

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.4815 OF 2019**

ANUPAL SINGH AND OTHERS

...Appellants

VERSUS

**STATE OF U.P THROUGH PRINCIPAL
SECRETARY, PERSONNEL DEPARTMENT
AND OTHERS**

...Respondents

WITH

**C.A. No. 4817/2019, C.A. No. 4816/2019, C.A. No. 4819/2019,
C.A. No. 4818/2019, C.A. No. 4821/2019, C.A. No. 4820/2019,
C.A. No. 4830/2019, C.A. No. 4829/2019, C.A. No. 4833/2019,
C.A. No. 4825/2019, C.A. No. 4827/2019, C.A. No. 4834/2019,
C.A. No. 4828/2019, C.A. No. 4824/2019, C.A. No. 4835/2019,
C.A. Nos.4822-23/2019, C.A. No.4836/2019, C.A. No. 4826/2019,
C.A. No. 4832/2019, C.A. No. 4831/2019**

J U D G M E N T

R. BANUMATHI, J.

These appeals arise out of the judgment dated 10.02.2017 in Writ-C No.34196 of 2015 and batch matters passed by the High Court of Judicature at Allahabad in and by which the High Court while upholding the result of written examination for the post of Technical Assistant-Group-C Agriculture Department, quashed selection process subsequent to the written examination and directed the Principal Secretary, State of U.P. to send requisition to the Uttar Pradesh Public Service Commission on the basis of quantifiable data and cadre strength as well as actual persons

working in different categories so that the interview may be conducted afresh and complete the selection.

2. Brief facts which led to filing of these appeals are as under:-

The Uttar Pradesh Public Service Commission issued an advertisement No.A-5, E-1/2013 dated 22.10.2013 inviting applications for 6628 vacancies of Subordinate Agriculture Services, Cadre-III (Technical Assistant Group-C). In the said advertisement for the total requisitioned 6628 vacancies, category-wise vacancies are as under:-

| Advertisement Number | Vacancies in Subordinate Agriculture Services, Cadre-III (Technical Assistant Group-C) | | | |
|--|--|-------------|------------|------------|
| Advt. No. A-5, E-1/2013 dt. 22.10.2013 | Unreserved | SC | ST | OBC |
| Total vacancies: 6628 | 3616 | 2211 | 235 | 566 |

Horizontal reservation in original advertisement is as under:-

| Women | Handicapped | Dependents of Freedom Fighter | Ex-servicemen |
|-------------|-------------|-------------------------------|---------------|
| 1325 | 253 | 132 | 331 |

The appellants as well as the private respondents applied for and appeared in the written examination held on 30.03.2014. As per the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "UP Reservation Act, 1994"), specific percentages of vacancies have been reserved for different categories viz., (a) in the case of Scheduled Castes – 21% (b) in the case of Scheduled Tribes – 2% and (c) in the case of OBC–27%. It was brought to the notice of the State Government that there was wrongful calculation of category-wise vacancies in the earlier requisition and therefore, the earlier requisition was required to be revised. After a detailed inquiry as to

the cadre strength of Technical Assistant – Group C and the actual working strength of persons in different categories, it was found that initially the number of requisitioned candidates in the category of General/Unreserved and OBC were wrongly calculated. It was noticed that the diploma holders who were required to be appointed against “Unreserved quota”; but were wrongly appointed against the “OBC quota” and the same was to be rectified. According to the State, after adjustment of diploma holders against “General Category” and in order to fulfill the requirements of constitutional and statutory mandate of reservation, the State Government has reworked the vacancies for different categories of persons and sent the revised requisition for the vacancies for different categories. The State Government after taking opinion of the Department of Personnel *vide* its order dated 20.08.2014 approved the revised vacancies for different categories of persons in accordance with the applicable reservation rules and accordingly, revised the requisition. Based on the said order dated 20.08.2014, Department of Agriculture *vide* its letter No.AC/101 dated 20.08.2014 sent the revised requisition for 6628 posts to the UP Public Service Commission as under:-

| | | | | |
|--|--|-------------|------------|-------------|
| Advertisement Number | Vacancies in Subordinate Agriculture Services, Cadre-III (Technical Assistant Group-C) | | | |
| Government Order No.941/12-4-14-1992/2014 dt. 20.08.2014 | Unreserved | SC | ST | OBC |
| Total vacancies: 6628 | 2515 | 1882 | 201 | 2030 |

Horizontal reservation in amended requisition is as under:

| | | | |
|-------------|-------------|-------------------------------|---------------|
| Women | Handicapped | Dependents of Freedom Fighter | Ex-servicemen |
| 1325 | 252 | 132 | 330 |

Based upon the above revised requisition, on 15.09.2014, UP Public Service Commission declared the result of the written

examination wherein, both the appellants as well as the private respondents were declared successful. After declaration of the result of written examination, the UP Public Service Commission issued an Office Memorandum dated 12.10.2014 notifying 2515 posts for Unreserved/General category; 1882 posts for SC category; 201 posts for ST category and 2030 posts for OBC category in consonance with the government order dated 20.08.2014. The successful candidates who cleared the written examination appeared for interview held from 27.10.2014 onwards. Finally, when the result of select list candidates was declared on 21.05.2015, the private respondents did not qualify.

3. Number of writ petitions came to be filed before the High Court by the unsuccessful candidates against respondents No.1 to 4 and by impleading some of the successful candidates assailing the validity of the Office Memorandum dated 12.10.2014 and the result declared on 21.05.2015 praying that they be quashed. They further prayed for direction to respondents No.1 to 4 to prepare the result afresh without giving effect to Office Memorandum dated 12.10.2014. It was contended that change in the number of vacancies in different categories is illegal and the same amounts to changing the rules of the game in the middle of the selection process. The impugned result was also assailed on the ground that it is in contravention to Section 3(1) of UP Reservation Act, 1994 and Rule 15(3) of UP Subordinate Agriculture Services Rules, 1993 (Agriculture Service Rules, 1993) and that the percentage of reservation to SC/ST and OBC categories crossed the upper limit of 50%.

4. After referring to decisions on the aspect of reservation, *vide* the impugned judgment, the High Court allowed the writ petitions *inter alia* holding as under:-

- The entire maneuvering in the instant case has taken place in the garb of diploma holders wherein, 1749 diploma holders in the department were adjusted/regularized in the year 1998. Even at the time of their regularization, their heads were counted and the same is reflected from their regularization orders and once their heads were already counted qua their respective categories and reserved category of persons especially OBC adequately represented, there was no occasion for putting all the diploma holders against the open category.
- After the declaration of result of written examination on 15.09.2014, changing the number of vacancies for different categories amounts to violation of Rule 15(3) of Agriculture Service Rules, 1993 during the pendency of the advertisement and thus, depriving 3303 general category candidates even to appear in the interview and allowing 4392 more candidates of OBC category to appear for interview by bringing them in the zone of consideration for the selection, amounts to changing the rule of the game during the process of selection.
- The Commission declared the final result on 21.05.2015 wherein, 88% candidates belonging to reserved categories have been shown to be selected whereas, only 12% candidates under open category have been selected and the entire selection is in contravention to Section 3(1) of UP Reservation Act, 1994 and the Rule 15(3) of the Agriculture Service Rules, 1993.

On the above findings and other reasonings, the High court allowed the writ petitions by holding that subsequent to the declaration of the result of written examination, the entire selection is vitiated and as such, the same cannot be sustained. Placing reliance upon

Union of India and Others v. O. Chakradhar (2002) 3 SCC 146, the High Court held that when the court comes to the conclusion that the selection is tainted, there is no necessity to serve individual notices and as such, the entire selection can be cancelled. The High Court issued a direction to the Principal Secretary, Government of U.P. to send a fresh requisition to the UP Public Service Commission on the basis of quantifiable data, existing strength of cadre as well as the actual persons working in different categories forthwith so that interview be conducted at the earliest and that the entire exercise be completed within four months.

5. Being aggrieved by the impugned judgment, the appellants who are the selected candidates and have already joined their respective posts have filed these appeals before this Court. *Vide* order dated 03.03.2017, this Court ordered to maintain status-quo as existing on the said date.

6. The batch of appeals were heard at length and the hearing stretched over number of dates. We have heard Mr. P.S. Patwalia, learned Senior counsel, Mr. M. Karpaga Vinayagam learned Senior counsel, Mr. Guru Krishna Kumar, learned Senior counsel, Ms. Mahalakshmi Pavani, learned Senior counsel, Ms. Vibha Datta Makhija, learned Senior counsel, Mr. Mehul M. Gupta, learned counsel and Mr. A. Subba Rao, learned counsel appearing on behalf of the appellants. We have heard Mr. S.R. Singh, learned Senior counsel appearing on behalf of respondent-State. We have also heard Mr. Alok Mishra, learned counsel, Mr. K. Parmeshwar, learned counsel, Mr. Anil Nauriya, learned counsel, Ms. Sumita Hazarika, learned counsel and Mr. Dinesh Kumar Tiwary, learned counsel appearing on behalf of the applicants-respondents.

