

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) No. 53 of 2020

1. Ranjeet Kumar Sah, aged about 31 years, son of Sri Vishwanath Sah, resident of Village & P.O. Dhamni Bazar, P.S. Sundar Pahari, District-Godda, Jharkhand
2. Uttam Kumar Upadhyay, aged about 30 years, son of Sushil Kumar Upadhyay, resident of Village & P.O. Barwadih, P.S. Barwadih, District- Latehar ... **Petitioners**

-Versus-

1. The State of Jharkhand
2. The Secretary, Road Construction Department, Government of Jharkhand, Project Building, Dhurwa, P.O. & P.S. Dhurwa, District-Ranchi
3. The Secretary, Water Resources Department, Government of Jharkhand, Project Building, Dhurwa, P.O. & P.S. Dhurwa, District-Ranchi
4. The Secretary, Drinking, Water and Sanitation Department, Government of Jharkhand, Project Building, Dhurwa, P.O. & P.S. Dhurwa, District- Ranchi
5. The Additional Chief Secretary, Personnel Administrative Reforms and Rajbhasha Department, Government of Jharkhand, Project Building, Dhurwa, P.O. & P.S. Dhurwa, District- Ranchi
6. The Principal Secretary-cum-Law Advisor, Department of Law, Government of Jharkhand, Project Building, Dhurwa, P.O. & P.S. Dhurwa, District- Ranchi
7. The Secretary, Jharkhand Public Service Commission, Circular Road, Ranchi, P.O. & P.S. Lalpur, District- Ranchi ... **Respondents**

PRESENT

HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioners : Mr. Saurabh Shekhar, Advocate
 For the Respondent-State : Mr. Rajiv Ranjan, Advocate General
 Mr. Mohan Kumar Dubey, A.C. to A.G.
 For the Respondent-JPSC : Mr. Sanjay Piprawall, Advocate

C.A.V. on 14.12.2020

Pronounced on 21.01.2021

Heard Mr. Saurabh Shekhar, learned counsel for the petitioners, Mr. Rajiv Ranjan, learned Advocate General assisted by Mr. Mohan Kumar Dubey, learned counsels for the respondent-State and Mr. Sanjay Piprawall, learned counsel for the respondent-Jharkhand Public Service Commission.

2. This writ petition has been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation arising

due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter has been heard on merit.

3. The petitioners have preferred this writ petition for quashing the Advertisement No.05/2019, contained in Annexure-4 of the writ petition so far as it relates to the appointments to be made on the post of Assistant Engineer (Civil), limited to the extent of retrospective applicability of 10% reservation for Economically Weaker Section (for the sake of brevity herein after to be referred to as "EWS") reservation. The prayer is also made for quashing of the decision to conduct single selection process on the vacancies of the year 2013 and 2015 respectively. The further prayer is made for conducting selection process on the vacancies arrived in the year 2013, 2015 & 2019 separately and independently.

4. The fact leading for filing of this writ petition is that the department for the first time earmarked vacancies to be filled up for the post of Assistant Engineer (Civil) in the year 2013 and pursuant to this the advertisement was published numbered as Advertisement No.06 of 2015 for the selection process by respondent no.7. The petitioners applied to participate in the selection process for their direct recruitment on the post of Assistant Engineer. The number of unreserved posts advertised was 105 vacancies. There was no EWS reservation of 10% quota applicable at that point of time. The cut-off date for age eligibility was specified to be 01.08.2013 and it was also specified that the age of eligibility to participate will be 21 to 35. The selection process was started, but not concluded in conducting selection tests. In the very same Advertisement No. 06 of 2015, the departments' earmarked vacancies to be filled up for the post of Assistant Engineer (Civil) in the year 2015 was published. The petitioners

