

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.305 OF 2008

DEEPAK NARAYAN GAUDE,
major, Indian National,
r/o House No.125, Gothan Veling,
Mardol, Goa.

... Petitioner

Versus

1. The STATE OF GOA,
through the Chief Secretary,
Government of Goa,
having his office at Secretariat,
Porvorim, Goa.
2. The COMMISSIONER OF
COMMERCIAL TAXES,
Government of Goa,
having his office at Vikrikar Bhavan,
M.G.Road, Panaji, Goa.
3. GAURISH V. KHEDEKAR,
Major, Indian National,
r/o House No.500 (1),
Near Shree Mahalsa Temple,
Mardol, Goa, 403404.
4. SUDESH B. NAIK,
major, Indian National,

r/o House No.53, Ganjem,
Usgaon, Ponda, Goa 403407.

5. PREETI A. NAIK @ PREETI J.
MADREKAR, major,
Indian National,
r/o House No.108,
Zariwada, Vithalnagar,
Sanquelim, Goa.
6. SHILPA H.P. DESAI, major,
Indian National,
r/o C/o Ravindra Dhuri,
House no.88/11,
Near Chandrakant Garage,
Khorlim, Mapusa, Goa.
7. PALLAVI S. PATIL, major,
Indian National, r/o T-2F,
Saredessai's Radha Co-op.
Housing Society, Shantinagar,
Ponda, Goa.
8. GAJANAN X. BHOSALE,
major, Indian National,
r/o House no.111/3, Palmar
Waddo, P.O. Carona
Pomburpa, Bardez Goa 403523..
9. SUBHASH S. GURAV,
major, Indian National,
r/o. Subhash S. Gurav,

LIG-451, Housing Board,
Near MarutiMandir,
Opp. Rumdamol Panchayat Office,
Rumdamol, Davorlim,
Navelim, Salcete, Goa.

10. LAXMI U. LAWANDE,
major, Indian National,
r/o House No.1453,
Manjushree, Opp. Verlekar
Nursing Home, Verlekar Nursing
Home, Vasant Nagar-II,
Sanquelim, Goa.
11. ATISH N. MANDREKAR,
major, Indian National,
r/o House no.168, Manaswada,
Mulgao, Bicholim, Goa.
- 12 VANDANA V. BHAVE,
major, Indian National,
r/o House no.148,
Near Mahaganapati Mandir,
Bimal, Khotode,
Bimbal, Goa.
13. VIVITA S. AMBE,
major, Indian National,
r/o F-1/C, Palmgrove Co-op. Hsg Society,
Tonca, Caranzalem,
Co-op.403002.

14. AMEY P. NAIK,
major, Indian National,
r/o Akar Road,
Mardol, Goa 403404,
15. SUKANTI R. PILGAONKAR,
major, Indian National,
r/o House No.505, Sanklembhat,
Carambolim, Tiswadi, Goa.
16. SANDHYA RAJESH KAMAT,
House No.E-74, Near Sati Temple,
Bhatlem, Panaji, Goa. Respondents

Mr.Vivek Rodrigues with Mr.Vithal Naik, Advocates for the Petitioner.

Mr.Pravin Faldessai, Additional Government Advocate for the Respondent nos.1 & 2.

Mr. V.A.Lawande with Ms.P. Kaur, Advocates for the Respondent nos.3 to 8.

Mr.Nitin Sardesai, Senior Advocate with Ms. Gautami Kamat and Mr. L.Raghunandan, Advocates for the Respondent nos.9 to 16.

*Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.*

*Reserved on : 29 August 2018.
Proonounced on : 12 September 2018.*

JUDGMENT (Per Prithviraj K. Chavan, J):

By this petition, the Petitioner has prayed for the following reliefs:

“(A) That the Hon'ble Court may be pleased to issue a writ of Mandamus or any other writ, order or direction in the nature of Mandamus, directing and commanding the Respondent Government to withdraw and/or cancel and/or revoke the order No.CCT/EST/1-1/-7/08/2305 dated 31.01.2008 appointing Respondent Nos. 3 - 8 as Assistant Commercial Tax Officer, the Order No.CCT/EST/1-1/07-08/2304 dated 31.01.2008 appointing Respondent Nos.9 – 15 as vacant Commercial Tax Inspectors and the Order No.CCT/EST/1-1/07-08/2372 dated 14.2.2008 appointing Respondent No.16 as Commercial Tax Inspector, and consequently, directing the Government, to make fresh recruitment against the vacant posts in the cadre of Assistant Commercial Tax Officer and the cadre of Commercial Tax Inspector, by appointment only of candidates belonging to the category for which a post may be reserved.

