

Mr. Manoj Kumar, Adv.
For the State : Mr. Subhash Chandra Mishra, SC 16
(In Civil Writ Jurisdiction Case No. 17074 of 2022)
For the Petitioner/s : Mr. Ram Nibash Prasad, Adv.
For the State : Mr. Jai Prabhat Kishore, AC to SC 13
For the U.S.C. : Mr. Pawan Kumar Chaudhury, Adv.
For the B.P.S.C. : Mr. Sanjay Pandey, Adv.
Mr. Nishant Kumar Jha, Adv.
(In Civil Writ Jurisdiction Case No. 226 of 2023)
For the Petitioner/s : Mr. Uday Chand Prasad, Adv.
For the Respondent/s : Mr. Prabhakar Jha (GP 27)
Mr. Pawan Kr. Chaudhary, Adv.

CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH SHARMA

ORAL JUDGMENT

Date : 24-02-2023

1. These writ petitions involve a common question of law and the facts are similar in all the cases. However, certain claims have been made by the petitioners who are from different categories. Having noticed the facts which shall be mentioned at suitable place, the writ petitions are being decided jointly. Arguments of respective counsels were heard and the Additional Chief Secretary, Education Department also appeared in person and made some submissions.

2. The entire *gravamen* of the arguments is a challenge to the advertisement dated 21.09.2020 issued by the Bihar State University Service Commission (hereinafter, referred as Universities Commission). Applications were invited for appointment of Assistant Professor in 13 Universities for 52 different subjects. The advertisement mentions breakup of



subject-wise posts category-wise available for appointment in Table 1.

As per Table 1 :-

CATEGORY	TOTAL POSTS	POSTS RESERVED FOR WOMEN
Open Category	1223	407
E.W.S.	309	63
S.C.	1187	175
S.T.	141	1
E.B.C.	1227	197
B.C.	344	65
B.C. Women	207	
Physically Handicapped	103	
Wards of Freedom Fighters	26	

3. Thus, out of the total 4638 posts of Assistant Professors advertised, only 1223 posts have been made available for General Category/ Open Category (hereinafter, referred as O.C.).

4. Thus it is alleged that the bar of making reservation more than 50% has been breached. It is also alleged that sufficient percentage of reservation for E.W.S., Physically Handicapped and Wards of Freedom Fighters has also not been provided. The percentage reserved for B.C. Category has also not been fulfilled.



5. The **Bihar Reservation of Vacancies in Posts and Service (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991** (hereinafter, referred as **Reservation Act of 1991**), provides following percentage of reservation after the reorganization of State of Bihar in 2002.

1. Scheduled Caste (S.C.) - 16%
2. Scheduled Tribe (S.T.) – 1%
3. Extremely Backward Class (E.B.C.) -18%
4. Backward Class (B.C.) - 12%
5. Women of Backward Classes (W.B.C.) - 3%

Total Percentage – 50%

That apart, in terms of the **The Rights of Persons with Disabilities (RPWD) Act of 2016** (hereinafter, referred as **Disabilities Act of 2016**), 4% reservation was required to be provided to Disabled persons of various categories.

That apart, in terms of the Bihar Gazette notification dated 18.02.2016, 2% reservation was to be provided to the grandsons/ granddaughters of freedom fighters (hereinafter referred as, Wards of Freedom Fighters).

6. Similarly for E.W.S., out of 4638 posts, if 2319 posts would have been kept for Open Category, 231.9 posts i.e. 232 posts would be available for E.W.S. and 18.5 posts would



have been available for Physically Handicapped and 9 posts would have been available for Wards of Freedom Fighters, if the Reservation Act would have been applied uniformly to the total number of posts.

7. The submission of the petitioner is that the aforesaid statistics show that the reservation quota has been wrongly applied in the advertisement by the respondents which has not only resulted in lowering down the number of O.C./General posts but has also lowered down the number of posts which would have been available for Backward Classes, while it has increased from more than 1% for Scheduled Tribe and to women of Backward Class as well as for Scheduled Caste. The advertisement does not anywhere mentions about including of backlog posts. The learned counsel for the petitioner have further pointed out that even if backlog posts were to be added, the same has been wrongfully calculated. It is further submitted that the law as laid down by the Apex Court from time to time relating to filling up of posts under **Article 16(4)(A)** and **16 (4)(B)** has been completely violated resulting in depriving candidates from Open Category and from Backward Class from their rightful consideration for appointment.



8. In **C.W.J.C. No. 17074/2022**, the candidates are from Disabled category and claims 4% reservation in terms of **The Rights of Persons with Disabilities (RPWD) Act of 2016**, hereinafter referred as **Disabilities Act of 2016**. However, it has been pointed out that of the total number of 4,638 posts, only 8 posts have been reserved for Disabled Category, one each in subject of English where there were 253 posts, Hindi where there were 292 posts, History where there were 316 posts, Political Science where there were 280 posts, Economics where there were total 268 posts, Psychology where there were 424 posts, Botany where there were 333 posts and Mathematics where there were 261 posts.

9. It is submitted that where there were more than 100 posts in a subject, 4 posts would be reserved for Disabled Category in terms of the **Disabilities Act of 2016**, but the provisions of the Act have been violated.

10. By gazette notification dated 03.09.2015, 2% Horizontal Reservation was provided to the maternal or paternal grandson or granddaughter of a freedom fighter in the Government services vide another notification dated 18th February 2016, a model roster providing for the grandsons and granddaughters of freedom fighters was notified by the State



Government. The petitioner in **C.W.J.C. No. 5853/2021** applied for the post of Assistant Professor in Home Science Department but the same was not provided.

