

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos.12636, 14971 and 15010 of 2022

(In the matter of applications under Articles 226 and 227 of the Constitution of India, 1950).

In W.P.(C) No.12636 of 2022

Lalatendu Mishra & Ors. *Petitioners*

-versus-

State of Odisha and Ors. *Opp. Parties*

Advocates appeared in the case through Hybrid Mode:

For Petitioners : *Mr. Jayanta Rath, Sr. Adv.*
Mr. Durgesh Narayan Rath, Adv.

-versus-

For Opp. Parties : *Mr. Ashok Ku. Parija, AG*
Mr. Sandeep Parida, Sr. S.C.
Mr. Biswajit Mohanty, SC
Mr. D.R. Mohapatra, SC
(for S & ME Deptt.)
Mr. Prafulla Ku. Rath, Adv.
(for intervener)

In W.P.(C) No.14971 of 2022

Malaya Ranjan Tripathy and Ors. *Petitioners*

-versus-

State of Odisha and Ors. *Opp. Parties*

Advocates appeared in the case through Hybrid Mode:

For Petitioner : *Mr. Kirtiranjana Mohanty, Adv.*
Mr. D.K. Panda, Adv.

-versus-

For Opp. Parties : *Mr. Ashok Ku. Parija, AG*
Mr. Sandeep Parida, Sr. S.C.
Mr. Biswajit Mohanty, SC
Mr. D.R. Mohapatra, SC
(for S & ME Deptt.)

In W.P.(C) No.15010 of 2022

Arindam Mohanty & Ors. *Petitioners*

-versus-

State of Odisha and Ors. *Opp. Parties*

Advocates appeared in the case through Hybrid Mode:

For Petitioners : *Mr. D.K. Panda, Adv.*
Mr. A.K. Mishra, Adv.

-versus-

For Opp. Parties : *Mr. Ashok Ku. Parija, AG*
Mr. Sandeep Parida, Sr. S.C.
Mr. Biswajit Mohanty, SC
Mr. D.R. Mohapatra, SC
(for S & ME Deptt.)

CORAM:

DR.JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-24.06.2022

DATE OF JUDGMENT:-21.07.2022

Dr.S.K. Panigrahi, J.

1. The Petitioners in the abovementioned Writ Petitions have challenged the advertisement dated 23.12.2021 issued by the Directorate of Secondary Education, Odisha on the grounds that the same is illegal and bad in law as it does not conform to the provisions of the Odisha Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975 (*hereinafter referred to as "the ORV Act" for brevity*) and the law laid down by the Apex Court of India. Moreover, it is also alleged that the said advertisement for recruitment of Initial Appointee Teachers in Government Secondary Schools of Odisha on contractual basis is liable to be set aside as it is arbitrary, for it does not prescribe a minimum pass mark for the Computer Based Test. Further, in one of the Writ Petitions, it has been contended that the State Government has utilized the services of an alleged blacklisted company for conducting the Computer Based Competitive examination which suffers from the vice of *mala fide*. Since the cause of action of the aforementioned Writ Petitions are broadly similar, these are being taken up analogously and have been dealt with by this common judgment.

I. Facts of the Case:

2. The School and Mass Education Department, Government of Odisha vide Resolution No. 24293 dated 14.12.2021 decided to fill up the vacant posts of secondary school teachers in government schools after collecting information about the vacancies in each district. Pursuant to the same, after receiving the prescribed permissions, the Directorate of Secondary Education, Odisha vide Notice No. 4A-7-II-2021-33683 dated 23.12.2021 issued an advertisement (*the impugned advertisement*) inviting online applications from intending eligible candidates for recruitment against existing vacancies of Initial Appointee Teachers in Government Secondary Schools of Odisha.
3. The vacant posts that were sought to be filled were in TGT Arts, TGT Science (PCM), TGT Science (CBZ), Hindi Teacher, Sanskrit Teacher, Telugu Teacher and Physical Education Teachers. A detailed district-wise vacancies and breakup of the number of vacancies available for different reservation categories was appended to the said advertisement as "Appendix A" and was widely published. Eligibility conditions pertaining to age, educational qualifications for each post depending on the subject and other miscellaneous conditions were laid out in a detailed manner in the impugned advertisement.
4. The method of selection was also comprehensively set out. It was determined that candidates would be selected on the basis of their performance in the Computer Based Test for which a syllabus was also attached in the impugned advertisement. The

Selection Committee appointed by the Government to oversee this recruitment process reserved the right to decide the cut-off mark at a later stage and left the option of choosing to normalize the score open. A rank list was to be prepared after either normalizing all scores or in order of the marks secured, as would be decided by the Selection Committee and then candidates would be short-listed from the said rank list. These short-listed candidates would then get their documents verified and it was also explicitly mentioned in the advertisement that the committee shall have the right to decide the criteria for such short-listing. The Selection Committee decided that after document verification, a draft merit list would be prepared and objections would be invited. Pursuant to necessary corrections, the merit list would be finalized and appointments would ensue after district-wise allocation through online counselling or any other mode deemed fit which was to be decided later by the Selection Committee.

5. The impugned advertisement also made it clear that this engagement is purely contractual in nature and the candidate would have to execute a contract agreement in the specific format, indicating the terms of their appointment, with the District Education Officer prior to their engagement.

II. Submissions advanced on behalf of the Petitioners

6. The Petitioners in W.P. (C) No. 12636 of 2022 assail the impugned advertisement on the ground that it is illegal for the State Government to reserve its right to decide the cut-off mark

of the Computer Based Test for shortlisting as the same leads to an anomalous situation wherein in the absence of a pass mark everyone who appears and passes, becomes eligible to be shortlisted, however, the perspective of the recruiter remains unclear, because the State Government shall arbitrarily determine the pass mark at a later stage. The thrust of the argument made was that in the absence of fixation of a pass mark by the recruitment authority which is allegedly a marked departure from previous advertisements of the State Government. Thus, it allegedly shows the *malafide* intention of the authorities. The Petitioners also assail the impugned advertisement on the ground that the district-wise vacancies per post which is appended in "Appendix A" of the impugned advertisement is a clear violation of the provisions of the ORV Act and the law laid down by the Supreme Court in *Indra Sawhney v. Union of India*¹ as the reservations for social categories exceed 50% of the vacancies that are advertised for, in excess of the ceiling limit, which renders the advertisement illegal and liable to be quashed.

