

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2351 OF 2011
(Arising out of SLP (C) No.25966 of 2008)

State of U.P. & Ors. ...Appellants

Versus

Bharat Singh & Ors.

...Respondents

With Civil Appeal Nos. 2352-2361 of 2011
(Arising out of SLP (C) Nos.27077, 27522-27524, 27526-27528, 27530-27531 of 2008 and No.455 of 2009)

With

T.P. (C) Nos.3 and 1136 of 2009

Contempt Petition (C) No.32 of 2009 in SLP (C) No.25966 of 2008

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.
2. These appeals arise out of a judgment and order dated 7th August 2008 passed by the High Court of Allahabad whereby the High Court has allowed the writ petitions filed by the selected candidates, quashed the orders under challenge in the same and by a mandamus directed the Director, Higher Education to give effect to the recommendations made by the U.P. Higher Education Service Commission for appointment to the post of Principals in aided/affiliated Degree and Post-Graduate colleges. The High Court has further directed issue of placement orders in favour of the selected candidates without any delay. The

facts giving rise to the filing of the petitions may be summarized as under:

3. The Government of U.P. has established what is known as 'Uttar Pradesh Higher Education Services Commission' in terms of Section 3 of the U.P. Higher Education Services Act, 1980. The Commission is, among other functions assigned to it under the Act, empowered to prepare guidelines touching the method of recruitment of teachers in colleges and conduct examinations, hold interviews and make selection of candidates for being appointed as teachers and make recommendations to the managements concerned regarding the appointment of selected candidates. The selection process undertaken by the Commission is, however, confined only to colleges to which the privileges of affiliation or recognition have been granted by the University including colleges that are maintained by local authorities. Colleges that are maintained by the State Government or

colleges imparting medical education are outside the purview of the Act aforementioned. We shall presently refer to the provisions of the Act in greater detail but we may at this stage only say that in terms of Section 12 of the Act, the Managements of the colleges are required to intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year to the Director of Education who is then required to notify to the Commission a subject wise consolidated list of vacancies intimated to him from all colleges to enable the Commission to initiate and undertake the selection process.

4. Based on the information notified to the Commission in terms of the above procedure, a consolidated advertisement bearing multiple numbers (33 to 36) was issued by it on 29th May 2003 inviting applications for the vacancies mentioned in the said advertisement. A large number of writ petitions challenging the said advertisement came to be filed before

the High Court of Allahabad primarily on the ground that the post of Principals notified by the Commission available as they were in different colleges affiliated to the University being single posts in the cadre were not amenable to reservation. These writ petitions were entertained by the High Court and by interim orders dated 1st September, 15th September and 22nd September 2003, directions issued to the Commission to the effect that the post of Principals shall be treated as non-reserved posts.

5. In compliance with the above directions, the Commission issued a fresh advertisement dated 24th February 2005 being advertisement No.39 inviting applications for 140 posts of Principals, out of which 87 posts were available in Post-Graduate Colleges while 53 others were in Degree Colleges. The advertisement did not make any mention about any reservation implying thereby that the posts were offered in the general/open merit

category. The entire selection process was to be subject to the ultimate outcome of the writ petitions pending before the Allahabad High Court. It is common ground that interim orders dated 1st September 2003, 15th September 2003 and 22nd September 2003 were challenged before this Court by way of SLPs, but the said petitions were dismissed on the ground of delay and laches by this Court's order dated 3rd November, 2008.

6. The Commission took nearly two years to complete the selection process which culminated in the publication of a select list in terms of a notification dated 15th May 2007. With the publication of the select list, the batch of writ petitions pending before the High Court in which the interim orders mentioned above had been issued was dismissed as infructuous. The High Court while doing so noted the submission made on behalf of the Commission that there was no cadre of Principals in the Post-Graduate

colleges and the posts of Principals were not interchangeable or transferable.

7. In the case of the appellant-State of Uttar Pradesh that before appointment orders could be issued to those included in the select list, a number of complaints were received by it against the selection held by the Commission alleging large scale irregularities and malpractices of serious nature in the selection procedure and demanding an inquiry into the same. The State Government accordingly directed the Divisional Commissioner, Allahabad to hold an inquiry into the allegations and to submit a report within 15 days. The Divisional Commissioner in turn asked for certain information from the Service Commission in connection with the inquiry with a copy to the Director, Higher Education requesting him to show restraint in issuing the placement orders in terms of the recommendations received from the Service Commission.

8. Aggrieved by the said communication, the selected candidates filed several writ petitions before the High Court of Allahabad challenging the notification issued by the Government appointing the Divisional Commissioner as an inquiry officer and the letter written by him to the Director of Education asking him to withhold the issue of placement orders in favour of the selected candidates. While the said writ petitions were still pending disposal the Divisional Commissioner submitted a preliminary inquiry report dated 6th July 2007 in which he recorded a *prima facie* conclusion that a series of irregularities and malpractices had been committed by the Service Commission in the process of selection. The High Court in the meantime passed an interim order dated 13th July 2007 staying the operation of the notification appointing the Divisional Commissioner as an inquiry officer with a direction to the respondent to issue

appointment letters to the selected candidates within three weeks.