11. In **C.W.J.C. No. 433/2021**, the petitioners claiming themselves to be from E.W.S. category have demanded 10% quota for E.W.S. and submit that out of the total number posts namely 4,638 whereas only 309 posts have been kept reserved for them. The learned senior counsel appearing for the petitioners submits that the action of the respondents goes contrary to the spirit of the Constitution. The reservation policy could not have been applied in a negative form that is the General/Open Category seats could not have been reduced to such an extent as it would place them in minority. The principle of keeping at least 50% posts as Open post for open competition, could not have been violated.

12. Learned counsel further submits that in the name of filling backlog vacancies the quota as prescribed under the **Reservation Act of 1991** and the roster to be applied has been violated by the Commission and the State Government. The respondents could not have applied the principle of backlog vacancies to the current advertisement. It is asserted that after 2002, reorganization of Bihar State, there has never been any



selection process conducted twice. If backlog posts were to be filled a separate exercise for filling backlog posts should have been conducted and the present posts could not have been reduced in the name of filling backlog.

13. It is also argued that the method and manner in which the backlog posts have been calculated is wholly erroneous and goes contrary to the principles laid down by the Supreme Court and by this Court from time to time.

Learned counsel for the petitioner has submitted that once a selection process has taken place, the backlog posts can be only those which could not be filled in that particular selection and the respondents could not have gone beyond the previous selection for calculating backlog posts. The criteria/ formula adopted by the respondents for filling backlog posts is alleged to be wholly erroneous and mis-concieved.

14. Learned counsel further submits that the reservation for Disabled Category under the **Disabled Act of 2016** was to be applied horizontally in each category and the same could not have been applied University-wise and Department-wise. Similarly, the 2% reservation required to be applied for the Wards of Freedom Fighters has to be on the basis of total number of posts in a particular subject and not as per



each University.

It is asserted that when the selection is being conducted commonly, the reservation has to be also applied commonly to all the Universities. The respondents have not mentioned about including the backlog posts and therefore before this Court, the respondents cannot turn around and cover their mistake by stating that the posts have been shifted on account of backlog.

15. Learned counsel has relied on **State of Uttar Pradesh & Ors. Vs. Sangam Nath Pandey & Ors. 2011 (2) SCC 105, M. Nagraj & Ors. Vs. Union of India & Ors. 2006 (8) SCC 212 and Dr. Sudhir Kumar & Ors. Vs. The State of Bihar & Ors. 2018 (2) PLJR 609.**

16. Learned counsel appearing for the University Commission submits that the reservation policy is framed by the State Government and the requisition was sent by the State Government after having consulted the concerned Universities. A list of posts were provided to the Commission available under each category for the various subjects for the different Universities. Each University was treated as a unit and the vacant post of Assistant Professor in different Universities was considered and the roster was applied at the University



level in the subject. The University Commission has pointed out from Table 2 that the reservation allocation was done University-wise and the backlog posts were identified University-wise. The same approach was adopted for horizontal reservation also. Considering every University as a separate unit, the roster point was allocated. In cases relating to Wards of Freedom Fighters, wherever the roster point reached up to 50, 1 post was reserved in a particular University in a particular subject and so on and so forth.

Similar stand has been taken for Disabled Category also. Thus, if there is a post in a particular subject in a particular University which are more than 25 available for recruitment, 1 post of Disabled Category has been reserved.

17. Learned counsel Shri Subhash Chandra Mishra has supported the submissions raised by Shri Pawan Chaudhury on behalf of the Commission and further adds that an amendment was made in the **Reservation Act of 1991** and adds that a proviso was added to **Section 4 (1)(b)**, whereby while filling up the backlog posts and carry forward vacancies of previous year with respect to reserved class, the maximum limit of reservation of 50% would have no application and the same would be treated as separate and distinct class.



The respondent states that the word 'vacancy' was to mean posts in terms of the judgment passed in **R.K. Sabharwal & Ors. Vs. State of Punjab & Ors. 1995 (2) SCC 745**. Further, it is stated that an amendment was made in the Bihar State Universities Act 2013 and Patna Universities Act authorizing Bihar Public Service Commission for making recommendation for appointment of Assistant Professor. The Commission conducted an exercise on the basis of requisition sent from the Universities who did not indicate backlog/ carry forward vacancies. The State Government passed a resolution on 20th March 2014, deciding that out of the total number of posts requisitioned by the University, 75% of the total vacancies be filled up subject-wise as current vacancies as per roster clearance and 25% was kept pending as backlog which were to be filled later on. The B.P.S.C. was accordingly sent a requisition for the year 2014 for which selection process has been almost completed except for some subjects.

18. The respondents have filed a supplementary affidavit which is stated as under :-

“उदाहरण स्वरूप मगध विश्वविद्यालय के किसी विभाग में सहायक प्राध्यापक के पद पर नियुक्ति के लिए रोस्टर क्लियर करना है जिसका स्वीकृत बल की संख्या-77 है, अन्य सूचनाएं भी निम्न प्रकार है-

1. संचिका के अवलोकन से वस्तुस्थिति निम्नवत् है-

(i) कुल स्वीकृत बल- 77

(ii) कोटिवार कार्यरत बल- 37 (गैर आरक्षित वर्ग-23, अत्यंत पिछड़ा



वर्ग 5 एवं पिछड़ा वर्ग-9)

(iii) शुद्ध रिक्ति- $77 - 37 = 40$

(iv) रोस्टर पंजी में व्यवहृत अंतिम रोस्टर बिन्दु - 37

2. इस प्रकार वर्तमान में कुल रिक्ति 40 पदों का रोस्टर बिन्दु-38 से 77 के विरुद्ध रोस्टर क्लीयरेंस करने का प्रस्ताव है।