7. In W.P.(C) No. 14971 of 2022, the Petitioners have *inter alia* challenged the impugned advertisement on the ground of engagement of an alleged blacklisted company, one MeritTrac Services Private Limited to conduct the Computer Based Test which allegedly has culminated into suspicious scores of some candidates who sat for the test and have scored questionably

¹ 1992 Supp (3) SCC

high marks which is not possible given the previous trends of scores in this examination. It is urged by the Petitioners in this Writ Petition that the examination was not conducted in a fair and transparent manner. Furthermore, a new system of publication of result and calculation of normalized scores was purported to have been used which smack malpractice and therefore, the impugned advertisement, the examination and result are sought to be declared invalid.

8. Finally, in W.P. (C) No. 15010 of 2022, the Petitioners have challenged the impugned advertisement mainly on the ground of its alleged violation of the provisions of the ORV Act and the law laid down by the Hon'ble Supreme Court in *Indra Sawhney (supra)* as the reservations exceed the ceiling limit of 50% of the vacancies that are advertised for.
9. All the Petitioners had admittedly applied for the vacant posts advertised in the impugned advertisement in the unreserved category. They subsequently appeared in the Computer Based Test and were unsuccessful to be placed in the merit list thereafter.

III. Submissions by the Opposite Party:

10. Mr. A. K. Parija, Ld. Advocate General, appearing for the Department of School and Mass Education contended that:
 - a. The Petitioners who have participated in the recruitment process i.e., applied online, and appeared in the CBT and failed in the said test. They had complete knowledge about

the break up of the reserved and unreserved seats as reflected in the advertisement itself. They could have challenged the same at the beginning. The Petitioners are estopped from challenging the advertisement at this final stage of the selection process. This approach of the petitioner does not find favour with the Apex Court in *Dhananjay Malik v. State of Uttaranchal*², *Ranjan Kumar v. State of Bihar*³, and *Anupal Singh v. State of U.P.*⁴.

- b. Reliance was also placed on the judgment of the Supreme Court by the petitioners in *Krishna Rai v. Banaras Hindu University*⁵. In paragraph 22 of the said judgment, the Supreme Court has held that "*The Division Bench ought to have considered that the appellants were Class-IV employees working from 1977 onwards and expecting from them to have raised serious objection or protest at the stage of interview and understanding the principles of changing the Rules of the game, was too far-fetched, unreasonable and unwarranted*". He vehemently submitted that in light of the aforesaid observations, the judgment of the Apex Court in *Krishna Rai* (*supra*) is distinguishable and must be considered in light of its peculiar facts and circumstances. However, in the instant case, the Petitioners were at liberty to challenge the advertisement at the very inception. Instead, the Petitioners have chosen to challenge the advertisement only after publication of the results.

² (2008)4 SCC 171 (Para 7 & 9)

³ (2014) 16 SCC 187 (Para- 14)

⁴ (2020) 2 SCC 1731 (Para 55-61)

⁵ 2022 SCC OnLine SC 750

- c. The principle of “*Person aggrieved*” is not applicable to the present petitioners as the Petitioners were candidates and applied against the vacancies advertised under the un-reserved categories. Even if the writ petition were to be allowed, the Petitioners would not get any relief since the number of UR vacancies remains unchanged and the number of reserved vacancies shall be reduced. Since the Petitioner has not made out a case that in the event the writ petition was to be allowed, they would be entitled to some relief, hence they are not persons aggrieved. He placed reliance on *Jasbhai Motibhai Desai v. Roshan Kumar*⁶ and *S.L. Kapoor v. Jagmohan*⁷ to buttress his point on this issue.
- d. Writs are ordinarily not issued if the same is against the public interest. In the instant case, public interest is loaded in favour of the State as the recruitment pertains to filling up of teacher vacancies, so that the future of students pursuing education in Government Schools is not affected due to the non-availability of teachers. He placed reliance on the judgment of the Division Bench of this Court in *Manjula Manjari Dei v. M.C. Pradhan*⁸ to buttress his point.
- e. The present Writ petitions are liable to be dismissed on the ground of non-joinder of necessary parties, namely, candidates belonging to the Reserved Category. Reliance in this regard is placed on the judgment of the Supreme Court

⁶(1976) 1 SCC 671 (Para 34 to 39)

⁷(1980) 4 SCC 3791 (Para 17)

⁸1952 SCC OnLine Ori 18

in the matter of *Ranjan Kumar v. State of Bihar*(supra), and *Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors*⁹ to buttress the issue of non-joinder of parties.

- f. The petitioners have tried to signal about the breach of 50 % reservation in the advertisements that create a flankline between the constitutional mandate and the tone of the advertisement. Further, it has been contended that the State has violated the 1st proviso to section 7 of the Orissa Reservation of Vacancies in Posts and Services (For Scheduled Castes & Scheduled Tribes) Act, 1975 (ORV Act). While tersely putting, he contended that the submission of the petitioners is fallacious which reveals from a bare perusal of the chart at Annexure B/1 to the Counter Affidavit. The said document ably demonstrates that the cadre strength in each subject is strictly in conformity with the ceiling of 50%. In other words, the reserved category has been allocated 50% of the total number of posts and the remaining 50% of the posts have been allocated to the Unreserved Category.