Contentions of the appellants

7. **Mr. P.S. Patwalia, Senior Counsel:** Contending that the revised requisition was in accordance with the provisions of UP Reservation Act, 1994, the learned Senior counsel submitted that there are no allegations of *malafide*/arbitrariness to vitiate the selection process. It was submitted that based on the complaint received by the State Backward Class Commission, the Department of Agriculture has undertaken an exercise and found that there was wrongful calculation of the category-wise vacancy and the earlier requisition was required to be rectified. Learned Senior counsel submitted that the revised Office Memorandum of the UP Public Service Commission dated 12.10.2014 is based on the revised requisition of the Department of Agriculture dated 20.08.2014 and only the breakup of vacancies category-wise has been reworked and revised and while so, the High Court erred in saying that the rules of the game had been changed in the midst of the selection process vitiating the selection. It was submitted that the eligibility criteria have not been changed at all and the High Court erred in relying upon *K. Manjusree v. State of Andhra Pradesh and another (2008) 3 SCC 512* and *Hemani Malhotra v. High Court of Delhi (2008) 7 SCC 11* for setting aside the process of selection from the stage of declaration of result of the written examination. Learned Senior counsel further submitted that the private respondents/intervenors having participated in the interview and having found that they are unsuccessful, have filed the writ petitions and they are estopped from challenging the Office Memorandum dated 12.10.2014 and the selection process.

8. **Mr. M. Karpaga Vinayagam, Senior Counsel:** Learned Senior counsel submitted that the revised Office Memorandum of UP Public Service Commission dated 12.10.2014 was based upon the revised requisition sent by the Department of Agriculture dated 20.08.2014 and only when the private respondents found themselves unsuccessful, they chose to challenge the Office Memorandum dated 12.10.2014. Learned Senior counsel further submitted that the private respondents have not raised any protest over the change in number of vacancies and the appellants having been selected and presently working, great prejudice would be caused to them if the entire selection process is set aside.

9. **Mr. Guru Krishna Kumar, Senior Counsel:** Learned Senior Counsel submitted that the State has filed detailed counter affidavit explaining the reason for revised requisition and that the same was done only to fulfill the constitutional mandate of reservation and the statutory provisions in UP Reservation Act, 1994. The High Court has not considered this aspect in proper perspective. Learned Senior counsel further submitted that the private respondents have not shown as to how they are affected by the increase in number of posts for OBCs. It was contended that non-impleading of successful parties in the writ petition is fatal and the High Court was wrong in saying that impleading of some of the successful candidates would be enough. Learned Senior counsel further contended that the rules of the game was not changed and only the category-wise vacancies were changed and the Government has the power to rectify the requisite number of vacancies in order to fulfill the constitutional mandate of reservation and the provisions of UP Reservation Act, 1994.

10. **Ms. Mahalakshmi Pavani, Senior Counsel:** Reiterating the above submissions, learned Senior counsel submitted that the eligibility criteria for selection of Technical Assistant – Group C has not been changed at all; but only the breakup of vacancies category-wise has been reworked and the High Court was not right in setting aside the selection of the appellants. It was submitted that the successful candidates have been working for more than three years and their selection and appointment are based on merit in different categories and the entire selection cannot be set aside upsetting the entire process.

11. **Ms. Vibha Datta Makhija, Senior Counsel:** Reiterating the above submissions, learned Senior counsel contended that after issuing earlier requisition dated 03.10.2012, department has undertaken an exercise and found that there was wrongful calculation of category-wise vacancies. It was further contended that a complaint was made before the Backward Classes Commission and after the complaint, on direction from the State Government, the Department of Agriculture has undertaken the exercise and found that there was wrongful calculation of the category-wise vacancy and the earlier requisition was thus required to be rectified. It was submitted that when there is no allegation of *mala fide*/arbitrariness, the entire selection process cannot be set aside.

12. **Mr. Mehul M. Gupta and Mr. A. Subba Rao, learned counsel** have also reiterated the above submissions and *inter alia* made their contentions. Mr. Mehul M. Gupta prayed to exercise the power under Article 142 of the Constitution of India to issue appointment orders to 906 candidates.

Contentions of the State

13. **Mr. S.R. Singh, Senior counsel:** Taking us through the detailed counter affidavit filed by the State, learned Senior counsel has submitted that the High Court was not right in holding that the revised requisition as amounting to changing the rules of the game during the process of selection. Learned Senior counsel has submitted that mere rectification of mistake in the calculation of vacancies category-wise before commencement of interview would not amount to changing the rules of the game during the process of selection. Learned Senior counsel also made elaborate submissions as to the absorption of diploma holders against the posts meant for "General quota". It was submitted that to keep the appointments within the permissible statutory limits, the appointments were issued only to 6599 candidates and 29 candidates withheld for want of details. It was submitted that 906 candidates were not given appointments as it would be beyond the permissible statutory limit of reservation under the UP Reservation Act, 1994.

Contention of the private respondents

14. **Mr. Alok Mishra, learned counsel:** Learned counsel submitted that changing the number of vacancies category-wise is in violation of the statutory provisions and Rule 15(3) of the Agriculture Service Rules, 1993 and also the constitutional mandate was infringed and by revising the number of posts in the various categories, substantial number of candidates were illegally deprived of the opportunities to appear in the interview. It was contended that Office Memorandum dated 12.10.2014 changing the number of vacancies category-wise suffers from vice of arbitrariness and the

High Court rightly held that the rules of the game were changed during the process of selection and the High Court rightly set aside the selection of the appellants directing holding of interview afresh based on the quantifiable data collected and taking into account the cadre strength and the actual working strength. Learned counsel further submitted that since the rules were violated and the constitutional mandate was infringed, as held in *Union of India and others v. O. Chakradhar (2002) 3 SCC 146*, individual notices were not required to be sent to the selected candidates and non-issuance of notice to individual selected candidates will not affect the correctness of the impugned judgment.

15. **Mr. K. Parameshwar, learned counsel:** Learned counsel submitted that challenging the Office Memorandum dated 12.10.2014 issued by the UP Public Service Commission and also the selection process and the final selection list, number of writ petitions were filed and the appellants have challenged the judgment in the lead case in WP (C) No.34196 of 2015 and in the other writ petitions viz. WP(C) No.38399/2015, WP(C)No.45822/2015, WP(C) No.47894/2015, WP(C) No.50878/2015 and SPLAD No.283/2016 and the appellants have not chosen to challenge the judgment passed in number of other writ petitions remaining unchallenged and operate as *res judicata*. In support of his contention, learned counsel placed reliance upon *Sri Gangai Vinayagar Temple and Another v. Meenakashi Ammal and Others (2015) 3 SCC 624*. Insofar as horizontal reservation, the learned counsel further submitted that wherever the candidates for horizontal reservation were not available, they were filled up with the candidates with the vertical reservation which is not in

accordance with law and the consistent view taken by the Supreme Court. The learned counsel submitted that considering number of irregularities in the selection process, the High Court rightly set aside the selection process subsequent to the stage of declaration of written examination and the impugned judgment warrants no interference.

16. Mr. Anil Nauriya, learned counsel submitted that the terms and conditions for the selection were set out in the advertisement and the rights of the candidates for selection to be considered in accordance with the rules as they existed on the date of the advertisement and not by the subsequent events. In support of his contention, the learned counsel placed reliance upon *N.T. Devin Katti and others v. Karnataka Public Service Commission and others (1990) 3 SCC 157*. The learned counsel further submitted that by the adjustment of diploma holders against the “general quota”, the State erred in revising the requisition of the vacancies in different categories which prejudicially affect the interest of the candidates who appeared in the examination and passed in the written examination and the High Court rightly set aside the selection process subsequent to the stage of declaration of the written examination. Reliance was placed upon *Government of India through Secretary and another v. Ravi Prakash Gupta and another (2010) 7 SCC 626*.

17. Mr. Dinesh Kumar Tiwary, learned counsel: Drawing our attention to Uttar Pradesh State Public Service Commission (Regulation of Procedure and Conduct of Business) Act, 1974, the learned counsel submitted that the conduct of business by the UP Public Service Commission shall be strictly in accordance with the

provisions and the revised Office Memorandum dated 12.10.2014 changing the number of vacancies in different categories is unsustainable and the High Court rightly set aside the same and directed the selection process to be continued and directed the State to send requisition to the UP Public Service Commission on the basis of quantifiable data and cadre strength as well as actual persons working in different categories. Reliance was placed upon *K. Manjusree*.