बैकलॉग की गणना

कोटि	अनुमान्यता	कार्यरत	बैकलॉग (कॉलम 2-3)
1	2	3	4
अनुसूचित जाति	$23 \times 2 \times 16\% = 7.36 = 7$	0	7
अनुसूचित जनजाति	$23 \times 2 \times 1\% = 0.46 = 1$	0	1
अत्यन्त पिछड़ा वर्ग	$23 \times 2 \times 18\% = 8.28 = 8$	5	3
पिछड़ा वर्ग	$23 \times 2 \times 12\% = 5.52 = 6$	9	-3 No Backlog
पिछड़े वर्गों की महिला	$23 \times 2 \times 3\% = 1.38 = 1$	0	1

कुल बैकलॉग - 12

शुद्ध रिक्ति $40 - 12 = 28$

कोटिवार अनुमान्यता

कोटि	अनुमान्यता	कार्यरत + बैकलॉग	रिक्ति कॉलम (2-3)
1	2	3	4
अनुसूचित जाति	$77 \times 16\% = 12.38 = 12$	$0 + 7 = 7$	5
अनुसूचित जनजाति	$77 \times 1\% = 0.77 = 1$	$0 + 1 = 1$	0
अत्यन्त पिछड़ा वर्ग	$77 \times 18\% = 13.86 = 14$	$5 + 3 = 8$	6
पिछड़ा वर्ग	$77 \times 12\% = 9.24 = 9$	$9 + 0 = 9$	0
पिछड़े वर्गों की महिला	$77 \times 3\% = 2.31 = 2$	$0 + 1 = 1$	1

कुल - 38 26 12

उपर्युक्त से स्पष्ट है कि शुद्ध रिक्ति 28 है इसके अलोक में आर्थिक रूप से कमजोर वर्ग एवं गैर आरक्षित की गणना निम्नवत की जाएगी-

आर्थिक रूप से कमजोर वर्ग के अनुमान्य पद	रिक्ति (28) का 10 प्रतिशत = $28 * 10/100 = 2.8 \sim 3$
आर्थिक रूप से कमजोर वर्ग के अनुमान्य पद	=कुल रिक्ति - (आरक्षित वर्ग के लिए अनुमान्य पद + आर्थिक रूप से कमजोर वर्ग के लिए अनुमान्य पद) = $28 - (12+3) = 13$ पद

3. उपर्युक्त परिप्रेक्ष्य में अधिसूचना संख्या-2622 दिनांक- 26.02.2019 की अनुसूची-III में अंकित रोस्टर बिन्दु के आलोक में 40 पदों का रोस्टर बिन्दु- 38 से 77 तक आच्छादित होने वाला रोस्टर क्लीयरेंस निम्नवत् प्रस्तावित है-



अनुसूचित जाति— रोस्टर बिन्दु— 38, 39, 40, 41, 42, 43 एवं 44 = 7 पद (बैकलॉग के रूप में) ।

अनुसूचित जनजाति— रोस्टर बिन्दु — 45 = 1 पद (बैकलॉग के रूप में)।

अत्यन्त पिछड़ा वर्ग — रोस्टर बिन्दु— 46, 47 एवं 48 = 3 पद (बैकलॉग के रूप में)

पिछड़े वर्ग की महिला— रोस्टर बिन्दु— 49 = 1 पद (बैकलॉग के रूप में)।

अनुसूचित जाति— रोस्टर बिन्दु— 56, 58, 62, 68 एवं 74= 5 पद ।
(अधिसूचना संख्या—2622 दिनांक— 26.02.2019 की अनुसूची—III में अंकित रोस्टर बिन्दु के आलोक में रोस्टर बिन्दु—62 = 1 पद अनुसूचित जाति की महिला को अनुमान्य है।)

यद्यपि रोस्टर बिन्दु—58 वर्ग को कर्णांकित है, परन्तु इनका कोटा पूर्ण होने के कारण उक्त रोस्टर बिन्दु अनुसूचित जाति को अनुमान्य कराया गया है।

अत्यन्त पिछड़ा वर्ग— रोस्टर बिन्दु—50, 54, 60, 66, 70 एवं 76 = 6 पद ।

(अधिसूचना संख्या—2622 दिनांक—26.02.2019 की अनुसूची—III में अंकित रोस्टर बिन्दु के आलोक में रोस्टर बिन्दु—60 एवं 76 = 2 पद अत्यन्त पिछड़ा वर्ग की महिला को अनुमान्य है।)

पिछड़े वर्गों की महिला— रोस्टर बिन्दु—52 = 1 पद ।

आर्थिक रूप से कमजोर वर्ग—रोस्टर बिन्दु— 57, 67 एवं 77=3 पद ।
(अधिसूचना संख्या—2622 दिनांक—26.02.2019 की अनुसूची—III में अंकित रोस्टर बिन्दु के आलोक में रोस्टर बिन्दु—67= 1 पद आर्थिक रूप से कमजोर वर्ग की महिला को अनुमान्य है।)

गैर आरक्षित वर्ग— रोस्टर बिन्दु— 51, 53, 55, 59, 61, 63, 64, 65, 69, 71, 72, 73 एवं 75 = 13 पद ।

यद्यपि रोस्टर बिन्दु—64, 72 पिछड़ा वर्ग को कर्णांकित है, परन्तु इनका कोटा पूर्ण होने के कारण उक्त रोस्टर बिन्दु गैर आरक्षित वर्ग को अनुमान्य कराया गया है।

(अधिसूचना संख्या—2622 दिनांक—26.02.2019 की अनुसूची—III में अंकित रोस्टर बिन्दु के आलोक में रोस्टर बिन्दु—64, 72 एवं 73= 3 पद गैर आरक्षित वर्ग की महिला को अनुमान्य है।)