eligible on all counts, applied to participate in the selection process for their direct recruitment on the post of Assistant Engineer. The number of unreserved posts advertised was 93 vacancies (only for Road Construction Department). There was no EWS reservation of 10% quota applicable at that point of time. The cut-off date for age eligibility was specified to be 01.08.2015 and further it was disclosed that the age eligibility to participate will be 21 to 35 years. Though the selection process was initiated, but the same was not concluded by way of selection test. No selection test was conducted pursuant to above two advertisements. The Government of India vide office memorandum dated 31.01.2019 published its decision, whereby, 10% reservation for EWS in direct recruitment in civil posts and services in Government of India was notified. The State of Jharkhand introduced the reservation quota of 10% for EWS in the civil posts and services of the Government of Jharkhand. The amendment in the reservation rules of 2001, were brought in effect to the extent of increasing the percentage of reservation to 60%. This decision was published vide Government notification dated 25.02.2019, superseded vide another Government notification dated 08.07.2019. The provisions of the notification clarify that the effect in applicability of the notifications will be post facto and not retrospective. The respondents further published Advertisement No.05 of 2019 to make appointment on the post of Assistant Engineer (Civil). The earlier advertisements were not completed and they have been superseded by the current advertisement, which contains merged vacancies of advertisements of 2013 and 2015 and also current vacancies of 2019. Aggrieved with this merger part of the earlier advertisements, the petitioners have moved before this Court by way of filing this writ petition.

5. Mr. Saurabh Shekhar, learned counsel for the petitioners submitted that the petitioners are not EWS candidates, and therefore, the applicability of reservation quota on this count is adversely affecting their right on earlier vacancies, on which the provisions of EWS cannot be made applicable retrospectively. He further submitted that due to merger of vacancies, the seats which were available in the year 2013 and 2015, have been brought under the cover of current advertisement of the year 2019, wherein 10% reservation for EWS have been made applicable retrospectively for all the earlier vacancies, that were part of earlier selection process. He further submitted that 52 seats have been carved out from unreserved quota, includes merged vacancies of earlier selection process of the year 2013 and 2015, in the current advertisement of 2019. He also submitted that 52 seats have been earmarked for EWS candidates separately, but these seats have been carved out from the unreserved quota, as the reservation point has been increased by 10%, thereby, enhancing the upper limit of reservation 60%, but this has to be done on post facto vacancies. He further submitted that the petitioners will suffer as the vacancies in unreserved quota have been reduced by applicability of EWS in the vacancies of earlier selection process. He further made out a case that ineligible candidates of earlier selection process on the point of age come eligible in the current selection process of the year 2019 thereby adversely affecting the right of the petitioners. He further submitted that there is an amendment in the Constitution of India i.e. 103rd Amendment Act, 2019, whereby, in Article 15 of the Constitution of India, Clause 6 has been inserted after Clause 5 and in Article 16 of the Constitution of India, Clause 6 has been inserted after Clause 5. He also submitted that this amendment was made effective from the date of the notification in the

official gazette. He further submitted that the Central Government notified the 103rd Amendment Act, 2019 in the official gazette on 14.01.2019. The amendment was made effective from 14.01.2019. He referred to Clause 6.2 and Clause 11 of the resolution of the Government of Jharkhand dated 15.02.2019 and submitted that it was made effective by the resolution w.e.f. 15.01.2019, whereas, in the earlier vacancies, this has been made retrospectively enhancing the reservation and in view of various judgments rendered by the Hon'ble Supreme Court, reservation was required to be restricted to 50% of the vacancy. On this ground, he submitted that retrospective applicability of 103rd Amendment Act, 2019 by the respondents is against the mandate of the Constitution of India.

