

CWP Nos.10675 of 2020 and connected cases

-1-

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 10675 of 2020 (O&M)

Date of Decision : 14th December, 2020.

Gurpreet Singh and others

...Petitioners

Versus

State of Punjab and others

...Respondents

CWP No.1001 of 2020(O&M)

Rajinder Kaur and others

...Petitioners

Versus

State of Punjab and others

...Respondents

CWP No.12036 of 2020 (O&M)

Meenakshi and others

...Petitioners

Versus

State of Punjab and others

...Respondents

CWP No.12273 of 2020 (O&M)

Gursant Singh and others

...Petitioners

Versus

State of Punjab and others

...Respondents

(Through video conferencing)

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

CWP Nos.10675 of 2020 and connected cases

-2-

Present: Mr. Gurminder Singh, Sr. Advocate with
Mr. Gurnoor Singh Sandhu, Advocate for the petitioners
in CWP No.10675 of 2020.

Mr. Bikramjit Singh Bajwa, Advocate for the petitioners
in CWP Nos.1001 and 12273 of 2020.

Mr. Sumeet Singh Sandhu, Advocate for the petitioners
in CWP No.12036 of 2020.

Ms. Anju Arora, Addl. A.G. Punjab
in C.M Nos.9169-CWP and 9171-CWP of 2020.

Mr. Sher Singh, Advocate for respondent-applicant
in CM-6627-CWP of 2020.

Harsimran Singh Sethi, J. (Oral)

By this common order, the bunch of writ petitions, details of which have been given in the heading, are being disposed of as the same question of law is raised in all these writ petitions and are based upon the same set of facts relating to the same selection process. For the purpose of this order, the facts are being taken from CWP No.10675 of 2020 titled as ***Gurpreet Singh and others vs. State of Punjab and others.***

The undisputed factual position is as under :-

The Director Education Department, Recruitment Directorate issued an advertisement dated 08.03.2019 inviting online applications from the eligible candidates for direct appointment to 1558 posts of Head Teachers. The method of selection as per the advertisement was that a candidate was required to undergo a written test and the selection was to be made on the basis of the marks secured in the said written test, subject to the scrutiny of the documents of the eligible candidates. 1558 posts of Head

CWP Nos.10675 of 2020 and connected cases

-3-

Teachers were bifurcated in various categories which are as under:-

Sr. No.	Category	No. of Posts
1.	Unreserved (50%)	779
2.	SC(20%)	312
3.	SC Ex-serviceman (4%)	62
4.	SC Sports (1%)	16
5.	BC(10%)	156
6.	BC Ex-serviceman(2%)	31
7.	Ex-serviceman(7%)	109
8.	Sportsman (2%)	31
9.	Freedom Fighter (1%)	15
10.	Handicapped (3%)	47
11.	Total No. of Posts	1558

The written test for selection was conducted by the respondents on 20th and 21st of July, 2019 and the result of the same was declared on 07.08.2019. Before proceeding further, it is required to be noticed here that the posts, details of which have been given hereinbefore, were to be filled up in various districts of the State of Punjab and the post in question i.e. Head Teacher is a District cadre post, to be filled in each district on the basis of merit coupled with the option of a candidate. The procedure adopted by the respondents for selection and appointment of a candidate is that a candidate, who is called on the basis of merit, after scrutiny of his/her documents, is to select a station as per his/her choice keeping in view the availability of a vacant post in a particular district and on obtaining the option of the said candidate for appointment in a particular district against the available post, the selection process is complete and thereafter, appointment order is issued to the said candidate by the concerned District Education Officer. Hence, the selection process comes to an end only after

the candidate opts for the post in a particular district so as to entitle the candidate an appointment order to be issued by the concerned District Education Officer of the district, where the candidate opted for the post.

The undisputed factual position is that the Recruitment Board constituted by the respondents for selecting the candidates, in pursuance to the advertisement dated 08.03.2019, started the selection process against all the 1558 posts advertised in different categories simultaneously, based upon the merit obtained by the candidates in the result declared on 07.08.2019. The candidates equal to the number of posts advertised in the different categories were recommended by the Recruitment Board for selection/appointment to the respondent-department.

Due to the said procedure, which was adopted by the Recruitment Board, only 779 candidates were recommended for selection/appointment against 779 posts advertised in open general category and all the posts in the said category could not be filled, which fact is clear from the selection list (Annexure P/5), as out of the 779 recommended candidates, a large numbers of candidates were either declared as 'withheld' or some of the eligible candidates did not turn up for consideration of their claim on various accounts. Certain candidates though appeared for scrutiny of their documents but did not complete the selection process of appearing and opting for the post in a particular district and thereby giving up their right for appointment before the completion of selection process. All the posts advertised in open general category could not be filled up due to non-availability of recommended candidates as the Recruitment Board had recommended the candidates for consideration and appointment to the

various categories posts equal to the number of posts advertised and selection process of filling all the 1558 posts was taken up simultaneously by conducting selection and appointment in the open general category as well as the reserved categories posts.

As per the pleadings, out of the 779 posts advertised in open general category to be filled from joint merit list, 226 posts remained unfilled due to non-availability of recommended candidates as only 779 candidates were recommended against 779 posts. One of the reasons for non-availability of eligible candidates to fill all the 779 posts advertised in the open general category was that the candidates starting from the merit list no. 780 onwards were recommended by the Recruitment Board to be considered in the various reserved categories and their selection process was also being taken simultaneously on the same date, when the posts in the open general category were being filled up. The candidates starting from the merit position no. 780 were considered and appointed in the various reserved categories due to which, there were not enough eligible recommended candidates available to fill up all the 779 posts in the open general category.