विभागीय संकल्प संख्या— 13062 दिनांक— 12.10.2017 द्वारा दिव्यांगजन अधिकार अधिनियम, 2016 के आलोक में दिव्यांगता से ग्रस्त उम्मीदवारों को निम्नवत् क्षैतिज आरक्षण देय होगा—

रोस्टर बिन्दु— 51 से 75 तक — चलन दिव्यांगता को — 1 पद ।

नोट:—

(i) राज्य के मूलवासी को ही आरक्षण का लाभ देय होगा।

(ii) गुणागुण के आधार पर चयनित आरक्षित वर्ग के अभ्यर्थियों की गणना गैर आरक्षित वर्ग में की जायेगी।



(iii) नियुक्ति के क्रम में सभी प्रचलित नियमों/अधिनियमों को ध्यान में रखा जाना अपेक्षित है। ”

19. In order to adjudicate the aforesaid issues, this Court would categorize the adjudication in following categories:-

- (a) Backlog
- (b) E.W.S. Reservation
- (c) Disabled Category
- (d) Wards of Freedom Fighters

20. Having noticed the aforesaid arguments, this Court finds that the entire answer to the queries raised by the petitioners is essentially of application of backlog vacancies. The respondents have tried to explain that the backlog posts were added in the present advertisement and therefore, there is a disturbance of quota.

21. By the **81st Amendment Act** to the Constitution of India, **Article 16 (4-B)** was inserted. It empowers the State from considering an unfilled vacancy of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause 4 or Clause 4 (a) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of



the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year.

22. The **Reservation Act of 1991** provided for backlog as per **Section 4 (6)** of the Act is held as under:-

“(a) In case of non-availability of suitable candidates from the Scheduled Castes and Scheduled Tribes for appointment and promotion in vacancies reserved for them, the vacancies shall continue to be reserved for three recruitment years and if suitable candidates are not available even in the third year, the vacancies shall be exchanged between the Scheduled Castes and Scheduled Tribes and the vacancies so filled by exchange shall be treated as reserved for the candidates for that particular community who are actually appointed.

(b) In case of non-availability of suitable candidates from the Extremely Backward Classes and Backward Classes the vacancies so reserved shall continue to be reserved for them for three recruitment years and if suitable candidates are not available even in the third year also, the vacancies shall be filled by exchange between the candidates from the extremely backward and Backward classes and the vacancies so filled by Exchange shall be treated as reserved for the candidates of that particular community who are actually appointed.

[(c) In case of non-availability of suitable candidates for the vacancies reserved for the women of backward classes, the vacancies shall be filled in order of preference as follows :-

(i) by the candidates from the Scheduled Castes;



(ii) by the candidates from the Scheduled Tribes;

(iii) by the candidates from Extremely Backward Classes;

(iv) by the candidates from Backward Classes;

The vacancies so filled in the transaction shall be treated as reserved for the candidates of that particular community who are actually appointed.]

(d) If in any recruitment year, the number of candidates of Scheduled Castes/ Scheduled Tribes, Extremely Backward and Backward Classes are less than the number of vacancies reserved for them even after exchange formula the remaining backlog vacancies may be filled by general candidates after dereserving them but the vacancies so dereserved shall be carried forward for three recruitment years.

[(e) If the required number of candidates of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes are not available for filling up the reserved vacancies, fresh advertisement may be made only for the candidates belonging to the members of Scheduled Castes, Scheduled Tribes and Extremely Backward and Backward Classes and Women of Backward Classes, as the case may be, to fill the backlog vacancies only.]”

Further, **Section 4 (1)** is held as under:-

“All appointments to services and posts in an establishments which are to be filled by direct recruitment shall be regulated in the following manner, namely :-

(1) The available vacancies shall be filled up-



(a) from open merit category ...50%

(b) from reserved category ...50%

[Provided that backlog and/or carry forward vacancies would be treated as a separate and distinct class and will not be considered together with the reserved vacancies of the year in which they are being filled up, for determining the ceiling of 50 percent reservation on total no. of vacancies of that year. In Other Backward, 50 percent maximum limit of reservation to be applied for the vacancies which fall in the current year during which the process of filling up the vacancies are being adopted and backlog and carry forward vacancies of previous years with respect to reserved classes would be treated as a separate and distinct class and would be treated as a separate and distinct class and would be exempted from maximum limit of reservation.]”

23. Thus, the recruitment agency has to separately earmark backlog vacancies as a separate class and the fresh vacancies have to be marked separately. The word “backlog vacancies” is a term denoting those post of reserved category which could not be filled in the previous recruitment.

24. In **State of Uttar Pradesh & Ors. Vs. Sangam Nath Pandey & Ors. 2011 (2) SCC 105**, the Supreme



Court has held as under :-

“27. In any recruitment year, it may happen that the candidates belonging to the reserved category may not be available to fill the vacancies falling to the share of the particular reserved category. In such circumstances, sub-section (2) of Section 3 enables the State to carry forward the unfilled vacancy/vacancies to be filled through special recruitment as a separate class of vacancy. Such class of vacancy cannot be intermingled with the vacancies of the year of recruitment in which it is filled. It also cannot be counted for the purpose of determining of ceiling of 50% reservation of the total vacancies of that year. The provision contained in sub-section (2) is, notwithstanding anything to the contrary contained in sub-section (1), which provides for a total 50% reservation for the categories of Scheduled Castes, Scheduled Tribes and Other Backward Classes i.e. 21%, 2% and 27% respectively.

28. The terminology of the aforesaid section is clear and unambiguous. Therefore, construed in its ordinary, literal sense, the sub-section provides that the carried-forward vacancies are not to be included in calculating the 50% cap as contained in proviso 2 to Section 3(1). The special recruitment may be held in that very year or in the succeeding year or years of recruitment as a separate class of vacancy.