6. Per contra, Mr. Rajiv Ranjan, learned Advocate General appearing for the respondent-State submitted that in view of Article 16(4)(B) of the Constitution of India, it is well within the domain of the State Government to fill up the vacancies in any succeeding year or years. He further submitted that the said applicability of 10% reservation for EWS is being implemented by the State of Jharkhand in view of the State resolution dated 15.02.2019, which has been annexed as Annexure-1 of the counter affidavit. He also submitted that the resolution dated 15.02.2019 is not under challenge in this writ petition. He further submitted that in terms of the said statutory provisions, Advertisement No. 05 of 2019 has been published by the Jharkhand Public Service Commission after 15.01.2019 and thus 10% reservation for EWS with respect to the appointment to be made on the post of Assistant Engineer (Civil) has been rightly made. He also submitted that the resolution dated 15.02.2019 clearly states that it will be effective from 15.01.2019 in direct recruitment. The State has got the right not to fill up the vacancy of a particular year. He further submitted

that the vacancies, which are not filled up in any advertisement, that will be filled up in the next advertisement. He further submitted that the advertisement of 2019 is in accordance with the rules. He further submitted that it is well settled proposition of law that there is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date. He relied upon the judgment rendered by the Hon'ble Supreme Court in the case of **Deepak Agarwal & another v. State of Uttar Pradesh & Others**, reported in **(2011) 6 SCC 725**, paragraphs 26, 27 and 28 of the said judgment are quoted herein below:

"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants has been taken away by the amendment.

27. The judgments cited by the learned counsel for the appellants, namely, B.L. Gupta v. MCD, P. Ganeshwar Rao v. State of A.P. and N.T.Devin Katti v. Karnataka Public Service Commission are reiterations of a principle laid down in Y.V. Rangaiah case. All these judgments have been considered by this Court in Rajasthan Public Service Commission v. Chanan Ram. In our opinion, the observations made by this Court in SCC paras 14 and 15 of the judgment are a complete answer to the submissions made by Dr. Rajeev Dhavan. In that case, this Court was considering the abolition of the post of Assistant Director (Junior) which was substituted by the post of Marketing Officer. Thus the post of Assistant Director (Junior) was no longer eligible for promotion, as the post of Assistant Director had to be filled by 100% promotion from the post of Marketing Officer. It was, therefore, held that the post had to be filled under the prevailing rules and not the old rules.

28. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in Dr. K. Ramulu. In the aforesaid case, this Court considered all the judgments cited by the learned Senior Counsel for the appellant and held that Y.V. Rangaiah case would not be applicable in the facts and circumstances of that case. It was observed that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. It was also held that when the Government

takes a conscious decision and amends the rules, the promotions have to be made in accordance with the rules prevalent at the time when the consideration takes place."

Learned Advocate General appearing for the respondent-State further relied upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Union of India & Ors. v. Krishna Kumar & Ors.***, reported in **(2019) 4 SCC 319**, paragraphs 10, 11 and 12 of the said judgment are quoted herein below:

"10. *In considering the rival submissions, it must, at the outset, be noted that it is well settled that there is no vested right to promotion, but a right be considered for promotion in accordance with the Rules which prevail on the date on which consideration for promotion takes place. This Court has held that there is no rule of universal application to the effect that vacancies must necessarily be filled in on the basis of the law which existed on the date when they arose. The decision of this Court in Y.V. Rangaiah v. J. Sreenivasa Rao has been construed in subsequent decisions as a case where the applicable Rules required the process of promotion or selection to be completed within a stipulated time-frame. Hence, it has been held in H.S. Grewal v. Union of India that the creation of an intermediate post would not amount to an interference with the vested right to promotion. A two-Judge Bench of this Court held thus: (H.S. Grewal case, SCC p. 769, para 13)*

"13. ... Such an introduction of an intermediate post does not, in our opinion, amount to interfering with any vested rights cannot be interfered with, is to be accepted as correct. What all has happened here is that an intermediate post has been created prospectively for future promotions from Group B Class II to Group A Class I. If, before these Rules of 1981 came into force, these officers were eligible to be directly promoted as Commandants under the 1974 Rules but before they got any such promotions, the 1981 Rules came in obliging them to go through an intermediate post, this does not amount to interfering with any vested rights."