- i. As an illustration, for the subject of TGT Arts, 6613 posts have been allocated to the Reserved category and 6614 posts have been allocated to the Unreserved category.
- ii. The man in position column of the chart shows that reserved category vacancies are much higher than the unreserved vacancies.

⁹1998 2 SCC 322 (Para-13)

iii. The present advertisement seeks to fill up vacant Reserved category posts which have been carried forward from previous selections. This exercise does not breach the ceiling of 50% allocated posts in the cadre and is quite in conformity with Article 16 (4)(b) of the Constitution of India.

iv. The case of the petitioners is that the advertisement violates the first proviso to Section 7 of the ORV Act which dovetailed with the law laid down in *Indra Sawhney (supra)*. The provision reads "*Provided that in the years following the recruitment year the normal reserved vacancies together with the vacancies carried forward shall not exceed fifty percent of the total number of vacancies of the year in which recruitment is made and the excess over fifty per cent of the reserved vacancies shall be carried forward to subsequent years of recruitment.*".

v. While putting things self-afficacingly, he contended that the principle of law laid down in *Indra Sawhney (supra)* as extracted above, posed serious problems for filling up of backlog or carry forward vacancies which could not be filled up in earlier selections. This necessitated the insertion of Article 16(4B) with the following objective:

"THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000 [ASSENTED ON 9-6-2000 AND CAME INTO FORCE ON 9-6-2000]

The Statement of Objects and Reasons.-Prior to 29-8-1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as 'backlog vacancies'. These vacancies were treated as a distinct group and were excluded from the ceiling of fifty percent reservation. The Supreme Court of India in its judgment in *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217: held that the number of vacancies to be filled up on the basis of reservations in a year including carried-forward reservations should in no case exceed the limit of fifty percent. As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes combined together had already reached forty-nine and a half percent and the total number of vacancies to be filled up in a year could not exceed fifty percent, it became difficult to fill the 'backlog vacancies' and to hold special recruitment drives. Therefore, to implement the judgment of the Supreme Court, an official memorandum dated 29-8-1997 was issued to provide that the fifty percent limit shall apply to current as well as 'backlog vacancies' and for discontinuation of the special

recruitment drive. Due to the adverse effect of the aforesaid order dated 29-8-1997, various organisations including the Members of Parliament represented to the Central Government for protecting the interest of the Scheduled Castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make an amendment in the Constitution so that the unfilled vacancies 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) of Article 16 of the Constitution, shall be considered 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 fifty percent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before 29-8-1997". (**emphasis supplied**)

- vi. The said Article 16(4B) which was inserted vide the Constitution (Eighty-first Amendment) Act, 2000 reads as under:

"(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies 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 fifty per cent reservation on total number of vacancies of that year."

vii. It is well settled that while interpreting the first proviso to Section 7, this Court would be pleased to read the same harmoniously with Article 16(4B). On a harmonious construction, sub-Article (4B) of Article 16 would prevail over the first proviso to Section 7 in the event of any inconsistency between the said two provisions. Hence, no infirmity or illegality can be said to have been committed by the State Government in issuing the said advertisement which is strictly in conformity with provisions of Article 16(4B).

viii. The Petitioners' contention regarding the filling up the backlog vacancies can only be made by way of a special drive for reserved categories is fallacious upon a bare perusal of paragraph 96 of the judgment in the case of *M. Nagaraj v. Union of India* which may be extracted below:

"96.....If it is within the power of the State to make reservation then whether it is

made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter."

ix. The Petitioners' heightened contention that there have been excess appointments of SEBC candidates and notwithstanding the same, 150 posts of SEBC have now been advertised and therefore, the same is illegal and renders the advertisement bad in law. This submission is also fallacious for the following reasons:

a. The excess 400 SEBC appointments is a legacy of the past. While earlier 27% reservation was provided for SEBC, the same has now been restricted to 11.25%. The said issue is also pending before the Apex Court. These 400 posts will be reverted to UR vacancies as and when the posts fall vacant upon superannuation or otherwise of the incumbents.

b. The reason for the advertisement of 150 posts now can be explained from the fact that in some districts such as Sl. No. 3 Baragarh, Sl. No. 5 Bolangir, Sl. No. 6 Boudh, Sl. No. 7 Cuttack, et cetera, no

vacancies have been advertised there on account of the excess SEBC appointments. On the other hand, in some districts such as Sl. No. 1 Angul, Sl. No. 2 Balasore, Sl. No. 4 Bhadrak, et cetera, SEBC posts have been advertised since there is a deficit in the representation of SEBC in those districts.

Prescribing qualifying marks was only one of the modalities and the same was not mandatory. It was left open to the Selection Committee to delineate the procedure to be followed.

- g. The alleged blacklisting has been quashed by the High Court of Punjab and Haryana. Moreover, the blacklisting of the Agency has been stayed by a Division Bench of the Hon'ble Delhi High Court. Hence the issue of engaging a black listing company is unnecessarily being raised to create prejudice in the litigation atmosphere. In view of the aforesaid submissions, the Writ petition is liable to be dismissed. The prayer of the petitioners are beyond the trap of priest craft.

IV. Issues for determination and Court's Reasoning:

11. In view of the argument advanced by the parties, the Petitioners mostly confined their arguments to assuage the question of maintainability of the writ petition and whether the impugned advertisement breached the ceiling limit of 50% in reservations

of posts. However, it is considered apposite in the present *lis* to determine the following four issues which are germane to the caseathand. These issues are as follows:

- I. Whether the present Writ Petitions are maintainable in light of the fact that the Petitioners having participated in the selection process and thereafter being unsuccessful, have belatedly sought to quash the impugned advertisement?
- II. Whether the Computer Based Test being conducted by an alleged black-listed company is unfair and thus the entire examination and subsequent merit list prepared on the basis of the marks achieved by candidates in the examination is liable to be set aside?
- III. Whether the impugned advertisement is in violation of the provisions of the ORV Act, 1975 and the position of law laid down by the Hon'ble Apex Court in Indra Sawhney's case?
- IV. Whether the impugned advertisement which advertises for contractual appointments, is liable to be set aside due to non-conformity with Section 3(d) of the ORV Act, 1975 in as much as the ORV Act, 1975 shall not apply to the impugned advertisement, however, the impugned advertisement in Clause 4 states that the ORV Act, 1975 shall apply to it?