In order to fill up the 226 unfilled posts in the open general category, the respondents sought to shift the reserved category candidates to the open general category, who are higher in merit, starting from the merit position no. 780, though they had already been appointed in the reserved category. This act of shifting the reserved category candidates, who had already been appointed in the various reserved categories, to the open general category, is being resisted by the petitioners on the ground that the

candidates already appointed in the reserved category cannot be shifted against the unfilled posts in the open general category subsequent to their appointment in the reserved category and the unfilled posts of the open general category should be filled up from the candidates belonging to the open general category only, who are awaiting appointment.

Upon notice of motion, respondents have filed the reply.

Respondents in their reply have stated that initially when the process of selection and appointment was undertaken, the number of candidates equivalent to the posts advertised in the different categories were recommended for appointment by the Recruitment Board and Recruitment Board recommended only 779 candidates for selection and appointment against 779 posts to be filled in open general category and similar recommendations were made by the Recruitment Board in respect of reserved categories as well. It has been stated by the respondents that filling up of the posts available in the open general category i.e. 779 posts was undertaken simultaneously alongwith the process of filling up the posts in other categories. It has been further averred that 226 posts out of 779 posts advertised in the open general category remained unfilled due to the non-availability of the recommended candidates for appointment. The respondents in their reply have admitted that the posts, which remained unfilled in the open general category due to the non-availability of the recommended candidates, were thereafter sought to be filled up by transferring the reserved category candidates, who were higher in merit and had been already appointed in the reserved categories, to the open general category as per the joint merit list. As per the respondent-State the said

shifting of the candidates was undertaken keeping in view the settled principle of law that the reserved category candidates who secured higher marks though, might have applied under reserved category are to be considered and appointed against the posts advertised in the open general category, as per their merit and, therefore, are entitled for appointment in the open general category, hence, it is being pleaded by the State that transferring the reserved category candidates, who are higher in merit to the open general category for appointment as Head Teacher, is perfectly valid and legal and in consonance with law and the grievance which is being raised by the petitioners is liable to be rejected.

In rebuttal, learned Senior counsel appearing on behalf of the petitioners has submitted that once, a candidate belonging to reserved category has already been appointed against the reserved category post, the said candidate, in the second counselling, cannot be shifted to the unfilled posts in open general category and the unfilled posts of open general category after first counselling, have to be filled from the same category i.e. open general category and the reliance is being placed upon the judgment of the Hon'ble Supreme Court of India in ***Rajiv Mittal vs. Maharshi Dayanand University 1998 (2) SCC 402.***

I have heard learned counsel for the parties and have gone through the record with their able assistance.

Keeping in view the pleadings and the undisputed facts and circumstances pleaded and recorded hereinbefore, the question of law, which arises for consideration before this Court is whether in the facts and circumstances of the present cases, the respondents can transfer the reserved

category candidates, who have already been appointed in the reserved categories, to the open general category on the basis of their higher merit so as to fill the 226 unfilled posts out of the 779 posts advertised in the open general category, which remained vacant due to non-availability of recommended candidates.

Before answering the said question, the law on the subject as to how the appointments are to be made while undertaking process for direct recruitment, needs to be enumerated. This issue is no longer res-integra and the same has been settled in a catena of judgements. As per the settled principle of law, settled by the Division Bench of this Court in ***Jaskaran Singh vs. State of Punjab, 1995 (2) S.C.T 65***, the candidates who are higher in merit are required to be appointed against the open general category on the basis of the joint merit list irrespective of the category in which they have applied for. It is only after all the posts available in the open category are filled on the basis of joint merit list, the posts advertised in the various reserved categories are to be filled on the basis of merit obtained by the reserved category candidates. The relevant paragraph of the judgment is as under:-

*“6. The matter now stands finally settled by the decision of the Supreme Court in **Indra Sawhney v. Union of India, 1993(1) RSJ 1 : 1993(1) SCT 448 (SC)** : wherein their Lordships of the Supreme Court after concluding that the reservation contemplated in clause (4) of Article 16 of the Constitution should not exceed 50 per cent, observed in paragraph 831 of the judgment, as under:-*

"In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some

members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Caste; they will be treated as open competition candidates."

For the reasons recorded above, the Government instructions dated 19.10.1983 are hereby quashed. It is directed that while granting admission against the reserved and unreserved seats, a common merit list of all the reserved and unreserved candidates should be prepared and the open seats filled up as per that merit list and if any candidate from the reserved category falls in that list he will be treated to have been admitted in the General Category. After this is done, the reserved candidates should be granted admission in the order of their merit against the reserved seats. This method would certainly avoid the anomaly that has arisen in the present case."

Thereafter, same question again came up for consideration before a Division Bench of this Court in CWP No. 12318 of 2001 titled as ***H.S. Grewal Vs. State of Punjab***, decided on 22.11.2001 and the Division Bench following the law settled in ***Jaskaran Singh's case (supra)***, again held that the posts in the open general category are to be filled up first before resorting to the appointment in the reserved category. The relevant paragraphs 5, 6 and 7 of the judgment are as under :-

*"5. Learned counsel for the petitioner placed reliance upon a Division Bench judgment of this court in the case of ***Jaskaran Singh and others v. State of Punjab and others, 1995(2) SCT 65 (P&H)(DB) : 1995(1) Recent Services Judgments 510***, where the Bench was dealing with the question as to the entitlement of the applicants claiming seats under the category of children/grand children of political*

sufferers having attained higher merits in the general category were entitled to seat under the general category or under particular reserved category for them. The Bench held as under:-

*"6. The matter now stands finally settled by the decision of the Supreme Court in **Indira Sawhney and others v. Union of India and others, 1993(1) RSJ 1** wherein their Lordships of the Supreme Court after concluding that the reservation contemplated in clause (4) of Article 16 of the Constitution should not exceed 50 per cent, observed in paragraph 831 of the judgment, as under:-*

"In this connection it is well to remember that the reservations under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Caste; they will be treated as open competition candidates."