18. Upon consideration of the above submissions and the impugned judgment and other materials on record, the following points arise for determination:-

- (i) Whether the revised requisition dated 20.08.2014 and the office memorandum of UP Public Service Commission dated 12.10.2014 is only rectification of wrongful calculation of category-wise vacancies?
- (ii) Whether the revised Office Memorandum dated 12.10.2014 suffers from arbitrariness as contended by the respondents?
- (iii) Whether the office memorandum dated 12.10.2014 revising the breakup of vacancies would amount to change in the rules of the game during the process of selection?
- (iv) Having had full knowledge of revising the category-wise vacancies and having consciously participated in the interview, whether the unsuccessful candidates-private respondents-intervenors are estopped from challenging the selection of the successful candidates?
- (v) When the regularization of diploma holders was not under challenge in the writ petitions filed in the year 2015, whether the High Court was right in going into the legality of the regularization of the diploma holders and recording an

adverse finding regarding the absorption of the diploma holders against the General quota?

- (vi) Whether revised requisition of the number of vacancies category-wise has caused prejudice to the General/Unreserved category candidates as contended by the respondents?
- (vii) Whether 906 candidates are entitled to seek for direction for issuance of appointment orders?

Revised requisition dated 20.08.2014 and Office Memorandum dated 12.10.2014 notifying revised vacancies in different categories – in consonance with the provisions of UP Reservation Act, 1994 and UP Subordinate Agriculture Service Rules, 1993 (UP Service Rules, 1993)

19. The posts of Technical Assistant Grade-III are Class-III Posts which are governed under the Agriculture Service Rules, 1993. The posts were restructured with effect from 25.10.2007. The pay scale of the aforesaid posts was fixed as Rs.3200-4900 and the total number of sanctioned posts of Technical Assistant Grade-III was 10,531. After restructure of the posts, the details of the vacancies were worked out in which it was found that 10,531 posts were sanctioned out of which 5,860 persons were working. On that ground, the total vacancies were determined as 4,671; after making deduction of 2% as per Government Order dated 05.03.2002, the total vacant posts were shown as 4,578 and the requisition was sent to the UP Public Service Commission on 03.10.2012. Subsequently, the number of posts were increased by 2,092 out of which, as per Government Order dated 05.03.2002, 2% had been deducted and *vide* requisition dated 30.04.2013, a requisition was

sent showing the increased vacant posts as 2,050 out of which total number of vacancies against the OBC quota was shown as 554. In the earlier requisition dated 03.10.2012, the total number of vacancies against the OBC quota were shown as 12. Thus, after sending the second requisition, total number of vacancies against the OBC quota were shown as $554 + 12 = 566$.

20. The Department of Agriculture to fill up the existing vacancies of the year 2013 determined the vacancies and sent it to the State Government. Accordingly, the State Government sent the requisition to the UP Public Service Commission showing total number of posts as 6,628 out of which 3,616 posts were shown against the General quota, 2,211 posts shown against the Scheduled Castes, 235 posts reserved for the Scheduled Tribes and 566 posts were figured out against Other Backward Classes and accordingly, UP Public Service Commission published the advertisement dated 22.10.2013.

21. After the publication of the vacancies, a complaint was filed before the Backward Classes Commission, UP complaining that instead of showing actual vacancies of the reserved category of Other Backward Classes, 566 posts have been shown in the advertisement. On such complaint, the Department of Agriculture as well as UP Public Service Commission were called upon to reply to the aforesaid complaint. It was thereafter, the Agriculture Department undertook an exercise and found that on account of wrongful calculation of the category-wise vacancy, the earlier requisition was required to be rectified. After undertaking the exercise as directed by the Authority, it was found that the total number of "General category" candidates was wrongly figured out

and shown as 2,622; while in fact 1,749 employees (979 OBC and 770 Others) who were absorbed on account of having a diploma from the Government Agriculture School during the years 1981 to 1987, were also required to be counted against the “General category”.

22. The Government Agriculture School, Bulandshahar, Government Agriculture School, Chargawan-Garakhpur and Government Agriculture School, Jhansi were run by the Agriculture Department. The schools were providing certificate of two years in Krishi Prasar Diploma and the persons undertaking aforesaid diploma during 1981 to 1987 were required to be appointed directly without any selection. However, after enforcement of the Agriculture Service Rules, 1993 since the diploma holder of 1981 to 1987 could not be appointed, the Directorate has sought guidelines from the State Government *vide* its letter dated 22.01.1998. The State Government *vide* its letter dated 04.06.1998 granted the relaxation and directed the appointment of Agriculture Diploma Holders who were 1822 in number, out of which 1749 had joined up to 1998. Since at the time of determination of the vacancy, the OBC category persons appointed on the basis of the Agriculture Diploma Holders Certificate were also counted against the vacancy in OBC category while they were not required to be counted against the OBC category, the wrongful calculation had been arrived at. The earlier requisition sent showing only 566 vacancies against the “OBC quota” while in fact it should have been 2030, as all the diploma holders were appointed against the “General quota” and they have not been appointed against the “OBC quota”. According to the department, subsequent requisition was merely a rectification of the

earlier mistake. On the date of advertisement, the actual vacancies of OBC was 2030 but on account of wrongful calculation by the department, it was advertised as 566.

23. It is thus due to the wrongful calculation of OBC quota, the earlier requisition was sent showing the vacancies against OBC quota as only 566; while in fact vacant posts against OBC quota should be 2030. It is in this context, the Department of Agriculture has reworked the vacancy against various categories and sent the revised requisition as under:-

| Total number of sanctioned posts | 50% General Category | 21% Scheduled Caste | 2% Scheduled Tribe | 27% Other Backward Classes |
|---|----------------------|---------------------|--------------------|----------------------------|
| 10559 | 5280 | 2217 | 211 | 2851 |
| Employees working - 3796 | 2713 | 297 | 6 | 780 |
| Vacant – 6763 | 2567 | 1920 | 205 | 2071 |
| After 2% deduction as per Government Order – 6628 | 2515 | 1882 | 201 | 2030 |

24. After taking the opinion of the Personnel Department, the first respondent *vide* order dated 20.08.2014 approved the vacancies for different categories of persons in accordance with the applicable Agriculture Service Rules and sent the revised requisition as under:-

| Advertisement Number | Vacancies in Subordinate Agriculture Services, Cadre-III (Technical Assistant Group-C) | | | |
|--|--|-------------|------------|-------------|
| Government Order No.941/12-4-14-1992/2014 dt. 20.08.2014 | Unreserved | SC | ST | OBC |
| Total vacancies: 6628 | 2515 | 1882 | 201 | 2030 |

On the basis of the above government order dated 20.08.2014, the Department of Agriculture *vide* its letter No. AC/101 dated 20.08.2014 sent the above revised requisition to the UP Public Service Commission. According to the State, the category-wise

vacancy position was changed only after a meeting was held of all concerned i.e. representatives of the Karmik Department as well as the representatives of the Administrative Department and it was found that a wrongful calculation of category-wise vacancy had been sent earlier which was likely to result in anomalies in the total representation of each category in total cadre strength of Technical Assistant Grade-III in the Agriculture Department. Hence, revised requisition was sent on 20.08.2014 from the Administrative Department to the Director, Agriculture who in turn was directed to communicate the same to the UP Public Service Commission.

25. The result of the written examination published on 15.09.2014 was only based on the above revised requisition. The declaration of result of the written examination was issued based on the revised requisition of the posts. The UP Public Service Commission acted on the revised requisition of the Government dated 20.08.2014. Before the candidates were called for interview, Office Memorandum dated 12.10.2014 was issued by the UP Public Service Commission revising the number of vacancies for different categories. The UP Public Service Commission has thus not travelled beyond the requisition sent by the Government.

26. By the revised requisition, the State endeavoured to achieve the object of reservation as per Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. The original advertisement was for '3616' posts against "Unreserved (UR) quota" and only '566' against "OBC quota" which was far less than the requisite percentage for OBC. As per Section 3(1) of UP Reservation Act, 1994, specific percentage of vacancies have been reserved for different

categories. Section 3 of the UP Reservation Act, 1994 reads as under:-

“3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes:-

(1) In public services and posts, there shall be reservation at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5), in favour of the persons, belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens:-

- a. In the case of Scheduled Castes – twenty-one per cent;
- b. In the case of Scheduled Tribes – two per cent;
- c. In the case of Other Backward Classes of citizens –
twenty-seven per cent

Provided that reservation under clause (c) shall not apply to the category of Other Backward Classes of the citizens specified in Scheduled-II.

Provided further that the reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment of to be made.

(2) If in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of the year notwithstanding anything to the contrary contained in sub-section (1).

.....”

27. Section 4 of the UP Reservation Act, 1994 imposes responsibility and powers upon the competent authority for compliance of the Act. Section 4 reads as under:-

“4. Responsibility and powers for compliance of the Act.-

- (1) The State Government may by notified order, entrust the appointing authority or any officer or employee with the responsibility of ensuring the compliance of the provisions of this Act.
- (2) The State Government may in the like manner, invest the appointing authority or officer or employee referred to in sub-section (1) with such powers or authority as may be necessary for effectively discharging the responsibility entrusted to him under sub-section (1).