Issue No. 1

12. The Ld. Counsel for the Petitioners submits that a candidate is not estopped from challenging the selection process if the selection process has misconstrued statutory rules as the selection process allegedly has done in the matter at hand. Ld. Counsels for the Op. Parties have, on the other side, vehemently argued that the present Writ Petitions are not maintainable given that the Writ Petitioners have admittedly participated in the selection process and understood all terms and conditions laid down in the impugned advertisement. Being fully conscious of its terms, reservation policy, number of vacancies available etc. the Writ Petitioners took a calculated chance and after having been unsuccessful in getting selected or scoring unsatisfactory marks in the Computer Based Test thereby doubting their chances of selection. They have belatedly challenged the impugned advertisement only with an objective of derailing the recruitment process. The action of the present petitioner is likely to push thousands of successful candidates' future into uncertainties when thousands of schools in the state are afflicted by shortage of teachers.

13. In this regard, it is trite in law that a candidate who has participated in the selection process, upon being unsuccessful, cannot turn around and challenge the advertisement. This position of law has been time and again reiterated by the

Hon'ble Supreme Court in *Madan Lal v. State of J.K.*¹⁰, *Ranjan Kumar v. State of Bihar*¹¹, *Anupal Singh v. State of U.P.*¹², *Vijay Seyal v. State of Punjab*¹³ and *Dr. G. Sarana v. University of Lucknow*¹⁴. In *Dhananjay Malik v. State of Uttaranchal*¹⁵, wherein it was held that having participated in the selection process without any *demur*, the respondent-writ petitioners are estopped from complaining that the selection process was not in accordance with the Rules and that if they thought that the advertisement and selection process were not in accordance with the Rules, they should have challenged the advertisement and selection process, at the threshold itself, without participating in the selection process.

14. As it flows therefrom, needless to say that the persons who participated in the selection process after having accepted the terms and conditions of the selection, cannot challenge the said process subsequently and this issue, therefore, is answered in favour of the Opposite parties. However, given the important questions of law this present *lis* raises, this Court considers it prudent to examine the same despite the present Writ Petitions being liable to be dismissed on the ground of non-maintainability itself.

Issue No. 2

¹⁰(1995) 3 SCC 486

¹¹(2014) 16 SCC 187

¹²(2020) 2 SCC 1731

¹³(2003) 9 SCC 401

¹⁴(1976) 3 SCC 585

¹⁵(2008) 4 SCC 171

15. As regards the second issue is concerned, Ld. Counsel for the Petitioners have drawn this Court's attention to an order of the Hon'ble Punjab and Haryana High Court dated 7.4.2015 in W.P.(C) No. 919 of 2012 and an order of the Hon'ble Delhi High Court dated 22.5.2019 in W.P.(C) No. 1936 of 2015 whereby, the company which conducted the Computer Based Test, one, Merit Trac Services Private Limited has allegedly been blacklisted and therefore, it is the Petitioners' contention that the State Government should not and could not have awarded the tender for conducting the Computer Based Test to the said company. The Petitioners further allege that the State Government's decision to use a blacklisted private agency to conduct the Computer Based Test resulted in the examination not being conducted with fairness and transparency. *Per contra*, the Ld. Counsel for the Opposite Party-State submits that the Petitioners have attempted to mislead this Hon'ble Court as the operative portion of the order dated 7.4.2015 in W.P.(C) No. 919 of 2012 of the Punjab and Haryana High Court states that by the said order, the said High Court was pleased to quash a previous order dated 8.9.2014 whereby the company had been blacklisted for two years. Similarly, as far as the order dated 22.5.2019 in W.P.(C) No. 1936 of 2015 of the Delhi High Court is concerned, the High Court merely allowed ONGC (a party therein) to proceed with blacklisting the company. After ONGC completed its process and blacklisted the company for two years vide its order dated 28.1.2021, the company challenged the same vide

W.P.(C) 1527 of 2021 before the Delhi High Court. The High Court was thereafter pleased to stay the blacklisting order and allowed the company to participate in tenders floated by governmental authorities. Therefore, the Ld. Advocate General contends that as on the date of awarding the tender to the Company, the Company was not blacklisted. As a matter of fact, it is submitted that the said Company had intimated/disclosed all of its litigation history to the knowledge of the State Government, which, after a thorough perusal had determined that in the absence of the company being blacklisted on the relevant date, the company could be awarded the tender to conduct the Computer Based Test. It is also brought to this Court's notice that the said Company has conducted not just this particular test, but in the calendar year of 2021 and 2022 has been conducting competitive examinations for premier recruiting bodies of the State of Odisha like the Odisha Staff Selection Commission (OSSC), OPSC, Odisha Subordinate Staff Selection Commission and Odisha Police etc.

16. Having considered the rival submissions of the parties on this issue, it is apparent from the materials on record that the Company was selected after following a proper tender process and being thoroughly vetted by the technical committee constituted by the State Government to evaluate tenders. On the relevant date of award of tender by the Director Secondary Education, Government of Odisha, the company was not blacklisted and as such, there is no illegality in awarding the

work order given to said M/s Merit Trac Services Private Limited. This issue raised mainly in present W.P.(C) 14971 of 2022 is therefore answered against the Petitioners.