7. "For the reasons recorded above, the Government instructions dated 19.10.1983 are hereby quashed. It is directed that while granting admission against the reserved and unreserved seats, a common merit list of all the reserved and unreserved candidates should be prepared and then open seats filled up as per that merit list and if any candidates from the reserved category falls in that list he will be treated to have been admitted in the general Category. After this is done, the reserved candidates should be granted admission in the order of their merit against the reserved seats. This method would certainly avoid the anomaly that has arisen in the present case."

6. We are in respectful agreement with the observation of the Hon'ble Division Bench. In fact, the observations are in

consonance with the principle enunciated by the Hon'ble Supreme Court.

7. In the present case, it is not disputed that the petitioner is much higher in merit in the general category and more particularly is much above in merit than the last candidate admitted to the course under the general category. The principle is so well settled that it hardly calls for any further discussion in the case. In any case, the respondents themselves declared the result of the petitioner on 19th May, 2001 under the general category and rightly so. This cannot be said to be a mistake or error. If the petitioner is entitled to get admission in the general category of his own merit, it will be unjust and unfair to deny him the seat in the general category on the reasoning that the petitioner is not entitled to seat in the sports category because he possesses sports gradation certificate of lower standard/category.”

Again following the Division Bench judgment in **Jaskaran Singh's case (supra)**, another Division Bench of this Court while deciding **CWP No. 15133 of 2002**, titled as **Ravinder Singh Vs. The State of Punjab**, on 09.12.2002, held that the seats in the open general category are to be filled up first without reference to the reservation in any manner. The relevant paragraphs 4 and 5 are as under :-

*4. The controversy in the present case squarely hinges on the law laid down by the Supreme Court in **Indra Sawhney v. Union of India, 1993(1) SCT 448**, which was followed by this Court in **Jaskaran Singh v. State of Punjab, 1995(2) SCT 65**. The relevant excerpts from the judgment rendered by the Division Bench of this Court are reproduced hereunder :-*

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5. In view of the above, it is evident that admission should have been first made to the General Category seats without reference to any manner of reservation. Those falling in the merit list so as to occupy the General Category seats in terms of the judgments referred to above, would not be taken into consideration for filling up seats in the reserve categories."

The same question of law as to how the direct recruitment is to be made came up for consideration before a Co-ordinate Bench of this Court in CWP No. 12618 of 2014, titled as ***Parminder Singh and others Vs. State of Punjab and others***, decided on 15.12.2017. The relevant paragraph no. 16 of this judgment is as under :-

"16. It has been settled by the Hon'ble Supreme Court in a catena of judgements that in the first instance General Category seats are to be filled up purely on the basis of merit of the candidates irrespective of their category. Then, the seats reserved for Scheduled Castes, Scheduled Tribes and Backward Classes are to be filled

and candidates belonging to these categories who have been selected on merit in the open/General Category are not to be counted against the quota reserved for these categories. The concept of vertical reservation was dilated upon by the Hon'ble Supreme Court in Rajesh Kumar Dariya Vs. Rajasthan Public Service Commission, 2007 (4) S.C.T, 99 and it was held as under:- "Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc. under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16 (4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for Scs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category (Vide-Indira Sawhney (supra), R.K. Sabharwal v. State of Punjab, 1995 (2) SCT 646: (1995(2) SCC 745), Union of India v. Virpal Singh Chauhan, 1995(4) SCT 695: (1995(6) SCC 684."

A bare perusal of the law cited hereinbefore clearly shows that the law on the subject is well crystallized to the effect that while making selection and appointment by way of direct recruitment, first of all, all the candidates, irrespective of the categories in which they have applied, are

eligible to be appointed purely on the basis of merit against the posts advertised in the open general category. It is only after all the posts in the open general category are filled on the basis of joint merit list, the process of filling up of the posts in the reserved categories is to be undertaken, out of the remaining eligible candidates belonging to various reserved categories as per their respective merit.

Keeping in view the settled position of law noticed hereinbefore, it was incumbent upon the respondents to first fill up the 779 posts advertised in the open general category from the joint merit list irrespective of the category, in which a candidate has applied for. Only after filling up the 779 posts, the respondents should have undertaken the process of filling up the posts in various reserved categories starting from the next merit position available. This process has not been followed by the Recruitment Board as well as the respondents in the present case, which has led to the present controversy. In the present case, the first irregularity which has been committed by the Recruitment Board is that they recommended the candidates only equal to the number of posts advertised in the different categories for consideration and appointment. Eligible candidates, twice the number of posts advertised should have been recommended for consideration for selection and appointment so that, no post is left unfilled due to non-availability of eligible candidates. No reason has come forward on the record as to why or on what basis the Recruitment Board only recommended candidates equal to the number of posts advertised in the different categories for selection and appointment. This irregular act on the part of the Recruitment Board has led to a situation

where total 779 posts in the open general category could not be filled up and 226 posts remained unfilled due to the non-availability of recommended candidates as large number of candidates out of 779, who were recommended by the Recruitment Board, either did not participate in the process or left the selection process half way or were found ineligible, which fact is clear from the selection list (Annexure-P/5).