33. A harmonious construction of Sections 2(d), 3(2) and 3(5) would lead to the conclusion, as stated by the Division Bench, that only those vacancies can be declared backlog vacancies, within the reserved category, which were subject-matter of advertisement but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. It is only in respect of such vacancy that the procedure qua backlog vacancy can be adopted. Any vacancy, which has not been subjected to a complete process of selection, even though vacant, cannot be treated as a backlog vacancy.”

(Underline is mine)

25. In **Dr. Sudhir Kumar & Ors. Vs. The State of Bihar & Ors.** reported in **2018 (2) PLJR 609** which is held as under :-

“63. While filling up of the vacancy on the basis of reservation, rule of 50 per cent ceiling could be relaxed only to the extent it is permissible in accordance with Article 16(4-B) of the Constitution of India

64. In the present case, however, the core issue, which is involved, is clearly different. The question is whether the State respondents have carried out any exercise for identifying backlog vacancies in accordance with the 1991 Act or not. The answer, in my view, is in negative, after having seen the pleadings and the documents on record, which have already been discussed.



65. In view of the above discussions, following conclusions are reached:-

*(i) The impugned advertisement of the Bihar Public Service Commission inviting applications for appointment to the posts of Assistant Professor, to the extent it provides for reservation in Superspeciality Departments, namely, Cardiology, Nephrology and Neurology, cannot be sustained, in view of the Supreme Court's decisions, in the cases of **Indra Sawhney** (supra), and **Dr. Preeti Srivastava** (supra). The Bihar Public Service Commission is accordingly directed to proceed with the process of selection purely on the basis of merit for appointment in these Superspeciality Departments.*

*(ii) In view of clear language used in Section 4 of the 1991 Act, only those vacancies can be declared backlog vacancies within the reserved category, which, though, were subject matter of a previous advertisement, but remained unfilled because of non-availability of suitable candidates, within the reserved category, after selection. No vacancy, which has not been subjected to a complete process of selection could be treated as backlog vacancy, in view of the law laid down by the Supreme Court, in the case of **Sangam Nath Pandey** (supra).*

*(iii) The relaxation given by the Supreme Court, in the case of **Sangam Nath Pandey** (supra), to the State Government to fill up backlog vacancy has no application in the present*



case, since the said relaxation, as is evident, was given in peculiar facts and circumstances of that case.

*(iv) Though, it is open to the State respondents to carry forward a point in the event of non-availability of a suitable reserved candidate at a roster point, the same has to be done in just and fair manner, as observed by the Supreme Court, in the case of **R.K. Sabharwal** (supra).*

68. *In view of the above conclusions, this application is allowed with the following directions:-*

(i) The State of Bihar is directed to identify the year-wise backlog vacancies to be filled up by reserved category candidates in conformity with the conclusion recorded hereinabove, within one month from today and communicate the same to the Bihar Public Service Commission forthwith.

(ii) Since the selection in question pertains to appointment of skilled Doctors for teaching and providing health services to the common mass, in Government medical colleges and hospitals in the State of Bihar, which is of immense public interest and importance, it is directed that if the said exercise is not done within the aforesaid period of one month, the Bihar Public Service Commission will be required to proceed with the process of selection and make recommendation of names on the basis of reservation quota fixed under Section 4(i) read with Section 4(ii) of 1991 Act.

This Direction, I am issuing in view of the emergent



situation prevailing in the State of Bihar where many of the medical colleges and many courses in the medical colleges are either facing threat of de-recognition by the Medical Council of India or unable to get recognition because of the lack of teachers/faculty members.

(iii) The Bihar Public Service Commission is directed to make selection for appointment in Superspeciality Departments of Cardiology, Nephrology and Neurology, strictly on the basis of merit alone.”

26. Keeping in view above, if the affidavit of respondents is examined, it is apparent that in the last recruitment conducted in 2014, a resolution was taken on 20th March 2014 by the State Government to fill only 75% vacancies treating them as current vacancies, while 25% was to be kept as backlog.

Thus, in the present selection process, the University Commission was required to have a separate class of backlog posts which would include the 25% vacancies which were not recruited and any post of reserved category which could not be filled under the 2014 selection process. These posts alone can be said to be backlog posts.

27. This Court finds that the State Government gave an erroneous formula to the respective Universities for calculating the backlog. The formula as noted



(supra) fails to take notice of those posts which are of Open Category but filled by any meritorious reserved category candidate. In order to find the backlog posts, it was essential for the respondents to have first identified all the Assistant Professors appointed earlier on their own merit from the reserved category. Such Assistant Professors who may be belonging to a particular category were not to be included in the slot for treating the slot to have been filled of the said category. Thus, relying upon the total number of persons who have already been appointed from a particular reserved category, the backlog cannot be assessed.

The new formula does not take into consideration the resolution passed by the Government dated 20th March 2014, whereby 25% of the posts which were to be filled in 2014, from all the Universities, were kept as backlog. Therefore, prior to 2014, only 25% of the posts advertised in 2014 can be said to be backlog posts but the new formula extends the calculation beyond the advertisement of 2014 from the date of inception of posts in the various Universities. Thus, the State Government has created a situation where almost 70% of the posts fall in the Reserved Category. Even in the Reserved Category, there is a complete imbalance of posts which does not



either protect the Reserved candidates, nor it protects the Open Category candidates.

28. Similarly, the sanction of posts has been treated as on the day when the calculation is being done while the sanctioning of posts is from time to time. At the initial establishment of a University, the number of posts would be different from the number of posts which are presently existing. It is not uncommon to notice that the post of a particular subject, in a University and its constituent colleges, may increase or decrease. Thus, the very basis of calculating backlog posts by the respondent State suffers from a basic fallacy and the same could not have been applied generally to all the Departments in all the Universities.