28. Section 5 of the UP Reservation Act, 1994 is the penal provisions. Section 5 provides that *“Any appointing authority or officer or employee entrusted with the responsibility under Section 4(1) who wilfully acts in a manner intended to contravene or defeat the purposes of the Act, shall, on conviction, be punishable with imprisonment which may extend to three months or with fine.....”*. As per Section 2(a) of the UP Reservation Act, 1994, “appointing authority” in relation to public services and posts means the authority empowered to make appointment to such services or posts.

29. As pointed out earlier, the post of Technical Assistant Grade-III is governed under the Agriculture Services Rules, 1993. As per Rule 15 of Agriculture Service Rules, 1993, the recruitment authority would determine the number of vacancies to be filled during the year for Scheduled Castes, Scheduled Tribes and other Backward Class candidates under Rule 6. Rule 15 reads as under:-

15. Determination of vacancies

The Recruitment Authority would determine the number of vacancies to be filled during the year and would also determine the number of

vacancies for Scheduled Castes, Scheduled Tribes and other categories candidates under Rule 6. The vacancies for direct recruitment, would be informed to the Commission according to the prevalent rules and orders at that time or would be notified to the Employment Office.

Rule 6 of the Agriculture Service Rules, 1993 stipulates that “*reservation for Scheduled Castes, Scheduled Tribes and other Backward Class candidates would be done according to the orders of the Government prevalent at the time of the appointment.*” Agriculture Service Rules, 1993 thus clearly stipulate that it is for the Recruitment Authority to determine the number of vacancies to be filled during the year and would also determine the number of vacancies for Scheduled Castes, Scheduled Tribes and other category candidates under Rule 6. On noticing that there was wrongful calculation of the category-wise vacancy, the Recruitment Authority is empowered to rectify the wrongful calculation and make a revised requisition which is in accordance with the provisions of UP Reservation Act, 1994 and Agriculture Service Rules, 1993.

30. Reiterating the well-settled principle that the percentage of reservation has to be worked out in relation to number of posts which form cadre strength, in *R.K. Sabharwal and others v. State of Punjab and others (1995) 2 SCC 745*, the Supreme Court held as under:-

“6. The expressions ‘posts’ and ‘vacancies’, often used in the executive instructions providing for reservations, are rather problematical. The word ‘post’ means an appointment, job, office or employment. A position to which a person is appointed. ‘Vacancy’ means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a ‘post’ in existence to enable the ‘vacancy’ to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in

respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

31. It emerges from the materials on record that the total number of sanctioned posts is 10,559 and the quota of 21% Scheduled Caste has come to 2,217 but of which 297 persons are working which come to 2.81% in the Scheduled Caste quota. The rest of vacant posts 1,920 are about 18.18% and after deduction of 2% as per the Government Order, the revised requisition for 1,882 posts against the Scheduled Caste quota has come to 18.18% which was sent. Likewise, against 2% Scheduled Tribe, total posts carved out were 211 posts out of 10,559 posts and the working strength of the employees is 6 which comes to 0.05%. Out of the rest of the 205 posts which comes to 1.94%, after deduction of 2% as per government order, 201 posts of Scheduled Castes were sent in the revised requisition. So far as 27% posts of Other Backward Classes, the total number of posts are 2,851 out of 10,599 and the working employees of OBC is 780 which come to 7.38% and the rest of the 2,071 posts come to 19.61%. In the same way, 2,713 employees are working against the General quota which comes to 25.69% and rest of the posts required to complete 50% quota is 2,567 i.e. 24.31%. This can be well clarified by the following chart:-

| Total number of sanctioned posts | 50% General Category | 21% Scheduled Caste | 2% Scheduled Tribe | 27% Other Backward Classes |
|----------------------------------|----------------------|----------------------|--------------------|----------------------------|
| 10559 | 5280 | 2217 | 211 | 2851 |
| Employees working – 3796 | 2713 (25.69%) | 297 (2.81%) | 6 (0.05%) | 780 (7.38%) |
| Vacant – 6763 | 2567 (24.31%) | 1920 (18.18%) | 205 (1.94%) | 2071 (19.61%) |
| | | | | |

| | | | | |
|--|-------------------------|-------------------------|-----------------------|-------------------------|
| After 2% deduction as per Government Order – 6628 | 2515 (23.81%) | 1882 (17.82%) | 201 (1.90%) | 2030 (19.22%) |
|--|-------------------------|-------------------------|-----------------------|-------------------------|

From the above tabular column, it is seen that the revised requisition is to ensure compliance of the reservation in terms of Section 3 of the UP Reservation Act, 1994. This aspect has not been properly appreciated by the High Court.

32. Revising the number of vacancies in OBC category as 2030 does not violate the right of the General category candidates because the State Legislature has enacted the Reservation Act No.4 of 1994 providing for reservation, keeping in mind the parameters of Article 16(4) of the Constitution of India. By revising requisition, the State has endeavoured to achieve the object of the reservation by working out the vacancy for selection of the posts in question without causing any prejudice to the General category candidates. The revised requisition so made was within the purview of the competency of the State in order to achieve the object of the UP Reservation Act, 1994. Moreover, as rightly contended by the appellants, the total number of vacancies have not been changed or modified.

33. The appropriate authority has taken the cadre strength of the Technical Assistant Grade-III as a unit in the operation of the roster in the year to ascertain whether the given class or group is adequately represented in service. The revised requisition of the Department of Agriculture dated 20.08.2014 was well within the purview of the competence. Moreover, the total number of vacancies i.e. 6628 have not been changed or modified.

34. As pointed out earlier, the category-wise vacancy position was changed after a meeting of all concerned was held i.e.

representatives of the Karmik Department as well as of representatives of the Administrative Department and it was found that a wrong calculation of category-wise vacancy had been sent earlier. If the original requisition dated 22.10.2013 was to be retained, it would have resulted in anomalies of the category-wise posts thereby contravening the provisions of the UP Reservation Act, 1994. Hence, the revised requisition was sent on 20.08.2014 from the Administrative Department to the Director, Agriculture who in turn communicated the same to the UP Public Service Commission. By the revised requisition of vacancies for various categories, there is no violation of any rules; on the other hand, it is only to rectify the calculation of vacancies in different categories and to comply with the requisite quota of reservation in different categories as per UP Reservation Act, 1994. This aspect was not properly appreciated by the High Court.

35. In para (68) of the impugned judgment, though the High Court held that the Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given group or category is adequately represented. The revised requisition dated 20.08.2014 and the Office Memorandum dated 12.10.2014 of the UP Public Service Commission was only to ensure the compliance of the provisions of the UP Reservation Act, 1994 and to ensure that the category-wise reservation is not violated which was not kept in view by the High Court.

Absorption of the Diploma Holders

36. In para (64) of the judgment, the High Court observed that the entire maneuvering has taken place in the garb of diploma holders wherein, 1749 diploma holders in the department were

adjusted/regularized in the year 1998 and there was no occasion for putting all the diploma holders against open category and under the garb of adjustment of vacancies, the entire scenario has been changed and thus, the entire vacancies against General category have been usurped. The High Court held that the diploma holders ought not to have been absorbed against the General category so as to alter the advertised number of posts under the General category.

37. As pointed out earlier, the earlier requisition was sent showing only 566 vacancies against the OBC quota, while in fact, it should have been 2030, as all the diploma holders were appointed against the General quota and they have not been appointed against the OBC quota. In this context, we may usefully refer to the affidavit filed by the Deputy Director, Agriculture (Training) before the High Court on 17.03.2015 which reads as under:-

“.....the Government Agriculture School-Bulandshahar, Government Agriculture School-Chargawan-Gorakhpur and Government Agriculture School-Jhansi were running by the Agriculture Department. The schools were providing certificate of two years in Krishi Prasar Diploma and the persons undertaking aforesaid diploma during 1981 to 1987 were required to be appointed directly without any selection. However, after enforcement of the Service Rules 1993 since the diploma holder of 1981 to 1987 could not be appointed, the Directorate has sought guidelines from the State Government vide its letter dated 22/1/1998. The State Government vide its letter dated 4/6/1998 granted the relaxation and directed for appointment of Agriculture Diploma Holders who were 1822 in number, out of which 1749 were joined upto 1998. Since at the time of determination of the vacancy, the OBC person appointed on the basis of the Agriculture Diploma holders certificate were also counted against the vacancy in OBC category while they were not required to be counted against the OBC category, the wrongful calculation had been arrived.

The earlier requisition was sent and showing only 566 vacancies against the OBC quota while in fact it should be 2030, as all the diploma holders were appointed against the general quota and they have not been appointed against the OBC quota. Subsequent requisition was merely a rectification of the earlier mistake. On the date of advertisement, the actual post of OBC was lying vacant 2030 posts but on account of wrongful calculation it was advertised as 566.....”.

