

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2428 of 2018

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Rita Kumari wife of Sri Krishna Kumar, resident of Village- Gothani, Post-
Dawath, P.S.- Suryapura, District- Rohtas.

... .. Petitioner/s

Versus

1. The State Of Bihar and Ors
2. The Principal Secretary, Education Department, Govt. of Bihar, Patna.
3. The Director Primary Education, Education Department, Govt. of Bihar, Patna.
4. The District Collector, Bhojpur.
5. The District Education Officer, Bhojpur.
6. The District Programme Officer Establishment, Bhojpur.
7. The Block Development Officer, Sadar Ara, Bhojpur.
8. The Block Education Officer North Ara, Bhojpur.
9. The Panchayat Secretary, Grampanchayat, Karari, P.S.- Ara Muffasil, Block- Ara Sadar, District- Bho
10. The Mukhiya Grampanchayat, Karari, P.S.- Ara Muffasil, Block- Ara Sadar, District- Bhojpur.
11. Puja Verma, wife of Shashi Bhushan Prasad, Panchayat Teacher New Primary School North Tola Karari, Block- Ara Sadar, P.S.- Ara Muffasil, District- Bhojpur.
12. Birendra Kumar Mishra, son of Shiv Dayal Mishra, Panchayat Teacher Primary School Dewarhi, P.S.- Ara Muffasil, Block- Ara Sadar, District- Bhojpur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Maya Shankar Mishra, Adv. Mr. Nagendra Upadhyay, Adv.
For the Respondent No. 11 and 12	:	Mr. H.S. Roy, Adv.

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CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH SHARMA

ORAL ORDER

- 7 18-01-2023 1. The petitioner assails the order passed by the District Appellate Authority dated 31.10.2016 as well as the order passed by the State Appellate Authority dated 03.08.2017, whereby the contentions raised by the petitioner have been



rejected and the petitioner's appeal preferred before the District Appellate Authority was treated to be time barred and also on merits.

2. Learned counsel for the petitioner submits that for the Teacher Employment year 2008, the petitioner had applied for the post at Gram Panchayat, Karari, where 5 posts were available. Out of the 5 posts, one was marked for UR, one for UR (Female) and one for EBC and one for SC and one for SC (Female) category. The petitioner was from SC (Female) category. Initially, she was not allowed to participate in the counseling by the concerned Employment Unit, in spite of having made her application and she, therefore, filed an appeal before the District Appellate Authority, who passed an order in her favor on 8th July 2010, directing the Employment Unit to allow her to participate in the counseling. The said counseling was not conducted for more than two years, whereafter, the District Panchayat Raj Officer directed the Employment Unit to conduct the counseling of the petitioner vide his order dated 13th February 2012 and the counseling was conducted thereafter, on 2nd March 2013. After the counseling having being conducted, the petitioner was not offered employment and she therefore, challenged and filed a representation to the authorities on



02.05.2014, but the same remained unanswered and she therefore, preferred an appeal before the District Appellate Authority assailing the selections conducted by the respondent wherein, she was denied appointment although, she was entitled to the appointment against the SC (Female) category.

3. The learned counsel for the petitioner points out that in the selection process which was conducted, one Rita Kumari, daughter of Guljar Rai, who was from OBC category had scored merit of 99.71% and was thus, the highest meritorious and therefore, she was required to be treated as appointed against Unreserved category. The other post of Unreserved (Female) would have fallen to the next female category person who was from SC namely, Pooja Verma and she would have been appointed under the Unreserved (Female) category and the post which Pooja Verma occupied namely SC (Female) would have been made available to the petitioner who was next in merit, scoring 54.78 % marks.

4. Learned Counsel for the petitioner submits that Birendra Kumar Mishra who was appointed against unreserved post was wrongly given appointment as there was no post available for Unreserved category, once Rita Kumari fills the said post being highest meritorious person. The petitioner's contention was



however, rejected by the District Appellate Authority and the State Appellate Authority on a wrongful interpretation of the **Bihar Reservation and Vacancies of Posts Services (SC/ST and O.B.C. Act of 1991).**

5. Learned counsel for the petitioner submits that the District Appellate Authority as well as State Appellate Authority wrongly interpreted the said provision which has resulted in ousting the petitioner from being selected under the SC (Female) category. It is submitted that the interpretation taken by the State Appellate Authority that under the Bihar Panchayat Elementary Teachers Rules, 2006, there is a provision for reservation of 50 % posts for female candidate and because there is no provision that if a female candidate is applied on merit she will be counted against the open vacancy is erroneous. The State Appellate Authority has wrongly treated that Rita Kumari would be only considered under the Unreserved(Female) category and Birendra Kumar Mishra would be employed under unreserved category.

