

Allahabad High Court

Dr. Ravindra Kumar Pandey Son Of ... vs State Of U.P. Through Secretary ... on 3 July, 2006

Author: V Sahai

Bench: V Sahai, S Yadav

JUDGMENT V.M. Sahai, J.

1. The questions that arise for consideration in this petition are whether horizontal reservations were to be provided by the Director, U.P. Higher Education, while notifying the vacancies for lecturer in Geography; whether the U.P. Higher Education Service Commission while making the selection on the advertisement providing for selection to be made in accordance with the reservation policy of the State was bound to make selection for horizontal vacancies as a matter of law irrespective of whether it was mentioned in the advertisement or not; whether reservation for physically handicapped is three per cent or one per cent for each category of physically handicapped; whether vacancy for physically handicapped had to be worked out on the caste/category of the candidate; whether where there is only one vacancy for physically handicapped, it had to be offered to the candidates of the first category and if there was no candidate of that category it was to be carried over or it had to be offered to the candidate of second and third category; whether the State and the Commission have committed an error of law in construing G.O. No. 4/1-2001-Ka-2-2001 dated 22.10.2001?

2. The brief facts are that an advertisement No. 32 was published on 23.4.2002 by U.P. Higher Education Service Commission, Allahabad (in brief the Commission) inviting applications for the post of lecturers in Geography and various other subjects. For Geography 41 vacancies were notified. The petitioner, a first divisioner of Intermediate, B.A., M.A. with 59.4%, a Doctorate degree in Geography and having passed National Eligibility Test in Geography in 1997 applied for the post of lecturer in Geography as a general category candidate and claimed reservation as physically handicapped. A medical certificate dated 25.11.1988, issued by Chief Medical Officer, Kushi Nagar was also attached along with the application, which showed that the petitioner suffered 70% of congenital deformity in upper portion of both hands. The selection was to be made only on the basis of interview. After the preliminary screening the petitioner by letter dated 28.1.2003 was called for interview. He appeared in selection held on 19.2.2003. The result was declared on 5.3.2003. He was not selected. The petitioner has challenged the selection made by the respondents on the ground that the Commission has not provided horizontal reservation to physically handicapped candidates and if such reservation would have been provided, the petitioner would have been selected.

3. In the counter affidavit filed on behalf of the Commission it is stated that the total post for lecturer in Geography were 41 out of which 21 was for General, 12 for Other Backward Class (in brief the OBC), 8 for SC and none for ST. No post was reserved for physically handicapped. It is stated that the petitioner being a candidate for general category and 1% of twenty one vacancies for general category comes to less than 0.5, therefore, the petitioner could not be offered appointment as physically disabled candidate. It is stated that the petitioner was considered as a general category candidate but he could not be selected on merits. It is further stated that posts in concerned subject of different colleges are clubbed subject wise and sent by the Director, Higher Education U.P. and

certain posts in the selection are reserved in accordance with The Uttar Pradesh Public Services (Reservation for Scheduled Caste, Scheduled Tribes and Other Backward Classes) Act, 1994 [U.P. Act No. 4 of 1994]. It is averred that the Commission only makes selection for the posts notified and sent by the Director, and the notification issued carried reservation only for OBC and SC, but no reservation was provided for physically handicapped, therefore, the petitioner could not have been selected in the category of physically handicapped. Paragraph 5 (d) and 9 of the counter affidavit are extracted below:

5.(d) That the posts in the concerned subjects of different colleges are clubbed subject wise and sent by the Director Higher Education U.P. and in that certain number of posts are kept reserved as per U.P. reservation Act 4 of 1994. It is further stated that the answering respondent only make selection for those posts, which are notified and sent by the Director, Higher Education, U.P. to the U.P. Higher Education Service Commission, Allahabad. Such notification carries reservation (subject-wise) for only OBC and SC/ST., the notification/requisition sent by the Director Higher Education does not provide for reservation for physically handicapped (subject-wise). Therefore, in whichever subject in which larger number of posts are available and in which at least one post (0.5 of the post and above) may be made available for reservation to the physically handicapped persons, the answering respondent Commission provides such reservation and selects eligible physically handicapped candidates against such posts.

9. That in reply to the contents of para 7 of the writ petition, it is necessary to submit here that under the reservation quota, no post in Geography subject has come for physically handicapped persons, therefore, in the advertisement No. 32, no application for handicapped candidates were invited for Geography subject as per the handicapped reservation rules by the answering respondent. It is further stated that the Director Higher Education sent the posts after determining the quota to the answering respondent and the answering respondent has also considered the reservation rules at the time of selection. The posts of handicapped reserved category was not determined by the Director of Higher Education as well as Commission at the time of finalisation of reservation quota under the rules.