11. *In Deepak Agarwal v. State of U.P., this Court observed thus: (SCC p. 735, paras 26-27)*

"26. It is by now a settled proposition of law that a candidate has the right to be considered in the light of the existing rules, which implies the "Rules in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in Y.V. Rangaiah case lays down any particular time-frame, within which the selection process is to be completed. In the present case, consideration for promotion took place after the amendment came into operation. Thus, it cannot be accepted that any accrued or vested right of the appellants

has been taken away by the amendment.

27. The judgments cited by the learned counsel for the appellants, namely, *B.L. Gupta v. MCD, P. Ganeshwar Rao v. State of A.P. and N.T. Devin Katti v. Karnataka Public Service Commission* are reiterations of a principle laid down in *Y.V. Rangaiah case.*"

12. Recently, in *State of Tripura v. Nikhil Ranjan Chakraborty*, another two-Judge Bench of this Court held thus: (SCC pp. 650-51, para 9)

"9. The law is thus clear that a candidate has the right to be considered in the light of the existing rules, namely, "rules in force on the date" the consideration takes place and that there is no rule of absolute application that vacancies must invariably be filled by the law existing on the date when they arose. As against the case of total exclusion and absolute deprivation of a chance to be considered as in *Deepak Agarwal*, in the instant case certain additional posts have been included in the feeder cadre, thereby expanding the zone of consideration. It is not as if the writ petitioners or similarly situated candidates were totally excluded. At best, they now had to compete with some more candidates. In any case, since there was no accrued right nor was there any mandate that vacancies must be filled invariably by the law existing on the date when the vacancy arose, the State was well within its rights to stipulate that the vacancies be filled in accordance with the Rules as amended. Secondly, the process to amend the Rules had also begun well before the Notification dated 24-11-2011."

By way of relying these judgments, learned Advocate General submitted that there is no rule of universal or absolute application that vacancies must invariably be filled by the law existing on the date when they arose. He further submitted that *Deepak Agarwal's* case has been considered by the Hon'ble Supreme Court in the judgment reported in **(2019) 4 SCC 319**. He also submitted that only participation in selection process is giving no right to the candidates for appointment, if they responding to the advertisement. He further relied upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Mohd. Rashid v. Director, Local Bodies, New Secretariat & Ors.***, reported in **(2020) 2 SCC 582**, paragraph 13 of the said judgment is quoted herein below:

"13. The appellants who are aspirants for direct recruitment have no right for appointment merely because at one point of time the vacancies were advertised. The candidates such as the appellants cannot claim any right of appointment merely for the reason that they responded to an advertisement published on 12-9-2013. Even after completion of the selection process, the candidates even on

the merit list do not have any vested right to seek appointment only for the reason that their names appear on the merit list. In Shankarsan Dash v. Union of India, a Constitution Bench of this Court held that a candidate seeking appointment to a civil post cannot be regarded to have acquired an indefeasible right to appointment in such post merely because of the appearance of his name in the merit list. This Court held as under: (SCC pp. 50-51, para 7)

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha; Neelima Shangla v. State of Haryana or Jatinder Kumar v. State of Punjab.”

On the aforesaid grounds, learned Advocate General appearing for the respondent-State submitted that the case of the petitioners is fit to be rejected and the writ petition may kindly be dismissed.

7. Mr. Sanjay Piprawall, learned counsel for the respondent-JPSC submitted that no right is accrued to the candidates for appointment in earlier advertisement. He further submitted that it is State Government's prerogative. He further submitted that the last date for submission of application form has already been over and process of examination is going on. He also submitted that the Jharkhand Public Service Commission is constitutional body and it has to start selection process in terms of requisition of the concerned Department of the State Government and, therefore, the writ petition is not maintainable. He further submitted that the writ petition has been filed on 09.01.2020. The filing of the writ petition is after thought. He also submitted that the result of Preliminary

Test has already been published on 14.08.2020 and the date for Mains examination has already been published.