The second irregularity which has been committed by the Recruitment Board is to take up the selection process of all the 1558 posts simultaneously rather than first filling up all the posts of the open general category and then reverting to fill up the posts available in the reserved categories. The settled position of law has been ignored by the Recruitment Board while adopting the above stated process and that too without giving any valid explanation for the same. The oral argument submitted by the learned State counsel for resorting to the simultaneous selection against all the 1558 posts rather than filling up the posts advertised in the open general category first is that it would have delayed the selection process. This argument is fallacious and cannot be accepted. The outcome of the said illegal/irregular action of the respondents shows that even up to now, the selection and appointment of the candidates could not be finalized and has also created unnecessary/unneeded litigation. Had the respondents followed the settled principle of law noticed hereinbefore of first making selection and appointment to the posts advertised in the open general category and thereafter resorting to fill up the available posts in various reserved categories, this controversy would not have arisen at all and the selection process could have been finalized much earlier. Even as of now, the

candidates are awaiting appointment, which is only due to the irregular and illegal act on the part of the respondents in resorting to simultaneous selection and appointment to 1558 posts de-hors the settled principle of law. The posts remained unfilled in the open general category due to this irregular process of recruitment adopted by the Recruitment Board and followed by the respondent-department. Now the unfilled posts in the open general category are being filled by the respondents by transferring the reserved category candidates, who are higher in merit and had been already appointed in the reserved category, to the open general category so as to satisfy the requirement of law and to rectify their mistake .

It is a conceded fact that had the Recruitment Board and the respondents followed the settled principle of law noticed hereinbefore of first filling up all the posts in the open general category and thereafter undertaking the process of filling up the posts advertised in the various reserved categories, the meritorious reserved category candidates, who were granted appointment in the reserved category and are now sought to be shifted in the open general category, would have got appointment in the open general category at the first instance itself. The appointment of the meritorious candidates in the reserved category was only due to the irregular/illegal act of the Recruitment Board of the respondents in firstly recommending the candidates equal to the number of posts advertised and of undertaking the selection and appointment process simultaneously for all the 1558 posts advertised.

Now, the question before this Court is whether the illegality/irregularity committed by the department at the initial stage, while

undertaking the selection process due to which posts in the open general category remained unfilled due to non-availability of recommended candidates and granting appointment in the reserved category can be rectified subsequently or not.

This illegality/irregularity of undertaking the process of simultaneous selection for all the 1558 posts advertised and only recommending candidates equal to the number of posts advertised for selection and appointment in various categories has caused prejudice to the candidates, who are otherwise eligible for appointment, keeping in view the settled principles of law discussed hereinbefore. Any illegality/irregularity committed by the department cannot take away a legal right of a candidate for appointment in accordance with law. The eligible candidates cannot be made to suffer on the basis of an illegal process and procedure adopted by the respondents initially to fill up 779 posts in the open general category by recommending in 779 candidates for selection and appointment and also by undertaking the process of filling all the advertised posts simultaneously. This Court has to uphold the law and also ensure that the eligible candidates get appointed as envisaged under law, especially, when the candidates had no role in illegality/irregularity committed by the respondents while making appointment to the posts of Head Teachers. It is a conceded fact that in case the respondents would have filled up 779 posts advertised in the open general category first, before resorting to the appointment in the reserved category, the reserved category candidates, who are now being sought to be transferred from the reserved category to the open general category, would have got appointment in the open general category itself. The rights of

eligible candidates to seek appointment as per law cannot be thrown to the wind merely because the respondents chose to adopt a particular method for appointment, which is de-hors the settled principle of law.

Conversely, any illegality/irregularity committed by the department in filling up the 779 posts in the open general category or the reserved category posts will also not give a right to the petitioners to claim appointment based upon the said illegality/irregularity. The acceptance of the arguments of learned senior counsel for the petitioners will amount to perpetuating the illegality, to which, this Court cannot be a party. The right of the petitioners has to be asserted in accordance with law and should not be based upon the illegality/irregularity committed by the department.

This Court takes the support of the law laid down by the Hon'ble Supreme Court of India, wherein, it has been held that the mistake on the part of the department cannot confer a right upon a person(s) de-hors the rules and settled principles of law. Hon'ble Supreme Court of India in ***Civil Appeal No. 7215 of 2008*** titled as ***Ramesh Gajendra Jadhav Vs. Secretary, Late S.G.S.P. Mandal & Ors.***, decided on 22.7.2010, held that a mistake on the part of an institution cannot vest an indefeasible right to seek appointment and the mistake can be cured subsequently. Paras 7 and 8 of the said judgment are as under :-

“7. There can be no doubt that a post is determined to be a part time or full time depending on the work load in a particular college. The University, vide its letter dated 5th December, 1998, had referred to the requirements which a college ought to satisfy. In response thereto, the College had completed the requirement and had clearly stated that in Geography, there was one vacancy of part time lecturer which