4. On 13.11.2003 this Court directed the Commission, in the instant writ petition, to consider the case of the petitioner in the light of law laid down by this Court in Dr. Dhananjay Singh v. State of U.P. and Ors. Civil. Misc. Writ Petition No. 34444 of 1999 decided on 8.2.2000. In pursuance of the direction the Commission considered the representation of the petitioner by order dated 25.11.2003. It reiterated the stand taken on its behalf in the counter affidavit and held that physically handicapped was to be given benefit of one per cent. But since twenty one vacancies were available in general category and one per cent of twenty one was less than 0.5, therefore, the petitioner was not entitled to any benefit.

5. We have heard Sri Ashok Khare, learned senior counsel assisted by Sri Aditya Kumar Singh for the petitioner, learned standing counsel appearing for the respondent No. 1 and Sri H.N. Singh, learned Counsel appearing for respondents No. 2 and 3.

6. Sri Ashok Khare, learned senior counsel for the petitioner has urged that 3% horizontal reservation exists for the physically handicapped candidates, the quota for which has to be worked out on the total number of vacancies in the subject and not caste/category wise. He has further urged that on 41 vacancies of lecturers in Geography, 3% reservation for physically handicapped comes to 1.26, therefore, one vacancy should have been horizontally reserved for physically handicapped candidates. Since the petitioner had secured highest marks as physically handicapped candidate, he was entitled to be selected in the aforesaid quota but the Commission has committed an error in not granting any reservation under the physically handicapped category.

7. On the other hand, Sri H.N. Singh, learned Counsel for the respondent Commission has urged that horizontal reservation should be worked out caste/category wise. He has further urged that even if the argument of Sri Ashok Khare is accepted, then only one vacancy would be available to be filled by physically handicapped candidate, in order of priority mentioned in the U.P. Act No. 4 of 1993 as amended. The learned Counsel pointed out that under the Act 3% quota of physically handicapped persons has been split in 3 parts and 1% reservation to each of these 3 different types of candidates suffering from different physical disability has been provided. One percent vacancy reserved for one type of physically handicapped candidates cannot be offered to the other type of physically handicapped candidate. He vehemently urged that locomotor disability or cerebral palsy fall in the third category of the disability, therefore, even if there was one vacancy it could not be offered to petitioner. It could only be offered to the first category, a candidate suffering from blindness or low vision, which has 1% reservation and if there is no such candidate available then it would be carried forward to be filled in the next selection. Reservation to the third category of physically handicapped candidate could only be provided if there were three vacancies. The learned standing counsel has supported his counter affidavit.

8. Before advertizing to the various arguments advanced by the learned Counsel for the parties, which are both intricate and important we must express our surprise and concern on the stand taken by the State and the Commission in the counter affidavits filed on their behalf and supplementary counter affidavit filed by the Commission. The Commission is a statutory body, which functions under the U.P. Higher Education Services Commission Act, 1980. It is bound by the law of the State. The allegation that the Commission is only a selecting body which is bound by the notification issued by the Director cannot be appreciated in view of clear mention in the advertisement that selection of candidate was to be made in accordance with law and orders issued by the Government on reservation. The bifurcation of 41 vacancies into 21 for General, 12 for OBC and 8 for SC was in accordance with the policy of vertical reservation. But that did not mean that vacancies were not available for horizontal reservation. If the notification issued by the Director was understood as providing for no reservation to physically handicapped, then it was contrary to horizontal reservation in public services as explained by the apex court and provided by legislation, both, Central and State.

9. What is the meaning of horizontal reservation, how does it differ from vertical reservation was explained by the bench of nine Judges of the Apex Court in Indra Sawhney etc. etc. v. Union of India and Ors. . The law was settled clearly by the Constitution Bench in paragraph 95 which is extracted below:

We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes, and other backward classes (under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under Clause (1) of Article 16); can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations -- what is called inter-lock reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains--and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

10. Horizontal reservation, thus, is different from vertical reservation. One is related to Article 16(1) whereas the other to Article 16(4) of the Constitution. In the light of the law laid down by the Apex Court the State appears to have enacted The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 [U.P. Act No. 4 of 1993] (in brief the Act). Section 3 of the Act provided for reservation of vacancies in favour of physically handicapped person. Section 3 is extracted below:

3. Reservation of vacancies in favour of physically handicapped etc.-

(1) In public services and posts in connection with the affairs of the State there shall be reserved five per cent of vacancies at the stage of direct recruitment in favour of-

(i) physically handicapped,

(ii) dependents of freedom fighters, and

(iii) ex-servicemen.

(2) The respective quota of the categories specified in Sub-section (1) shall be such as the State Government may from time to time determine by a notified order.

(3) The persons selected against the vacancies reserved under Sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to Scheduled Tribes Category, he will be placed in that quota by making necessary adjustments; if he belongs to Backward Classes category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed in that category

by making necessary adjustments.