OR

In the alternative to an appropriate writ, order or direction quashing and setting aside Order no.CCT/EST/1-1-7/08/2305 dated 31.01.2008 appointing Respondent nos.3 - 8 as Assistant

Commercial Tax Officer, the order No.CCT/EST/1-1/07-08/2304 dated 31.01.2008 appointing Respondent nos.9 - 15 as vacant Commercial Tax Inspectors and the order no.CCT/EST/1-1/07-08/2372 dated 14.02.2008 appointing Respondent No.16 as Commercial Tax Inspector, and consequently, directing the Government, to make fresh recruitment against the vacant posts in the cadre of Assistant Commercial Tax Officer and the cadre of Commercial Tax Inspector, by appointment only of candidates belonging to the category for which a post may be reserved.

(B) That the Hon'ble Court may be pleased to issue a writ of Mandamus or any writ, order and/or direction in the nature of mandamus, commanding and directing the Respondent Government, not to make appointments against the 2 additional vacancies that have arisen in the cadre of Commercial Tax Inspector, without first publishing an advertisement inviting applications from eligible candidates for appointment against the said posts.”

2. Pursuant to an advertisement published in the daily “Navhind Times” on 6 October 2006, the Government invited applications from eligible candidates, for appointments by direct

recruitment against vacant posts in the cadre of the Assistant Commercial Tax Officer (for short “ACTO”) to be submitted in the office of Respondent no.2 on or before 10 December 2006. It is a Selection Post in the scale of Rs.5,500-175-9,000. 75% of the posts in the cadre are to be filled by promotion and the remaining 25% of the posts, by direct recruitment. As per the said advertisement, the break up of vacancies was as follows:

Category	No.of Vacancies
Scheduled Caste	3
Scheduled Tribe	2
General Category	1
Total	6

3. Being eligible for an appointment as ACTO by direct recruitment, the Petitioner moved an application dated 24 November 2006 along with his curriculum vitae.

4. By another advertisement published in the local daily in the month of December 2006, the Government invited applications from eligible candidates for an appointment by direct recruitment against the post of the Commercial Tax Officer (for short “CTO”) to be submitted to the office of Respondent no.2 on or before 15 February 2007. The post of CTO is Selection Post to be filled 75%

by promotion and 25% by direct recruitment. The advertisement specified the break up of the vacant posts in the said cadre were as follows :-

Category	No. of Vacancies
Scheduled Caste	2
Scheduled Tribe	2
General Category	2
Total	6

5. The Petitioner had also applied for the said post, vide his application dated 9 February 2007 along with his bio-data. On 15 July 2007 a written test was held as a part of the recruitment process of filling up the vacant posts in the cadre of ACTO covering English Grammar & Composition, Accounting and Mathematics. The Petitioner appeared for the written test.

6. On 19 September 2007 the Respondent no.2 published result of the written test conducted for the aforesaid posts on its website in which the Petitioner was placed at Serial no.44. Thereafter interviews were conducted. The Petitioner appeared for the interview at the scheduled date and time. On 11 January 2008 the Respondent no.2 on completion of the selection process, published a list of persons who were to be issued letters of appointments in the cadres of the

ACTO and Commercial Tax Inspector (“for short “CTI”). The Respondent nos.1 and 2 have appointed five candidates from the General category and one candidate from OBC category for the post of the ACTO.

7. For the post of the CTI, the Respondents nos.1 and 2 appointed six candidates belonging to the General category, one candidate belonging to the OBC category and only one candidate belonging to ST category. The said persons are the Respondent nos.3 to 16.

8. It is the contention of the Petitioner that the appointments made are contrary to the list/break up of vacancies in that cadre, which were advertised by the Government in the aforesaid advertisements. The Petitioner has given the following Chart indicating irregularities in the appointment for the post of ACTO.