It is also to be noticed that in cases where the posts are less than 9 in number, the roster to be applied is different from the 100 point roster. The roster is “L” shaped and every recruitment year a particular category may not get the reservation.

29. The understanding of the respondents with reference to **R.K. Sabharwal** (supra) is also erroneous. In **R.K. Sabharwal & Ors. Vs. State of Punjab & Ors. 1995 (2) SCC**



745, the Supreme Court has held as under :-

“5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of “running account” is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of “running account” in the impugned instructions has to be so interpreted that it does not result in excessive reservation. “16% of the posts ...” are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the



impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The “running account” is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the “running account” must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to



which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word 'post' means an appointment, job, office or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation."

The aforesaid aspect is to be considered on the basis



of the total number of posts at a given point of time. The percentage is accordingly calculated. A 100 point roster is therefore accordingly prepared. The respondents have not considered the roster point which is continuous in nature. Till it ends at number 100, as held by the Supreme Court (supra), resulting in a situation, where the number of posts available for Open Category comes to only 28%.

The Judgment passed by the Apex Court never intended to create such an anomalous situation. The post of Assistant Professor is a specialized post, where the concerned person teaches students for awarding of Graduate and Post-Graduate degrees. The application of roster and reservation, therefore, has to be done with utmost care and caution.

30. The respondents have also not been able to explain as to how the reservation has been applied treating University as a unit when the University Act provides for conducting a selection for all the Universities by a common advertisement and a common examination. Therefore, all the posts existing in the various Universities will have to be counted together as one unit for the purpose of application of the roster. If a different interpretation as taken by the respondents is accepted, it would result in



variation of the number of posts available in a particular University of O.C. Class viz-a-viz Reserved Class. The details from all the Universities were only required for knowing the number of posts available for recruitment of Assistant Professors in a particular subject, whereafter, the respondents were required to add all the posts of various Universities in a particular subject together and apply to the roster. Backlog posts were also required to be identified accordingly.

The said horizontal and vertical reservation has to be applied to the total number of posts in a particular subject and cannot be applied segregating the post available in a particular University of a particular subject. As has come on record, there are Universities which only require 1 post in a subject while in other University, there are posts for the same subject which is more than 50 or 100. The Reserved Category and Open Category candidates should be distributed almost equally to all the Universities and the same could be only applicable if the quota is applied to all the number of posts in a subject which may be filled in a particular University or several Universities.



31. The sequence of operation of merit for filling the post in various categories has been laid down and settled by the Supreme Court in **Saurav Yadav & Ors. Vs. State of Uttar Pradesh & Ors. 2021 (4) SCC 542** and reiterated in **The State of Tamil Nadu Vs. K. Shobana 2021 (4) SCC 686**, and it was held that the steps for filling up the posts requires that the candidates from the Open merit list shall fill up the post first, whereafter the backlog posts of a particular Reserved Category shall be occupied by the respective Reserved Category selected candidate. The remaining reserved posts of the current year shall be filled as a third step.

In the present selections, the State did not earmark backlog vacancies separately for the various subjects and intermingled it with the current posts. Apart from applying a wrongful formula of calculating backlog posts as discussed above, it is noticed that the filling up of posts in certain subjects which has already been done, is also erroneous. The steps as required and laid down by the Supreme Court(supra) have not being strictly adhered to.

Since in 2014, there were no backlog posts considered, it is to be assumed that the exercise of filling backlog posts has been done only in the present selection for the



first time.

Therefore keeping in view the judgment passed in **Sangam Nath Pandey** (supra), the backlog can be only in relation to the post which were advertised and remained unfilled in 2014 selection. From the perusal of the formula and affidavit filed by the State, this Court finds that there are no details of posts of Reserved Category which remained unfilled in 2014 selection. It is further noticed that the 2014 selection process is still not complete, and there are some subjects where the appointments have not been made. In such subjects therefore, there could be no backlog posts for being included in the present selection, but there is no averment by the respondent in their affidavit about the posts and hence it can be concluded that in the present selection post which remained unfilled from Reserved Category in 2014 have not been included.

Hence, the selection process of filling up backlog posts along with the Open Category posts as has been done in the present case by the respondent University is erroneous and faulty.

32. From the record which has been placed for the perusal of this Court, this Court is satisfied that the exercise conducted by the respective Universities for identifying



the backlog post suffers from non-application of mind and the respondents have mechanically applied the formula quota(supra). The said formula being illegal and contrary to the scheme of reservation as provided under the **Reservation Act of 1991**, its application is held to be illegal.

33. After perusal of record, this Court finds that a complete administrative chaos has resulted in a situation, where in certain Universities, like in the subject of Persian language in Bhupendra Narayan Mandal University only 1 post is available. Similarly, in Jai Prakash Narayan University, there is only 1 post for the Sanskrit subject. Similarly, for Munger University, there is 1 post available in the subject of Sanskrit. The respondents have not been able to explain as to how the reservation would apply at such places. This Court finds that in **Ajit Singh Januja & Ors. Vs. State of Punjab & Ors. 1999 (7) SCC 209**, the Constitution Bench held that there can be no reservation on a single post. The post has been kept in the subject of Arabic language for Scheduled Caste and for Backward Class while 1 in the subject of Rural Studies, the post has been kept unreserved. In matters relating to posts less than 9, the second post could also not be sent for reservation but the respondents have applied wrongfully the said method which has



resulted in wrongful application of the roster, which is not sustainable in law.

34. Having noticed above law, this Court finds that the respondents have miserably failed in identifying backlog posts of reserved category.

