

**Court No. - 4**

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**Case :-** WRIT - A No. - 323 of 2022

**Petitioner :-** Bharti Patel And 5 Others

**Respondent :-** State Of U.P. Thru. Addl. Chief Secy. Basic Education  
Deptt. Lko. And 9 Others

**Counsel for Petitioner :-** Sridhar Awasthi

**Counsel for Respondent :-** C.S.C.,Deepak Singh,L.B.Singh  
Bhadauria,Mujtaba Kamal Sherwani,Ran Vijay Singh

**Hon'ble Rajan Roy,J.**

Heard Sri Sudeep Seth, learned Senior Advocate assisted by Sri Sridhar Awasthi, learned counsel for the petitioner, Sri Raghavendra Singh, learned Advocate General for the official opposite parties, Sri Upendra Nath Mishra, learned Senior Advocate for opposite party no.7, Sri Mujtaba Kamal Sherwani, learned counsel for opposite party no.9 and Sri Rakesh Kumar Chaudhary, learned counsel for opposite party no.10.

By means of this petition, the petitioners have challenged the decision of the State Government dated 05.01.2022 by which they have decided to issue an additional select list of 6800 (inadvertently referred as 6000 in the earlier order dated 25.01.2022) candidates by revisiting the selection process based on which the appointments have already been made against 69000 posts, and the consequential action in issuing a select list of 6800 persons for appointment as Assistant Teacher.

On 25.01.2022, this Court had passed the following order:-

*"Heard.*

*Five of the petitioners herein had appeared in the selection (A.T.R.E. 2019) for 69000 vacancies on the post of Assistant Teachers which were advertised on 1.12.2018, but did not succeed. As per counsel for the petitioners they are entitled to be considered for vacancies which had not been advertised in 2018, but would be advertised subsequently. Out of the petitioners petitioner nos. 2, 4, 5 and 6 belong to the 'Reserved Category.*

*Contention of Sri Sudeep Seth, learned Senior Counsel appearing for the petitioners is that as against 69000 posts advertised on 1.12.2018 all*

*the posts were filled up after selection as per the affidavit filed by the Secretary, U.P. Basic Education Board filed in Writ Petition No. 1389 (SS) of 1991, Jawahar Lal v. State of U.P. on 12.7.2021. He also points out that a writ petition was filed Hon'ble the Supreme Court seeking relief that certain vacancies which had occurred subsequently could also be filled up on the basis of the selection held in pursuance to the advertisement dated 1.12.2018 which was in respect of the 69000 posts referred hereinabove, however, this relief was declined by Hon'ble the Supreme Court vide its judgment dated 11.2.2021 passed in Writ Petition (Civil) No. 760 of 2020, Shivam Pandey & ors. v. State of U.P. & ors. The said order reads as under :*

*"This petition filed under Article 32 of the Constitution of India prays inter alia that 26944 unfilled posts from the Assistant Teachers Recruitment Examination 2018 be directed to be filled through instant selection.*

*Heard learned counsel for the parties.*

*It is a matter of record that 69000 posts were advertised to be filled through Assistant Teachers Recruitment Examination 2019.*

*In the circumstances, no direction can be issued to the concerned authorities to fill up posts in excess of 69000.*

*We, therefore, see no merit in the petition.*

*The writ petition is, accordingly, dismissed.*

*Pending applications, if any, also stand disposed of."*

*He also informs the court that in another writ proceedings the High Court has already been informed the 6000 posts which are to be filled from the 'Reserved Category' candidates are not part of the 68500 vacancies on the posts of Assistant Teacher which were advertised on 9.1.2018 (A.T.R.E. 2018). In this scenario counsel for the petitioners says that these vacancies were neither advertised on 1.12.2018 nor on 9.1.2018 and, as such these 6000 vacancies allegedly meant for 'Reserved Category' candidates were never advertised and were not part of selection referred hereinabove relating to A.T.R.E. 2018 and A.T.R.E. 2019, therefore, they cannot be filled up on the basis of the said selection, as is apparent from what has been noticed hereinabove. He says that, therefore, unless these vacancies are advertised and a fresh recruitment exercise for recruitment is conducted, there is no way that these 6000 vacancies can be filled up, but it seems that based on the selection for the 69000 posts referred hereinabove these vacancies are being filled up, which is clearly in the teeth of the decision of Hon'ble the Supreme Court dated 11.2.2021 as also the law on the subject. He says that the five petitioners who are not successful in A.T.R.E. 2019 could nevertheless be entitled to be considered for fresh appointment in the subsequent vacancies which would include the 6000 vacancies which are the subject matter of this writ petition, as petitioner nos. 2, 4, 5 and 6 belong to the Reserved Category from which these posts are to be filled up. Moreover, he says that the determination of these reserved vacancies itself is erroneous and, therefore, the other petitioners of the General Category have also a locus standi in the matter. He further says that out of the 6000 selectees opposite party nos. 6 to 10 have been arrayed in representative capacity. He says that on 5.1.2022 a select-list of 6000 reserved category candidates has been issued which is not tenable in law and is liable to be stayed. The petitioner no. 6 had not appeared in A.T.R.E. 2019 and is a prospective candidate for the*