38. At the time of absorption of the diploma holders in the year 1998, there was no provision for reservation for Backward Class category in the concerned department; only by U.P. Reservation (Amendment) Act, 2002, the reservation was extended to the concerned department and therefore, the appointees/diploma holders have to be considered only against the “general quota” candidates. As seen from the above affidavit filed by the Deputy Director, Agriculture (Training), the diploma holders were not required to be counted against OBC quota; by a wrongful calculation, they have been adjusted against the OBC quota which is not permissible in law as reservation cannot be granted retrospectively. By the revised requisition, the Government sought to rectify this mistake which resulted in alteration in number of vacancies available against certain categories. Such rectification of mistake by Government cannot be faulted nor can this be a ground for recalling the advertisement in question and issuing a fresh one. The High Court, in our view, should have adopted a pragmatic approach of the matter in hand and considered the fact that the variation in number of vacancies against “General quota” was only because of the absorption of the diploma holders against the “General quota” and rectifying the mistake of adjustment against “OBC vacancies”.

Office Memorandum dated 12.10.2014 revising the vacancies category-wise – whether amounts to changing the rules of the game after the commencement of the selection

39. The High Court held that after the advertisement dated 22.10.2013, changing the break-up of vacancies would amount to change of the rules of the game after the commencement of the selection process which is not permissible. The High Court placed reliance upon *Madan Mohan Sharma and another v. State of Rajasthan and others* (2008) 3 SCC 724. The learned counsel for the private respondents submitted that changing the vacancies in different categories is illegal and the same amounts to changing the rules of the game in the middle of the selection process. In support of their contention, the learned counsel appearing for the respondents placed reliance upon *Hemani Malhotra* and *K. Manjusree*.

40. In *K. Manjusree*, the selection to ten posts of District and Sessions Judge (Grade-II) in the Andhra Pradesh Higher Judicial Service in pursuance of the advertisement dated 28.05.2004, was the subject matter of the appeal. The selection was on the basis of written examination followed by an interview. There were no minimum cut-off marks prescribed for clearing the interview. After the selection process was completed and the select list was prepared by the interview committee which was approved by the Administrative Committee, when the matter was placed before the Full Court, the Full Court authorized the Chief Justice to constitute a committee of judges for preparing the list of candidates to be recommended for appointment of District and Sessions Judge (Grade-II). Accordingly, the Chief Justice appointed a sub-committee

of two judges which prepared a fresh list of candidates for appointment prescribing minimum qualifying marks for the interview. The sub-committee was of the view that apart from applying the minimum marks for the written examination, the cut-off marks/percentage should be applied for interview marks also and those who failed to secure such minimum marks in the interview, should be considered as having failed. The sub-committee thus prepared a fresh merit list. In those facts and circumstances of the case, the Supreme Court set aside the select list by holding that the introduction of the requirement of cut-off marks for the interview after the entire selection process was completed amounted to changing the rules of the game after the selection process was almost complete which is impermissible.

41. In *Hemani Malhotra*, the result of the written examination of the Delhi Higher Judicial Service was not announced by the High Court of Delhi, and individual communication was sent to the petitioners therein, informing them of their selection for the interview. Five candidates were called for interview on various dates and were informed of its postponement i.e. the interview first scheduled for 20-09-2006 was later deferred to 29-11-2006, 07-12-2006, 23-01-2007, 05-02-2007 and was finally conducted on 27-02-2007. Meanwhile on 13-12-2006, by a Full Court Resolution, minimum qualifying marks for the viva voce was prescribed (55% for general candidates and 50% for SC and ST candidates). In such facts and circumstances, prescribing minimum marks for the interview was struck down as changing the rules of the game during selection process. Initially, there was prescription of minimum marks for written test only and not for viva voce. The minimum marks for

viva voce were prescribed after written test was over and it was held that this was not permissible.

42. The case in hand is distinguishable from those cases where the mode of selection was altered by fixing the cut-off marks after the selection process had completed/commenced; whereas in the present case only wrongful calculation in the number of vacancies in different categories had been corrected in order to satisfy the percentage of reservation against various categories as per the provisions of UP Reservation Act, 1994. Such correction cannot be said to changing the rules or basis of selection. The eligibility criteria was not changed.

43. It is also pertinent to note that the proposition of law that rules of game cannot be changed after the selection has been commenced itself has been referred for reconsideration by a larger Bench in *Tej Prakash Pathak and others v. Rajasthan High Court and others* (2013) 4 SCC 540. While referring the matter to a larger Bench, in *Tej Prakash*, the Supreme Court explained the ambit of the expression changing the rules of the game as under:-

“11. Those various cases deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment, or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in *K. Manjusree v. State of A.P.* (2008) 3 SCC 512 or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment (such as driving test as was in *Maharashtra SRTC v. Rajendra Bhimrao Mandve* (2001) 10 SCC 51).

15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the “rules of the game” insofar as the prescription of eligibility criteria is concerned as was done in *C. Channabasavaih v. State of Mysore* AIR 1965 SC 1293, etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the “rules of the game” stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon’ble Chief Justice of India for appropriate orders in this regard.”

44. As discussed earlier, the case in hand is clearly distinguishable from *K. Manjusree (supra)* and *Hemani Malhotra (supra)*. The diploma holders were wrongly counted against the vacancies in OBC category; while they could not have been counted against OBC category and while doing so, a wrongful calculation had been arrived and the same has to be corrected by counting the diploma holders against the general category.

45. It is to be pointed out that instruction No.7 in the advertisement dated 22.10.2013 stipulates that the number of vacancies may increase or decrease. Agriculture Service Rules, 1993 clearly stipulate that it is the prerogative of the government to determine the number of vacancies in accordance with the rules. As per Rule 15 of the Agriculture Service Rules, 1993, “*the recruitment authority would determine the number of vacancies for Scheduled Castes, Scheduled Tribes and other category candidates under Rule 6.*” Rule 6 stipulates that “*reservation for Scheduled Castes, Scheduled Tribes and other Backward Class candidates would be done according to the orders of the government prevalent at the time of appointment.*”

46. Rule 15(3) of the Agriculture Service Rules, 1993 provides for calling the successful candidates, keeping in mind the vacancy of the reserved categories required under Rule 6 after the declaration of result of written examination and for the adequate representation of each category, three times of candidates qua vacancies are required to be invited for the interview. Thus, on the total advertised number of seats for open category i.e. $3616 \times 3 = 10848$ candidates were eligible under Rule 15(3) of the Agriculture Service Rules, 1993 to be called for interview.

47. In the impugned judgment, the High Court has observed that by decreasing the number of seats of General category, number of candidates of General category were illegally deprived from appearing in the interview. The High Court has also observed that by increasing the number of seats of OBC category, more candidates have been called for interview, even though they were not eligible as per advertisement dated 22.10.2013 and thus, changing the number of vacancies for each category, has prejudiced the number of candidates who are to be called for interview. The relevant findings of the High Court is as under:-

“.....Thus, on the total advertised number of seats for open category i.e. $3616 \times 3 = 10848$ candidates were eligible under Rule 15(3) for interview test. However, by decreasing the number of seats vide letter dated 20.08.2014 i.e. $2515 \times 3 = 7545$ candidates were invited, thus, $10848 - 7545 = 3303$ candidates were illegally deprived to appear in the interview test. However, in the Other Backward Class category, only 566 vacancies were advertised against which only 1698 candidates would be eligible to appear in the interview. However, by illegally increasing the number of vacancies to 2030, 6090 candidates had been invited for the interview. Thus, in the Other Backward Class category, $6090 - 1698 = 4392$ more candidates were called for the interview, even though they

were not eligible as per advertisement dated 22.10.2013. Thus, by changing the number of vacancies for different categories amounts to violation of Rule 15(3) of Rules, 1993 during the pendency of the advertisement and thus, depriving of 3303 general category candidates, even to appear in the interview and allowing 4392 more candidates of OBC in the zone of consideration for the selection, amounts to changing the rule of the game during the process of selection.....”.

48. By careful consideration, we are unable to countenance the above view taken by the High Court that the change in number of vacancies has illegally deprived 3303 candidates in General category from appearing in the interview and had benefitted the OBC category candidates. Be it noted that the writ petitions were filed by the candidates who appeared for interview and were unsuccessful. It is not known that what were the marks secured by the writ petitioners/candidates in the written examination and what were their position in the merit list. The writ petitioners who are unsuccessful candidates have not demonstrated as to how they were prejudicially affected by the change in number of vacancies against “General category” and “OBC category”. The High Court was not right in making a generalised observation that decrease in the number of vacancies against “General category” has illegally deprived 3303 candidates from appearing in the interview.