9. Aggrieved by the interim order referred to above, the State filed a special leave petition in this Court in which this Court by an order dated 21st August 2007 stayed the interim direction in so far as the same directed the Director, Higher Education to issue appointment letters in favour of the selected candidates. The special leave petition was finally disposed by this Court on 12th February 2008 with a request to the High Court to dispose of the writ petitions within four months. The interim order issued by this Court on 21st August 2007 was continued in the meantime.

10. Before the High Court, the Government filed a counter affidavit to the writ petition stating that there were serious infirmities in the process and an indepth inquiry into the matter was necessary. The High Court eventually allowed

the writ petition quashing orders dated 12th June 2007 and 16th June 2007 impugned therein and issued a mandamus to the Director, Higher Education Service Commission to make placements in favour of the selected candidates. The present appeals assail the correctness of the said orders.

11. We may at this stage point out that by an interim order dated 20th November, 2008 passed in these cases this Court directed the appellant-State to appoint the selected candidates-respondents in these appeals as Principals of various aided non-Government degree colleges and post-graduate colleges within a period of one month subject to the decision of these appeals, provided the respondents filed undertakings in this Court to the effect that in case they lose the battle they will stand reverted to the posts of Readers and the difference of salary amount drawn by them as Principals recovered and paid back to the State. That direction was reiterated by this Court in terms of order dated

23rd April, 2009 whereby this Court directed that although 56 candidates had already been appointed out of the select list in different Degree and Post-Graduate colleges, the direction issued by this Court should be complied with in toto within a period of one month from the date of the said order. Hearing of the SLPs was also directed to be expedited. It is not in dispute that the State has pursuant to the above direction appointed the selected candidates upon their filing undertakings before this Court with the result that all the selected candidates are duly appointed subject to the outcome of the present appeals and subject to the conditions stipulated in the interim orders mentioned above.

12. Appearing for the appellant-State Mr. Srivastava made a two-fold submission in support of the appeals. Firstly, he contended that the High Court had fallen in error in quashing order dated 12th June, 2007 appointing the Divisional Commissioner, Allahabad for holding a preliminary enquiry

into the allegations of malpractices in the selection process based on the complaints received by the Government. He urged that Section 6(1) of the Uttar Pradesh Higher Education Services Commission Act, 1980 empowered the State Government to remove from office any member of the Service Commission, in situations where the State Government considers them unfit to continue in office by reason of proved misconduct. The source of power so available was according to the learned counsel sufficient for the Government to hold an enquiry into the allegations regarding the legality and procedural regularity of the selection process for it was only on the basis of any such enquiry that the Government could determine whether any misconduct had been committed by the members of the Commission. The Government could on the basis of the outcome of the enquiry act against the member responsible for such misconduct and irregularity and/or refuse to approve the end result of the selection process. The

preliminary enquiry, therefore, had the sanction of law, argued the learned counsel and could not be cut short by the High Court in the manner it has done.

13. Mr. Srivastava further contended that even if Section 6 is given a restricted interpretation its rigors are confined to the removal of the members of the Commission from office and do not extend to the holding of an enquiry into the validity of the selection process, yet the general executive power vested in the State Government under Article 154 of the Constitution of India was wide enough to entitle the Government to institute such an enquiry in cases where allegations of rampant corruption, malpractice and the like vitiating the selection process are made. Relying upon the pronouncements of this Court it was urged that no candidate had a right to seek an appointment simply because he has been empanelled for such an appointment. In cases where the State has serious, reservations about the fairness of the

selection process and where allegations casting a cloud on the legality and propriety of the procedure have been made, the State could not refuse an enquiry nor could any such enquiry be struck down and appointments ordered having regard to the compelling need for maintaining absolute purity in the selection process leading to such appointments.

14. Secondly, it was argued that the High Court was wrong in disposing of writ petition Nos. 39369/2003, 39370/2003, 48621/2003, 41191/2003, 52411/2003, 70062/2003, 42992/2003, 41345/2003 and 38714/2003 as infructuous.

The High Court had ignored the fact that the issue of advertisement No.39 pursuant to the interim direction of the High Court and the selection process concluded on the basis thereof was subject to the outcome of the said writ petitions.

Mere issue of a fresh notification in compliance with the order passed by the High Court or the completion of the selection process did not render the writ petitions infructuous, for the question whether the posts of Principals

were subject to reservation had to be answered by the High Court which it had omitted to do. It was further argued that the High Court had not only ignored the decision of a coordinate Bench in **Onkar Dutt Sharma and Ors. v. State of U.P. and Ors.** (2001) 1 SAC 505, but failed to satisfactorily address the question whether the post of Principals constituted a cadre and was, therefore, amenable to reservation in terms of The Uttar Pradesh Services (Reservation for Scheduled Castes and Scheduled Tribes and other Backward Classes) Act, 1994. It was contended that the provisions of the Uttar Pradesh Higher Education Service Commission Act, 1980 had the effect of clubbing posts of Principals in different affiliated colleges and once such clubbing was statutorily prescribed for purposes of process of selection and recommendations for appointment, the said posts could be treated as a part of one single cadre to which provisions of Reservation Act, 1994 would apply.