Category	No.of Vacancies Advertised	Appointments made
Scheduled Caste	3	0
Scheduled Tribe	2	0
General Category	1	5
OBC	0	1
Total	6	6

9. Similarly, as regards the post of the CTI, the Petitioner has given the following chart indicating irregularities in the appointment which were made as under:

Category	No. of Vacancies Advertised	Appointments made
Scheduled Caste	2	0
Scheduled Tribe	2	1
General Category	2	6
OBC	0	1
Total	6	8

10. Consequent upon the issuance of offers of appointments, the aforesaid candidates accepted the offers of the appointments issued to them, except one Mr. Sandeep S.Lotlikar, who was placed at Serial no.5 in the select list belonging to the General category, pertaining to the post of CTI, on receiving the offer of appointment as CTI, he did not accept the said offer. Vide Order no.CCT/EST/1-1-7/08/2304 dated 31 January 2008, the Government appointed the Respondent nos.9 to 15 as “Commercial Tax Inspectors” on temporary basis with effect from the date of their joining service against the said post. Vide another Order No.CCT/EST/1-1-7/08/2305 dated 31 January 2008,

the Government appointed Respondent nos.3 to 8 as “Assistant Commercial Tax Officers” on temporary posts with effect from the date of their joining service against the said post.

11. As such, the grievance of the Petitioner is that even though he possesses the essential requirements prescribed for an appointment by direct recruitment against the vacant post in both the cadres viz. ACTO and CTI and also he being a member from ST category, was eligible to be appointed against one post in the cadre of CTI and two posts in the cadre of ACTO, which were reserved for the members of ST category, has been denied the said opportunity. The said posts have been filled up otherwise than by appointing the candidate belonging to ST Category. The Petitioner contends that he is entitled to be appointed against the vacant post in the cadre of ACTO or at least against the vacant post in the cadre of CTI.

12. In the affidavit-in-reply on behalf of Respondent nos.1 and 2, a stand is taken that the petition deserves to be dismissed at the very outset on the ground that in the list of candidates for the post of ACTO shortlisted for interviews, the Petitioner has obtained a total of 47.25% marks out of 100 and, therefore, he was figuring at Serial no.3 in the Scheduled Tribe category for the said post, whereas as per

the first advertisement, there was only one post available for the Scheduled Tribe category and the subsequent advertisement two posts were available for the Scheduled Tribe category. The Respondents have placed a reliance on the judgment of the Supreme Court in the case of *R.K. Sabharwal and others Vs. State of Punjab and others*¹ by contending that pursuant to a Circular dated 14 November 2006 issued by the Social Welfare Department, Government of Goa and also in view of the Policy of the Government on reservation, the Roster was thereafter modified and Post Based Roster was prepared and approved by the State Government where there was no post available for the Scheduled Tribe category.

13. As regards the post of CTI, an advertisement was published on 13 December 2006 indicating two posts available for the Scheduled Tribe category. However, subsequent to the said advertisement, the State Government issued a fresh Circular to maintain a Point Based Roster. Subsequently, there were two new posts which were created in the said category of CTI for direct recruitment. The Director of Social Welfare has approved Post Based Roster which certified one vacancy for ST category. The Petitioner obtained 27.25 marks out of 100 and, therefore, was figuring at Serial no.6 in the ST

1. AIR 1995 SC 1371

category. The selected candidate i.e. Ms.Sukanti Pilgaonkar was at Serial no.1 in the ST category of the said list, who came to be appointed to the post of the CTI.

14. It is contended by the Respondent nos.1 and 2 that the Petitioner cannot challenge the appointment of other candidates who were successfully appointed based on their rankings when the Petitioner himself does not figure in the merit list, as per the posts reserved due to the marks obtained by him. There is no infringement of rights of the Petitioner, as the Petitioner was not at all selected to the aforesaid post.