8. By the way of reply, Mr. Saurabh Shekhar, learned counsel for the petitioners submitted that there is no question of after thought of filing of the writ petition. The petitioners have already applied in the earlier advertisements. He further submitted that once the advertisement is there, the State has got no prerogative to cancel the advertisement. He also submitted that ceiling limit of 50% in view of Article 16(4)(B) of the Constitution of India has not been followed. He further submitted that by way of merging the advertisement, which has been admitted in paragraph 9 of the counter affidavit of the respondent-State, the retrospective effect of 103rd Amendment has been given, which is against the mandate of the Constitution of India. He further submitted that Article 15 of the Constitution of India secures the fundamental right of the petitioners. He also submitted that Article 16 can be raised even after selection process. He further submitted that this Court may mould the rule under Article 226 of the Constitution of India.

9. In light of the above facts and considering the submission of the learned counsel appearing for the parties, the Court has gone through the materials available on record. The only question requires to be answered by the Court as to whether EWS reservation can be given effect retrospectively or not. The fact which is not in dispute is that the State of Jharkhand has come out with a resolution on 15.02.2019 for providing reservation to the EWS, which was made effective from 15.01.2019. Thus, it is clear that the reservation was made effective from 15.01.2019. The Court has gone through the said resolution, contained in Annexure-1 of the counter affidavit of the respondent-State. Clause 11 of the said document

clearly stipulates that the said reservation will be made effective w.e.f. 15.01.2019. The respondents have issued resolution on 15.02.2019 and the advertisement was published after 15.01.2019. 103rd Amendment Act, 2019 is quoted herein below:

"BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. (1) *This Act may be called the Constitution (One Hundred and Third Amendment) Act, 2019.*

(2) *It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*

2. *In article 15 of the Constitution, after clause (5), the following clause shall be inserted, namely:—*

'(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.'

3. *In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—*

"(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

The said amendment was to be made effective by the notification in the official gazette vide notification dated 14.01.2019, which reads as under:

"NOTIFICATION

New Delhi, the 14th January, 2019

S.O. 292(E).- In exercise of the powers conferred by sub-section (2) of section 1 of the Constitution (One Hundred and Third Amendment) Act, 2019. the Central Government hereby appoints the 14th January, 2019 as the date on which the provisions of the said Act shall come into force."

Thus, it is clear that the said amendment was made effective w.e.f. 14.01.2019. The Government of Jharkhand has also made resolution dated 15.02.2019, which will be made effective w.e.f. 15.01.2019. Thus, in any view of the matter the said 10% reservation to EWS was required to be made effective w.e.f. 15.01.2019.

10. Before judicially scrutinizing the retrospective effect of the said applicability, it would be proper to make reference of the judgment rendered by the Hon'ble Supreme Court in the case of ***M. R. Balaji & Ors. v. The State of Mysore & Ors.***, reported in ***AIR 1963 SC 649***, the Constitution Bench of the Hon'ble Supreme Court has been pleased to reject the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the Court on the extent of reservation. It has also been observed that a provision under Article 15(4) being a special provision must be within reasonable limits. The Hon'ble Supreme Court has been pleased to take strict view in the case of ***State of Kerala & anr. v. N. M. Thomas & Ors.***, reported in ***(1976) 2 SCC 310***, wherein, it has been held that as to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases and decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. The said issue came up for consideration before the Constitution Bench of the Hon'ble Supreme Court in the case of ***Indra Sawhney v. Union of India & Ors.***, reported in ***1992 Supp (3) SCC 217***, wherein, the Constitution Bench of the Hon'ble Supreme Court by its majority view has been pleased to approve the view taken in the case of ***M. R. Balaji (supra)*** and disapproved the

view taken by the Hon'ble Supreme Court in the case of **N. M. Thomas** (*supra*) by providing proposition that the extent of reservation shall not exceed to 50% of the appointment of post except in certain extraordinary situation taking together with reservation in favour of Scheduled Caste and Scheduled Tribe category candidates. The extraordinary situation has been observed in paragraph 808 of the said judgment, which is quoted herein below:

"808. *It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4)-conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" . No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept ."*

The reservation extent again came up for consideration before the Hon'ble Supreme Court in the case of **R.K. Sabharwal & Ors. v. State of Punjab & Ors.**, reported in **(1995) 2 SCC 745**, wherein, it has been held that roster system is necessary to be followed in the matter of public employment so that extent of reservation may not exceed to 50% limit taking into account the principle laid down to maintain equality under Article 16 of the Constitution of India, on which balance is maintained.

11. The Government of India came out with an amendment by way of 85th Amendment Act incorporating the provision of accumulated reservation in promotion by giving the benefit of seniority. Consequently, Article 16(4A) has been incorporated in the Constitution of India. The *vires* of the said constitutional amendment was challenged before the Hon'ble Supreme

Court in the case of **M. Nagaraj & Ors. v. Union of India & Ors.**, reported in **(2006) 8 SCC 212**, in which, the Hon'ble Supreme Court has taken into consideration the law laid down in the case **Indra Sawhney (supra)** and held that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all consequential requirements without which the structure of equality of opportunity in Article 16 would collapse.

12. The cases of M. Nagaraj and R. K. Sabharwal (*supra*) were again considered by the Hon'ble Supreme Court in the case of **B.K. Pavitra & Ors. v. Union of India & Ors.**, reported in **(2017) 4 SCC 620** and certain observations made in M. Nagaraj case has been taken into consideration in paragraph 22 of the said judgment and in paragraph 25 of the said judgment, the case of U.P. Power Corpn. Ltd. was summarised. Paragraphs 22 and 25 of the said judgment are quoted herein below:

"22. *It may also be worthwhile to note further observations of this Court in the said judgment: (M. Nagaraj case, SCC pp. 250-52, 268-72 & 276-78, paras 49, 59, 102, 104, 106-108, 117-118, 120 & 122)*

"49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification.

* * *

59. Giving the judgment of the Court in Indra Sawhney Jeevan Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of Backward Classes to the total population would certainly be relevant.

* * *

102. ... Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by

the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid.

* * *

104. ... As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

* * *

106. ... According to the Constitutional Law of India, by H.M. Seervai, 4th Edn., p. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of "guided power". This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts. ...

107. ... If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. ...

108. ... Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.

* * *

117. ... Therefore, in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.

118. *The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs each case to be decided on case-to-case basis.*

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120. *At this stage, one aspect needs to be mentioned. Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, needs and means. These three criteria can be put under two concepts of equality, namely, "formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In Indra Sawhney all the Judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation. In Indra Sawhney this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in Indra Sawhney. The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in Indra Sawhney has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.*

* * *

122. *We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."*

xxx xxx xxx

"25. Reference was then made to the Constitution amendment enabling reservation in promotions and consequential seniority which was upheld in *M. Nagaraj*. The said judgment was summarised as follows: (*U.P. Power Corpn. Ltd. case*, SCC pp. 36-37, para 81)

"81. From the aforesaid decision in *M. Nagaraj case* and the paragraphs we have quoted hereinabove, the following principles can be carved out:

(i) Vesting of the power by an enabling provision may be constitutionally valid and yet "exercise of power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

(ii) Article 16(4) which protects the interests of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.

(iii) Each post gets marked for the particular category of candidates to be appointed against it and any subsequent vacancy has to be filled by that category candidate.

(iv) The appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

(v) The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4-A). Therefore, clause (4-A) will be governed by the two compelling reasons—"backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist, then the enabling provision cannot be enforced.

(vi) If the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept, then posts will continue to remain vacant for years which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the duration depending upon the fact situation.

(vii) If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335, then this Court will certainly set aside and strike down such legislation.

(viii) The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case.