15. Mr. Dinesh Dwivedi learned, senior counsel appearing for the management who are interveners in SLP No.27077/2008 contended that the expression "cadre" appearing in the Reservation Act, 1994 had to be interpreted liberally. So interpreted Uttar Pradesh Higher Services Commission Act had the effect of bringing about a cadre of Principals in aided and affiliated Degree and Post-Graduate institutions argued the learned counsel. He further submitted that several features supported the caderisation of the posts in such institutions. For instance the salary of the incumbent Principals in such institutions was paid by the State Government. Reference in this regard was made by him to Sections 60-A, 60-B, 60-D and 60-E of the Uttar Pradesh State Universities Act, 1973. It was argued that the clubbing of posts for conduct of a common selection process under 1980 Act (supra) and the fact that the power of appointment against the said post was effectively with the Director having regard to the provisions of Sections 12 and

13 of the Act was also a significant feature that indicated that the posts comprised a single cadre of Principals. The posts of teachers were also interchangeable subject to certain conditions and restrictions. The fact that the terms and conditions of service of the employees were the same under the relevant rules stipulated by the affiliating universities and the retirement and termination was not in the hands of the managements also suggested, according to the learned counsel, that the posts of Principals constituted a single cadre. Mr. Dwivedi also drew support from the fact that posts of Principals of secondary schools were excluded from the rigors of reservations while the Degree and Post-Graduate institutes did not enjoy any such immunity. The difference between the two provisions was, according to Mr. Dwivedi, significant and showed that wherever reservation was not intended to apply to the post of Principals as in the case of secondary schools, a specific provision to that effect was made in the statute.

16. On behalf of the respondents Mr. P.S. Patwalia, senior counsel, argued that the enquiry instituted by the Government into the validity of the selection process was motivated by political considerations. He urged that selection process having been completed by the Commission during the previous regime the same was not found palatable by the successor Government in the State of Uttar Pradesh who contrived to subvert the entire exercise on one pretext or other.

17. Mr. Patwalia further submitted that there was no real basis for the Government to institute an enquiry into the validity of the selection especially when the allegations were totally vague, unfounded and imaginary containing an appeal to the Government to intervene on caste and community considerations rather than any concrete evidence regarding the commission of any malpractices. He drew our

attention to the order passed by the High Court to show that the State Government had failed to come out with a specific statement that it intended to conduct any further enquiry or proceedings in the matter. The High Court was, therefore, justified in quashing the preliminary report submitted by the Divisional Commissioner especially because the Government did not, according to the learned counsel, have the power under Section 6 of the Uttar Pradesh Higher Education Services Act to nullify a validly concluded selection process. He refuted the contention that the Government could exercise its general executive power under Article 154 of the Constitution and submitted that no such argument was ever urged before the High Court.

18. Mr. Patwalia further contended that the provisions of the Uttar Pradesh Higher Education Services Commission Act did not have the effect of bringing about a cadre of Principals and termed the submissions made to that effect to

be wholly fallacious. He submitted that the minimum requirement for holding that a cadre exists in any given service is that those who constitute a part of a given cadre must have a common employer. This requirement was not satisfied in the instant case as the employer of each one of the Principals was the management of the college concerned. The posts of the Principals were not interchangeable or transferrable under the Rules except with the mutual consent of the incumbents and the management under whom they were serving. The question whether a cadre existed in such circumstances was, according to Mr. Patwalia, concluded by the decision of this Court in **Balbir Kaur and Anr. v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad and Ors.** (2008) 12 SCC 1.

19. Mr. Pallav Shishodia and Mr. V. Shekhar, senior counsels who appeared for some of the respondents also

adopted the arguments advanced by Mr. Patwalia that there was nothing in the provisions of the Uttar Pradesh Higher Education Services Commission Act or the Reservation Act of 1994 for that matter to suggest that the Legislature ever intended to create a cadre of Principals serving under different managements. The only purpose underlying the two legislations, according to the learned counsel, was to provide a unified mechanism for selection of suitable candidates for appointment as Principals to ensure that appointments are made on a fair and transparent basis. The State considered that to be necessary not only in the interests of getting the best candidates for the institutions that were affiliated to the universities and were serving a laudable public purpose but also because the salary payable to those appointed against such vacancies was reimbursed to the institutions by the State.

20. Two questions fall for our determination, these are :

(i) Whether the High Court was justified in quashing the appointment of the enquiry officer appointed to look into the allegations of malpractice allegedly committed in the course of selection process and

(ii) Whether the posts of Principals in different affiliated/aided Degree and Post-Graduate institutions constitute a cadre and are, therefore, subject to reservation as prescribed under the provisions of the Reservation Act of 1994.

21. We propose to take up the questions ad seriatim.

Re: Question No.(i)

22. Selection of Principals in affiliated/aided Degree and Post-graduate colleges is regulated by the Uttar Pradesh Higher Education Services Commission Act, the Rules and

Regulations framed thereunder. The selection process was initiated and concluded by the Commission treating the post to be open category post pursuant to the interim directions issued by the High Court. The select list was also duly notified. In the ordinary course recommendations of a statutory Commission established for selecting suitable candidates as teachers including Principals for the colleges ought to get the respect it deserved. The State Government, however, appears to have received some complaints on the basis of which it initiated an enquiry culminating in the submission of a preliminary report finding fault with the procedure adopted by the Commission in the conduct of the selection process. According to the appellant-State of U.P. the allegations made in the complaint were serious in nature and deserved to be looked into. It was urged that the State had all the intentions of instituting a further enquiry into the matter on the basis of the preliminary report submitted to it. The High Court did not think so. From a reading of the order

passed in W.P. No.29524 of 2007, it appears that the High Court had given an opportunity to the learned counsel for the State to take instructions whether the Government intended to institute any further enquiry in the matter. Despite the opportunity learned counsel for the State had reported no instructions in the matter. This is evident from the following passage appearing in the order passed by the High Court:

“On all these dates, we requested the standing counsel to give the stand of the State Government. Learned standing counsel informs that he had sent the information to the State Government but no instructions have been received by him.”