was for open category. This had been approved by the University, but subsequently it was noticed that the University by mistake had granted approval for full time lecturer in English and Geography, while the advertisement had indicated the vacancy of a part time lecturer in Geography. It is expected and desirable of the Authorities concerned to have corrected the mistake at that juncture itself. However, because of inter se correspondence between the University, College and the Director of Education, the matter got delayed and in the meanwhile the Selection Committee, on the basis of the approval letter issued by the University, selected the appellant as full time lecturer to the post vide letter dated 3rd March, 1999. The University had informed the College that as per the roaster, the full time regular vacancy of the College has to be given to SC category candidate and, therefore, earlier advertisement should be cancelled and fresh advertisement should be issued. It is a settled principle of law that a vacancy which has been reserved for SC category cannot be converted to an open category unless and only if specified and that too only if the rules permit. Nothing of this kind has been placed on record and in fact no submission in that behalf has been made by any of the parties before us. Once the post was reserved for SC category, the Authorities could only fill up the said post by a reserved category candidate. No advertisement for reserve candidate had been issued earlier, as such, none would have applied for the same being a post for open category and this mistake vitiated the entire selection process. As already noticed, fresh advertisement was issued and Respondent No. 5 was appointed to the said post, resulting in termination of services of the present appellant. Of course, to some extent, this mistake was ought to be corrected at least partially by University by giving the approval to the full time post for one academic year 1999-2000 in favour of the appellant. No doubt, appellant has been subjected to some inconvenience and

prejudice and his remedy for damages or any other relief, as he may deem fit and proper, are open to be taken but this is not a case where interference of this Court is called for under Article 136 of the Constitution. We must notice that in the needs of employments, particularly, in the Institutions which are aided and are under the control of the State or statutory bodies, adherence to the concept of equality and avoidance of discrimination is an essential feature. In other words, the respondents were expected to act in consonance with the constitutional mandate contained under Articles 14 and 16 of the Constitution of India. We find that the Selection Committee was at fault in selecting the candidate as full time lecturer, while admittedly the advertisement had been given for a post of part time lecturer in Geography. It is a matter of common knowledge that the eligible candidates, if knew, that the post was that of 'full time lecturer in Geography' would have applied in larger number and even with better qualifications. In other words, number of candidates have been denied an opportunity of competing for this post. It would add arbitrariness or unfairness to the entire process of selection. The appointment of the appellant, even if otherwise, in accordance with procedure would stand vitiated on this ground alone. It is a matter of concern that the post which was advertised as part time was treated as full time, that too under the general category only on the pretext that the University had written a letter that the post of Geography lecturer was full time while completely ignoring the stand of the College when it had sought clarification from the University to remove the confusion created by this stand. Thus, it was not a case where post of full time lecturer in Geography in general category was available. It was neither desirable nor fair for all the Authorities concerned to make this appointment in the manner in which it has been done, even if the Selection Committee had recorded it minutes to that effect. Viewed from this angle as

well, we do not think it was a case, where we can find any error in the judgment of the High Court.

8. Another factor, which has to be considered by the Court, is that in the Writ Petition No. 1689 of 2000 filed by the appellant, which was dismissed by the High Court, he could have raised these issues in that Writ Petition but the point of res judicata/constructive res judicata had not been decided against the appellant by the learned Single Judge. The appellant could have challenged the order of High Court and even raised the issue with regard to reservation or his deemed regular appointment as full time lecturer in Geography in that writ petition itself. However, the advertisement was issued for filling up the reserve vacancy on 1st January, 2001. Therefore, we cannot find fault with the appellant to the extent that appeal filed by him could be dismissed on that ground. Be that as it may, a detailed discussion on this subject would be uncalled for in the facts and circumstances of the present case. The fact of the matter remains that there was a collective error on the part of the University and College and more on the part of the University that led to this situation. But this mistake cannot vest indefeasible legal right in the appellant to be appointed or deemed to have been appointed against a reserve category while he is a candidate, admittedly, belonging to the open category and was so appointed by the Selection Committee.”

In the present case, it was admittedly a mistake/irregularity upon the part of the respondents in undertaking the selection process for the total 1558 advertised posts simultaneously without filling the open general category posts first and that too by recommending only 779 candidates against the 779 posts advertised in the open general category, due to which 226 posts in the open general category remained unfilled due to non-availability of recommended candidates. The said mistake/irregularity is

now being rectified by the department by transferring the meritorious reserved category candidates, who in the opinion of this Court, were wrongly appointed in the reserved category, to the unfilled posts of open general category. Once the appointment of the meritorious reserved category candidates, in the reserved category was an outcome of illegal and irregular act on the part of the respondents, the petitioners cannot claim that the said illegal and irregular act should be allowed to continue and their claim, which is based upon the said irregular act, should be allowed, which would mean to perpetuate the illegality/irregularity committed by the department. This Court cannot be a party in perpetuating the illegality/irregularity, which costs an eligible candidate his/her appointment.

Learned Senior counsel appearing on behalf of the petitioners raised an argument that a candidate who has already been appointed in the reserved category cannot be allowed to transfer subsequently even if posts in the open general category remained available by relying upon the judgement of Hon'ble Supreme Court of India in ***Rajiv Mittal's case (supra)***.

The said argument is to be tested in the light of the facts whether the appointment of the meritorious candidates belonging to the reserved category against the posts in the reserved categories, at the first instance was legal or not. In the present case, as already noticed, the selection process adopted by the respondents was contrary to the settled principle of law as only 779 candidates against the equal number of posts advertised in the open general category were recommended and also due to simultaneously undertaking the process of selection against all the 1558

advertised posts including the posts advertised in various reserved categories without filling up all the posts advertised in the open general category first is held to be bad. Due to this illegal act, the consequences were that not only 226 posts in the open general category remained unfilled due to the non-availability of sufficient recommended candidates but also the meritorious reserved category candidates, who would have been appointed against those 226 open category posts at the first instance only, without considering their claim against the posts available in the open general category first, were considered and appointed against the reserved category posts. Once, the initial appointment of the reserved category candidates, against the reserved category posts, was not in accordance with settled principle of law and was due to irregular and illegal selection process adopted by the respondents, no benefit of the said irregular appointment of the reserved category candidates against the reserved posts, can be extended to the petitioners, so as to grant their prayer as raised in these petitions.