*vacancies which had occurred after the advertisement dated 1.12.2018, hence this petition by him.*

*Sri Ran Vijay Singh, learned counsel appearing for the opposite parties says that learned Advocate General would argue the matter; hence some short time be provided.*

*List/put up this case on 27.1.2022 as first case of the day."*

Today, Sri Raghavendra Singh, learned Advocate General has put in appearance on behalf of the official opposite parties and informed the Court that certain reserved category candidates had filed petitions before this Court, some of which are Writ -A. No.13156 of 2020 and Writ -A No.8142 of 2020 wherein certain orders were passed by this Court based on which, the State has revisited the implementation of reservation policy as also the provisions of the Reservation Act, 1994 and the law on the subject, according to which, such reserved category candidates who are otherwise meritorious, meaning thereby, they have secured marks higher than the cut-off for the general category are entitled to be considered and selected for unreserved posts. Accordingly, the State Government after revisiting the matter has taken a decision to issue a fresh select list containing names of 6800 candidates who are those reserved category persons who have secured higher marks than the cut-off for the unreserved category and as this exercise is the result of orders passed by this very Court, therefore, the Court should not interfere in the matter at this stage.

Learned Advocate General also informs the Court that, in fact, entire process of selection is informed by the State officials to the N.I.C. and it is the latter which prepares the select list.

Learned Advocate General also submitted that as regards the order of Hon'ble the Supreme Court quoted in the order of this Court dated 25.01.2022, the same is not applicable in the facts of this case, as already clarified hereinabove.

However, on being asked as to how if 69000 posts have already been filled up as noticed in the earlier order, these 6800 selectees would be appointed, against which post they would be appointed, and whether against one post two persons can work and get salary, the learned Advocate General could not satisfy the Court on this count but stated that State has not taken any decision to oust the already appointed candidates who may have secured lesser marks than these 6800 candidates.

It is nobody's case certainly not that of the State that before issuing the list of 6800 additional selected candidates, as referred hereinabove, an equivalent number of candidates who have been appointed earlier have been disengaged in accordance with law.

Sri Upendra Nath Mishra, learned Senior Counsel for opposite party no.7 has invited attention of the Court to the orders passed by this Court which are annexed at page no.144-145 of the writ petition which have been referred by the learned Advocate General. He says that those writ petitions should be heard on priority basis and he also says that additional 6800 selectees are, in fact, entitled to be appointed and those who are not entitled but have been appointed are liable to be ousted. He agrees to the extent that persons cannot be appointed in excess of the 69000 vacancies which were advertised.

Sri Rakesh Kumar Chaudhary, learned counsel who has put in appearance on behalf of opposite party no.10 adopts the arguments of Sri Upendra Nath Mishra. In addition to it, he says that physically handicapped candidates who have also filed writ petitions before this Court, leading writ petition is Writ-A. No.13792 of 2020 wherein certain orders have been passed by this Court for giving the benefit of the quota prescribed for such persons and therefore, inclusion of these physically handicapped persons in the impugned select list of 6800 persons is in accordance with the orders of this Court and need not to be interfered with, certainly not at the interim stage. However, on being asked as to

whether the opposite party no.10 on whose behalf he appears is a physically handicapped, he submitted that no, he was not physically handicapped but he is the counsel in Writ-A. No.13792 of 2020 and connected matters, therefore, he has made the aforesaid statement.