(ix) The concepts of efficiency, backwardness and inadequacy of representation are required to be identified and measured. That exercise depends on the availability of data. That exercise depends on numerous factors. It is for this reason that the enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment.

(x) Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists

backwardness of a class and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in the matter of employment.”

13. In view of the above judgments, it is clear that the extent of reservation is made up to 50%. However, extraordinary situation may be there. The Court is not examining this aspect of the matter in this writ petition as to whether the reservation upto 60% is valid or not. The only question requires to be answered by the Court as to whether EWS reservation can be given effect retrospectively or not. Admittedly, 103rd Amendment Act, 2019 was made effective w.e.f. 14.01.2019. The Government of Jharkhand by way of resolution dated 15.02.2019 has also adopted the said amendment. In view of Clause 11 of the resolution dated 15.02.2019, it is clear that the reservation will be effective w.e.f. 15.01.2019 in subsequent advertisement. Thus, that reservation cannot be allowed to be made effective with retrospective effect, which is against the mandate of the Constitution of India. The Constitution of India is fountain of all the Statutes. At the time of advertisement of 2013 and 2015, 10% reservation for EWS was not there and by way of clubbing the vacancies, 10% reservation for EWS has been provided in the vacancy of 2013 and 2015, which is against the mandate of the Constitution of India. The merger of earlier advertisements, which has been made effective retrospectively is against the constitutional scheme.

14. The judgments relied by the learned Advocate General are in the facts and circumstances of those cases and most of the cases relied by the learned Advocate General are on the point of promotion. It is true that merely by way of participating in the examination process, that does not provide right to aspirants i.e. one aspect of the matter. However, in the

present case in the garb of resolution dated 15.02.2019, reservation for EWS has been made effective along with the vacancy of the year 2013 and 2015, which cannot be allowed.

15. It is well settled proposition of law that the judgment needs to be read in the facts and circumstances of the case. A reference in this regard may be made to the judgment rendered by the Hon'ble Supreme Court in the case of **State of Orissa Versus Sudhanshu Sekhar Misra and Others**, reported in **AIR 1968 SC 647**, in which, the Hon'ble Supreme Court has considered Earl of- Halsbury, which is at page 651 of the said judgment quoted herein below for ready reference:

"On this topic this is what Earl of- Halsbury. LC said in Quinn v. Leatham, 1901 AC 495. "Now before discussing the case of Allen v. Flood, (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all." "

16. By the order of this Court dated 14.01.2020, it was ordered that final appointment will be subject to the result of the writ petition. Thus, the contention of the learned counsel for the respondent-JPSC that the writ petition is not maintainable, is not accepted by this Court.

17. In view of the above discussions, the writ petition succeeds. The impugned Advertisement No. 05 of 2019, contained in Annexure-4 of the writ petition is set aside and this Court declares that the retrospective application of 10% EWS quota is against Articles 14 and 16 of the Constitution of India. Consequently, the State Government is directed to modify the Advertisement no. 05 of 2019, contained in Annexure-4 of the

writ petition to the extent that 10% quota for EWS shall not be made effective retrospectively for the vacancy of the year 2013 and 2015. Consequently, on going appointment process are not based on constitutional mandate and are held to be illegal.

18. The respondent-State has already come out with advertisement of the year 2013 and 2015 respectively, which was cancelled subsequently. This appointment was required to be completed adhering the extent of reservation upto 50%. Thus, the said vacancies are required to be filled up in terms of Rule of that time. Accordingly, the State shall advertise those posts separately within eight weeks from today.

19. The advertisement of 2019 shall carry out after modifying the said advertisement afresh in light of 103rd Amendment of Constitution, which was made effective w.e.f. 14.01.2019 by way of incorporating Article 16(6) in the Constitution of India.

20. Accordingly, the writ petition stands allowed and disposed of.

(Sanjay Kumar Dwivedi, J.)

High Court of Jharkhand, Ranchi
Dated: the 21st day of January, 2021
Ajay/ A.F.R.