercise was directed to be completed within three months. The Court thereafter directed that the rules of reservation and roster thereafter to be applied college-wise, only and subject-wise when there are plurality of posts.

14. Shri Baghel and Shri Rajiv Misra submit that in complete violation of directions issued in Dr. Vishwajeet Singh's case the Commission has again advertised the vacancies committing the same legal mistakes. They have again initiated recruitment only for the reserved category candidates namely Scheduled Castes/Scheduled Tribes without making calculation college-wise and subject-wise. In spite of repeated requests and directions the Commission has not given the college-wise break up of the vacancies. It is proceeding to make selection subject-wise and further rules of reservation have been made applicable even where there are less than five posts in any subjects in any College. Shri Baghel submits that the State has filed a SLP (Civil) No. 18064-18065 of 2009 against the judgment in Vishwajeet Singh's case, in which the matter was heard on 6.8.2010 but no interim order was granted.

15. Shri Baghel further submits that the question of applicability of roster for promotion and direct recruitment on Class III posts (Clerical Grade), in view of the difference of opinion in Dr. Vishwajeet Singh's case (supra) and Smt. Phoolpati Devi v. Smt. Asha Jaiswal and Ors. 2009 (2) ADJ 90, was referred to a Larger Bench. The Full Bench of three Hon'ble Judges in Heera Lal v. State of UP and others held in its judgment dated 9.7.2010 reported in 2010 (3) ESC 2091 (All.) (FB) agreeing with the view taken in Dr. Vishwajeet Singh's case that the judgment in Mahendra Kumar Gond v. District Inspector of Schools 2009 (6) ADJ 674 (DB) is per incuriam and even otherwise does not apply the law correctly. It was rendered without noticing the decision in Dr. Vishwajeet Singh and Smt. Phoolpati Devi. The Bench of Three Hon'ble Judges relied upon Indra Sawhney v. Union of India 1992 Supp (3) SCC 217 ; R.K. Sabharwal and others Vs. State of Punjab and others, ; Prabhash Chand Jain v. State of Haryana and Ors., (1996) 8 SCC 105 and R.S. Garg Vs. State of U.P. and Others, in arriving at the conclusion that the rules of reservation are not applicable unless there are at least five posts in the cadre.

16. Shri H.N. Singh appearing for the Commission assisted by Shri V.K. Chandel, Shri Ashok Khare, Shri B.D. Mandhyan and Shri Shailendra learned Counsel

appearing for the Respondents submit that the decisions in Vishwajeet Singh and Heera Lal do not correctly interpret the Supreme Court judgments and have not laid down correct law on the questions of law, namely that unless the reserved vacancies are advertised, they cannot be treated to be "unfilled", u/s 3(2) of the Act of 1994, to be advertised separately. They have relied upon a Division Bench judgment in Dr. Neeraj Shukla and Ors. v. State of UP and Ors. Writ Petition No. 54870 of 2009 decided on 7.9.2010 in which these Judgments, in so far as the aforesaid question of law is concerned, were in view of M. Nagaraj and Others Vs. Union of India (UOI) and Others, , were held to be per incuriam, The Division Bench provided by one of us (Hon. Sunil Ambwani, J.) held that in M. Nagaraj the Constitution Eighty First Amendment Act, 2000 inserting Clause (4-A) to Article 16 and Clause (4B) in Article 16 by 82nd Amendment Act to the Constitution were explained. It was held that in Dr. Vishwajeet Singh's case the ratio of M. Nagaraj was not considered, and in which it has been clearly laid down and further it is specifically provided u/s 3 (2) of the Act of 1994 that each point in the roster indicate a post which on falling vacant has to be filled up by a particular category of candidate to be appointed against it, and that any subsequent vacancy has to be filled up by that category candidate alone. The question of clubbing the unfilled vacancy with current vacancy, therefore, does not arise. Article 16(4B) grants legislative assent to the judgment in R.K. Sabbarwal's case. It was held that if it is within the power of the State to make reservation, then whether it is made in one selection or deferred selections, is only a convenient method of implementation, as long as it is post based, subject to the replacement theory and within the limitation indicated in the judgment. The 50% cap on carry forward vacancy (backlog vacancy) was lifted by Article 16(4B) introduced by the Constitution 81st Amendment Act, 2000. The ceiling limit of 50% on current vacancies, however, continued to remain. In working out the carry forward rule, it was cautioned in M. Nagraj, that two factors are required to be kept in mind, namely unfilled vacancies and the time factor. Where there are unfilled vacancies and there is a time spread over number of years over which the unfilled vacancies are sought to be carried over, are alternative factors and therefore if the ceiling limit on the carry over or unfilled vacancies is removed, the other alternative time factors comes in, and in that event, time factor has to be imposed in the interest of the efficiency in administration as mandated by Article 335. If the time factor is not kept, then the posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate government will have to introduce a time cap depending upon the fact situation. In some States the carry forward rule does not extend beyond three years. The UP Act of 1994 was amended by UP Act No. 1 of 2002 providing that if in respect of any year of recruitment, any vacancy reserved for any category of persons under Sub-section (1) of Section 3, remains unfilled, such unfilled vacancy may be filled up in any succeeding year or years of recruitment as a separate class or vacancy and such class of vacancy would not be considered together with the vacancies of the year of the recruitment in which it is being filled up.