6. Per contra, learned counsel appearing for the concerned respondent namely, Pooja Verma and Birendra Kumar Mishra submits that the roaster has been rightly applied. Rita Kumari was rightly considered to be employed under the Unreserved



(Female) category, as she will continue to occupy a female post. The unreserved post would therefore, fall in favor of Birendra Kumar Mishra and Pooja Verma has rightly been treated under the SC (Female) category. It is also submitted that the reservation of 50% cannot be violated.

7. I have carefully considered the submission, this Court finds that the petitioner has filed appeal before the District Appellate Authority in year 2014 after her counseling was conducted on 2nd March 2013 and after she made a representation when she was not offered employment both by the District Appellate Authority as well as by the State Appellate Authority after counseling of 2013 failed to notice that appeal was filed and therefore, the appeal preferred by the petitioner could not have been said to be belated or suffering from laches. The dismissal of the appeal on the ground of delay is therefore, found to be erroneous and the same is not sustainable in law.

8. The second contention raised before this Court with regard to the operation of roster is concerned in a recent judgment passed by the Supreme Court in **Saurav Yadav & Ors. Vs. State of Uttar Pradesh**, as reported in **2021 (4) SCC 542** as under:

26. The principle that candidates belonging to any



of the vertical reservation categories are entitled to be selected in “Open or General Category” is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong. Apart from the extracts from the decisions of this Court in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and R.K. Sabharwal [R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745 : 1995 SCC (L&S) 548] the observations by the Constitution Bench of this Court in V.V. Giri v. D. Susi Dora [V.V. Giri v. D. Susi Dora, (1960) 1 SCR 426 : AIR 1959 SC 1318] , though in the context of election law, are quite noteworthy: (AIR pp. 1326-27, paras 21-22)

“21. In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional



claim; and both the claims have to be decided on the basis that there is one election from the double-Member constituency.

22. In this connection we may refer by way of analogy to the provisions made in some educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates.”

27. The High Courts of Rajasthan, Bombay, Uttarakhand, and Gujarat have adopted the same principle while dealing with horizontal reservation whereas the High Court of Allahabad and Madhya Pradesh have taken a contrary view. These two views, for facility, are referred to as the “first view” and the “second view” respectively. The second view that weighed with the High Courts of Allahabad and Madhya Pradesh is essentially based on the premise that after the first two steps as detailed in para 18 of the decision in Anil Kumar



Gupta [Anil Kumar Gupta v. State of U.P., (1995) 5 SCC 173] and after vertical reservations are provided for, at the stage of accommodating candidates for effecting horizontal reservation, the candidates from reserved categories can be adjusted only against their own categories under the vertical reservation concerned and not against the “Open or General Category”.

29. The second view may lead to a situation where, while making adjustment for horizontal reservation in Open or General Category seats, less meritorious candidates may be adjusted, as has happened in the present matter. Admittedly, the last selected candidates in Open General female category while making adjustment of horizontal reservation had secured lesser marks than the applicants. The claim of the applicants was disregarded on the ground that they could claim only and only if there was a vacancy or chance for them to be accommodated in their respective column of vertical reservation.

38. The second view is thus neither based on any authoritative pronouncement by this Court nor does it lead to a situation where the merit is given precedence. Subject to any permissible reservations i.e. either social (vertical) or special (horizontal), opportunities to public employment and selection of



candidates must purely be based on merit. Any selection which results in candidates getting selected against Open/General category with less merit than the other available candidates will certainly be opposed to principles of equality. There can be special dispensation when it comes to candidates being considered against seats or quota meant for reserved categories and in theory it is possible that a more meritorious candidate coming from Open/General category may not get selected. But the converse can never be true and will be opposed to the very basic principles which have all the while been accepted by this Court. Any view or process of interpretation which will lead to incongruity as highlighted earlier, must be rejected.

39. The second view will thus not only lead to irrational results where more meritorious candidates may possibly get sidelined as indicated above but will, of necessity, result in acceptance of a postulate that Open/General seats are reserved for candidates other than those coming from vertical reservation categories. Such view will be completely opposed to the long line of decisions of this Court.

40. We, therefore, do not approve the second view and reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand



and Gujarat is correct and rational.