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11. The section did not specify any percentage for physically handicapped nor it mentioned the categories of physically handicapped. Sub-section (2) provided that the respective quota for the categories specified in Sub-section (1) would be determined by the State Government from time to time. Sub-section (3) provided for placing such persons in appropriate category to which they belong. In other words, it incorporated the principle of horizontal reservation.

12. In 1995 The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in brief the Central Act) was enacted to give effect to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. The Act was passed as our country was signatory to the resolution dated 5th December 1992 passed in the meeting held at Beijing, adopting the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. The application of the Act was extended to the whole of India except the State of Jammu and Kashmir. Clause (a) of Section 2 defined appropriate Government as under:

2.(a) "appropriate Government" means,--

(i) in relation to the Central Government or any establishment wholly or substantially financed by the Government or a Cantonment Board constituted under the Cantonment Act, 1924 (2 of 1924), the Central Government;

(ii) in relation to a State Government or any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Coordination Committee and the Central Executive Committee, the Central Government; (iv) in respect of the State Coordination Committee and the State Executive Committee, the State Government;

13. Section 33 of the Central Act is extracted below:

33. Reservation of posts.- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

14. A perusal of Central Act shows that it provided two important things regarding physically handicapped, one that every appropriate government would reserve not less than three percent vacancies for physically handicapped, second it categorised them in three and reserved one percent for each category. Therefore, from the date of coming into force of this Act it became imperative for every State Government to reserve not less than 3% vacancies in public services for physically handicapped. The categorisation was provided to ensure that the reservation was provided, only, to such persons who suffered from severe handicap and deserved to be helped. The allocation of one percent to each category of physically disabled was to ensure that the benefit of reservation is not confined to only one category. For example, if there are three vacancies for physically disabled, all cannot be given to one or the other category. That appears to be the reason for allocating one percent to each category out of the three percent reserved for physically handicapped. If there is only one vacancy then how it should be allocated is a matter of construction to which we shall advert later.

15. In 1997 The U.P. Act No. 4 of 1993 was amended by Uttar Pradesh Public Services (Reservation of Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1997 (U.P. Act 6 of 1997) by which Section 3 of the Principal Act was amended. It is extracted as under:

Amendment of Section 3.-- In Section 3 of the Principal Act,-

(a) for Sub-section (1) the following sub-section shall be substituted, namely:

(1) There shall be reserved at the stage of direct recruitment,-

(i) in public services and post two per cent of vacancies for dependents of freedom fighters and one per cent of vacancies for ex-servicemen;

(ii) in such public services and posts as the State Government may, by notification, identify one per cent of vacancies each for the persons suffering from,-

(a) blindness or low vision;

(b) hearing impairment; and

(c) locomotor disability or cerebral palsy.

(b) Sub-section (2) shall be omitted;

(c) in Sub-section (3) for the words "Backward Classes; the words "other Backward Classes of citizens" shall be substituted.

(d) Sub-section (4) shall be omitted;

(e) for Sub-section (5), the following sub-section shall be substituted, namely:

(5) Where, due to non-availability of suitable candidates, any of the vacancies reserved under Sub-section (1) remains unfilled it shall be carried over to the next recruitment.

16. From the amendment introduced by U.P. Act No. 6 of 1997 it appears obvious that the State in keeping with the Central enactment provided reservation for physically handicapped incorporating the provision of one percent for each category of physically handicapped. Even though the State Act has not specifically provided that three percent of the vacancies shall be reserved for physically handicapped but the two enactments the Central and State dealing with the same subject and the Central Act having directed every appropriate government to provide not less than three percent for physically handicapped, the State enactment has to be read as providing three percent reservation for physically handicapped. In U.P. Act No. 4 of 1993 the State had provided for reservation of five percent vacancies to physically handicapped, dependants of freedom fighters and ex-servicemen. No separate percentage was reserved for different class nor any category of handicapped was mentioned. But after the Central enactment it became necessary to provide not less than three percent for physically handicapped, therefore, the State Legislature while providing for reservation to physically handicapped fell in line with the Central enactment both in percentage of reservation for physically handicapped and for categorising them. Section 3 was substituted by providing separately for dependants of freedom fighters and ex-servicemen in Sub-section (i) of Section 3(1) and for physically handicapped in Sub-section (ii) of Section 3(1).

17. The provisions for reservation for physically handicapped etc was amended again by The Uttar Pradesh Public Services (Reservation for (Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1999 (U.P. Act 29 of 1999). Section 3(1) of the Act No. 4 of 1993 was amended as under:

Amendment of Section 3.-In Section 3 of the principal Act, in Sub-section (1) for Clause (1) the following clauses shall be substituted, namely:

(i) in public services and posts two per cent of vacancies for dependents of freedom fighters;

(i-a) in public services and posts other than Group 'A' posts or Group 'B' posts, on and from May 21, 1999 two per cent of vacancies, and on and from the date on which the Uttar Pradesh Public Services (Reservation for (Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1999 is published in the Gazette five per cent of vacancies, for Ex-Servicemen;.