49. Notification by the UP Public Service Commission dated 12.10.2014 is based upon the revised requisition of the vacancies by the order of the Administrative Department dated 20.08.2014. In our view, this would not amount to changing the rules of the game after the selection process had commenced nor it had affected the selection process by changing the eligibility criteria.

50. **Having participated in the interview, the private respondents cannot challenge the Office Memorandum dated 12.10.2014 and the selection.** On behalf of the appellants, it was contended that after the revised notification dated 12.10.2014, the private respondents participated in the interview without protest and only after the result was announced and finding that they were not selected, the private respondents chose to challenge the revised notification dated 12.10.2014 and the private respondents are estopped from challenging the selection process. It is a settled law that a person having consciously participated in the interview cannot turn around and challenge the selection process.

51. Observing that the result of the interview cannot be challenged by a candidate who has participated in the interview and has taken the chance to get selected at the said interview and ultimately, finds himself to be unsuccessful, in *Madan Lal and Others v. State of J&K and Others (1995) 3 SCC 486*, it was held as under:-

“9 The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted ”

52. In *K.H. Siraj v. High Court of Kerala and Others* (2006) 6 SCC 395, it was held as under:-

“73. The appellant-petitioners having participated in the interview in this background, it is not open to the appellant-petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper... ”.

53. In *Union of India and Others v. S. Vinodh Kumar and Others* (2007) 8 SCC 100, it was held as under:-

“19. In *Chandra Prakash Tiwari v. Shakuntala Shukla* (2002) 6 SCC 127, it was further observed:-

“34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not ‘palatable’ to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process.”

Same principle was reiterated in *Sadananda Halo and Others v. Momtaz Ali Sheikh and Others* (2008) 4 SCC 619 wherein, it was held as under:-

“59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule. This position was reiterated by this Court in its latest judgment in *Union of India v. S. Vinodh Kumar* (2007) 8 SCC 100The Court also referred to the judgment in *Om Prakash Shukla v. Akhilesh Kumar Shukla* 1986 Supp SCC 285, where it has been held specifically that when a candidate appears in the examination without protest and subsequently is found to be not successful in the examination, the question of entertaining the petition challenging such examination would not arise ”

54. Before the declaration of the result of the written examination on 15.09.2014, the State Government by its Government order dated 20.08.2014 revised the requisition thereby revising the number of vacancies in different categories. UP Public Service Commission issued Office Memorandum dated 12.10.2014 specifically mentioning the number of vacancies to be filled up in various categories in accordance with the requisition sent by the State Government. The said Office Memorandum dated 12.10.2014 published by UP Public Service Commission reads as under:-

“UPPSC

INTERVIEW PROGRAMME

Month October/November/December, 2014 (24)

OFFICE MEMORANDUM

| | | |
|----|--|---|
| 98 | Post Subordinate Agricultural Service Class III (Provisional Asstt. Group C) Agricultural Deptt. U.P. Reservation 2515 posts – Non-reserved 1882 posts – SC 201 posts – ST 2030 posts – OBC Pay Scale Rs.5200-20200/- Grade Pay Rs.2400/- Advertisement No.A-5/E-1/2013 Last Date: 21.11.2013 | October – 27, 28, 29, 30 November – 05, 07, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 December – 01, 02, 03, 04, 05, 06, 08, 09, 10, 11, 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, 2014 Before 10.00 a.m. |
|----|--|---|

Dt. 12.10.2014”.

It is thus clear that the candidates who appeared in the interview were well aware about the modification/revision in number of vacancies of Technical Assistants in different categories. The private respondents/intervening applicants have appeared in the interview with their eyes wide open regarding the modified vacancies to be

filled up in various categories of the posts. Having appeared in the interview without any demur or protest, it is not open to the candidates to challenge the selection process on the ground that there was modification in the number of vacancies in different categories and they are estopped by the principle of estoppel from challenging the same.

55. The private respondents knew that by the revised notification dated 12.10.2014, the number of vacancies of different categories have been changed and knowing the same, they participated in the interview and have taken a chance and opportunity thereon without any protest. Having participated in the interview and having failed in the final selection, it is not open to the private respondents to turn around and challenge the revised notification dated 12.10.2014 and the revised requisition of the number of vacancies in different categories. Having regard to the consistent view taken by the Supreme Court, the High Court should not have granted any relief to the private respondents/intervenors.

Unfilled vacancies of Horizontal Reservation filled by candidates of vertical reservation

56. Contention of the private respondents is that as per the statutory requirement, the horizontal reserved vacancies were unfilled and those unfilled vacancies of horizontal category were filled by vertical reservation candidates/other category candidates, which is in violation of the statutory provisions vitiating the selection process. On behalf of the UP Public Service Commission, Mr. Shrish Kumar Misra, learned counsel has furnished the details as to the number of vacancies reserved for horizontal category and the

number of candidates found suitable and placed in the respective categories. The said details are as under:-

| Category | No. of Vacancies | No. of Selected Candidates |
|--------------------------------|------------------|----------------------------|
| Women | 1325 | 156 |
| Dependents of Freedom Fighters | 132 | 45 |
| Ex-Servicemen | 330 | NIL |
| Partially Blind | 84 | 84 |
| Partially Deaf | 84 | 57 |
| One-Arm | 42 | 42 |
| One-Leg | 42 | 42 |

On behalf of UP Public Service Commission, it was submitted that one of the policies of the State Government regarding horizontal reservation is that, if the suitable candidates for filling the vacancies reserved for such posts of horizontal reservation are not available and the same are not carried forward; they are filled up by other suitable candidates from amongst the candidates belonging to vertically reserved categories according to their merit. It was submitted that unfilled horizontal reservation vacancies were thus filled up by suitable candidates of respective vertical categories according to their merit which is as per the policy of the government. The High Court was not right in finding fault with the filling up of vacancies reserved for horizontal reservation with other candidates of respective vertical reservation.

Plea of *res judicata*

57. The respondents have sought to invoke the principles of *res judicata* by contending that the common judgment dated 10.02.2017 passed by the High Court involved eighty-eight petitions which were allowed with the direction specified in para (75) of the impugned judgment. Out of twenty-one appeals filed before this Court, the judgment of the High Court passed in six writ petitions only viz.

WP(C) No.38399/2015, WP(C) No.45822/2015, WP(C) No.47894/2015, WP(C) No.50878/2015 and SPLAD No.283/2016 has been challenged; other matters have not been challenged either by the State or by the appellants. Mr. K. Parameshwar, learned counsel has contended that when the appellants have not challenged the common judgment rendered in all the eighty-eight writ petitions and in the present appeals, only the judgment rendered in Writ-C No.34196 of 2015 and few other writ petitions are challenged, the judgment rendered in other writ petitions having not been challenged, have attained finality and thus, operate as *res judicata*. In support of his contention, the learned counsel has placed reliance upon *Sri Gangai Vinayagar Temple* wherein, the Supreme Court held that when the common judgment was passed in two or more suits and the judgment and decree passed in two or more of the suits have not been challenged, the decree not assailed there upon, *meta morphoses* into the character of a “former suit” and the same operates as *res judicata*. It was therefore, contended that in the instant proceedings, the principle of *res judicata* would arise since the appellants have not chosen to challenge the common judgment rendered in number of other writ petitions.

58. The above contention does not merit acceptance. In *Sri Gangai Vinayagar Temple*, three separate decrees were passed in OS No.5 of 1978 (a suit for injunction simpliciter); OS No.6 of 1978 (monetary part of the suit claim); and OS No.7 of 1978 (monetary part of the suit claim and also the issue of ownership). The tenants thereon challenged only the decree passed in respect of OS No.6 of 1978; but have not challenged the decree passed in OS No.5 of 1978 and OS No.7 of 1978. It was in that context, the Supreme

Court held that non-challenge to two of the decrees would amount to *res judicata*. In *Sri Gangai Vinayagar Temple*, considering the facts and circumstances of the case and non-challenge to the decree passed in OS No.6 of 1978 and OS No.7 of 1978, the Supreme Court took the view that having failed to file appeal against the decree in OS No.5 of 1978 and OS No.7 of 1978, the cause of the tenants-respondents thereon was permanently sealed and foreclosed since *res judicata* applied against them.

59. It is pertinent to note that in *Sri Gangai Vinayagar Temple*, observing *that mere filing of a single appeal leads to the entire dispute becoming sub judice once again*, the Supreme Court in para (27) held as under:-

“27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again.” [underlining added]

60. In the present case, before the High Court, the contentions raised were the same and common arguments were advanced. The High Court dealt with the batch of writ petitions and disposed all of them by common judgment. Since it is a common judgment with common reasonings, the present batch of appeals before us would not result in any inconsistent decree or order as all of them arise out of the common judgment containing common operative portion of the judgment.