Issue No. 3

17. In order to determine the third issue, the necessary statutory provision of the ORV Act, 1975 is reproduced hereinbelow for ready reference:

“7. Carry forward of reservation and de-reservation :— If, in any recruitment year, the number of candidates either from Scheduled castes or Scheduled Tribes is less than the number of vacancies reserved for them even after exchange of reservation between the Scheduled Castes and Scheduled Tribes the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment:

Provided that in the years following the recruitment year the normal reserved vacancies together with the vacancies carried forward shall not exceed fifty percent of the total number of vacancies of the year in which recruitment is made and the excess over fifty per cent of the reserved vacancies shall be carried forward to subsequent years of recruitment.

[Provided further that the provisions of this section shall not apply to the reserved vacancies to be filled up by promotion on the basis of selection where such promotion is to be made—

(a) from class III posts to Class II posts;

(b) within Class II posts;

(c) from Class II posts, to Class I posts, and

(d) from posts in the lowest rung to class I]

[Provided also that nothing in the Section shall apply to the vacancies reserved in respect of Class III and Class IV posts. If candidates are not available for filling up such reserved vacancies these remaining vacancies shall be filled up by holding fresh recruitment only from candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, and sub-section (5) of Section 9 shall not apply to such vacancies.]

18.Ld. Counsel for the Petitioners submits that the reservation of posts as appended to the impugned advertisement as “Annexure A” showcases that the Respondent did not adhere to Section 7 of the ORV Act, 1975 and also the law laid down by the Hon’ble Supreme Court in *Indra Sawhney (supra)*. It is submitted that in all the subjects, the reserved category posts exceed the ceiling limit of 50% and in some districts are almost twice the number of unreserved category posts if not more, therefore the impugned advertisement is illegal and liable to be quashed. It is also contended that as the Petitioners belong to the unreserved category, this improper distribution of posts due to non-compliance with the ceiling limit of 50% has resulted in depriving the Petitioners from being selected. *Per contra*, with

respect to the allegations pertaining to violation of Section 7 of the ORV Act and the position of law laid down by the Hon'ble Supreme Court of India, the Ld. Advocate General submitted that the impugned advertisement has been published after taking together the current vacancies as well as the previously unfilled vacancies belonging to all social categories which had been carried forward due to inadequate participation of candidates from the relevant social categories at the time of selection. The authorities have taken due care and exercised caution to ensure that the reservations in vacancies with respect to vacancies arising in the current year are not violative of the ceiling limit of 50%. The authorities have also taken into consideration that treating the entire cadre as a unit, the provisions of the ceiling limit as laid down by the ORV Act, 1975 and the law laid down by the Supreme Court of India, have not been violated. The increased number of vacancies in reserved categories is attributable to low participation of candidates belonging to the social categories in the previous years of selection which have led to more vacancies for the particular social category. In this regard, the Ld. Advocate General has also drawn this Court's attention to Annexure A/2 of their Counter Affidavit in W.P.(C) 12636 of 2022 wherein a detailed chart indicating the total cadre strength, the positions filled for each social category, the positions unfilled for each social category and the posts advertised for in each social category has been attached. A cursory glance over the said chart demonstrates that

indeed maximum number of posts in the unreserved category are full and huge vacancies exist in the posts for the reserved category.

19. Prior to 29.8.1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as "Backlog Vacancies". These vacancies were treated as a distinct group and were excluded from the ceiling of fifty percent reservation and were filled up in subsequent years by conducting a "Special Recruitment Drive".

20. After the pronouncement of judgment by the Supreme Court in *Indra Sawhney (supra)*, the position of law that emerged was that the number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of fifty percent. This, in effect, meant that current and backlog vacancies in reserved category could not exceed 50% in a given year.

21. Thereafter, the State of Odisha issued an Official Memorandum on 29.8.1997 directing the discontinuation of Special Recruitment Drives in the State to fill backlog vacancies and the said memorandum also provided that the fifty percent limit would apply to these backlog vacancies as well in light of the aforementioned position of law laid down by the Hon'ble Supreme Court.

22. However, States from all over the country faced a piquant situation in recruitment due to this interpretation of the ceiling limit. Various representations were made to the Parliament to amend the same. Thereafter, the Parliament took notice of the grievances raised by the States and a legislative instrument in the shape of 81st Amendment to the Constitution of India came into being. If one refers to the Statement of Objects and Reasons of the Constitution (Eighty-First Amendment) Act, 2000, which came into force on 9.6.2000. The Statement of Objects and Reasons reads as follows:

"THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000 [ASSENTED ON 9-6-2000 AND CAME INTO FORCE ON 9-6-2000]

Statement of Objects and Reasons.- Prior to 29-8-1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as 'backlog vacancies'. These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in Indra Sawhney v. Union of India [1992 Supp (3) SCC] held that the number of vacancies to be filled up on the basis of reservations in a year including carried-forward reservations should in no case exceed the limit of fifty per cent. As total reservations in a year for the Scheduled Castes, the Scheduled

Tribes and the Other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent, it became difficult to fill the 'backlog vacancies' and to hold special recruitment drives. Therefore, to implement the judgment of the Supreme Court, an official memorandum dated 29-8-1997 was issued to provide that the fifty per cent limit shall apply to current as well as 'backlog vacancies' and for discontinuation of the special recruitment drive.

2. Due to the adverse effect of the aforesaid order dated 29-8-1997, various organisations including the Members of Parliament represented to the Central Government for protecting the interest of the Scheduled Castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the Constitution so that the unfilled vacancies 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) of Article 16 of the Constitution, shall be considered 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 fifty per cent, reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before 29-8-1997".

(emphasis supplied)

The said Article 16(4B) which was inserted vide the Constitution (Eighty-first Amendment) Act, 2000 reads as under:

"(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies 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 fifty per cent reservation on total number of vacancies of that year."

23. In conjunction with the 81st Amendment of the Constitution of India, the Supreme Court in *R.K. Sabharwal v. State of Punjab*¹⁶, attempted to clarify the applicability and purport of the judgment of the Hon'ble Apex Court in *Indra Sawhney* (*supra*) and observed as under:

"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-

¹⁶ (1995) 2 SCC 745

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 Castes/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. Jeevan Reddy, J. speaking for the majority in *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217] observed as under: संघमित्र नमो*

“Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5

respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be."