E.W.S. CATEGORY

35. As regards the 10% reservation for E.W.S. category is concerned, it is to be noticed that the reservation has been provided after adding **Article 16(6)** to the Constitution of India vide **103rd Amendment** which came into force with effect from 14.01.2019. Thus, the 10% reservation of the total number of Open Category posts were required to be marked exclusively for the E.W.S. category. The same has however been bifurcated by the respondent to different Universities making them as separate units.

36. In the aforesaid paras, this Court has already held that the Universities were not individually employing the candidates but the selection was being done for all posts in all Universities and has already held such action of identifying posts treating University as individual unit to be bad, the action of bifurcating E.W.S. reservation, to ensure each University treating as a separate for each subject, is illegal as it



frustrates the very purpose of introduction of reservation for Economically Weaker Section.

In 2022 SCC Online Page 1540 Janhit Abhiyan Vs. Union of India, the aforesaid amendment added to Article 16(6) has been upheld and the Apex Court has held as under:-

“188. The amendment in question makes a reasonable classification between “economically weaker sections” and other weaker sections, who are already mentioned in Articles 15(4), 15(5) and 16(4) of the Constitution and are entitled to avail the benefits of reservation thereunder. The moment there is a vertical reservation, exclusion is the vital requisite to provide benefit to the target group. In fact, the affirmative action of reservation for a particular target group, to achieve its desired results, has to be carved out by exclusion of others. The same principle has been applied for the affirmative action of reservation qua the groups of SEBCs, OBCs, SCs, and STs. Each of them takes reservation in their vertical column in exclusion of others. But for this exclusion, the purported affirmative action for a particular class or group would be congenitally deformative and shall fail at its inception. Therefore, the claim of any particular class or section against its exclusion from the affirmative action of reservation in favour of EWS has to be rejected.

189. In fact, it follows as a necessary corollary to the discussion in the preceding segments of this judgment that looking to the purpose and the objective of the present affirmative action, that is, reservation for the benefit of economically weaker sections, the other classes, who are already availing the benefit of affirmative action of



reservation by virtue of Articles 15(4), 15(5) and 16(4), are required to be kept out of the benefits of EWS reservation in Articles 15(6) and 16(6). It could easily be seen that but for this exclusion, the entire balance of the general principles of equality and compensatory discrimination would be disturbed, with extra or excessive advantage being given to the classes already availing the benefit under Articles 15(4), 15(5) and 16(4). In other words, sans such exclusion, reservation by way of the amendment in question would only lead to an incongruous and constitutionally invalid situation.

190. Putting it in other words, the classes who are already the recipient of, and beneficiary of, compensatory discrimination by virtue of Articles 15(4), 15(5) and 16(4), cannot justifiably raise the grievance that in another set of compensatory discrimination for another class, they have been excluded. It gets, perforce, reiterated that the compensatory discrimination, by its very nature, would be structured as exclusionary in order to achieve its objectives. Rather, if the classes for whom affirmative action is already in place are not excluded, the present exercise itself would be of unjustified discrimination.

191. Even a slightly different angle of approach would also lead to the same result. The case sought to be made out on behalf of the class or classes already availing the benefit of Articles 15(4), 15(5) and 16(4) is that their exclusion from EWS reservation is of inexplicable discrimination. What this argument misses out is that in relation to the principles of formal equality, both the reservations, whether under the pre-existing provisions or under the newly inserted provisions, are of compensatory discrimination which is permissible for being an affirmative action; and is to be contra-distinguished from direct discrimination, which is not permissible.



192. According to the petitioners, it is a case of their direct discrimination when they have been excluded from EWS reservation. The problem with this argument is that EWS reservation itself is another form of compensatory discrimination, which is meant for serving the cause of such weaker sections who have hitherto not been given any State support by way of reservation. SEBCs/OBCs/SCs/STs are having the existing compensatory discrimination in their favour wherein the presently supported EWS are also excluded alongwith all other excluded classes/persons. As a necessary corollary, when EWS is to be given support by way of compensatory discrimination, that could only be given by exclusion of others, and more particularly by exclusion of those who are availing the benefit of the existing compensatory discrimination in exclusion of all others. Put in simple words, the exclusion of SEBCs/OBCs/SCs/STs from EWS reservation is the compensatory discrimination of the same species as is the exclusion of general EWS from SEBCs/OBCs/SCs/STs reservation. As said above, compensatory discrimination, wherever applied, is exclusionary in character and could acquire its worth and substance only by way of exclusion of others. Such differentiation cannot be said to be legally impermissible; rather it is inevitable. When that be so, clamour against exclusion in the present matters could only be rejected as baseless.

196. The above observations make it absolutely clear that so far as the classes availing the benefit of compensatory discrimination in the form of reservation under Article 16(4) are concerned, no further classification or special treatment is to be given to them. A fortiori, they cannot make a claim to intrude into other compensatory discrimination in favour of another deserving group.

197. Having said so, even if it be assumed for the sake of



argument that the amendment in question alters the existing equality principles, it is not of abrogation or annulment of the existing rights but could only be treated to be of moderate abridgment thereof for a valid purpose. Thus viewed, it cannot be said that the amendment in question leads to such a violation of the rule of equality which is shocking or is unscrupulous travesty of quintessence of equal justice.

198. Viewed from any angle, the amendment in question cannot be declared invalid as being violative of the basic structure of the Constitution of India.”

DISABLED PERSON

37. The **Section 3** and **Section 34** of the **Rights of Persons with Disabilities Act 2016** provides for 4% reservation. The Act has been passed by the Parliament and is binds the State Government to provide 4% reservation to Disabled persons in each category.