15. The Respondent nos.1 and 2 have denied the averment in the petition that the candidates belonging to the General category have been appointed against the posts reserved for the candidates belonging to the Scheduled Castes and Scheduled Tribes in the Department of Commercial Taxes. It is specifically contended that the Department was having 23 sanctioned posts of the Assistant Commercial Tax Officers, out of which 17 were filled and, therefore, the remaining six were supposed to be filled by direct recruitment.

16. The Respondent nos.1 and 2 contend that in the first advertisement dated 20 July 2004, six vacancies of ACTOs by direct

recruitment were advertised, which were categorized as under:-

SC	1
ST	1
Ex-serviceman	1
General Category	3
Total	6

17. In the second advertisement dated 10 October 2006, the break up of vacancies are worked out as per approval of the Social Welfare Department indicated as under:-

SC	3
ST	2
General Category	1
Total	6

18. As regards the posts of Commercial Tax Inspectors, an advertisement was published on 13 December 2006 wherein the posts were published as under:

SC	2
ST	2
General Category	2
Total	6

19. Pursuant to the aforesaid advertisements, written tests

were conducted on 15 July 2007 for the categories of ACTOs and CTIs. 75 candidates were shortlisted for oral interviews in case of ACTO and 64 candidates were shortlisted for oral interview in case of CTIs.

20. The Respondent nos.1 and 2 contend that in view of the judgment of the Supreme Court in case of *R.K.Sabharwal and others Vs. State of Punjab and others*, the Ministry of Personnel, Public Grievances and Pension, Government of India on 2 July 1997 Office Memorandum bearing no.36012/2/96-ESTT(RES), which was adopted and circulated by the State Government, vide Circular dated 14 November 2006 bearing no.61-2-2006-BC/5331 under the signature of Ex-officio Joint Secretary & Director of Social Welfare, which referred to the Office Memorandum dated 2 July 1997, the said OM stated as under:-

“9. These orders shall take effect from the date of their issue. However, where selections have already been finalized they need not be disturbed and the necessary adjustments in such cases may be made in future. In other cases, recruitment may be withheld till the revised rosters are brought into operation and recruitment effected in accordance with this instructions.”

21. In view of the said Circular, all the Departments are

required to complete the exercise of switching over from Vacancy Based Roster to Post Based Roster were directed to submit the Roster for inspection to the Director of the Social Welfare. The Respondent nos.1 and 2 have, thus, implemented and followed the aforesaid office memorandum by preparing a Post Based Roster.

22. The Respondent nos.1 and 2 prepared 100 Point Roster for direct recruitment and promotions for all categories of posts which are as under:

1	Scheduled Castes	2 and 51	(2%)
2	Scheduled Tribes	4, 17, 30, 43, 56, 69, 81 and 94.	(7 ½ %)
3	Physically Disabled	1, 34, 67	(3%)

23. By the aforesaid Notification, all the earlier Notifications came to be superseded.

24. It is contended that pursuant to the directions of the Social Welfare Department, another notification bearing no.13-14-90-SWD/(Vol-II)/3049 dated 24 January 2004 came to be issued by which the Government has revised reservations in favour of the Scheduled Tribes to the extent of 12% of all categories of posts, as mentioned in the Circular dated 22 April 2003 and accordingly, the

revised points pertaining to the ST category in the 100 Point Roster was maintained for direct recruitment and promotions for all categories of posts separately.

25. As such, the State Government permitted to fill up the posts as per revised roster points. Accordingly, oral interviews for the posts of ACTOs was held on 5 November 2007 and the DSC recommended selection of five candidates in the General category including one vacancy of (Ex-serviceman/General) and one candidate in the OBC category against six clear vacancies as given below:

Sr.no	General Category	Against Roster Pt.No.
1	Gaurish Vaman Khedkar	2
2	Sudesh Bablo Naik	3 (against Ex-Serviceman)
3	Preeti Anil Naik	4
4	Shilpa H.P.Desai	5
5	Pallavi S.Patil	7
	OBC Category.	
1	Gajanan Bhosale	6

26. As regards CTIs, oral interviews were held on 5 November 2007. The Committee recommended selection of the six candidates in General category, as there were no candidate in the categories of Ex-serviceman and Physically Handicapped, which were added to the general lists. One candidate in OBC Category and one candidate in

ST category were selected against eight clear vacancies as shown below:-

Sr.no	General	Against Roster Pt.No.
1	Subhash Gurav	3 (against Ex-Serviceman)
2	Laxmi Lawande	4
3	Atish Mandrekar	5
4	Vamdana V.Bhave	7
5	Sandeep Lotlikar	10
6	Vivita Ambe	8
	OBC	
1	Amey P. Naik	6
	ST	
1	Sukanti Pilgaonkar	9

27. Thus, it is the contention of the Respondent nos.1 and 2 that in view of the aforesaid position, no case is made out by the Petitioner.