18. Its perusal indicates that Sub-section 3(1) was amended but Section 3(1)(ii) dealing with physically handicapped remained unchanged. It is not disputed that the provision for physically

handicapped is same even today.

19. The State has provided horizontal reservation since 1993 by enacting laws, and issuing orders from time to time. No selection can be made in the State ignoring the law. That is why when the advertisement for various vacancies was issued by the Commission it was provided that reservation would be made in accordance with law. For better understanding the relevant part of the advertisement No. 32 issued by the Commission by which 41 vacancies of lecturer in Geography were advertised is extracted below:

mRrj izns'k mPprj f'k{kk lsok vk;ksx 18&,] U;k; ekxZ] bykgkckn& 211001 foKkiu la[;k% 30]31]32 moizo jkT; fo'ofokky; vf/kfu;e] 1973 ,oa rn~vUrxZr rFkk la'kksf/kr ifjfu;eksa esa fu/kkZfjr vgZrk /kkjd vH;fFkZ;ksa ls vuqeu; HkRrksa lfgr osrueku :o 8000&13500 esa fuEu fooj.kkuqlkj izns'k ds v'kkldh; egkfo|ky;ksa ds fofHkUu fo"ksa esa izk/;kid@izoDrk inksa gsrq vkosnu vkefU=r fd;s tkrs gSaA fo"ks; ds le{k dze'k% lkekU; oxZ] vU; fiNM+k oxZ] v- tkfr rFkk v-t- tkfr gsrq lqjf{kr inksa dh la[;k nh xbZ gS tks ?kV&c<+ ldrh gSA vkj{k.k O;oLFkk ekuuh; mPpre U;k;ky; ds fopkjk/khu ;kfpdk ij ikfjr vafre fu.kZ; ds vuq:i gksxhA 'kkjhfd :i ls fodykax] Lora=rk laxzke lsukuh ds vkfJr vkSj HkwriwoZ lsfudksa ds laoxkZs dks vf/kfu;ekuqlkj o 'kklu ds fu;ekuqlkj vkj{k.k vuqeu; gSA Dzo lao fo"ks;

dk uke foKkiu lao 30 foKkiu lao 24 dk r`rh; vxzahr fo'ks "k p;u foKkiu lao 31 foKkiu la- 26 dk f}rh; vxzahr fo'ks" k p;u foKkiu la[;k 32 01-

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20. The aforesaid advertisement, thus, provided reservation for physically handicapped candidates in accordance with law and orders issued by the Government. But what the Commission did was to completely ignore the law. In paragraph 9 of the counter affidavit extracted earlier it is stated that no post was reserved for physically handicapped in the advertisement. The counter affidavit was sworn by Deputy Director Higher Education Commission. He must be a senior officer who must have been aware of his responsibilities. The averment is contrary to the advertisement which clearly provided that reservation to physically handicapped etc. would be provided in accordance with law and government orders issued from time to time. The law has been explained above. If the law would have been applied the Commission would have made selection for physically handicapped. It could not take cover under the plea that no post was reserved for physically handicapped. It was not open to the Commission to ignore the law. The vacancy for physically handicapped was not required to be notified. It was not vertical reservation. The reservation for physically handicapped was to be

provided as a matter of law.