The reliance being placed by the learned senior counsel appearing on behalf of the petitioners on ***Rajiv Mittal's case (supra)***, in order to contend that the reserved category candidate already appointed cannot be transferred to the open general category, is misplaced and misconceived. ***Rajiv Mittal's case (supra)*** related to admission of candidates to the M.B.B.S. Course. It is also a matter of fact that in the said case, while making selection, the seats advertised in the open general category were filled first and it is only thereafter the process of filling up the seats in the reserved category was undertaken. From a bare reading of paragraph 13, which is being relied upon by the learned senior counsel to

buttress his argument, it is clear that there were 49 seats in the open general category and all those seats were filled up first and the last selected candidate, who got admission in the open general category, was at merit list no. 53, and one Sunil Yadav, who had applied in the reserved category of backward class, was at serial no. 1 in the merit list of the reserved category though, in the joint merit list, his merit position was 62. The said Sunil Yadav could not get selected against one of the 49 seats in the open general category when those were filled up as last candidate selected against the open general category was at serial no. 53. The selection for the reserved category seats was made after filling up all the open general category seats and Sunil Yadav, who was at serial no. 1 in the merit list of the reserved category of backward class, was granted admission in the said reserved category. Thereafter, the candidate selected in the open general category did not join and ultimately, the candidate at merit list no. 66, was granted the admission in the open general category. The candidate, who was at merit position no. 12 in the reserved category of backward class, who could not get admission against the 11 seats reserved for the said category, made a claim for shifting of Sunil Yadav, who was at merit position no. 62 to the open general category and claimed the resultant seat to be vacated by the said Sunil Yadav. This Court allowed the petition and held that rather than granting the admission to a candidate, who was at merit position no. 66, Sunil Yadav, who was at merit position no. 62, and has already been granted admission in the reserved category of backward class, should be shifted to the open general category. This order was under challenge before the Hon'ble Supreme Court of India. Hon'ble Supreme Court of India allowed

the appeal. The relevant paragraphs no. 4, 5, 10, 11, 12 and 13 of the said judgement are as under :-

“4. On 09.09.1996 the first counselling for the 49 seats in the open/general category was held. Sunil Yadav did not secure any seat in the general category because of his low merit position. On the following day i.e. 10.09.1996, Sunil Yadav appeared for the first counselling for the reserved seats as he had been placed at serial No. 1 in the category of backward class. He naturally got selected and secured admission in M.B.B.S. Course at the Rohtak Medical College in the reserved category.

5. If after the first counselling, certain seats remained unfilled, then second, third or fourth counselling, as the need arise, takes place. In as much as few seats in the general category had fallen unfilled, second counselling was held on 26.09.1996. Students upto serial No. 60 in the aforesaid merit list were granted admission and there still remained one seat in the general category, which remained to be filled. The candidate at merit list no. 61 did not join the counselling, Sunil Yadav, who was at merit list no. 62 having already secured admission also did not appear for the counselling for the general category. Similarly, candidates at serial Nos. 63, 64 and 65 also did not join for counselling. This seat was thereupon offered to the appellant herein who was at serial no. 66. He accepted the offer of admission and joined the Rohtak Medical College.

xxxx xxxx xxxx xxxx xxxx

10. If as a result of first counselling, all the seats, which are available, are filled then no further counselling takes place. Where however some seats become available, then it appears that second, third or if the need arise, fourth counselling does take place but in such a manner that normally there should be no delay in the commencement of the course of

study. Furthermore unless and until counselling takes place, no candidate who has been granted admission on the basis of the counselling, is allowed to change his college merely because a seat in another college has fallen unfilled. The seats, if any, which fall unfilled, can only be filled if and when counselling takes place where the candidates who have already been selected may have no option of shifting to another college. An appropriate analogy of this system is that of a booking chart for a dramatic performance which has to take place in the future. The people standing in the queue reserve or book their seats out of those which are available according to their preference. Once the chart fills up the booking closes. Only sometimes, if tickets are returned they may be reissued. But once the dramatic performance starts no one is allowed to enter. Just as counselling for seats to medical colleges must stop once the courses of study commence.

*11. The learned counsel for the respondents submitted that Sunil Yadav could only be considered as a general category candidate and placed reliance on the observations of this Court in **Indra Sawhney & others v. Union of India 1992 Supp (3) SCC 212** where at page 735, it was observed as follows :*

"In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

The aforesaid principle has, apparently, been incorporated in Note 2 in the Information Brochure of the Maharshi Dayanand University, Rohtak which reads as follows :

"A candidate who applies either for reserved category or for both reserved and open will be considered first in open category. In case he/she is not selected in open category, he/she will be considered for reserved category."

12. The aforesaid Note 2 has been construed by the High Court to mean that Sunil Yadav who was also in the merit list for the seat in the open category should be considered as having been selected to the open category seat and he should not be considered as having been selected for the category seat.