61. Considering the above contention in the light of the consistent judicial pronouncements of this Court, the above submission is liable

to be rejected. In *M/s Shenoy and Co., Represented by its partner Bele Srinivasa Rao Street, Bangalore and Others v. Commercial Tax Officer, Circle II, Bangalore and Others* (1985) 2 SCC 512, a number of writ petitions were allowed by the High Court. However, the State chose to file appeal only in one case which came to be allowed by the Supreme Court in the said case. In that fact situation, this Court took the view that the decision of this Court was binding on all the writ petitioners before the High Court even though they were not the respondents in the appeal before the Supreme Court. In *M/s Shenoy and Co.*, it was held as under:-

“22. Though a large number of writ petitions were filed challenging the Act, all those writ petitions were grouped together, heard together and were disposed of by the High Court by a common judgment. No petitioner advanced any contention peculiar or individual to his petition, not common to others. To be precise, the dispute in the cause or controversy between the State and each petitioner had no personal or individual element in it or anything personal or peculiar to each petitioner. The challenge to the constitutional validity of 1979 Act proceeded on identical grounds common to all petitioners. This challenge was accepted by the High Court by a common judgment and it was this common judgment that was the subject-matter of appeal before this Court in *State of Karnataka v. Hansa Corporation case* (1980) 4 SCC 697. When the Supreme Court repelled the challenge and held the Act constitutionally valid, it in terms disposed of not the appeal in *Hansa Corporation case* alone, but petitions in which the High Court issued mandamus on the non-existent ground that the 1979 Act was constitutionally invalid. It is, therefore, idle to contend that the law laid down by this Court in that judgment would bind only the Hansa Corporation and not the other petitioners against whom the State of Karnataka had not filed any appeal. To do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution.

.....

26. The judgment of this Court in *Hansa Corporation* case is binding on all concerned whether they were parties to the judgment or not. We would like to make it clear that there is no inconsistency in the finding of this Court in *Joginder Singh* case AIR 1963 SC 913 and *Makhanlal Waza* case (1971) 1 SCC 749. The ratio is the same and the appellants cannot take advantage of certain observations made by this Court in *Joginder Singh* case for the reasons indicated above.”

62. Reiterating the above principle, in *Director of Settlements, A.P. and Others v. M.R. Apparao and Another* (2002) 4 SCC 638, it was held as under:-

“7. So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence..... A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered..... The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.....” [underlining added]

After referring to the above judgments, the same principle was reiterated in *Fida Hussain and others v. Moradabad Development Authority and Another* (2011) 12 SCC 615.

63. Before the High Court in several writ petitions, unsuccessful candidates challenged the revised notification dated 12.10.2014 and

also the result dated 21.05.2015 published on 22.05.2015. In all the writ petitions, some contentions were raised and the writ petitions were disposed of by the common judgment. Thus, the contentious issues raised by the parties stood determined on the same set of facts and on the same reasonings. There is no merit in the contention that the judgment passed by this Court would bind only the parties in Writ-C No.34196 of 2015 and that the other judgments passed by the High Court would stand and operate as *res judicata*. As held in *M/s Shenoy and Co.* and other judgments, to do so is to ignore the binding nature of a judgment of this Court under Article 141 of the Constitution of India.

Non-impleading of successful candidates in the writ petition

64. On behalf of the appellants, repeated arguments were advanced that the non-impleadment of successful parties will affect the right of the selected candidates who have been selected and given appointments. In this regard, the High Court relied upon *Union of India and Others v. O. Chakradhar (2002) 3 SCC 146* to hold that it is not necessary to implead all the successful candidates in the writ petition and therefore, non-impleadment of the successful candidates would not affect the maintainability of the writ petition. The learned Senior counsel appearing for the appellants submitted that in *O. Chakradhar*, the entire selection was vitiated due to misconduct of the selection and in the present case, there is no such misconduct, fraud or any such other factor which would vitiate the entire selection. It was submitted that the High Court itself has upheld the result of the written examination while finding fault with the further selection only because of the change in the number of vacancies advertised for each category.

65. When the selection of successful candidates is challenged, depending upon the facts and circumstances of the case, the successful candidates ought to be put on notice about the filing of writ petition by impleading them by issuance of notice in accordance with law *vide Poonam v. State of Uttar Pradesh and others (2016) 2 SCC 779*. In the present case, we are not inclined to go into this question in view of the order passed by the High Court dated 04.06.2015. In WP-C No.34196/2015, the High Court asked the writ petitioners/private respondents lawyer to implead the incumbents as parties who have been selected for the post in question. Before the High Court, Mr. Ajay Kumar, learned counsel representing the UP Public Service Commission submitted that he would supply at least names of ten successful candidates along with the details and by the order of the court, the counsel appearing for the writ petitioners were directed to serve notice upon those ten candidates. In such facts and circumstances, we are not inclined to go into this question as to impleading/non-impleading of all the successful candidates in the writ petition.

66. **Re: Contention – Appointment letters not issued to 906 candidates and plea to exercise power under Article 142 of the Constitution of India:** After the interview was completed, the UP Public Service Commission has selected 6599 candidates and the category-wise details of the candidates so recommended by the Commission are as under:-

| Total Vacancies | General | Scheduled Castes | Scheduled Tribes | OBC |
|-----------------|---------|--|------------------|------|
| 6599 | 2488 | 1881 + 176 Because of non-availability of ST Candidates + 2057 | 25 | 2029 |

67. The UP Public Service Commission has withheld the result of 29 candidates. The recommendation so made by the UP Public Service Commission was in excess of the permissible percentage of reservation as per UP Reservation Act, 1994. In fact, this was one of the grounds of challenge in the writ petition to assail the select list. In the counter filed by the Principal Secretary, Personnel, Government of UP, it is stated that change in the category-wise vacancies was further scrutinised in terms of Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. It was found that a harmonious construction of its various sections was needed to be taken. In the counter affidavit filed by the Principal Secretary, Personnel, it is stated that the total of 6628 vacancies was exceeding the demarcated percentage and the relevant portion of the said affidavit reads as under:-

“Hence, a further revision in category-wise vacancy position was made and subject to the orders of the Hon’ble High Court, the total 6628 vacancies have been sub-divided based on the reservation percentage as the result which was declared by UPPSC was exceeding the demarcated percentage in the following manner:

| Available posts after 2% reduction | General (50%) | Scheduled Castes (21%) | Scheduled Tribes (2%) | OBC (27%) |
|---|----------------------|-------------------------------|------------------------------|------------------|
| 6628 | 3316 | 1391 | 132 | 1789 |

Thereafter, the application of horizontal reservation for dependents of Freedom Fighters, Ex-Servicemen, Disabled persons and Women was proposed as follows:

| Dependent of Freedom Fighters | Women | Ex-Servicemen | Disabled Persons |
|--------------------------------------|--------------|----------------------|-------------------------|
| 132 | 1325 | 331 | 252 |

68. Writ Petition No.62112/2015 was filed by few of the successful candidates for issuance of appointment letter and the High Court *vide* its order dated 15.12.2015 directed the official respondents to issue appointment order. The High Court further clarified that any such appointment made as well as the select list shall abide by any order which may be passed by the Division Bench. Pursuant to the aforesaid order, the Chief Secretary, Government of UP *vide* its letter No.1161/12-4-15-1729/2012 dated 22.12.2015 gave directions to the Department that appointment orders be issued to the selected candidates and that the appointment should abide by the final decision of the court. Accordingly, the appointment orders were issued to the selected candidates on 30.01.2016 as under:-

| Position | Unreserved | Scheduled Castes | Scheduled Tribes | OBC | Total |
|---|-------------------|-------------------------|-------------------------|-------------|--------------|
| Appointment order issued by Agriculture Department | 2478 | 1385 | 22 | 1784 | 5669 |
| Documents withheld by UPPSC | 10 | 06 | 03 | 05 | 24 |
| Total | 2488 | 1391 | 25 | 1789 | 5693 |
| Number of candidates whose appointment letter were not issued | --- | 490 | 176 | 240 | 906 |

The appointments were made subject to the outcome of the writ petition. Thus, total of 5669 candidates were issued appointment orders; the appointment orders were withheld for 24 candidates as the documents were withheld by UP Public Service Commission.

69. Mr. Mehul M. Gupta, learned counsel submitted that even though UP Public Service Commission has recommended 6599 candidates on the basis of the vacancies available, 906 candidates were left out and were not issued appointment orders and prayed for direction that the 906 candidates be issued appointment orders.

It is pertinent to note that these 906 candidates were ranked lower in the merit list than the last selected candidate in their respective category under the reservation limit as identified by the Personnel Department, therefore appointment orders were not issued to them. This cannot be said to be arbitrariness or discrimination as selection of candidates was on the basis of the merit list. Further, the revised requisition dated 20.08.2014, on the basis of which the impugned office memorandum was issued itself was a case of excessive requisition, that is, beyond the permissible limits set out by the UP Reservation Act, 1994. As a result of this excessive requisition, 906 extra candidates recommended could not be issued appointment orders after the revision.