21. The next question is how the vacancy for physically handicapped had to be worked out. This was subject matter of vehement argument by learned Counsel for the respondents. From the counter affidavit filed by the respondents it is quite clear that the Commission and the State were of the opinion that no vacancy having been reserved for physically handicapped there was no question of considering the petitioner as one of the candidate for the same. It was only in the alternative it was stated that even assuming that the physically handicapped was entitled for reservation then the petitioner being a candidate of General category and there being only 21 vacancies in General category, 3% of 21 being less than 0.5, the petitioner was not entitled to it. Both assumptions are founded on complete misapprehension about the policy of reservation. We have explained that vacancy for physically handicapped was not necessary to be notified. It was to be considered as a matter of law. As regards working out of the vacancy it may be mentioned that horizontal reservations are not caste/category based. They are class based. The reservation for the class of physically handicapped is three percent. They being unfortunate persons have been treated as a different class which needed legislative protection. It is to bring them in social stream by making them feel positive. The endeavour is to wipe out the inequality in social participation by those who are not so fortunate. The reservation is for a class of persons who satisfy the disabilities mentioned in Section 3(1)(ii) of the U.P. Act No. 4 of 1993 as amended from time to time. The categorisation is to specify the disability which would enable a person to claim the benefit. The Legislative intent appears to make the category exhaustive. It is only those persons who suffer from the disability mentioned in the section who are entitled to claim reservation. The extent of protection has been determined by Central Legislature by directing that it should not be less than three percent. Who would be entitled for such benefit is mentioned and one percent has been marked for each category of disability. Therefore reservation for physically handicapped has to be worked out on three percent at the stage of direct reservation in public services and posts in connection with the affairs of the State. The allocation of one percent each to different category of disability is to avoid undue benefit of reservation to one or the other category. That cannot be the yardstick for determining percentage of reservation. The provision providing for reservation for physically handicapped by the State has to be read and understood as three percent. Any other interpretation may result in creating conflict in the Central and State legislation. We reach the same conclusion even if Section 3(1)(ii) of the U.P. Act No. 4 of 1993 is read on its own. It provides one percent reservation to three categories of physically handicapped. Therefore, the total reservation for physically handicapped comes to three percent. The allocation of one percent to each category, had to be totalled to arrive at the percentage of reservation for the class of physically handicapped. The allocation or bifurcation of vacancies to different categories of handicap cannot reduce the percentage of reservation for physically handicapped. Any other construction would result in reducing reservation to 1 per cent to three categories mentioned in Section 3(1) (K) instead of it being 3% for physically handicapped.

22. The next question is whether the horizontal reservation for physically handicapped have to be worked out relating it to caste/category of the candidate. To be more specific, was it open to the Commission to work out the vacancy for physically handicapped by referring it to number of seats available for general category candidates. The allegation in paragraph 27 of the writ petition that there was no minimum qualifying marks prescribed by the Commission in the interview for the

purposes of selection as lecturer in Geography was not denied by the Commission in paragraph 19 of the counter affidavit. But in paragraph 3 of the supplementary counter affidavit it has been asserted by the Commission that the petitioner was not entitled for reservation as he had applied as a general category candidate. In paragraphs 5 and 6 of the supplementary counter affidavit it is stated that the Commission by its resolution dated 25.11.2003 has rejected the claim of the petitioner of horizontal reservation under the physically handicapped quota as the 1% quota was worked out by the Commission only on the vacancies available for general category. It was further stated in the resolution that the petitioner had applied as general category candidate and out of total 41 vacancies of lecturers in Geography only 21 vacancies were available for general category candidates and on 21 vacancies if the horizontal reservation is worked out for the category of locomotor disability or cerebral palsy under which the petitioner had applied for which reservation is only 1%, it comes less than 0.5 and thus no vacancy could be worked out for horizontal reservation to any physically handicapped candidate. The Commission in passing the resolution dated 25.11.2003 committed grave error of law and even after direction of this Court adopted reasoning which were patently erroneous, contrary to law of reservation, against the government policy and in complete disregard of the government order. To appreciate it we consider it necessary to extract paragraph 3(b) of the counter affidavit filed by the State on behalf of the respondent No. 1 and 2 as under:

That in compliance of the order dated 13.11.2003 passed by the Hon'ble Court in the instant writ petition, the matter was duly examined by the Commission in its meeting held on 25.11.2003. It emerged that total 41 posts of lecturers in Geography were advertised vide Advertisement No. 32. Of these 21 were for candidates of General Category, 12 for the Other Backward Classes and 8 for S.C./S.T. candidates. Interview were over by 04.03.2003 and results were declared on 5.3.2003. Matter of extension of the benefit of reservation for handicap candidates was considered in accordance with G.O. No. 4/l-2001-Ka-2-2001 dated 22.10.2001. According to this G.O. 1% reservation for handicap candidates was permitted. As benefit was to be given to a candidate of General Category and 1% of 21 General posts was less than 5%, no post was available for handicap candidate. In this state of facts there was no post available for a handicap candidate of general category. Therefore, it was found that it was not possible to extend benefit of reservation to the petitioner. It is submitted that in this way the order dated 13.11.2003 stands fully complied with. It is further submitted that no post is available for the petitioner under the scheme of reservati as applicable to handicap candidates.