23. The High Court, therefore, proceeded on the basis that the Government did not intend to conduct any further enquiry into the matter and accordingly quashed the order appointing the enquiry officer as also the instructions issued by him against the making of the appointments. We consider it unnecessary to examine whether the complaints allegedly received by the State Government made out a prima facie

case for an enquiry into the matter or whether the enquiry instituted by the Government was vitiated by any political or other considerations. We would also not like to go into the question whether or not the power vested in the State under Section 6 of the Uttar Pradesh Higher Education Services Commission Act (supra) which the State Government purportedly invoked could be invoked by it for purposes of undoing the selection process and if could not be, whether the general executive power vested in the State under Article 154 of the Constitution could be exercised by it to institute an enquiry in the facts and circumstances of the case. We say so not because the questions were not germane to the controversy before us but because any enquiry by the State Government whether in exercise of its power under Section 6 or in exercise of its executive power under Article 154 would only duplicate the exercise which is already pending before the High Court in the form of several writ petitions in which the aggrieved candidates have raised

issues relating to the validity of the selection process on several grounds including those which the State Government purports to be looking into on the basis of the complaints received by it. We had in that view asked Mr. Srivastava whether there was any need for the State Government to undertake a parallel exercise especially when the examination by the High Court of all matters concerning the validity of selection would give an opportunity not only to the State Government but also to the aggrieved candidates who have been selected to present their respective version before it. If the High Court on the basis of whatever material is placed before it by the parties came to the conclusion that there was nothing wrong with the selection process, any enquiry made by the State would be wholly unnecessary. On the contrary, if the High Court came to the conclusion that the selection was vitiated by any illegality or irregularity, the State Government could exercise its power and institute an enquiry for the removal of any member who

may have committed any misconduct by being a party to any such illegality or irregularity. To the credit of Mr. Srivastava, we must record that he was agreeable to the course of action suggested by us with the only exception that the vigilance case that stood registered by the State Vigilance Department is allowed to go on to look into the criminal angle if any involved in the so-called illegal selection conducted by the Commission. In the circumstances, therefore, it is unnecessary for us to authoritatively determine the question whether the institution of enquiry by the State Government was justified and, if so, whether the source of power invoked by the Government was indeed available to it. We are of the view that in the writ petitions filed by the aggrieved candidates before the High Court all aspects of the matter shall be open to examination in which everyone connected with the selection process would have an opportunity to place his/her point of view.

24. We are told that the selected candidates may not have been impleaded as parties to the pending writ petitions although they are necessary parties having regard to the fact that any order that the High Court may pass regarding the validity of the selection may affect them adversely. The selected candidates who have been appointed on the basis of the selection process and who have filed undertakings before this Court shall, therefore, be impleaded as parties to the pending writ petitions to avoid any technical infirmity in the proceedings and any consequent delay in the disposal of the matter. A specific direction to this effect is being issued by us in the operative part of this order. Question No.(i) is answered accordingly.

Regarding Question No. (ii)

25. Uttar Pradesh Higher Education Services Commission Act, 1980 was introduced to make the selection of teachers

in Degree and Post-graduate Colleges fair, objective and transparent. The statement of objects and reasons for the legislation has referred to favoritism in the selection of candidates for such colleges and elimination of such infirmities from the selection process as one of the objectives underlying the enactment.

26. In terms of Section 4 of the Act, the Commission established under Section 3 consists of a Chairman and not less than two and not more than four other members to be appointed by the State Government satisfying the conditions of eligibility stipulated under sub-section (2) and (2-a) thereof. Section 11 enumerates the functions of the Commission which includes the preparation of guidelines on matters relating to the method of recruitment, conduct of examinations where considered necessary, holding of interviews for making selection of candidates to be appointed as teachers and selection of experts and appointment of examiners for such examination. Section 12

of the Act stipulates the process for appointment of teachers and inter alia provides that appointment of a teacher of any college shall be made by the Management only in accordance with the provisions of the Act and that any appointment made in contravention thereof shall be void. Sub-section (2) of Section 12 requires the management of the colleges to intimate the existing vacancies and the vacancies likely to be caused during the ensuing academic year to the Director of Education (Higher Education) in such manner as may be prescribed. Sub-section (3) requires the Director to notify to the Commission in the manner prescribed a subject wise consolidated list of vacancies intimated to him from all colleges.

27. The manner of selection of persons for appointment to the post of teacher of a college has also to be determined by regulations. It is further provided that candidate shall be required to indicate their order of preference for the various

colleges, vacancies wherein have been advertised. Section 13 of the Act requires the Commission to hold interviews with or without written examination and to send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be as far as practicable twenty five percent more than the number of vacancies in that subject duly arranged in the order of merit. Such a list would then be valid till the receipt of new list from the Commission. Sub-section (3) empowers the Director to intimate to the Management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancies. Sub-section (6) requires a copy of such intimation to be sent to the candidate concerned.