At this stage, Sri Seth, learned Senior Advocate appearing for the petitioners further submitted that if 69000 vacancies of Assistant Teachers were advertised and all of them have been filled up as admitted by the Principal Secretary to the Department in the affidavit filed before this Court as already noticed in the earlier order dated 25.01.2022, then, assuming for a moment that the State was entitled to revisit the selection process and based on such exercise it found that there were 6800 candidates who had a better right of being selected and appointed based on the marks obtained by them, then, at best the select list already published ought to have been modified and an equivalent number of candidates who have secured lesser marks than those 6800 candidates should have been ousted from it in accordance with law and if they have already been appointed, this should have been done after due and proper notice to them, and these 6800 candidates should have been substituted in their place but without undertaking such exercise the impugned action of the State to induct 6800 additional selectees leads to a situation where the 69000 vacancies would be exceeded which is apparently illegal and prejudices the rights of the petitioners to be considered against equivalent number of vacancies (6800) which would otherwise be re-advertised and the petitioner nos.1 to 5 would have a right of being considered for selection against such vacancies irrespective of the fact that they have not succeeded in the earlier selection. The petitioner no.6 in fact has not appeared in the selection ARTE 2019 and is entitled to be considered against such vacancies as and when they are advertised.

As regards Sri Chaudhary's contention that the petitioners do not have locus to challenge the impugned action, the petitioner nos.1 to 5 who belong to reserved category had appeared in the selection and the

contention of Sri Sudeep Seth, learned Senior Advocate as already recorded in the earlier order is that any vacancy other than 69000 will have to be re-advertised and fresh selection will have to be held in this regard in which the petitioner nos.1 to 5, even if, they have not succeeded in the earlier selection, are entitled to appear, therefore, filling up of any post in excess of 69000, without advertising these excess 6800 posts apart from being violative of law declared by Hon'ble the Supreme Court and the constitutional provisions, encroaches on the rights of the petitioner nos.1 to 6 to appear in such selection. The petitioner no.6 did not appear in the selection in question and therefore, he in any case, will have a right to appear in future selection against these excess vacancies. *Prima facie*, at this stage, Sri Seth, learned Senior Advocate appears to be correct.

Considering the facts of the case as already noticed in the earlier order dated 25.01.2022 which need not be reiterated and which, at least at this stage, have not been rebutted satisfactorily, especially the order of Hon'ble the Supreme Court dismissing a writ petition wherein it was the case that vacancies in excess of 69000 which were not advertised on 01.12.2018 (A.T.R.E.-2019) should be allowed to be filled up on the basis of the said selection advertised on 01.12.2018, as it has been dismissed with specific observation that posts in excess of those advertised cannot be allowed to be filled up based on the said selection, a piquant situation has been created by the State by the impugned action, *prima facie*. No doubt, there are orders of this Court passed in Writ - A. No.13156 of 2020 which are annexed at page no.144-145 of the writ petition which read as under:-

"Court No. - 10

Case :- SERVICE SINGLE No. - 13156 of 2020

Petitioner :- Mahendra Pal & Ors.

Respondent :- State Of U.P.Thru Addl.Chief Secy.,Deptt Of Basic Edu.&Ors

Counsel for Petitioner :- Neel Kamal Mishra

Counsel for Respondent :- C.S.C,Ajay Kumar

Hon'ble Devendra Kumar Upadhyaya,J.

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Heard Shri Upendra Nath Mishra, learned Senior Advocate, assisted by Shri Neel Kamal Mishra appearing for the petitioners, Shri P. K. Singh, learned Additional Chief Standing Counsel representing the State-respondents and Shri Ajay Kumar, learned counsel representing the respondent nos.3 and 7.

Issue notice to respondent nos.5 and 6 returnable at an early date.

Connect with Writ Petition No.10122 (S/S) of 2020 and other similar matters.

Let counter affidavit in this case be filed by the respondents within a period of four weeks. Two weeks' time thereafter shall be available to the learned counsel for the petitioners to file rejoinder affidavit.

List immediately after expiry of the aforesaid period.

It has been contended by the learned Senior Advocate that in fact rules of reservation in the selection in question has wrongly been followed as a result of which many deserving candidates have not been given appointment. He has, however, drawn attention to the Court on various orders passed earlier in similar matters requiring the respondents to file counter affidavit, however, counter affidavit in the said matters has not been filed.

In these circumstances, it is directed that a master counter affidavit in this case shall be filed and while filing the counter affidavit in this case, a copy of the same shall be furnished to the learned counsel representing the other similar writ petitions. There will be no requirement of separate counter affidavit to be filed on behalf of the respondents in other matters and counter affidavit which may be filed in this case shall be treated to be counter affidavit in other similar matters as well.

The Court expects that all sincere endeavours shall be made to file the counter affidavit on behalf of the respondents within the time being stipulated in today's order.

Order Date :- 25.8.2020

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Court No. - 4

Case :- SERVICE SINGLE No. - 13156 of 2020

Petitioner :- Mahendra Pal & Ors.