23. According to it the petitioner was not entitled to the benefit of reservation as the vacancy for physically handicapped had to be worked out in accordance with G.O. No. 4/l-2001-Ka-2-2001 dated 22.10.2001. A copy of the order dated 25.11.2003 and the aforesaid G.O. have been filed as Annexures-1 and 2 to the supplementary counter affidavit filed by the Commission. The order dated 25.11.2003 is extracted below:

m0 iz0 mPprj f'k{kk lsok vk;ksx] bykgkckn

vk;ksx dh vkikrdkyhu cSBd la[;k fnukad 25-11-2003 dk dk;Zo`k

vk;ksx dh 692oha vkikrdkyhu cSBd vkt fnukad 25-11-2003 dks ek- v/;{k ds d{k esa izks- fl;kjke t

- 1- izks- fl;kjke tk;loky v/;{k
- 2- izks- th- ,u- oekZ lnL;
- 3- ,e- lh- dkSy lnL;
- 4- Jh x;k izlkn lfpo

692-1 flfoy fjV ;kfpdk la[;k 12603@2003] Mko johUnz dqekj ik.Ms; cuke m-iz- ljdkj o nks vU; esa ikfjr ek- mPp U;k;ky; ds vkns'k fnukad 13-11-03 ds vuqikyua esa vkt cSBd esa fopkj fd;k x;kA mDr vkns'k ds izdk'k esa vk;ksx }kjk fu.kZ; fy;k x;k fd f'k{kk funks'kd] mPp f'k{kk }kjk jksLVj ds vk/kkj ij fo"k;okj ,oa laoxZokj inksa dks vf/k;kfpr fd;k x;k gS ftlds vk/kkj ij vk;ksx ds foKkiu la[;k&32 esa izoDrk Hkwxksy ds dqy 41 in 21 lkekU;] 12 v-fi-oxZ ,oa 08 vuq-tkfr ds in foKkfir FksA mDr inksa ds izfr lk{kRdkj fnukad 04-03-03 dks lekIr gks x;s Fks rFkk p;u ifj.kke fnukad 05-03-03 dks ?kksf"kr gks x;k FkkA vk;ksx }kjk 'kklukns'k la[;k&4@1&2001&dk&2&2001 fnukad 22-10-01 ds vuqlkj 'kkjhfd :i ls fodykax vH;FkhZ dks vkj{k.k dk ykHk fn;s tkus ij fopkj fd;k x;kA mDr 'kklukns'k esa 'kkjhfd :i ls fodykax vH;FkhZ dks vkj{k.k dk ykHk fn;s tkus ij fopkj fd;k x;kA mDr 'kklukns'k esa 'kkjhfd :i ls fodykax O;fDr dks ,d izfr'kr dk vkj{k.k dk ykHk fn;k tkuk vuqeU; Fkk pwWafd lkekU; oxZ ds vUrxZr 21 in miyC/k Fks] 21 inksa dk ,d izfr'kr -5 n'keyo ikWp izfr'kr ls de gS] bl izdkj 'kkjhfd :i ls fodykax gsrq dksbZ in miyC/k u gksus ds dkj.k vkj{k.k dk ykHk fn;k tkuk 'kklukns'k ds vuqdwya ugha gSA QyLo:i MkW- ik.Ms; dks mDr vkj{k.k dk ykHk ugha fn;k tkuk gSA 692-2 vU; feUnq vxyh cSBd esa izLrqr fd;s tk;saA go & go & go & ,e- lh- dkSy izks- th- ,u- oekZ izks- fl;kjke tk;loky lnL; lnL; v/;{k

24. The relevant paragraph 6 of G.O. No. 4/1-2001-Ka-2-2001 dated 22.10.2001 is extracted below:

6 mRrj izns'k yksd lsok 'kkjhfd :i ls fodykax] Lora=rk laxzke lsukuh ds vkfJr vkSj HkwriwoZ lSfudksa ds fy, vkj{k.k vf/kfu;e] 1993 esa mRrj izns'k vf/kfu;e la[;k 26 lr 1997 mRrj izns'k v/;kns'k la[;k 11 lu 1999 rFkk mRrj izns'k vf/kfu;e la[;k 29 lu 1999 }kjk fd;s x;s la'kks/kuksa ds vuqlkj yksd lsokvksa vkSj inksa esa] lh/kh HkrhZ ds izdze ij] fuEufyf[kr oxZ ds O;fDr;ksa dks muds lEeq[k vafdr izfr'kr esa vkj{k.k iznku fd;k tkuk visf[kr gS% 1 Lora=rk laxzke lsukuh ds fjfDr;ksa dk 2% vkfJr ds fy, 2 HkwriwoZ lSfudksa ds fy, fjfDr;ksa dk 2% lewg d ,oa [k dh fjfDr;ksa ds flok;