28. Section 14 of the Act enjoins upon the Management to issue an appointment letter to the person whose name has been intimated to it. It reads:

"14. Duty of Management.- (1) The management shall within a period of one month from the date of receipt of intimation under sub-section (3) or sub-section (4) or sub-section (5) of Section 13, issue appointment letter to the person whose name has been intimated.

(2) Where the person referred to in sub-section(1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on the request of the management intimate fresh name from the list sent by the Commission under sub-section(1) of Section 13 in the manner prescribed."

29. Section 15 entitles the person recommended for appointment but not so appointed by the management to approach the Director for issue of an appropriate direction under sub-section (2). Director is under the said provision empowered to hold an inquiry and to pass an order requiring the management to appoint the applicant as a teacher and to pay to him the salary from the date specified in the order.

30. The Government has in exercise of its power under Section 32 and Section 31 of the Uttar Pradesh Higher Education Services Commission Act, 1980 framed what are known "Uttar Pradesh Higher Education Services Commission Rules, 1981" and "Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983". While the Rules aforementioned deal with the constitution of the Commission, disqualification of the members, investigation into misconduct of members, staff etc. the Regulations referred to above deal with matters like qualifications and experience for appointment as teacher, determination and intimation of vacancies, procedure for selection and the like.

31. A careful reading of the provisions of the Act, the Rules and the Regulations referred to above do not support the theory propounded by Mr. Srivastava and Mr. Dwivedi that the same by a fiction of law create a cadre of principals

either for the purpose of applying reservation or otherwise. As seen earlier the object underlying the legislation was limited to ensuring a combined process of selection that would save time and expense involved in such selections if the same are made individually for each college. It is also intended to remove the element of arbitrariness and other malpractices that were noticed in the making of such selections and appointments by the institutions if left to themselves. The setting up of the Statutory Commission, appointment of persons qualified for the same, stipulating the terms and conditions of service of those appointed and the power to remove the members for misconduct and laying down the procedure for appointment of teachers are all meant to ensure that the process of selection is free from mal-practices that were generally associated with such process when handled by the institutions. There is nothing in the Act, the Rules and Regulations, to even remotely, suggest that the legislature intended to create a cadre of

principals even where none existed earlier either for purposes of reservation or otherwise.

32. The fact that the management was required to communicate the available vacancies to the Director of Higher Education or that an appointment order must be issued, once the selection process is completed and a candidate is recommended for appointment also does not in our opinion have the effect of creating a cadre of principals. All that the said provision is intend to achieve is to ensure that the vacancies are referred to the Statutory Commission to enable it to conduct the process of selection and once the process is completed and recommendations made, the management do not refuse appointment to the candidate considered best for the post.

33. The power vested in the Director to hold an enquiry and to issue directions for payment of salary, in case the

management does not appoint, is also meant to be a step in aid of the process of selection and appointment giving primacy to the opinion of the Commission regarding the merit and suitability of the candidate for such appointment and entitling the candidate to claim salary if the appointment is unjustifiably denied to him. Suffice it to say that the provisions of the Act and the Regulations do not have anything to do with creation of a cadre of Principals nor can the commonality of the selection process be confused with the caderisation of the post of Principals.

34. That brings us to the question whether similarity of the terms and conditions of the employees serving in the aided/affiliated colleges and the effect the payment of salary due to such teachers is reimbursed by the State Government would have the effect of creating a cadre of Principals. Our answer is in the negative. The fact that the State Government offers financial aid to the affiliated colleges in

terms of payment of salary of those serving such institutions does not in our opinion have any relevance to the question whether the posts of Principals in different colleges under different managements constitute a cadre. Merely because the Government supports the institutions which are in all other respects autonomous in their functioning, and are managed by individual managements cannot by any stretch of reasoning be taken as a circumstance constituting the posts in such colleges into a single cadre. So also the fact that the terms and conditions of service of such teachers serving in different colleges including Principals are similar on account of such colleges being affiliated to the same university and being governed by the same set of Statutes, Rules and Regulations also does not have anything to do with the creation or the existence of a single cadre comprising such posts. There is no gainsaying that such common features do not in any way impinge upon the autonomous character of such institutions nor does payment

of salaries and the similarity of conditions of service of the employees provide a test for holding that although serving in different institutions totally independent of each other the Principals appointed in such institution form a common cadre.

35. It was also contended on behalf of the respondents, that the power of appointment effectively rests only with the Director of Higher Education and that managements have no option but to comply with the directions in that regard. This according to the respondents suggests that the Director of Education is the real employer and the management of the institutions in which such appointments are made only carry out a ministerial duty that does not clothe them with the character of being the true employers. We see no merit even in that contention. It is true that in terms of Section 14 of the Act, managements are required to issue an appointment letter to the person whose name has been intimated to it but

any such obligation flowing from Section 14 does not make the State Government the employer of the person appointed. It is evident from a plain reading of Section 14 that the appointment letter has to be issued only by the management. There is no provision empowering the Director to do so. This implies that the selected candidate is taken into the employment of the institution only when the management of the institution issues in his favour a letter of appointment. It is manifest that the appointing authority even under the scheme of the Act remains the management of the institutions. The provisions of the Act simply make sure that the management makes an appointment only of the persons selected for the post and no more. The authorities under the Act do not substitute themselves as the employer of the person appointed.