Respondent :- State Of U.P.Thru Addl.Chief Secy.,Deptt Of Basic Edu.&Ors

Counsel for Petitioner :- Neel Kamal Mishra

Counsel for Respondent :- C.S.C,Ajay Kumar

Hon'ble Rajan Roy,J.

Heard.

*The contention Shri Upendra Nath Mishra, learned Senior Counsel appearing for the petitioners is that 28,000/- reserved category candidates, who had secured more than 67.11 marks which was the cut off for the general category, were not adjusted in the general category select list but were maintained in the reserved list contrary to Section 3(6) of the Reservation Act, 1994 and the law laid down by the Supreme Court by which a reserved category candidate, if otherwise meritorious and entitled to be included in the general select list, should not be treated as a reserved category candidate. Shri Mishra relies upon a chart prepared by him a copy of which is annexed as Annexure No. SA-7 at Page 63 of the supplementary affidavit dated 27.01.2021 in this regard.*

*On 03.02.2021 this Court had sought a response from the State Authorities in this regard which has not been filed as yet.*

*Let the concerned official opposite parties file their response positively within a period of one week.*

*As prayed on behalf of learned Advocate General, list/ put up on 12.04.2021 along with all connected matters except Writ Petition No. 9946(S/S) of 2020 which has been incorrectly connected and it shall now be delinked from this Bunch of writ petitions.*

*It is made clear that no further opportunity shall be granted to the State for filing response in this writ petition or in any other connected writ petition in which the response had been called by the Court but has not been filed and the matter shall be heard accordingly, as, matters pertaining to selection and appointment should not be kept pending for long. If they are kept pending for long they create complications for all the stake holders.*

*Order Date :- 17.3.2021"*

But the Court had only asked the State to file counter affidavit in the matter and the State was required to explain as to how the reservation policy has been implemented. The appropriate course for the State officials in these circumstances was to comply the said orders, revisit the matter, find out the facts and errors, if any, and on noticing them, to place the same before the Court either seeking its guidance or seeking permission to rectify the select list which had already been implemented or to modify the select list and disengage the persons already appointed, if they were erroneously appointed, as per law, but, instead of doing it, the State officials, for reasons best known to them, have hurried to issue a select list of 6800 persons in addition to the 69000 appointments already made by them without disengaging or cancelling the appointment of 6800



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candidates already appointed if they had secured lesser marks. Considering the fact that only 69000 posts were advertised, candidates in excess of 69000 cannot be appointed and they already having been appointed, one fails to understand as to what purpose the issuance of select list of 6800 persons, who may otherwise have been entitled to selection and appointment, seeks to achieve in the factual scenario created by the State, as, in no circumstances, persons can be appointed in excess of 69000 which were advertised.

Now, it is for the State to decide what it has to do in the matter as it is the State which has created this situation but one thing is very clear that persons beyond 69000 vacancies cannot be appointed against such posts.

Considering the discussion made hereinabove, it is provided that in no circumstances, persons in excess of the 69000 vacancies which were advertised on 01.12.2018 (A.T.R.E 2019), shall be appointed and unadvertised vacancies shall not be filled-up without being advertised and selection being held in respect thereof. It is ordered accordingly.

Let *Dasti* notice be issued for service upon opposite party nos.6 and 8. In addition to it, considering the large number of selectees which are 6800 and the complications which may be involved in getting them impleaded individually and having notices served upon them, especially as at this stage, they are only selectees and have not been appointed, the ends of justice would suffice if a publication is made in two daily newspaper, one of English and other of Hindi, having wide circulation in the state, namely, 'the Times of India' and 'Dainik Jagaran' notifying the selectees about the pendency of this petition so that they may, if they so choose, join in these proceedings, otherwise, persons have been impleaded in representative capacity. The Senior Registrar shall facilitate adequate steps being taken for publication in the newspaper as aforesaid.

Pleadings be exchanged between the parties.

List this case along with other matters i.e. Writ - A. No.13156 of 2020, Writ -A No.8142 of 2020 and connected matters referred hereinabove including Writ-A. No.13792 of 2020 and connected matters wherein pleadings are said to be complete.

Considering the urgency in the matter as already noticed in one of the orders quoted hereinabove as the fate of large number of selectees and also those already appointed may be involved, therefore, list this case on **18.02.2022** along with the connected matters.

**(Rajan Roy,J.)**

**Order Date :- 27.1.2022**

Shanu/-