66. I would conclude by saying that reservations, both vertical and horizontal, are method of ensuring representation in public services. These are not to be seen as rigid “slots”, where a candidate's merit, which otherwise entitles her to be shown in the open general category, is foreclosed, as the consequence would be, if the State's argument is accepted. Doing so, would result in a communal reservation, where each social category is confined within the extent of their reservation, thus negating merit. The open category is open to all, and the only condition for a candidate to be shown in it is merit, regardless of whether reservation benefit of either type is available to her or him.”

9. The subsequent three Judges Bench judgment in the case of **State of Tamil Nadu & Ors. Vs. K. Shobana & Ors.** as reported in **2021(4) SSC 686** has held held as under:

22. First, we would like to turn to the judgment [K. Shobana v. State of T.N., 2020 SCC OnLine Mad 9800] of the learned Single Judge which, in our view, is absolutely lucid and clear to the controversy and the conclusion. The learned Single Judge set forth the controversy in the first paragraph itself i.e. whether the candidates who secured high marks should have been fitted in the general turn but have



been fitted in MBC/DNC quota for the last year, which in turn has deprived certain candidates of selection. It has been rightly noted that the entire confusion has arisen due to the wrong reading of provisions of Section 27 of the Act, which provides for reservation for appointment. Section 27(f) merely states that if the required number of candidates belonging to the community which fall under reservation are not available, then, the vacancies, for which selection could not be made in the current year, should be treated as backlog vacancies. In the subsequent recruitment, the backlog vacancies and the current vacancies for the particular community must be separately announced, and the direct recruitment must first accommodate the backlog vacancies and thereafter only, the current vacancies have to be accommodated. The provision had been read by the appellants as if the backlog vacancies must be filled in by MBC/DNC category candidates, irrespective of the merit of the candidate or the rank secured by him/her. The highest mark that was secured was 109 and, up to 90 marks, the candidates were fitted in general turn and thus those candidates will have to be selected under the general turn, irrespective of their community. It is these candidates who had



been fitted in the backlog vacancy which has caused the problem.

26. There can be no doubt about the proposition that if a word is used in a statute, it cannot be made otiose as held in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92, paras 42 to 45 : (2014) 2 SCC (Cri) 86] . However, that is not the factual scenario in this case. The question arises as to at which stage would Section 27 of the Act operate, and where in the list, the application of the “first” principle would apply. Section 27 deals with the reservation. It has nothing to do with the general candidates list/General Turn vacancies. Such of the candidates who have made it on their own merit albeit, from reserved category, have not sought the benefit of the reservation. Thus, Section 27 of the Act would have nothing to do up to that point. Section 27 would apply only when the reservation principle begins, which is after filling up of the seats on merit. Thus, the word “first” would apply at that stage i.e. the backlog vacancies have to be filled in first and the current vacancies to be filled in thereafter. At the stage when the general category seats are being filled, there is thus no question of any carry forward or current vacancies for reserved category arising at all.



10. The three Judge Bench of Apex Court has lucidly explained as to how roaster will operate. The post which is the first post namely, the general Unreserved post would be offered to the highest meritorious candidate without considering as to from whichever class he or she may fall. Thus, Rita Kumari who is originally from BC category would occupy the Unreserved first post. The second post which is of Unreserved (Female), would therefore, be available to be filled from the next category namely, Pooja Verma who is originally from SC category and she would therefore, occupy the post under the Unreserved (Female). The post offered to Birendra Kumar Mishra is therefore, found to be erroneous and his appointment is found to have been wrongly offered and he would therefore, have to give room to fill the said post from a female category candidate. The remaining selections would also follow accordingly and the petitioner who comes in the SC (Female) category would occupy the post under the SC (Female) category would therefore, be entitled for appointment. The action of the respondent therefore, in not appointing her is found to be unjustified.

11. The view taken by the State Appellate Authority of holding that there is no provision that if a female candidate is



employed on merit, she will be counted against open vacancy is found to be erroneous and contrary to the basic principles and ethos laid down in the Act of 1991. The order passed by the District Appellate Authority/State Appellate Authority therefore, are set aside and quashed with aforesaid directions . The petitioner shall be now offered appointment with all consequential benefits.

12. The writ petition is accordingly allowed.

13. Appointment of Respondent No. 12 is set aside.

14. The Compliance is to be made within a period of 2 months.

(Sanjeev Prakash Sharma, J)

Suraj/-
Item No. 14

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