36. Last but not the least is the fact that the post of Principals in different aided/affiliated institutions is not

transferable or interchangeable. Interchangeability of the post and transferability of incumbents to another post in the same cadre are essential attributes of a cadre, which is in the instant case absent. Reference in this connection may be made to the Uttar Pradesh Higher Education Aided Colleges Transfer of Teachers Rules, 2005 framed by the State Government in exercise of its powers under Section 32 of the U.P. Higher Education Services Commission Act, 1980. Rule 4 of the said Rules is in this regard relevant and may be extracted:

"4(1) Teachers appointed on regular basis and holding lien as permanent teachers shall be entitled to transfer after 10 years of service only once in the whole service period.

(2) The transferred teacher shall become the employee of the college to which he has been transferred as his service conditions shall be governed by the statutes of the University concerned.

(3) The protection of salary of the teacher shall be admissible but the service rules of the new employers shall be applicable, to such teacher.

(4) The transferred teacher, shall be the junior most teacher of his cadre working on the date of his joining in the college concerned.

(5) The teachers shall be transferred against such posts for which salary is paid from the salary payment account. The management of the college before giving its consent to any teacher, shall ensure that no enquiry or any proceeding is pending against the teacher concerned and the post to which he has been considered to be appointed by transfer shall not be advertised by the Uttar Pradesh Higher Education Services Commission.

(6) The transfer application for single/mutual transfers from one college to other shall be submitted to the Director, High Education through the management legally construed and approved by the University along with the written consent of both the two management. The Director, High Education shall submit his recommendations to the Government within one month from the date of receipt of the application within one month from the date of receipt of the application. The Government shall take decision either on the basis of recommendation of the Director or on its own.

(7) No travel Allowance shall be admissible to the teachers against such transfers.

(8) The Manager of the former institution shall send its service book, Character Rolls, Leave Account, G.P.F., Group Insurance account and last pay certificate counter signed by the District Inspector of Schools/Regional Higher Education Officer, as the case may be, to the Regional Higher Education Officer of the Region concerned and to the Director, Higher Education."

37. It is evident from the above that there is no power vested in the State Government or any other authority for that matter to transfer the Principal from one institution to another institution as it may do for instance in the case of Government run institutions where Principal from one government college may be transferred to another government college in the same cadre. Sub-rule (1) of Rule 4 (supra) does not talk about the power of transfer vested in any authority. It talks about entitlement of a permanent teacher to be transferred after 10 years of service only once in the whole service period. Sub-rule (2) provides that the transferred teacher shall become an employee of the college to which he has been transferred. More importantly sub-rule (4) makes the transferred teacher go to the bottom of the cadre to which he may be transferred. That provision may not make much sense when it comes to transfer of a Principal from one college to another but it certainly shows that even when there are plurality of posts in the cadre

lower than the principal the person transferred from another institution would figure at the bottom of the said cadre. This again is a circumstance which negates the theory of Principals being a part of the same cadre.

38. Similarly in terms of sub-rule (5) the management of the college has to ensure that no enquiry or any proceeding is pending against the teacher concerned before giving its consent for the transfer of the teacher. This means that the institutions may refuse to relieve a teacher even when he may like to be transferred, should an enquiry be pending against him. Sub-rule (6) envisages that the transfer can be made only by mutual consent.

39. It is abundantly clear from the above that the attribute of interchangeability and transferability is missing in the case of Principals – in much the same measure as in the case of teachers, in the lower cadre. We have, therefore, no

hesitation in holding that there is no cadre of Principals serving in different aided and affiliated institutions and that the Principal's post is a solitary post in an institution. Reservation of such a post is clearly impermissible not only because the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 provides for reservation based on the 'cadre strength' in aided institutions but also because such strength being limited to only one post in the cadre is legally not amenable to reservations in the light of the pronouncement of this Court to which we shall presently refer.

40. We may before referring to the decisions of this Court on the question whether a single post can be reserved, notice the decision of this Court in **Balbir Kaur's** case (supra) relied upon by Mr. Patwalia. That was also a case from the State of U.P. It related to appointment of a

Principal under the U.P. Secondary Education Services Commission and Selection Boards Act, 1982. One of the questions that fell for consideration was whether the post of Principal in institutions offering secondary education was amenable to reservation having regard to the Reservation Act of 1994 referred above. This Court answered the question in the negative and gave two reasons in support of that conclusion. Firstly, the Court found that Section 10 of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 expressly excluded the post of Principal from the purview of the Reservation Act of the year 1994. Secondly and more importantly the post of Principal in an educational institution being a single post in the cadre such a post was held not amenable to reservation for any such reservation would amount to making a 100% reservation which was found impermissible under Articles 15 and 16 of the Constitution. Relying upon the decision of this Court in **Dr. Chakradhar Paswan v. State of Bihar & Ors.**

(1988) 2 SCC 214 and **Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association & Ors.** (1998) 4 SCC 1, this Court held that any reservation qua a single post cadre either directly or by the device of rotation of roster was not valid. The Court also held that since the Reservation Act, 1994 did not provide for clubbing of all the educational institutions in the State of U.P. for the purpose of reservation there is no question of clubbing the post of Principals in all the educational institutions for the purpose of applying the principles of reservation under the 1994 Act. The following passage is in this regard apposite:

“it was held that there cannot be any reservation in a single post cadre and the decisions to the contrary, upholding reservation in single post cadre either directly or by device of rotation of roster were not approved. Besides, as noted above, neither the principal Act, nor the Rules made thereunder or the 1994 Act provide for clubbing of all educational institutions in the State of U.P. for the purpose of reservation and, therefore, there is no question of clubbing the post of Principals in all the educational institutions for the purpose of applying the principle of reservation under the 1994 Act.”