3 d n`f"Vghurk@de n`f"V ls jkT; ljdkj }kjk vf/klwfpr inksa essa
 ls xzflr 0;fDr;ksa ds fy, fjfDr;ksa dk 1%
 [k Jo.kkl ls xzflr 0;fDr;ksa & rnSo &
 ds fy,
 x pyu fdz;k lEcU/kh fu%'kDrrk & rnSo &
 ;k izefLr"dh; vax?kkr ls xzflr
 0;fDr;ksa ds fy,

mi;qZDr vkj{k.k gkfjtUVy gksxkA vFkkZr ;fn mi;qZDr oxksZsa esa ls fdll oxZ dk p;fur vH;FkhZ vuqlwfpr tkfr dk gks rks mls vuqlwfpr tkfr ds dksVk esa ;Fkk vko';d lek;kstu djrs gq;s j[kk tk;sxkA ;fn og vH;FkhZ vuqlwfpr tutkfr dk gks rks mls vuqlwfpr tutkfr ds dksVk esa] ;Fkk vko';d lek;kstu djrs

gq;s j[kk tk;sxkA ;fn og vH;FkhZ vU; fiNM+k oxZ dk gks mls vU; fiNM+k oxZ ds dksVk esa] ;Fkk vko';d lek;kstu djds j[kk tk;sxk ;fn og [kqyh izfr;ksfxrk okyh dVsxjh vFkkZr lkekU; oxZ dk gks rks mls ml oxZ esa ;Fkk vko';d lek;kstu djds j[kk tk;sxkA ;fn dksbZ fjDr mi;qDr vH;FkhZ dh vuqiyC/krk ds dkj.k fcuk HkjH jg tkrh gS rks mls vkxkeh HkrhZ ds fy, vxzhr fd;k tk;sxkA

25. Since the resolution of the Commission is based on the G.O. we consider it necessary to examine whether the G.O. referred in the order and 19 examined by us reserves vacancy in public service for physically handicapped caste/category wise. A perusal of the G.O. indicates that it after giving out vacancies for different classes, namely dependants of freedom fighters, ex-army personals and physically handicapped directs that such reservation would be horizontal. We need not repeat the meaning of horizontal reservation as explained by the Apex Court. Therefore, the reservation was to be provided as laid down by the Apex Court. A disabled or handicapped candidate may be either of General, OBC or SC/ST category. He according to the G.O. has to be adjusted to the caste/category he belongs.

26. The provision for adjustment of selected candidate to the caste/category to which he belongs has erroneously been construed as horizontal reservation being caste/category based. The vacancy for physically handicapped had to be worked out on total number of vacancies for which selection was being held and not by working out to the caste/category to which a candidate applying as physically handicapped belonged. The G.O. extracted earlier does not directly or indirectly provides that the vacancy for physically handicapped should be worked out caste/category wise. The allocation of one percent vacancy for different categories of physically handicapped could not form the basis for determining the percentage of reservation for physically disabled. The assumption made by the Commission that since the physically handicapped candidates had to be adjusted in the caste/category therefore the determination of vacancy had to be decided on the number of vacancies existing for a caste/category is unsound and against the principle of horizontal reservation as explained by the Apex Court. The Legislature did not permit working out percentage on vacancies of General, OBC or SC. It had to be three percent of the total vacancies and then the selected candidate had to be adjusted as provided in the G.O. to the caste/category to which the candidate belonged.

27. The next question which according to us is very important is whether after working out 3% reservation quota for physically handicapped candidates, if only one vacancy is available then it would go to which of the handicap category? The U.P. Act was amended in 1997 and 1999, but so far as the reservation to physically handicapped candidates are concerned, it remained the same, 1% for each category of physical disability. In the U.P. Act instead of mentioning 3% the words used are 1% vacancy each for the person suffering from the aforesaid three categories of physical disability. On the strength of bifurcation in the percentage of reservation the learned Counsel for the respondents has vehemently urged that under the U.P. Act 1% has to be given to each of the aforesaid categories and that can be possible only when three hundred vacancies are available. According to the learned Counsel, if 3 vacancies are available then only one vacancy each can be given to all the aforesaid three categories. Similarly, if the vacancies are 200 then 2 vacancies can be given to the first two categories of physically handicapped and if there are 100 or less than 100 but 50 or more vacancies then only one vacancy could be reserved for the first category of physically handicapped and if no candidate of first category of physically handicapped is available then the vacancy has to be carried

forward to be filled in the next selection. The argument is in two parts, one that 3% vacancy can be worked out only if there were 300 vacancies and the second that even if only one vacancy is worked out for physically handicapped then the same could be offered to the first category and if no candidate of that category is available it could be carried forward but it cannot not be offered to candidate of second or third category. Both the arguments are without any merits. It is in teeth of statutory provisions. Horizontal reservation for physically handicapped candidates is a beneficial piece of legislation. It is in pursuance of commitment for social and equitable participation of physically handicapped. If the submission of learned Counsel for Commission is accepted it shall render the provisions of reservation for physically handicapped otiose. Its interpretation should not be narrow. It should be interpreted in such a manner that the benefit extended to disabled category reaches them. While interpreting it, it has to be kept in mind that the benefit extended by the legislature should reach the disabled, therefore, wider and harmonious construction of the provisions of the Act has to be made to ensure justice to this deprived section of the society. If the argument of the learned Counsel for the respondents is accepted then it will defeat the objective of horizontal reservation for physically handicapped persons.