8. The quoted observations clearly illustrate that the rule of 50% a year as a unit and not the entire strength of the cadre has been adopted to protect the rights of the general category under clause (1) of Article 16 of the Constitution of India. These observations in Indra Sawhney case are only in relation to posts which are filled initially in a cadre. The operation of a roster, for

filling the cadre-strength, by itself ensures that the reservation remains within the 50% limit. Indra Sawhney case is not the authority for the point that the roster survives after the cadre-strength is full and the percentage of reservation is achieved.

10. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100-point roster, 14 posts at various roster points are filled from amongst the Scheduled Caste/Scheduled Tribe candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by 31-12-1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of non-

availability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner.”

24. In simple words, the Apex Court laid down the principle of “Post Based Reservation” as a replacement for the earlier principle of “Vacancy Based Reservation”, and with that, the position of law at the moment is that the relevance of a 50% limit of reservation in any recruitment year has become irrelevant so long as the 50% reservation principle is not breached.

25. It is trite in law that the provisions of a statute cannot override constitutional provisions. The Apex Court in *Engineering Kamgar Union v. Electro Steels Castings Ltd.*¹⁷ was of the opinion that undoubtedly the provisions of the supreme law, i.e. the Constitution of India shall prevail over a statute. A *non obstante* clause contained in a statute cannot override the Constitution. Moreover, the Hon’ble Supreme Court in *Indra Das v. State of Assam*¹⁸ held that if a statutory provision is in violation of a constitutional provision such as the fundamental rights under Part III of the Constitution, an attempt has to be made to read down the said statutory provision. The relevant paragraphs are quoted hereunder:

“23. It has been submitted by the learned counsel for the Government before the TADA Court that under many laws mere membership of an organisation is illegal e.g. Section 3(5)

¹⁷ (2004) 6 SCC 36

¹⁸ (2011) 3 SCC 380

of the Terrorist and Disruptive Activities (Prevention), 1987; Section 10 of the Unlawful Activities (Prevention) Act, 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have to be read in consonance with the fundamental rights guaranteed by our Constitution.

24. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the court should be to try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in Govt. of A.P. v. P. Laxmi Devi [(2008) 4 SCC 720].

25. In this connection, we may refer to the Constitution Bench decision in KedarNath Singh v. State of Bihar [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] where the Supreme Court was dealing with the challenge made to the constitutional validity of Section 124-A IPC (the law against sedition). In KedarNath Singh case [AIR 1962 SC 955 : (1962) 2 Cri LJ 103] this Court observed: (AIR p. 969, para 26)

“26. ... If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections

would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."

(emphasis supplied)

28. As observed by this Court in *Govt. of A.P. v. P. Laxmi Devi* [(2008) 4 SCC 720] every effort should be made by the Court to try to uphold the validity of the statute, as invalidating a statute is a grave step. Hence we may sometimes have to read down a statute in order to make it constitutional."

26. It is, therefore, no doubt that while interpreting Section 7 of the ORV Act, 1975, this Court will have to read down the provision so as to make it harmonious with Article 16(4B) of the Constitution of India. This would mean that the State is permitted to carry forward unfilled vacancies of previous years which are in accordance with any provision for reservation, as a separate class, and the same will not be considered as a part of the vacancies in the current year for determining the ceiling of fifty percent reservation on total number of vacancies in the

current year. This Court in *Paritosh Tripathy v. State of Odisha and Anr.* vide its order dated 18.8.2021 in W.P.(C). No. 24508 of 2021 has also dealt with this particular contention of the present Petitioners and held as follows:

“7. This Court has not disputed the law laid down by the apex Court in the case of Indira Sawhney vs. Union of India, 1992 (Suppl) 3 SCC 217, that reservation should not exceed 50%, which was also been confirmed in catena of judgments. But fact remains, reserved vacancies of a particular recruitment year should not exceed 50% and, as such, when backlog vacancies of previous year would be taken into consideration, in that case, the reservation policy of 50% may not be applicable.”

Further a tabulation has been produced by the Opposite party- State to showcase that the overall vacancy position of posts and the filling up thereof is well within the permissible ceiling limits. The said table as hereunder;

TABLE TO ILLUSTRATE RESERVATION IS WITHIN PRESCRIBED LIMITS										
	Total Cadre Strength						Men in Position + Fresh Vacancies			
Subject	ST	SC	SEBC	UR	Total		ST	SC	SEBC	UR
Applicable %age	22.5	16.25	11.25	50						
Classical Sanskrit	1069	772	535	2376	4752		724	609	1275	1636
	0	0	0	0		Reservation %age	15.24	12.82	26.83	34.43
Hindi	1030	744	515	2289	4577		771	593	1408	1532
	0	0	0	0		Reservation	16.85	12.96	30.76	33.47

						%age				
PET	1047	756	523	2326	4652		906	401	1483	1463
	0	0	0	0		Reservation %age	19.48	8.62	31.88	31.45
Urdu	21.6	15.6	10.8	48	96		0	0	12	87
						Reservation %age	0	0	12.5	90.625

As can be seen from above table, there is no breach of the reservation percentage of 50% as prescribed by the Supreme Court except in the case of the SEBC Category which is a legacy issue. Therefore, there is no violation of the provisions of the ORV Act, 1975 and the advertisement is in consonance with the present position of law.