38. The specious plea as taken by the respondents in applying reservations University-wise. of reservation being applied University-wise and subject-wise and that too in each University resulting in only 103 posts being available for Disabled Category out of the total 4638 posts is nothing but making the provision a laughing stock. It is only 2.2% of the total posts which is less than 4%. The Disabled Category reservations are not to be seen with reference to a



particular University but will have to be with reference to total posts advertised for each subject alone. The posting of a candidate in a University is based on his merit and choice. It is settled position that the reservation is applied not at the initial stage but at the time of appointment. If there are 25 or more posts available for appointment in a particular subject, then one post has to be reserved for Disabled Category.

The action of the respondents seeks to deprive those persons who have been separately categorized not by the society but by providence. Such persons cannot be allowed to be deprived on account of faulty and handicapped method adopted by the respondents. The reservation which is Horizontal in nature will cut across the Vertical reservations meaning thereby, if a person is of a Disabled Category, he shall be appointed even if he belongs to any of the reserved category and would take away a particular seat of that category. Interpretation of provision is to be done in a manner that the purpose of the **Act of 2016** is achieved. The **Government of India through Secretary & Anr. Vs. Ravi Prakash Gupta & Anr. 2010 (7) SCC 626**, has held as under:-

“22. We have examined the matter with great care having regard to the nature of the issues involved in relation to the intention of the



legislature to provide for integration of persons with disabilities into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equalisation of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific regions, is fulfilled.”

Accordingly, the action of the respondents in reserving the posts for Disabled Category which results in frustrating to provide for 4% reservation is held to be illegal and unjustified.

WARDS OF FREEDOM FIGHTERS

39. The State Government has by notification dated 18.02.2016 provided 2% reservation for paternal/maternal grandchildren of freedom fighters. Such a reservation cannot be made *otiose* or ineffective on the basis of a special plea taken by the respondents that as the roster for such



reservation would fall at number 50 & 100 and therefore, till there are 50 posts available in a subject in a particular University, the reservation cannot be provided. This Court, finds that there are several subjects where the number of posts are 50 or more which are to be distributed amongst the 13 Universities. The reservation would therefore apply to the total number of posts in all subject and not to the concerned University as a unit. It is to be noted that the selection and appointment is not University-wise but for all the Universities together. Therefore, if a candidate coming from such category (wards of freedom fighters) has applied in a subject where the posts are 50 or above, he shall be entitled for consideration on merit basis against one Horizontal reservation. Upon his fulfilling the said post, one post of the category to which he belongs shall be reduced.

40. Having reached to the aforesaid conclusions, this Court finds that the bifurcation of posts done by the respondent State and the Commission in its advertisement dated 21.09.2020 is illegal and observed to be reviewed in terms of the observations made above. It is most unfortunate that in spite of their being a judgment passed by Coordinate Bench in **Sudhir Kumar** (supra) laying down the



method and manner in which backlog posts are to be identified, the present litigation has ensued for the same errors.

41. The State authorities must create a separate legal cell consisting of a separate cadre as is found in various other State Governments as well as in the Central Government, who would provide legal advice to the State executive authorities with regard to the application of judgments and the procedure to be followed in consonance with law for making recruitments and appointments in the State and subordinate services. It is the duty of the State to see that the litigation as against it is reduced. Judgments passed by the High Court which have attained finality on any question of law are required to be followed in subsequent actions. It is unfortunate that for each selection process, litigation is approaching to this Court resulting in delay of the appointments. In fact, had the respondents applied the judgment passed by this Court in **Sudhir Kumar** (supra), the present litigation could have been avoided.

42. This Court finds that the Commission has proceeded with the selection process based on the aforesaid advertisement. Candidates were called for interview category-wise. Thus, when the number of posts had been reduced from



the Open Category, B.C. Category, Disabled Category and Other categories, candidates were also called less in number for interview. As this Court has found the bifurcation of post to be erroneous, the Commission would be required to call additional candidates for interview from the various categories additionally, according to revised bifurcation.

Therefore, it is directed that the respondents shall revise the bifurcation of post on the principle of calculation of backlog posts as observed as given hereinabove. The said backlog posts shall be treated as a separate class. The post of current vacancies shall be bifurcated in different categories strictly in accordance with the provisions of the **Act of 1991** and by treating all the post in various Universities together subject-wise. Backlog posts have to be mentioned separately and current posts separately in the advertisement.

43. After conducting the aforesaid exercise, the University shall call candidates for the posts, which are found to have not been filled from the respective category, for interview and recommend their selections accordingly.

44. Those selections, which have already been made and concluded by the Commission, shall not be disturbed. Meaning thereby, if candidates from Reserved Category have



already been selected, they shall be deemed to have filled the respective backlog posts and thereafter the posts meant for them in current vacancies. Thus, posts which remained unfilled shall be treated by the respondents to be meant for Open Category or General category and the exercise as directed in the aforementioned para shall be conducted for the said posts also.

45. In cases where the selections in subjects this Court has restrained the respondents from giving appointments or restrained from declaring the result, the respondents shall after conducting the exercise of earmarking the backlog posts as above, conduct the selection process for the remaining post and declare the result together after calling for interview additional candidates of the category as well as those who would be called for interview in terms of the additional posts earmarked for their category. The appointments shall thereafter be made.

46. The candidates belonging to Disabled Category and Wards of Freedom Fighters shall also be called additionally for interview after calculating the number of posts from all the Universities. The selected candidate shall have to be replaced by such category candidate even if the said candidate possesses higher merit. Similar exercise for E.W.S. Category



shall also be done.

47. Keeping in view the interim direction issued by this Court that all the selections have been once made subject to the decision of this case, the aforesaid directions are being issued.

48. The writ petition stands allowed. No cost.

(Sanjeev Prakash Sharma, J)

sachin/-

AFR/NAFR	A.F.R.
CAV DATE	10.01.2023
Uploading Date	
Transmission Date	