13. The aforesaid Note 2 has not been correctly construed by the High Court. This note, in a case like the present, will have application only when a reserved category candidate is in a position to secure, and secures admission to a seat in the general in the same counselling in which seat is available to him in the reserved category. It is for this reason that the first counselling for the general category candidates was held on 9.9.1996 while the first counselling for the reserved category candidates was held on 10.9.1986. In other words the first counselling was spread over two days so that if any reserved category student had managed to secure admission to the general category seat then he will not be entitled to adjustment against the reserved seat. Had Sunil Yadav secured admission to any one of the 49 seats in the first counselling held on 9.9.96, then he could not have been called or considered for admission against any of the 11 reserved seats in the counselling which was held for the backward class candidates on 10.9.1996. As Sunil Yadav's position in the open category was at serial number 62 and the last candidate who had secured admission at the first counselling against the 49th seat was at serial No. 53, therefore, having failed to secure admission on 9.9.1996, Sunil Yadav was rightly allowed to take part on the second day of the first counselling for the backward

class candidates which was held on 10.9.1996. It is in that counselling that he was selected and granted admission to the Medical College at Rohtak. Once Sunil Yadav had secured admission in the reserved category quota at the first counselling, there would be no occasion for him to take part in the second counselling for the general category seat for the same college which was held on 26.9.1996. The seat which had fallen unfilled was one of the 49 seats which was required to be filled by the general category candidates. As the aforesaid Note 2 was not applicable to a case like the present, where Sunil Yadav having failed to secure admission to a seat in the open category in the first counselling for that category but had secured admission to the reserved seat in the same counselling, the question of his being shifted or being regarded as a candidate to the open category seat which had become available only after he had secured admission did not and could not arise and, consequently, the appellant was rightly granted admission to the general category seat in the Rohtak Medical College.”

Learned senior counsel is relying upon an observation of the Hon'ble Supreme Court of India in para 13 of ***Rajiv Mittal's case (supra)***. Said argument is raised by reading the said observation of the Hon'ble Supreme Court of India in isolation, without appreciating the facts of the said case as well as that of the case in hand. The observations of the Hon'ble Supreme Court of India cannot be *ipso facto* applied without appreciating the facts of the case, wherein the law has been laid down and also the facts of the case where the said law is sought to be applied. In ***Rajiv Mittal's case (supra)***, the selection to the seats available were made in accordance with law i.e. first all the seats in the open general category were filled up as per the joint merit list by considering all the eligible candidates

and it was only thereafter, the process of filling up the reserved category seats were taken up and those were filled up. In ***Rajiv Mittal's case (supra)***, the claim of the reserved category candidates stood considered against 49 seats available in the open general category but Sunil Yadav could not get selected against the seats in open general category due to the fact that he was at merit position No. 62 and all the 49 seats got filled up till the merit position No. 53 at the first instance. It was thereafter, Sunil Yadav i.e. the reserved category candidate, who was at serial No. 1 in the backward class category, was given admission against the reserved category seat. It was under these circumstances, the Hon'ble Supreme Court of India held that where the claim of a reserved category candidate has been considered against the open general category seat and the candidate could not get selected against the same and was thereafter granted admission in the reserved category, the shifting of the said candidate to a seat available in the open general category, keeping in view the facts and circumstances of the said case, is not permissible and was consequently declined.

The facts of ***Rajiv Mittal's case (supra)*** are not similar to the present case. In the present case, it is an admitted position that the meritorious reserved category candidates were appointed against the reserved posts without considering their claim against 779 posts available in the open general category. It is also conceded position that names of the meritorious reserved category candidates, who are now sought to be shifted to open general category, were never recommended by the Recruitment Board to be considered against open general category posts. If names of these meritorious reserved category candidates would have been considered

initially by the Recruitment Board against 779 seats available in the open general category, they would have got selected against the open general category posts even at the first instance. The appointment of the reserved category candidates, against the reserved posts, was made de-hors the settled principle of law. Once, the facts in ***Rajiv Mittal's case (supra)*** as well as in the case in hand are different, the observations of the Hon'ble Supreme Court as made in para 13 in ***Rajiv Mittal's case (supra)***, cannot be made applicable in the present case by reading them in isolation, ignoring the factual aspect. Therefore, reliance being placed by the petitioners in ***Rajiv Mittal's case (supra)***, is erroneous and misplaced, hence cannot be accepted to grant the prayer as being advanced by the petitioners.

Further, the challenge in the present petition is only qua the shifting of the candidates, who have already been appointed in the backward class category, to the unfilled posts in open general category. 62 candidates are being shifted from backward class category to the open general category whereas, admittedly, there were 226 posts out of the total 779 posts which remained unfilled due to the non-availability of the recommended candidates. The meritorious reserved category candidates appointed against other reserved categories posts have already been shifted to the unfilled open general category posts in accordance with their merit. That being so, a different yardstick cannot be adopted in respect of the meritorious candidates who were also appointed in a same fashion in the backward class category, and are now being shifted to the open general category on the basis of their merit. This will create a disparity in the selection process, which is impermissible.

Further, it is not the claim of the petitioners that anybody who is less meritorious than them is being shifted to the open general category so as to claim the posts in preference to them. Learned Senior counsel appearing on behalf of the petitioners concedes that all the candidates who are being shifted from reserved backward class category to the open general category to be appointed against the 226 unfilled posts out of 779 posts advertised in the open general category are higher in merit than the petitioners. That being so, as per the law laid down by the Division Bench of this Court in *Jaskaran Singh's case (supra)*, the candidates who are higher in merit and are entitled for appointment in the open general category are to be appointed in the said category notwithstanding the fact that they belong to the reserved category. Accepting the plea of the petitioners will violate the law settled by the Division Bench of this Court in *Jaskaran Singh's case (supra)*, which is impermissible.