28. The Respondent nos.3 to 8 in their affidavit-in-reply supported the stand taken by Respondent nos.1 and 2 and so also the Respondent nos.9 to 16. It is contended on behalf of Respondent nos.9 to 16 that the Petitioner, at the highest, can challenge the appointment of the only candidate belonging to ST Category as the Petitioner had applied for the post of CTI in ST category. The

Respondent no.15 namely Ms. Sukanti R.Pilgaonkar belonging to ST category has already been selected and appointed to the sole post of CTI in ST category for standing 1st in the merit list in that category. As the Petitioner having failed to secure 1st rank in the merit list over the Respondent no.15, he cannot challenge her appointment. The Petitioner, therefore, is not entitled to be appointed against the vacant post reserved for ST category in the cadre of CTI.

29. We heard the learned counsel for the Petitioner. It is contended by the learned counsel that the Respondent nos.1 and 2 had completely removed ST category and included OBC category without there being any advertisement and that the Petitioner was kept in dark throughout. Since the interviews were conducted after one year, there was no urgency and that there was sufficient time to inform general public about such a change of category. The learned counsel drew our attention to the affidavit of the Respondent nos.1 and 2. It is contended that the Circular dated 14.11.2006 issued by the Director of Social Welfare does not indicate anything about the advertisement of the said post or the change of categories made therein. The OM of 1997 was given to the Government in 2002. There is no explanation tendered by the Government for the delay. The learned counsel has placed reliance on the following judgments:

- (i) Anurag Kumar Singh and others vs. State of Uttarakhand and others²
- (ii) Rakhi Ray and others Vs. High Court of Delhi and others³
- (iii) Shyamal Kumar Das Vs. The State Of West Bengal and Ors.⁴
(dated 8 December 2010 of Calcutta High Court.)

30. It is contended by the learned counsel for the Petitioner that the Government had made false statements and the entire process is vitiated by arbitrariness. There is no public participation and, therefore, prayed for the reliefs claimed.

31. Mr. Faldessai, learned Additional Government Advocate contended that the arguments of the Petitioner are sans pleadings. The advertisements were duly published by the Government. Only because the Petitioner was not considered, he cannot challenge the process of selection as the posts have been filled as per the Roster Point in the light of the judgment in the case of *R.K. Sabharwal and others Vs. State of Punjab and others*. The learned Additional Government Advocate demonstrated as to how by following 100-Point Roster, the posts were filled. It is argued that in order to ensure equality of an opportunity to the backward classes and the general category is to

² (2016) 9 SCC 426

³ (2010) 2 SCC 637

⁴ M.A.T. No.1159 of 2010

permit the roster to operate till the time respective appointees occupy the posts meant for them in the Roster.

32. According to the learned Additional Government Advocate, the Respondent nos.1 and 2 have followed the Circular dated 14 November 2006 issued by the Director of Social Welfare in consonance with the judgment of *R.K. Sabharwal and others Vs. State of Punjab and others* by switching over from Vacancy Based Roster to Post Based Roster and, therefore, there was no question of appointing a scheduled tribe candidate. However, he admits that the Government is late in implementing the Post Based Roster but, it has to be followed in view of the Circular dated 14 November 2006 issued by the Director of Social Welfare. It is also contended that the Petitioner was not amongst two meritorious candidates from ST category and, therefore, he could not have been appointed since he was at Sr. no.3 in the list. As such, the learned Additional Government Advocate concluded his arguments by contending that the Government has followed the reservation policy as per the roster, which is at Page no. 100 of the Writ Petition.