70. As pointed out earlier, the revised requisition dated 20.08.2014 and the revised notification of the UP Public Service Commission itself were in excess of the permissible limits of reservation as per UP Reservation Act, 1994. We cannot pass direction to accommodate the surplus candidates as that would be in excess of the permissible limit as prescribed by the Act and would be in violation of prescribed limits of reservation as per the statutory provisions of UP Reservation Act, 1994. In exercise of power under Article 142 of the Constitution of India, if we are to issue direction to appoint 906 candidates, it will be crossing the limits of 50% reservation which would be violation of the constitutional provisions and the UP Reservation Act, 1994. Even assuming that the respondent State was not diligent in carrying out the proper quantifiable data of existing working strength in different categories and ascertaining the vacancies position under different categories, it

needs no reiteration that a wrong cannot be corrected by committing another wrong.

71. It is fairly well-settled that the selected candidates do not have any indefeasible right to be appointed. As held in *State of Bihar and Others v. Amrendra Kumar Mishra (2006) 12 SCC 561*, merely because the names of candidates were included in the provisional select list, they do not acquire any indefeasible right to be appointed. Merely because UP Public Service Commission has recommended the names of 906 candidates, they do not acquire any indefeasible right for being appointed.

72. In the counter affidavit filed by the State of U.P., it is stated that the candidates who were selected but not issued appointment letter filed a Writ Petition No.6198 of 2016 and the High Court *vide* order dated 02.03.2016 has directed the State to issue appointment letter in favour of the petitioners thereon. On request from the Agricultural Department, the Government after taking the opinion of Chief Standing Counsel has filed the Special Appeal before the Division Bench challenging the order dated 02.03.2016. The said Special Appeal was tagged with the Writ-C No.34196 of 2015. Since in Writ-C No.34196 of 2015, the High Court quashed the revised requisition dated 12.10.2014 and the result and quashed the entire selection process subsequent to the declaration of the written examination, consequently the Special Appeal came to be dismissed.

73. So far as the present vacant position in the counter affidavit filed by the State, it is stated that there are total vacancies of 4838 and the next selection process for selecting 2050 candidates has

been sent. The relevant portion of the counter affidavit filed by the State of U.P. before this Court reads as under:-

“.....It is pertinent to mention that the Department currently has a total present vacancy of 4838, and has accordingly sent a requisition letter to the Subordinate Services Selection Commission for selecting 2059 candidates. So, effectively as of today 2779 vacancies have still not been requisitioned keeping in mind 959 (906+53) posts under the consideration on which appointment order were not issued.

A break-up of the current requisition of above mentioned 2059 vacancies is as follows:

| No. of vacancies requisitioned | General | SC/ST | OBC |
|--|-------------|------------|------------|
| 2059 | 1031 | 473 | 555 |
| After filing the aforesaid vacant posts, the vacancies of the said post as per cadre strength is as follows: | | | |
| 2779 | 1761 | 534 | 484 |

74. Mr. Mehul Gupta, learned counsel on behalf of some of the appellants has prayed that power under Article 142 of the Constitution of India be exercised for extending the benefit of a beneficial provision to overcome injustice caused to 906 candidates who were not issued the appointment orders. It was submitted that the technical flaw in the revised requisition was in excess of the prescribed limit of reservation being in excess of the permissible limits under the UP Reservation Act, 1994 and the same can be rectified by exercising power under Article 142 of the Constitution of India. Learned counsel further submitted that 906 candidates in three different categories i.e. SC, ST and OBCs have successfully completed the written examination and the interview and these successful candidates have nothing to do with these technical flaws and therefore, prayed that in order to do complete justice, the power

under Article 142 of the Constitution of India be exercised. In support of his contention, Mr. Mehul Gupta, learned counsel has placed reliance upon *Union of India and Others v. Permanand Singh* **1999 Supreme Court Cases (L&S) 625** and *D.M. Premkumari v. Divisional Commissioner, Mysore Division and Others* **(2009) 12 SCC 267**.

75. Pointing out that even presently, there are 2779 vacancies and that 906 vacancies are kept apart, Mr. Mehul Gupta, learned counsel appearing for 906 candidates has submitted that 906 candidates can be accommodated in the aforesaid 2779 vacant posts existing as on date. This contention does not merit acceptance. The present vacancies i.e. 4838 and the available vacancies i.e. 2779 are the future vacancies which are to be filled up by a fresh advertisement and by participation of all the eligible candidates including the 906 candidates and other unsuccessful candidates. 2779 vacancies existing as on date, which are the vacancies as on date i.e. in 2019 cannot be filled up by the candidates who got selected pursuant to the advertisement in 2013-2014.

76. Article 142 of the Constitution of India confers wide power upon the Supreme Court to do complete justice between the parties. Though the powers conferred on the Supreme Court by Article 142 are very wide, the same cannot be exercised to pass an order inconsistent with express statutory provisions of substantive law. In *Ramji Veerji Patel and Others v. Revenue Divisional Officer and Others* **(2011) 10 SCC 643**, the Supreme Court held that the power under Article 142 of the Constitution of India is to be exercised very carefully and sparingly. The power under Article 142 of the

Constitution of India can be exercised so as to do complete justice between the parties. However, as held in *Supreme Court Bar Association v. Union of India and Another (1998) 4 SCC 409*, though the power under Article 142 of the Constitution are plenary in nature, the same cannot be construed to mean that the power can be used to supplant the substantive law applicable to the case. In the case in hand, as discussed earlier, as per the provisions of Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, specific percentages of vacancies have been reserved for different categories viz., (a) Scheduled Castes – 21% (b) Scheduled Tribes – 2% and (c) OBC – 27%. In any recruitment, this statutory permissible limit of reservation not exceeding 50% has to be maintained. The power under Article 142 of the Constitution of India cannot be exercised to supplant the statutory provision under the UP Reservation Act, 1994. In our view, in exercise of power under Article 142 of the Constitution of India, no direction can be issued to the State of UP to issue appointment orders to the 906 candidates.

77. Summary of Conclusion:-

- (i) The Office Memorandum dated 12.10.2014 issued by the UP Public Service Commission revising the number of vacancies is based upon the revised requisition of the Government dated 20.08.2014. The revised requisition of the Government dated 20.08.2014 was only to rectify the wrongful calculation of the number of vacancies in different categories and to comply with the requisite percentage of quota of reservation in different categories as per Uttar Pradesh Public Services (Reservation for Scheduled

Castes, Scheduled Tribes and Other Backward Classes)
Act, 1994;

- (ii) In view of Rule 15 and Rule 6 of UP Subordinate Agriculture Services Rules, 1993 (Agriculture Service Rules, 1993), the Recruitment Authority is empowered to rectify the wrongful calculation and make a revised requisition of number of vacancies in different categories which is in accordance with the provisions of UP Reservation Act, 1994 and Agriculture Service Rules, 1993;
- (iii) Absorption of diploma holders were required to be done only against the “General quota”. The High Court was not right in saying that the diploma holders ought not to have been absorbed against the “General category” so as to alter the advertised number of posts against the “General category”;
- (iv) Revising the number of vacancies in different categories to satisfy the statutory requirement of reservation quota as per UP Reservation Act, 1994 and this would not amount to changing the rules of the game after the commencement of the selection process;
- (v) Having participated in the interview and when they failed in the final selection, it is not open to the private respondents/intervenors to turn around and challenge the

revised notification dated 12.10.2014 and the final select list dated 21.05.2015;

- (vi) The filling up of the unfilled horizontal reservation by the candidates from the respective vertical reservation is in accordance with the policy of the government and the same cannot be faulted with;
- (vii) In view of the judgment in *M/s Shenoy and Co., Represented by its partner Bele Srinivasa Rao Street, Bangalore and Others v. Commercial Tax Officer, Circle II, Bangalore and Others (1985) 2 SCC 512* and *Fida Hussain and others v. Moradabad Development Authority and Another (2011) 12 SCC 615* and other judgments, challenging the common judgment only in WP-C No.34196 of 2015 and non-challenge to the other writ petitions, will not amount to *res judicata*;
- (viii) The 906 candidates were not issued the appointment orders in order to keep the appointment within the permissible percentage of reservation as per UP Reservation Act, 1994. The power under Article 142 of the Constitution of India cannot be exercised to issue direction to the first respondent-State to issue appointment orders to 906 candidates.

78. In the result, the common impugned judgment dated 10.02.2017 of the High Court in WP(C) No.34196 of 2015 and batch of writ petitions is set aside and these appeals are allowed. The private respondents/intervenors and 906 candidates who were not issued appointment orders and those who filed writ petitions before the High Court shall be granted age relaxation as one-time measure to participate in the upcoming recruitment. Age relaxation is strictly a

one-time measure. Consequently, all the intervenors/impleading applications stand dismissed.

.....J.
[R. BANUMATHI]

.....J.
[A.S. BOPANNA]

**New Delhi;
September 30, 2019**