41. It was argued on behalf of the respondents that while Section 10 of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 specifically excluded the post of Head of the institution from the process of determination of number of vacancies to be reserved for candidates belonging to Scheduled Caste, Scheduled Tribes and other Backward Classes, no such exclusion was made in the case of the 1980 Act that regulates selection for appointment to the Degree and Post-degree Colleges. This according to learned counsel for the appellant implied that wherever the legislature intended that the post of Principal should be excluded from reservation it specifically provided so and in case such exclusion was not intended no such provision was made. The decision in **Balbir Kaur's** case (supra) argued learned counsel for the appellants was on that basis distinguishable.

42. We do not think so. It is true that Section 10 of the 1982 Act which stipulates the procedure for selection of candidates for direct recruitment requires determination of the vacancies to be reserved for candidates belonging to SC, ST and Backward Classes and reference of such vacancies to be made to the Commission established under the said Act but excluding the post of Principal/Head of the institution from the said determination but it is equally true that Section 12 of 1982 Act with which we are concerned does not require any exercise to be undertaken by the Institutions for determining the number of vacancies to be reserved for candidates belonging to reserved categories. There is consequently no provision by which the post of Principal/Head of the institution is excluded from any such process. The two provisions in that sense are not comparable. In one case the number of vacancies to be reserved is required to be determined while in the other no

such requirement has been stipulated. Exclusion of the Principal's post from such determination under the 1982 Act cannot, therefore, be overemphasized in the absence of a provision requiring a determination of the reserved vacancies under Section 12 of the 1980 Act.

43. That apart we repeatedly asked learned counsel for the appellant-State and Mr. Dwivedi, learned counsel appearing for the managements whether there was any rationale for giving a differential treatment to Principals in Degree & Post-Graduate colleges in the matter of reservation, keeping in view the fact that Principals in Secondary Educational Institutions were not subject to any such reservation. We neither expected nor got any explanation from the learned counsel. The reason was obvious. If the posts of Principals in the secondary school which are much larger in number than the Degree and Post-Graduate colleges are not amenable to reservation and have been specifically excluded

from that process, there is no earthly reason why posts of Principals in Degree and Post-Graduate colleges which are relatively fewer in number available in colleges imparting higher education ought to be subjected to such reservation. What is true in the case of secondary schools would, therefore, be true in the case of Degree and Post-Graduate colleges also. Any interpretation that may render the legal position anomalous or absurd shall, therefore, have to be eschewed.

44. The other reason why we have no difficulty in rejecting the contention urged by appellants is the fact that this Court has in **Balbir Kaur's** case (supra) specifically examined the question whether the post of Principals in secondary institutions can be reserved independent of the provision by which such post are excluded from reservation. This Court held that since the posts of Principals are single post such reservation is not permissible qua them. There is no way

that view can be ignored or wished away by the State or the managements. Whether or not a single post can be reserved is even otherwise fairly well settled by the decisions of this Court to which we need refer only briefly.

45. The decision of this Court in **Indra Sawhney and Ors. v. Union of India and Ors.**, 1992 Supp.(3) SCC 217, continues to be the locus classicus on the subject of reservation. This Court in that case held that reservation under Articles 14, 15 and 16 must be applied in a manner so as to strike a balance between opportunities for the reserved classes on the one hand and other members of the community on the other. Such reservation cannot exceed 50% in order to be constitutionally valid.

46. In **Chakradhan Paswan's** case (supra) this Court relying upon the decision in **Arati Ray Choudhury v. Union of India** 1974 (1) SCC 87, **M.R. Balaji v. State of Mysore**

AIR 1963 SC 649 and **T. Devadasan v. Union of India** AIR 1964 SC 179 held that separate posts in different institutions cannot be clubbed together for the purpose of reservation and that reservations may be made only where there are more than one posts. Reservation of only a single post in the cadre would amount to 100% reservation and thereby violate Articles 14(1) and 16(4) of the Constitution.

In **Bhide Girls Education Society v. Education Officer, Zila Parishad, Nagpur and Ors.**, 1993 Supp (3) SCC 527 this Court held that a single post of Headmistress of an institution could not be reserved as the same would amount to making a 100% reservation.

47. The controversy was authoritatively set at rest by the Constitution Bench decision of this Court in **Post-graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and Ors.** (1998) 4 SCC 1 case (supra) where this Court overruled the decisions of this

Court in **Union of India and Anr. v. Madhav s/o Gajanan Chaubal and Anr.** (1997) 2 SCC 332, **Union of India v. Brij Lal Thakur** (1997) 4 SCC 278 and **State of Bihar v. Bageshwari Prasad** 1995 Supp (1) SCC 432 and observed:

"34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

48. In the light of the above decision, we have no hesitation in holding that the post of principals in each one of the aided/affiliated institution being a single post in the cadre is not amenable to any reservation. Question No.(ii) is accordingly answered in the affirmative.