17. The Court further observed in Dr. Neeraj Shukla's case as follows:

We are of the opinion that once the Constitution has been interpreted, and the law has been declared by the Constitution Bench of the Supreme Court, any judgment in ignorance of such judgment attracts the doctrine of per-incuriam vide V. Kishan Rao Vs. Nikhil Super Speciality Hospital and Another, State of Rajasthan and Others Vs. Jagdish Narain Chaturvedi, and Subhash Chandra and Another Vs. Delhi Subordinate Services Selection Board and Others,

18. In State of U.P. v. Sangam Nath Pandey Civil Appeal No. 4381 of 2010 Hon''ble Mr. Justice B.S. Reddy and Hon''ble Mr. Justice S.S. Nijjar on 15.12.2010, while allowing the appeal against the Division Bench judgment of the Court taking the same view as in Vishwajeet Singh's case, have saved the selection on all the reserved posts, which were not previously advertised.

19. So far as the directions in Dr. Vishwajeet Singh's case, that the vacancies have to be worked out college-wise and subject-wise, we find that the Court did not examine the scheme of the U.P. Higher Education Service Commission Act 1980 read with the UP Higher Education Service Commission Rules, 1981. Section 12 of the Act of 1980, provides in Sub-section (3) as follows:

(3) The Director shall notify to the Commission on such time and in such manner as may be prescribed subject-wise consolidated list of vacancies intimated to him from all Colleges.

20. The scheme of the UP Higher Education Service Commission Act, 1980 and the U.P. Higher Education Service Commission Rules, 1981 with special reference to Rules 7 and 8 as well as the UP Higher Education Service Commission (Procedure for Selection of Teachers) Regulation 1983, clearly provides the consolidation of the vacancies subject-wise to be intimated to the Commission for advertisement and selections. The scheme of selections substitutes the scheme of appointment of teachers u/s 31 of the UP State Universities Act, 1973. After the responsibility of the payment of salaries of teachers of aided postgraduate and graduate colleges affiliated to the Universities was taken over by the State Government under UP Act No. 21 of 1975 adding Chapter XI-A to the Act of 1973, the UP Higher Education Service Commission Act, 1980 was enacted for appointment of the teachers in such colleges by a common selection procedure provided under the rules and regulations made thereunder. All the teachers in the aided Postgraduate and Undergraduate Colleges were provided to be appointed by a common selection procedure with common pay scales, service conditions, and rules providing for procedure of mutual or a single transfer under the UP Aided Colleges Transfer of Teachers Rules, 2005, in a common cadre. Section 12 of the UP Higher Education Service Commission Act, 1980 was neither challenged nor declared ultra vires. In the scheme of the Act, Rules and Regulations, the college cannot be treated as a unit. The reasoning given in Dr. Vishwajeet Singh's case, that each college has to be treated as a faculty of the University, is not correct. We respectfully disagree with the ratio of the judgment