28. We have seen that in U.P. Act No. 4 of 1993 reservation was for physically handicapped. But when the Central Act came into force, the State Legislature bodily lifted the categorisation and allocation from the Central Act. It further defined the handicap of different category for entitlement of reservation, If there are three vacancies reserved for physically handicapped then there could be no dispute that one each has to be allotted to three categories of disability. But if there is only one vacancy then how it should be allotted and to whom. This requires a closer examination of Section 3(1)(ii) of U.P. Act No. 4 of 1993 as amended. The categorisation of physically handicapped is not without reason. Earlier the reservation was for physically handicapped. But the class being wide it could give rise to arbitrariness and leave scope for pick and choose. Therefore, the Legislature categorised the nature of disability to avail the benefit of reservation. It then fixed priorities by placing different category by specifying the order in which they were to be considered. A person suffering from blindness or impairment of vision, to the extent, mentioned in the section suffers from greater disability or deprivation as compared to others. Similarly, a person suffering from hearing impairment is considered to be suffering from greater deprivation as compared to a person suffering from locomotor disability or cerebral palsy. Categorisation of physically handicapped, it appears, is founded on intensity of deprivation or handicap. The Legislature, therefore, while categorising the disability, determined the order in which they should be treated if there were lesser vacancies.

29. The Central legislation having determined the percentage and the same having been accepted by the State it is not open to statutory body to render the provision nugatory by such interpretation as has been suggested in the supplementary counter affidavit or the argument advanced by the learned Counsel for the Commission and standing counsel for the State. The reasonable interpretation would be that in case there is only one vacancy available to be filled from physically handicapped category, it should be offered first to candidate suffering from blindness or low vision and if no such candidate is available then it should go to the next category of disability, namely, to the category of hearing impairment and again if there is no such candidate available, then it should be offered to the candidate suffering from locomotor disability or cerebral palsy. It would be within the permissible

limit of 1% reservation for each category of disability. This can be the only reasonable interpretation which could be given to the reservation provided to the three different types of disabilities and for extending the benefit of reservation to handicapped candidates.

30. The argument of learned Counsel for the respondents that if only one vacancy was available it could be offered to a candidate who was suffering from blindness and if no such candidate was available it would be carried forward, but it could not be offered to physically handicapped of next category is virtually nullifying the legislative intention of providing equal and social participation of physically handicapped. In fact it is very doubtful if the rule of carry forward mentioned in Sub-section 5 of Section 3 of U.P. Act No. 4 of 1993 as amended and G.O. No. 4/1-2001-Ka-2-2001 dated 22.10.2001 can be applied to horizontal reservation. However, in the view taken by us we do not consider it necessary to express any opinion on it.

31. For the reasons mentioned, hereinbefore, we are of the opinion that it was not necessary for the Director to reserve any vacancy for physically handicapped while issuing notification. Further since horizontal reservation had to be provided as a matter of law and advertisement No. 32 having mentioned so, the Commission acted against law in not considering the petitioner entitled for it as no vacancy was reserved for physically handicapped. We are also of the opinion that the vacancy for physically handicapped was three percent and it had to be worked out on total number of vacancies and not caste/category wise. If there was only one vacancy it had to be offered to the category of physically handicapped in the order of priority mentioned in Section 3(1)(ii) of the U.P. Act No. 4 of 1993 as amended.

32. The Commission, therefore in not considering the petitioner, who is physically handicapped, as a candidate entitled for such reservation acted against law of reservation as applicable in the State.

33. The question still is what relief should be granted to the petitioner. Normally we would have directed the Commission to work out the vacancy for physically handicapped on 41 vacancies available for lecturer Geography and then offered to the candidate in order of priority mentioned in Section 3(1)(ii) of the U.P. Act No. 4 of 1993 as amended. But there being no dispute that the petitioner was physically handicapped covered in the last category and no other candidate from any other category having approached this Court nor the respondents have claimed that there were other candidate of any other category, and it being not denied that 3% of 41 vacancies being 1,26, we are of the opinion that it would be in the interest of justice to issue the following directions.

34. In the result, the writ petition succeeds and is allowed. The order of the Commission dated 25.11.2003 is quashed. A writ of mandamus is issued to the respondents to treat one post of Lecturer in Geography horizontally reserved for physically handicapped in the selection held in pursuance of Advertisement No. 32 published on 23.4.2002 and declare the result of the petitioner within a period of six weeks from the date a certified copy of this order is produced before the Commission. After the result is declared by the Commission, the petitioner shall be adjusted as a physically handicapped candidate in the vacancies available in General category on the post of Lecturer in Geography. The Director, U.P. Higher Education, thereafter, shall issue placement order within three weeks.

35. The petitioner shall be entitled to his costs.