33. Shri Sardesai, learned Senior Counsel for the Respondent nos.9 to 16, at the outset contended that this is not being a public

interest litigation, at the highest, in service jurisprudence the claim of the Petitioner should have been restricted only to candidates from scheduled tribe category and not from the other category. The Respondent no.16 is a candidate from the scheduled tribe category, while Respondent nos.9, 10, 11, 13 and 14 are from the General category whereas the Respondent no.12 is from OBC category. All have been appointed as CTI. It is, therefore, contended by the learned Senior Counsel that the relief sought for quashing the appointments of Respondent nos.9 to 16 cannot be granted. The Petitioner could not have challenged the appointment process since he had an opportunity to participate in the process of recruitment. It is not a case that no candidate from the ST category has been considered. Since the Petitioner was at Serial no.6, he could not be appointed and he had no right even to challenge the candidate from the General category. It is, *inter alia*, contended by Mr. Sardesai that the Petitioner has not, till date, amended the petition in view of the fact that the other two candidates came to be appointed subsequently from the waiting list prepared by the Departmental Selection Committee viz Kum. Ahswini Navrekar and Kum. Kirti M. Kerkar and, therefore, the Petitioner has *sub-silentio* accepted the recruitment process by not challenging the entire merit list and the waiting list but, challenged the appointments of only a few candidates. The Petitioner is now estopped from

challenging the appointments of the Respondent nos.9 to 16. It is also argued that the date of birth of the Petitioner is 27 June 1974, however, he did not mention the same in the title of the petition though its a service matter. Nevertheless, the Petitioner is not going to accrue any benefit who is now 44 years of age.

34. Shri Lawande, learned counsel appearing for the Respondent nos.3 to 8, contended that since the Government wanted to implement the judgment in case of *R.K.Sabharwal and others Vs. State of Punjab and others*, the Petitioner should have amended his petition, but he did not. The State Government has rightly followed the 100-Point Roster and, therefore, the petition has no merit. He also drew our attention to the Caste Certificate of the Petitioner, which is a provisional as there is no verification of his caste till date.

35. The main grievance of the Petitioner is that he was eligible to be directly appointed in the cadre of ACTO and CTI, as he belongs to scheduled tribe category against one post of CTI in ST category and two posts of ACTOs in the same category but, candidates from the OBC category came to be appointed by completely eliminating the ST category.

36. It reveals from the record that the Petitioner had obtained

47.25 marks out of 100 for the post of ACTO and stood at Serial no.3 in the category of scheduled tribe candidate. There was only one post reserved for scheduled tribe category. In the subsequent advertisement dated 10 October 2006 two posts for the scheduled tribe category were available. However, in view of the judgment in case of *R.K.Sabharwal and others Vs. State of Punjab and others*, which was followed by the Respondent nos.1 and 2 in view of the Circular dated 14 November 2006 issued by the Social Welfare Department, the roster was modified and a Post Based Roster was prepared and subsequently approved by the Government. There was no post available for the scheduled tribe category. As such, there was no question of considering the Petitioner for the said post.

37. As regards the post of CTI, an advertisement was published on 13 December 2006. Two posts were available for the scheduled tribe candidates. However, in view of the Post Based Roster, there was only one vacancy for the scheduled tribe category. In the list shortlisted for the post of CTI, the Petitioner had obtained 27.25 marks out of 100 and was at Serial no.6 in the ST category; whereas one Ms. Sukanti Pilgaonkar was at Sr. no.1 in the ST category and, therefore, she came to be appointed to the said post of CTI from the ST category. Therefore, the Petitioner cannot challenge the

appointments of other candidates who have been successfully appointed based on their rankings.

38. The law on the point of Roster Point is no more *res integra*, in view of the judgment of the Supreme Court in case of *R.K.Sabharwal and others Vs. State of Punjab and others*. The Supreme Court in the said case has observed thus:

“5..... 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/promotes 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 short-fall 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.

7. When all the roster-points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Casts/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong.”

39. In view of the ratio, the Ministry of Personnel, Public Grievances and Pension, Government of India issued a Circular on 2 July 1997 bearing no.36012/2/96-ESTT(RES). The said OM reads as under:-

“9. These orders shall take effect from the date of their issue. However, where selections have already been finalized they need not be disturbed and the necessary adjustments in such cases may be made in future. In other cases, recruitment may be withheld till the revised rosters are brought into operation and recruitment effected in accordance with this instructions.”