in Dr. Vishwajeet Singh's case treating the College as a unit. The judgments relied upon by the Division Bench were rendered in respect to the Universities, and did not have the occasion to examine the scheme of the appointments of teachers under the Act of 1980, after the responsibility of payment of salaries, fixation of pay scales and conditions of service have been taken over by the State Government and the Commission was constituted. The treatment of colleges as faculties of the Universities after insertion of Section 60-A to UP Act No. 21 of 1975 and Constitution of UP Higher Education Service Commission under the U.P. Higher Education Service Commission Act, 1980, is not correct.

21. We further find that the UP Act of 1994 is applicable to the public services and posts and that educational institution u/s 2(c) (iv), owned and controlled by the State Government or which receives grant-in-aid from the State Government including a University established under the U.P. Act except the institutions set up by minority institutions, have been treated as public service, which has a common service conditions, pay scales and procedures of appointment. The College cannot, therefore, be treated to be a unit for the purposes of working out reservation on the posts.

22. Coming to the third question, we find that the view expressed by the Division Bench of existence of at least five posts for applicability of rules of reservation in a subject in a College as held in Dr. Vishwajeet Singh's case, is not legally correct. In Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, a Constitution Bench of the Supreme Court considered the review application on the question of applicability of rules of reservation to a single post cadre. It was held that there has to be plurality of posts for applying the rules of reservation. The view taken in Chakradhar Paswan Vs. State of Bihar and Ors, was upheld and Arati Ray Choudhary Vs. Union of India (UOI) and Others, was relied upon. The Constitution Bench held that the view expressed in Union of India and Another Vs. Madhav Gajanan Chaubal and Another, Union of India and others Vs. Brij Lal Thakur, and State of Bihar and Others Vs. Bageshwari Prasad and Another, was not correct. The Court did not lay down any such rule that there has to be at least five posts for applying rules of reservations to the cadre.

23. We have gone through the judgment in R.S. Garg Vs. State of U.P. and Others, carefully and do not find any such proposition laid down by the Supreme Court that in direct recruitment there has to be at least five posts for applying the rules of reservation. The issue raised in R.S. Garg related to reservation in promotion to a six post cadre of Dy Director of Factories. The paragraph relevant in the case for consideration is paragraph 40. In our opinion the Division Bench in Dr. Vishwajeet Singh's case has wrongly relied upon paragraph-40 in arriving at a conclusion that there has to be at least five posts for applying rules of reservation. The Apex Court in R.S. Garg's case in paragraph-40 did not lay down any such proposition. It held that the State cannot exceed the quota of the percentage and reservation and that in the event of any conflict between the

percentage of reservation and the roster the former shall prevail. Reading R.S. Garg's case togetherwith Postgraduate Institute of Medical Education, and Research Chandigarh the ratio, which can be culled out is that there has been plurality of posts for the purposes of applying the rules of reservation to avoid cent percentage reservation for a long period of time. The reservation is applicable to the posts in the cadre and the appointment has to be given in accordance with the roster. In R.K. Sabbarwal's case the Supreme Court explained the meaning of the words "post" and "vacancy" and thereafter observed that the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The observation was made in the context of vacancy on the post. The Supreme Court said that the concept of vacancies has no relevance in operating the percentage of reservation and when all the roster points in the cadre are filled, the required percentage of reservation in posts is achieved. The Apex Court did not mean that there has to be at least five posts in the cadre to apply the rules of reservation. The legal position expressed in Dr. Vishwajeet Singh and Heera Lal to that effect in our opinion does not lay down the correct law and requires reconsideration by a larger bench of more than three judges.