27. So far as the case of SEBC is concerned, this is because the excess 400 SEBC appointments is a legacy of the past. While earlier 27% reservation was provided for SEBC, the same has now been restricted to 11.25%. It was brought to this Court's notice that this issue is pending before the Hon'ble Apex Court. It has also been submitted that the said 400 posts will be reverted to UR vacancies as and when the posts fall vacant upon superannuation or otherwise of the incumbents. Further, the aided colleges/institutions which were taken over by Government were not mandated to follow the ORV provisions at the time of their establishment by the Managing Committee. Hence, the reservations in SEBC category is high because of retrofitting the same as per the reservation principle. The aided

institutions had not recruited/appointed candidates under the SEBC category. Therefore, for all practical purposes they are representing the unreserved category who have been retrofitted in the SEBC category. If this not had been done and every SEBC from the aided institutions had been considered as unreserved category, the unreserved category would have suffered irreparable loss. Therefore, the SEBC posts will revert to unreserved once the persons occupying the same retire or vacate the same and so the final position will become 50% unreserved posts.

28. Counsel for the Petitioners also submitted that if such carry forward of unfilled vacancies is made then a separate special drive for recruitment must be conducted for the reserved categories. However, it is noted that neither Section 7 of the ORV Act, 1975 nor Article 16(4B) of the Constitution of India mention any such "separate special drive for recruitment" which has also become an obsolete practice of the past given the Office Memorandum of the State dated 29.8.1997 which has been referred to above. Section 7 of the ORV Act, 1975 in fact only states that a "fresh recruitment" has to be conducted. Furthermore, the present position of law in this regard was laid down by the Supreme Court in *M. Nagaraj v. Union of India*¹⁹, wherein the Apex Court was pleased to observe that:

"96.....If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is

¹⁹ (2006) 8 SCC 212

only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.”

As such, the impugned advertisement is a fresh recruitment drive aimed to fill up vacancies arising in posts in the current year as well as unfilled vacancies carried forward in various social categories from previous years. It is, therefore, observed that the Opposite party-State has not committed any illegality, nor is it in conformity with the statutory provisions, the constitution and the present position of law, this issue is mainly raised in present W.P. (C) No. 12636 of 2022 is thus, answered in favour of the Opposite Party- State.

Issue No. 4

29. Despite this present issue having not been urged in final arguments, in order to do substantial justice between the parties and the stakeholders at large, this Court considers it apposite to delve into the same. As regards the final issue contended before this Court in present *lis*, it is apposite to refer to Section 3(d) of the ORV Act, 1975 which reads as follows:

“3. Applicability :– This Act shall apply to all appointments to the Posts and Services under the State except–

...(d) those filled up on the basis of any contract; ...”

Furthermore, Clause 4 of the impugned advertisement reads as:

"4. Reservation of Vacancies: The provision of the Orissa Reservation & Vacancies in Posts & Services Act, 1975 and other Reservation policy for women, Ex-Service Men and Persons with Disabilities, as prescribe by Government from time to time shall be followed. Percentage of reservation for candidate under special reservation categories will be calculated taking the total vacancies in a particular social reservation category in the State as a whole."

30. A Division Bench of this Hon'ble Court in the case of **Susanta Kumar Sethi v. State of Orissa**²⁰, vide order dated 3.9.2021, while confirming the view of the Ld. Single Judge in **Susanta Kumar Sethi v. State of Orissa**²¹ held as follows:

"30. Section 3 makes it clear that the Act will apply to all appointments to the posts and services under the State. Section 3 of the ORV Act lists out the posts to which the ORV Act will not apply. What is relevant here is that under Section 3 (d) the ORV Act will not apply to posts "filled up on the basis of any contract." Admittedly, the post of SS is a contractual post and therefore, the ORV Act does not apply to it.

33. Turning to Section 19, it says that the provisions of the ORV Act shall have effect notwithstanding anything to the contrary in any other law or "in any rule, order or resolution made by the State Government." Therefore, even if Clause-4.2 of

²⁰W.A. No. 86 of 2018

²¹ 2018 SCC OnLineOri 33

the resolution of the State Government dated 31st May 2006 mandates that non-SC/ST candidates cannot fill up the vacancies in the posts earmarked for the SCs and STs, that resolution is subject to the ORV Act.

34. Turning now to the Clause-6 of the advertisement which makes the ORV Act applicable, this again cannot be read as an amendment to either Section 3 or Section 6 of the ORV Act. On the other hand, it actually makes the ORV Act as it is applicable in toto to the selection to the posts of SS. Section 19 of the ORV Act begins with a non-obstante provision, making it clear that the ORV Act will override the resolution dated 31st May, 2006 of the Government of Odisha.

35. The sum total of the above discussion is that the ORV Act as it stands does not apply to the post of SS which is what the present appeal is concerned about."

The Supreme Court vide order dated 5.1.2022 in SLP(C) No. 20539 of 2021 declined to interfere with the aforementioned judgment and order of this Hon'ble Court and the same has as such attained finality. What flows from the above position of law is that, at present, the provisions of the ORV Act, 1975, in its current form, and Rules framed thereunder are not applicable to contractual appointments.

31. Seized of the present position of law as such, it is noticed that these days contractual employments are the rule of the day. Entry into public employment is mainly carried out through

such appointments. As a consequence, the entry into service through permanent employment in government service is soon becoming extinct like the proverbial unicorn. The scenario now prevailing in the employment sphere of the State was unforeseen during the year 1975. Presently, taking multiple amendments into consideration, in the State of Odisha, all contractual appointments are governed by the Contractual Appointment Rules. These Rules framed by the General Administration Department, lay down that these contractual appointments shall be governed by the provisions of the ORV Act, 1975 when it comes to SCs and STs and the provisions framed by the government from time to time in so far as Women, PwD, Ex Service Men and SEBC are concerned. The Rules also state that all initial appointments employed in various State Departments through contractual engagement, shall after six years of service be regularized. The relevant portion of the Odisha Group B Posts (Contractual Appointment) Rules, 2013 read with Odisha Group B Posts (Contractual Appointment) Amendment Rules, 2021 are reproduced hereunder:

“2(b-1) “Initial Appointees” means the persons appointed to any Group-B posts by way of direct recruitment made under rule 5

5. Recruitment Procedure:

(1) Recruitment to the posts as may be decided by the State Government shall be made on the basis of the provisions of the relevant recruitment rules or executive instructions, as the case may be, in force.