40. By a Notification dated 24 December 2004, the Government of Goa (Exhibit-C) maintained a 100 Point Roster in direct recruitment and promotions for all categories of posts. The Roster Point for the Scheduled Castes and Scheduled Tribes are as under:

Scheduled Castes	2 and 51	(2%)
Scheduled Tribes	4, 13, 22, 30, 39, 48, 56, 64, 73, 81, 91 and 99.	12%

41. Thus, due to exercise of switching over from the Vacancy Based Roster to the Post Based Roster, which was carried out pursuant to the directions of the Director of Social Welfare, there was change in the vacancy position. The State Government has permitted to fill up the posts in view of the changed position on account of introduction Post Based Roster. Thus, for the posts of the ACTOs, five candidates were recommended from the General category and one candidate from the OBC category against six clear vacancies have been filled up as already stated hereinbefore in para 25.

42. Insofar as the posts of CTIs are concerned, the Departmental Selection Committee had recommended selection of six candidates in General category, as there were no candidate from the category of the Ex-serviceman and Physically Handicapped, which

were added to the general list. One candidate each from the OBC and Scheduled Tribe category against eight vacancies were filled. As already stated above, one Ms. Sukanti Pilgaonkar is the only candidate of S.T. Category as Roster Point no.9 came to be appointed being above the Petitioner in the merit list in the said category.

43. The learned counsel for the Petitioner relied upon a judgment of the Supreme Court in case of *Anurag Kumar Singh and others Vs. State of Uttarakhand and others (supra)*. The observations of paragraph 11 of the said judgment read thus :

“11. It is clear from the pleadings and the various documents filed by the appellants that no additional posts were created between 1.7.2008 and 30.6.2009. It is significant that the Rules refer to the recruitment year. It is a well-accepted principle of service law that only the number of vacancies that are advertised can be filled up. If the advertisement gives liberty to the Government to vary the number of posts, such power cannot be exercised for filling up future vacancies. If additional posts were created during the recruitment year i.e. between 1.7.2008 and 30.6.2009, the Government could have directed the Second Respondent to include those posts also in the selection

list that was made pursuant to the advertisement dated 19.09.2009.”

44. In the case at hand, the Respondent nos.1 and 2 have not made any exercise for filling up the future vacancies. What has been done in the case at hand is that, the Government has followed the ratio in the judgment of *R.K. Sabharwal and others Vs. State of Punjab and others*. Thus, the ratio in Anurag's case can be distinguished accordingly.

45. The Petitioner has placed reliance on another judgment of the Supreme Court in the case of *Rakhi Ray and others Vs. High Court of Delhi and others* reported in (2010) 2 SCC 637 (*supra*). It is observed in paras 7, 12, 18 and 24 thus:

“7 It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is

neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide Union of India and Ors. v. Ishwar Singh Khatri & Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors. (1994) Supp 2 SCC 591; State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors AIR 1994 SC 736; Prem Singh & Ors. v. Haryana State Electricity Board & Ors. (1996) 4 SCC 319; and Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board.

12 In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16 (1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In

case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

18. In Malik Mazhar Sultan's case (2008) 17 SCC 703 (supra), this Court made it clear that appointments in Judicial Service have to be made as per the existing statutory rules. However, direction was issued to amend the rules for future selections. This Court considered the correspondences between various authorities of the States and also the decision taken in the conference of the Chief Ministers and Chief Justices held on 11.3.2006, and observed as under:

"... Before we issue general directions and the time schedule to be adhered to for filling vacancies that may arise in subordinate courts and district courts, it is necessary to note that selections are required to be conducted by the concerned authorities as per the existing Judicial Service Rules in the respective States/Union Territories..... As already indicated, the selection is to be conducted by authorities empowered to do so as per the existing

Rules. ... In view of what we have already noted about the appointments to be made in accordance with the respective Judicial Services Rules in the States, the apprehension of interference seems to be wholly misplaced...." (Emphasis added).