49. Mr. Patwalia, learned counsel for the selected candidates then argued that if the High Court was correct in holding that the provisions of 1994 Act regulating reservation of vacancy did not apply to the post of Principals in different affiliated/aided Degree and Post-Graduate colleges, there was no reason why the undertakings furnished by the selected candidates to this Court as a step in aid of their appointments should not be discharged and the selected candidates allowed to assume office on a substantive basis subject to any direction which the competent Court may issue as regards the validity of the

selection process and the consequent appointments. He urged the State Government was not releasing in favour of the appointed candidates the full benefits of such appointments in the form of increments and allowances etc. only because the appointments made were subject to the outcome of these proceedings and the undertaking furnished by the candidates. Alternatively, he urged that even if the appointments made by the State pursuant to the directions of this Court were to remain inchoate and subject to the outcome of the writ petitions before the High Court there was no reason why dues legitimately payable to the selected candidates should not be directed to be released on such conditions as the Court deem fit and proper.

50. On behalf of the State and the management it was per contra argued that the release of any further benefits to the selected candidates could await the disposal of the writ

petitions pending before the High Court which disposal could be expedited in the interest of all concerned.

51. The view taken by the High Court in so far as the applicability of reservation to single posts of Principal in the affiliated and aided institutions has been affirmed by us while answering question No.(ii) above. To that extent the controversy is being given a quietus. All the same the question whether there were any malpractices and if so whether the selection process could be nullified by the State Government in exercise of its power under Section 6 of the 1980 Act or Article 154 of the Constitution has been left open by us in the light of the fact that the question regarding legality of the selection process is pending adjudication before the High Court where all parties concerned would have an opportunity to present their respective cases. A parallel enquiry at the Government level into those questions has been held by us to be unnecessary.

There is, therefore, no final adjudication of the dispute between the parties in so far as the validity of the selection process is concerned. Such being the case we do not consider it necessary to relieve the appointed candidates of the obligations flowing from the undertaking given by them subject to which only the appointments were allowed to be made. This may not, however, mean that the appointed candidates will not be entitled to claim full benefit of the post admissible to the incumbent to which they have been appointed during the period such appointments continue to remain in force. The directions under which the appointments were allowed to be made also did not permit the State to withhold benefits legitimately flowing from such appointments. If any additional financial benefits by way of allowances become payable to the appointed candidates the same must be allowed to be drawn by them. Enjoyment of all such benefits would also remain subject to the undertakings which the appointed candidates have filed

before this Court.

52. An apprehension was expressed before us that the matter may continue languishing in the High Court for a long time especially because of the failure of the writ petitioners before the High Court in impleading the selected candidates as parties. It was submitted that orders for addition of the selected candidates could be passed by this Court to allay any such apprehensions. We see no impediment in passing appropriate orders in that regard, especially when, none of the parties before us were opposed to any such orders impleading the selected candidates as party respondents to the pending writ petitions before the High Court.

53. In the result we dispose of these appeals with the following directions:

(1) The impugned orders passed by the High Court to the extent the same hold that the posts of Principals in affiliated/aided colleges are not amenable to reservation are affirmed.

(2) Order dated 12th June, 2007 issued by the Government appointing the Divisional Commissioner, Allahabad as an Enquiry Officer to hold an enquiry into the validity of selection process and the report submitted by the said Enquiry Officer shall stand quashed and the order passed by the High Court to that effect affirmed.

(3) The question whether the Government was competent to direct an enquiry into the validity of the selection process under Section 6 of the Uttar Pradesh Higher Education Services Commission Act, 1980 or under Article 154 of the Constitution is left open in view of the pendency of the writ petitions challenging the validity of the selection process before the High Court.

(4) The High Court shall in the writ petitions pending before it be free to examine all issues regarding the selection process in question including the validity of the procedure followed in making the same. Depending upon whether the High Court finds the selection process to be valid or otherwise the Government shall have the liberty to institute an enquiry against the members of the State Services Selection Commission if such enquiry is otherwise permitted under law. In case, however, the High Court upholds the selection process and dismisses the writ petitions there shall be no room left for the State Government to embark upon any further enquiry into the matter on the administrative side. The aggrieved party shall be free to challenge the view taken by the High Court in appropriate proceedings in accordance with law.

(5) The selected candidates who have filed undertakings in this Court and have been appointed to the posts of Principals pursuant to the orders of this Court shall stand impleaded as parties to each of the writ petitions pending in the High Court and challenging the selection process. The selected candidates shall based on this direction appear before the High Court on 2.5.2011 without any further notice in each one of the petitions and file their counter-affidavits. Failure on the part of the candidates to do the needful shall be suitably dealt with by the High Court who shall be free to proceed ex-parte, against those who fail to comply with this direction.

(6) In order to expedite the hearing of the case the Chief Justice of the High Court of Allahabad is requested to place the writ petitions before a Division Bench of the High Court for an early hearing and disposal as far as possible before the 1st December, 2011.

(7) Pending disposal of the writ petitions by the High Court the selected candidates shall be entitled to receive their pay and allowances including increments etc. otherwise admissible to the post of Principal as if the appointments were made on a valid and substantive basis. Such benefits flowing from the same shall, however, be subject to the outcome of the writ petitions before the High Court and the undertakings furnished by the appointed candidates to this Court which undertaking shall be deemed to have been continued till such time the writ petitions are finally disposed of.

54. The parties shall bear their own costs.

.....J.
(V.S. SIRPURKAR)

New Delhi
March 8, 2011

.....J.
(T.S. THAKUR)