(2) Notwithstanding anything contained in the relevant recruitment rules or executive instructions, as the case may be in force, all appointments made through the process of recruitment pursuant to sub-rule (1) shall, from the date of commencement of these rules, be on contract basis.

6. Status of Vacant Posts:

For the purpose of contractual appointments made under sub-rule (2) of rule 5, all vacancies existing on the date of commencement of these rules as well as the future vacancies shall be deemed to have been converted to contractual posts from the date of commencement of these rules:

Provided that, consequent upon regular appointment under sub-rule (1) of rule 10 the contractual posts shall get re-converted to regular sanctioned posts.

7. Reservations:

Notwithstanding anything contained in these rules, reservation of vacancies for –

(a) Scheduled Castes and Scheduled Tribes shall be made in accordance with the provisions of the Odisha Reservation of

Vacancies in Posts and Services, (for Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder; and

(b) SEBC, Women, Sports persons and Persons with Disabilities shall be made in accordance with the provisions made under such Act, Rules, or Orders and Instructions issued in this behalf by the Government from time to time.

9. Tenure of Initial Appointees:

Persons appointed under sub-rule (2) of rule 5 shall continue as Initial Appointees for a period of six years, which shall be reckoned from the date of their appointment under rule 5.

Persons appointed under sub-rule (2) of rule 5 against the contractual posts shall continue on contractual basis for a period of six years. The period of six years shall be counted from the date of their contractual appointment under rule 5.

16. Conditions of Service on Regular Appointment:

(a) On the date of satisfactory completion of six years of contractual service under rule 9, they shall be deemed to have been regularly appointed. A formal order of regular appointment shall be issued by the Appointing Authority.

(b) On regular appointment they shall be entitled to draw the time Scale of Pay plus Grade Pay with DA and other allowances as admissible in the corresponding pay band.

(c) Other conditions of service shall be such as has been provided in the relevant recruitment rules."

32. In light of these provisions, a very peculiar situation arises and promises to be of immense practical difficulty. The posts mentioned in the advertisement are for vacancies in regularly sanctioned posts lying vacant in Government secondary schools and in line with the Odisha Group B Posts (Contractual Appointment) Rules, 2013 read with Odisha Group B Posts (Contractual Appointment) Amendment Rules, 2021, the initial appointees to these posts will be on a contractual basis for the initial period of six years, after which they shall be regularized.

33. This Court has delved into the issues in the foregoing paragraphs as to how reservations have to be calculated in a post-based manner and not vacancy based. If the position of law, in as much, as the inapplicability of the ORV Act, 1975 is accepted then that translates into contractual appointments having no requirement to provide for any reservations. Six years later when these initial appointees are regularized then, the lack of any provision for reservation at the time of their initial appointment will lead to the representation of social categories in the regular establishment will become completely skewed.

34. At the moment, when contractual appointments as envisioned by the impugned advertisement are conforming with the reservation policy laid down by the State in the ORV Act, 1975, it ensures that in the future when such initial appointees are

regularized and made permanent, the State Department will still be in complete conformity with the reservation policy of the State as laid down by the ORV Act, 1975 as these posts are being filled presently keeping the social category reservation in mind. If these appointments are made without following the provisions of the ORV Act, 1975 then six years later the State will face a dire situation wherein these appointees, despite rightfully being due to be regularized and made permanent, having faithfully served the State for six years, would be robbed of the benefit of the same due to the sudden embargo in place due to social category reservations for ensuring compensatory justice.

35. Due to the massive growth of contractual employment, it is high time that the state took a relook at the provisions of the ORV Act, 1975. If contractual appointments are not brought under the scope of the ORV Act, 1975, there will be no representation from different social categories, the unemployment crisis will go up and it will put the government in a very disturbing position. Public welfare, social growth and economic prosperity in the State will be jeopardized. In this respect, this Court must applaud the government for continuing to undertake to follow the provisions of reservation as laid down in the ORV Act, 1975 in matters of contractual appointment also despite it not being bound to do so under the ORV Act, 1975 and providing for the same in the Contractual Appointment Rules. However, after considering the lack of synchronization and

practical difficulties the present position of the State with respect to applicability of the ORV Act, 1975 to contractual appointments, will eventually give rise to an immediate need for the government to take a fresh look at the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and consider amending Section 3(d) of the same. Issue 4, which was mainly raised in W.P.(C) No. 15010 of 2022, is therefore, also decided in favour of the Respondents.

36. Article 226 of the Constitution of India reads as follows;

“Every High Court shall have power to issue to any person or authority, including any Government directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III, and for any other purpose.”

On a plain reading of the Article, it would appear that the Court can issue not only the well-known writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, but also directions, orders, or writs in the nature of what are known as “High Prerogative Writs” and that this power may be exercised not only for the enforcement of any of the rights conferred by Part III, but for any other purpose as well. While, therefore, this Court is prepared to concede that it will be futile to attempt to define the limits within which the power vested under Article 226 may be exercised, it must be well-recognised that the power

is not to be exercised arbitrarily, capriciously, or indiscriminately. That power is subject to sound judicial discretion and its exercise is governed by well-established legal principles. Too often, litigants resort to this Article and invoke the interference of the High Court in the normal administration of the State.

V. Conclusion and order:

37. In the circumstances, having regard to the principles enunciated in the various authorities cited above, I have no hesitation in coming to the conclusion that the petitioners cannot be granted any relief in these Writ Petitions and the present Writ Petitions are liable to be dismissed, being devoid of merit.
38. Accordingly, in view of the above, all pending I.As. also stand disposed of.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,

Dated the 21st of July, 2022/B. Jhankar