Therefore, it is clear that this Court clarified that selection was to be made as per the existing rules and direction was issued for amending the existing laws to adopt the recommendations of Justice Shetty Commission as approved by this Court for the future.

24. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment"

Since the Petitioner has participated in the process of selection and that there was no question of recruitment of candidates

in excess of the notified vacancies, the ratio in this case can be distinguished accordingly.

46. The learned Senior Counsel appearing for the Respondent nos.9 to 16, relied upon the judgment of the Supreme Court in the case of *Amlan Jyoti Borooah Vs. State of Assam and others*⁵. It is observed by the Supreme Court in paragraphs 8,15, 30, 31 and 32, which reads thus:

8. *On or about 4.7.2000, 169 candidates who had cleared the physical test/medical test were appointed on the post of Sub-Inspector of Police. The said order, appointing the aforementioned 169 posts was not the subject matter of the challenge before the High Court. However, it appears that during the currency of the life of the select list, the Director General of Police, by a letter dated 21.12.2000, addressed to the Commissioner-Secretary to the Home Department, Dispur, asked for sanction of the State-Level Empowered Committee (SLEC) to fill up 77 additional vacancies that had arisen from the aforementioned select list, stating :*

"I am writing to inform you that presently, there are 2154 number of vacancies in the rank of constables (Battalion 1136, District AB 504, District UB 514) and 77 Nos. of

5.(2009) 3 SCC 227

vacancies in the rank of SIs in the Assam Police. These are all functional posts. In the context of insurgency situation obtained in the state and that there will be Assembly Election within the next four months, we will need to mobilize all the manpower. In view of this, it is requested that permission of the State Level Empowered Committee may be conveyed to us to fill up these vacancies by direct recruitment from the results of the records of the previous recruitment rallies already available with us. Government orders on the same may kindly be issued immediately."

Allegedly, urgency and compelling reasons for which the said vacancies were to be filled up was vast deteriorating law and order situation in the State as also sudden spurt of extremists related incidents of violence.

15. Indisputably, during pendency of the said writ petition, posts were filled up as 75 persons who had been found suitable were offered appointment to the post of Sub-Inspector of Police on 2.3.2001. The respondents who were 74 in number had accepted the said offer of appointment on 3.3.2001; one of them, however, did not join the post. They were sent for and completed their training. Indisputably, they have been working in the said post.

30. The appellant concededly did not question the appointment of 169 candidates. It

is idle to contend that he was not aware thereof. If he was to challenge the validity and/or legality of the entire select list in its entirety, he should have also questioned the recruitment of 169 candidates which took place as far as back as on 4.7.2000.

31. The appellant was aware of his position in the select list. He was also aware of the change in the procedure adopted by the Selection Committee. He appeared at the interview without any demur whatsoever although was not called to appear for the physical ability test prior thereto. The appellant chose to question the appointment of 77 candidates not only on the premise that the procedure adopted by the Selection Committee was illegal but also on the premise that no new vacancy could have been filled up from the select list.

32. The appellant, in our opinion, having accepted the change in the selection procedure sub silentio, by not questioning the appointment of 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so”.

47. The ratio is squarely applicable to the present set of facts

inasmuch as the Petitioner did not question the appointments of Kum. Ahswini Navrekar and Kum. Kirti M. Kerkar. It is not the case of the Petitioner that he is not aware of the appointments of these two candidates. Thus, the Petitioner having accepted the aforesaid fact by not questioning their appointments, he cannot now be permitted to question the entire selection process and the appointments of the Respondents by the State Government. He is estopped from doing so.

48. Even if the advertisements published in the local daily were kept as it is and the vacancies filled up, the Petitioner could not have been appointed. If the Respondent nos.1 and 2 have corrected their action as per the judgment in the case of *R.K. Sabharwal and others Vs. State of Punjab and others*, we cannot direct them to act contrary to the said dicta. Rather appointment of the Petitioner ignoring the ratio by judgment in case of *R.K. Sabharwal and others Vs. State of Punjab and others* would have been counter productive.

49. The corollary of the aforesaid discussion is that there is no merit in the petition, which deserves to be dismissed. As such, the petition stands dismissed. Rule is discharged. There is no order as to costs.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.