Learned Senior counsel further in support of his claim places reliance upon the instructions issued by the Government of Punjab, a copy of which has been appended with the writ petition as Annexure P/16. Learned Senior counsel appearing on behalf of the petitioners argues that as per the Instructions dated 25.09.2017, the vacancy which comes into existence, is to be filled up from the same category to which it belongs and, therefore, as the posts have become available in the open general category, only the candidates who have applied under the open general category are eligible for appointment against the same.

The said argument has been raised by the learned Senior counsel by misconstruing the Instructions dated 25.09.2017. The

Instructions being relied by the petitioners are as under:-

“_____ I am directed to refer to the subject cited above and to inform that in light of the judgment of Constitutional Bench of Hon'ble Supreme Court of India dated 10.02.1995 in Writ Petition (Civil) 79 of 1979 titled as R.K. Sabharwal and others vs. State of Punjab and others, Department of Welfare vide No.3/8/95-RC3/4853 dated 10.07.1995, No.3/8/95-RC3/5071 dated 14.07.1995 and No.3/8/95-RC3/5454 dated 08.07.1996 had issued the following guidelines:-

(i) While calculating the percentage of reservation as prescribed in Govt. Instruction from time to time, the officials/officers appointed/promoted on seniority-cum-merit basis belonging to reserve categories will be excluded from the number of reserve categories working in the particular cadre.

(ii) The account of vacancies will be maintained in the form of roster as running account as per the existing instructions. However, the operation of roster will stop when the prescribed percentage for the particular reserve category is reached. This percentage is to be worked out by excluding the posts filled by reserve category employees on the basis of seniority-cum-merit. It is clarified that even after the operation of roster stops on achieving the prescribed percentage, the members of reserved category will not be denied promotion on the basis of seniority-cum-merit.

(iii) Thereafter, when there is a vacancy the same will be filled up from amongst the category to which the post belonged in the cadre. This will mean that a post vacated by a reserve category candidates and a post vacated by a general category candidate should be filled from the person belonging the General category.

(iv) In case there is a change in the cadre strength subsequently the number of posts on the basis of reservation will be recalculated and changed, if any, will be effected by adopting the running roster procedure.

(v) The procedure x x x x x x passed by the Hon'ble Supreme Court.

A bare perusal of these instructions would show that these have been issued on the basis of judgement of the Hon'ble Supreme Court of India in *Writ Petition (Civil) No.79 of 1979* titled as *R.K. Sabharwal and others vs. State of Punjab and others*, which case relates to the cases involving promotion and how the reservation is to be applied, while granting promotion in a particular category. Hence, the Clause (iii) of para 1, of the instructions being relied upon does not relate to the direct recruitments. As per clause 1 (iii) reproduced hereinbefore, the vacancy which is vacated by a particular category is to be filled up from the same category. In the present case, the posts are being filled up by way of direct recruitment and there is no question of vacation of vacancy by a particular category, to be filled by the same category. As far as the present case is concerned, the posts, which are now being filled up by way of transferring the meritorious candidates appointed in the reserved category to the unfilled post in the open general category, the question of filling up the posts upon vacation does not arise. The reliance upon the clause 1 (iii) of the instructions, by the petitioners, is without going into the background under which the instructions have been issued and the fact that the para 1(iii) relates to promotion cases, hence the reliance on para 1(iii) is misplaced and cannot be accepted.

Learned senior counsel appearing on behalf of the petitioners,

though is relying upon Clause (iii) of para 1 of the Instructions dated 25.09.2017 (Annexure P/16) but is completely ignoring the paragraph 4 of the said Instructions, which actually relates to the direct recruitment. As per para 4 of the Instructions dated 25.09.2017 (Annexure P/16), it is clear that a candidate belonging to the reserved category, who has secured more marks is eligible to be appointed against the open general category. The interpretation of the Instructions dated 25.09.2017 (Annexure P/16) forwarded by the learned senior counsel appearing on behalf of the petitioners is contrary to the basic intent of the Instructions and hence, does not warrant acceptance as the same lacks merit. In the present case, paragraph 4 of the Instructions dated 25.09.2017 (Annexure P/16) is applicable and not para 1(iii).

In view of the above, no ground is made out to interfere with the process of shifting of the candidates from reserved categories to open general category so as to undo the illegality/irregularity committed by the Recruitment Board in the appointment/selection process at the initial stage. The interim order granted by this Court earlier stands vacated.

All the writ petitions stand dismissed.

However, in order to avoid similar controversy in future, the Chief Secretaries to the State of Punjab, Haryana and the Home Secretary of the Union Territory of Chandigarh are requested to issue specific guidelines to all the recruiting agencies, as to how, the advertised posts are to be filled up while undertaking process for direct recruitment, keeping in view the settled principles of law. It is reiterated again that while filling up the posts advertised in various categories, first of all, the posts advertised in the open

general category are required to be filled up from the joint merit list and it is only after all the posts of open general category are filled, the process of filling up of posts available in various reserved categories is to be undertaken on the basis of merit secured by the reserved category candidates in the selection process. The deviation from this process creates anomalies and unnecessary litigations, which is very much avoidable in case, the recruitment agencies follow proper procedure for appointment as per the settled principle of law. In the present case, due to the illegal and improper procedure of appointment/selection adopted by the recruiting agency, which was contrary to the settled principles of law, the candidates got involved in the litigations and the meritorious candidates who were entitled for appointment as per law, rather than being appointed, are suffering unnecessary litigation. Let appropriate instructions, as detailed hereinbefore be issued to be followed meticulously without any fail while undertaking process for Direct Appointment to the various available posts by the recruiting agencies throughout the State of Punjab, Haryana and Union Territory of Chandigarh.

December 14, 2020
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(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No