24. In the present case, if we accept the proposition that the reservation has to be applied college-wise and subject-wise, and that unless there are five posts in each subject, in each college and that unless that post is advertised, it cannot be filled up separately in any year of recruitment or in subsequent year of recruitment, we may arrive at a startling result, namely that there will be no reservation in the aided colleges affiliated to Universities in the State of U.P. Out of 400 Colleges of which the vacancies are being filled up subject-wise, there are just a few Colleges in which there are more than five posts in any subject. In the majority of Colleges the number of lecturers in each subject is less than five, and thus if the proposition of law in Vishwajeet Singh and Heera Lal is accepted, the rules of reservation will not apply to the appointments of posts for teachers in the aided degree colleges. When this question was put to Shri P.S. Baghel, counsel for the Petitioners for explanation, he submitted that if the position in law so warrants, the rules of reservation may apply only to that limited extent, or not apply at all.

25. We further find that the interpretation, if the law as interpreted in Dr. Vishwajeet Singh and Heera Lal has to be applied, almost all the selections advertised and concluded by the UP Higher Education Service Commission upto Advertisement No. 41, will have to be declared as illegal and that all the teachers appointed in the reserved categories will be treated as illegally appointed against the rules of reservation. The law does not countenance such absurd conclusion.

26. In the facts and circumstances, we may observe that in order to correctly lay down the law and if found necessary to save the earlier selections, we refer the following questions to be considered and decided by a Bench, larger than three Judges with a request to Hon''ble the Chief Justice to constitute the Bench, as

early as possible to resolve the conflict:

1 Whether the rules of reservations under the U.P. Act No. 4 of 1994 are applicable to appointment on the post of lecturers, by direct recruitment, in the aided postgraduate and undergraduate colleges in the State of UP, affiliated to the State Universities by clubbing all the vacancies as provided u/s 12(3) of the UP Higher Education Service Commission Act, 1980 subject-wise; or the vacancies have to be worked out for applicability of rules of reservation college-wise and subject-wise?

2 Whether there has to be plurality posts in the cadre, for applying the rules of reservation, which means more than one; or there has to be at least five posts in the cadre for applying the rules of reservations?

3 Whether the vacancies arising in any recruitment year under Rule 3 (2) of UP Act No. 4 of 1994 can be filled up separately even if they have not been advertised earlier, in that recruitment year or in the subsequent recruitment year, or such reserved vacancies have to be advertised at least once to be carried over for the recruitment in the same year or in the subsequent year?

4 What is the meaning of the words "unfilled vacancies" in Section 3 (2) of UP Act No. 4 of 1994?

5 Whether Dr. Vishwajeet Singh's case (supra) and the Full Bench decision in Heera Lal's case (supra) have been correctly decided?

27. The U.P. Higher Education Service Commission advertised and has held selections for the 337 vacancies reserved for Scheduled Caste (305) and Scheduled Tribes (32) in which results of 21 subjects have been declared and sent to the Director of Education (Higher Education) U.P. for placements. The interviews in 13 subjects have not been held so far. In the meantime Advertisement Nos. 43, 44, and 45, have also been issued and applications have been received. The Advertisement No. 45 includes 548 post of lecturers, subject-wise and in which half the posts are unreserved. Taking into account the fact, that the Petitioners are honorarium teachers, and do not have vested and indefeasible rights to claim the posts, and further that all the unreserved vacancies were filled up on the date of Advertisement No. 41, and in fact more than 1000 unreserved candidates were working in excess of the total cadre strength of the lecturers, subject-wise, we do not find any justification to continue the interim order dated 26.8.2010. The interim order dated 26.8.2010 is thus vacated. The selections, placements and appointments of the reserved category candidates in pursuance to the Advertisement No. 41 of the year 2008, will be subject to the result of these writ petitions.