

HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

Writ Petition No. 12713/2018

Dr. D.P. Singh & othersPETITIONERS

Versus

State of Madhya Pradesh & Others RESPONDENTS

WITH

Writ Petition No. 12810/2018

Dr. Mamta Pandey & AnotherPETITIONERS

Versus

State of Madhya Pradesh & others RESPONDENTS

AND

Writ Petition No. 13396/2018

Neeraj BhardwajPETITIONER

Versus

State of Madhya Pradesh & Others RESPONDENTS

Appearance:

Shri Brindavan Tiwari, Advocate for the petitioners.

Shri Amit Seth, Government Advocate for the respondents/State.

Shri Anshul Tiwari, Advocate for the respondent/MPPSC.

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Akhil Kumar Srivastava, Judge

Whether Approved for Reporting : Yes

Law Laid Down:

- ✓ Even if there is a mistake in the advertisement in respect of available posts for general category or for reserved category candidates, that will not confer any cause of action upon the petitioners to dispute the selection process as the candidates have to be appointed in respect of posts available but generally not

exceeding the posts advertised. The State would be well advised to calculate the backlog vacancies and to fill the seats keeping in view the advertisement already issued and the seats which fall to the quota of backlog vacancies but the petitioners who are general category candidates cannot be permitted to dispute the entire selection process at this stage as even the examination for filling of such posts is yet to be held. The backlog vacancies are required to be re-verified at the time of filling of the posts. – Reliance is placed upon a Division Bench judgment of this Court delivered on 26.4.2018 in **W.P. No.2722/2018 (S) (Niharika Shukla and others vs. State of M.P. & others)**.

- ✓ The State having invited the applications for the general and reserved category candidates is to ensure that the constitutional mandate at the time of appointment and that the state can rework the quota so as to satisfy the Constitutional mandate at the time of appointment but generally speaking, the State is not expected to appoint large number of candidates over and above the posts advertised.
- ✓ Since the backlog vacancies have been separately advertised and are in specific subjects, therefore, the advertisement reflecting backlog vacancies separately than the vacancies which have been newly sanctioned is neither unreasonable nor arbitrary.

Significant Paragraph Nos.: 9 to 18

ORDER

(22nd day of June, 2018)

Per: Hemant Gupta, Chief Justice:

This order shall dispose of the above-mentioned writ petitions which have been filed challenging the Advertisement dated 12.12.2017 and the amendments published from time to time primarily on the ground that reservation for scheduled castes, scheduled tribes and other backward classes exceeds more than 50%. The specific challenge is to the excessive backlog vacancies shown in the advertisement. Since common questions of fact and law are involved in the present cases, they were heard analogously

and a common order is being passed. However, for the sake of convenience, the facts are taken from W.P. No.12713/2018 (Dr. D.P. Singh and others vs. State of M.P. & Others).

2. The petitioners are general category candidates working as guest faculty and are candidates for appointment to the posts of Assistant Professor for which advertisement was published by Madhya Pradesh Public Service Commission on 12.12.2017 (Annexure P-1). The posts have been advertised in three blocks. The first block is the backlog vacancies of scheduled castes, scheduled tribes and other backward classes for which initially 707 posts were advertised in 22 different subjects. The second block of the posts is the posts fallen vacant on account of promotion and/or retirement for which the posts advertised are 1040 in 36 subjects and the third block is in respect of 1221 newly sanctioned posts in 16 subjects. Thereafter, various amendments have been issued in respect of number of posts or subjects etc. The last amendment in respect of number of posts advertised was issued on 12.04.2018. By such amendment, 752 posts are advertised as backlog vacancies in 22 subjects whereas 1064 posts are on account of promotion and/or retirement in 38 subjects and 1606 posts are advertised as newly created posts in 16 subjects, totalling to 3422 posts.

3. The argument of the learned counsel for the petitioners is that in terms of the Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 (for short "the 1994 Act"), the backlog vacancies are those vacancies which remain unfilled after making attempt to fill such posts. It is contended that

7426 posts were in existence in the year 1990 when the M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990 (for short “the 1990 Rules”) were framed. As per the petitioners, there were 2737 posts meant for the general category and 409 posts were reserved for scheduled caste candidates. Thereafter, five advertisements have been issued in the year 1995, 2003, 2006, 2008 and 2018 for the posts of Assistant Professor as per 1990 Rules disclosing 266, 97, 64 and 243 vacancies of scheduled caste category in the advertisements issued in the year 2003, 2006, 2008 and 2018. In respect of scheduled tribe category, 438 posts were advertised in the year 2003, 132 posts in the year 2006, 84 posts in 2008 and 460 posts have been advertised in the year 2018 whereas in respect of other backward classes, 76 posts were advertised in the year 2006, 39 posts in 2008 and 109 posts have been advertised in the year 2018. A chart has been appended with the writ petition as Annexure P-7. The description of the posts is said to be as under:-

Sr. No	Year-wise Description	Total posts of Assistant Professor.
1.	As per 1990 Rules	7426
2.	Posts falling to the share of Madhya Pradesh after bifurcation of the State on 31.10.2000	5355
3.	Posts available in the year 2011 as per affidavit dated 8.4.2011 (Annexure P-8) filed in W.P. No.9739/2009 (Bhawani Singh v. State of M.P.)	6166
4.	Posts in 2015 as per M.P. Gazette (Extraordinary) published on 27.8.2015	7348
5.	Newly sanctioned posts in 2018	1606

4. The grievance of the petitioners is that since the backlog vacancies have not been reflected properly in the advertisement, therefore, right of the

petitioners for appointment against the general category seats is seriously prejudiced. The petitioners have filed an application being IA No.7595/2018 pointing out that the information displayed by the respondents on the website in terms of the direction of a Division Bench of this Court vide order dated 26.4.2018 passed in **W.P. No.2722/2018 (S) (Niharika Shukla and others vs. State of M.P. & others)** and other connected petitions is incorrect.

5. In **Niharika Shukla's** case (*supra*) challenge was also to the advertisement No.07/2017 dated 12.12.2017 inviting application for the posts of Assistant Professor under Higher Education Department, Government of Madhya Pradesh. In the said order dated 26.04.2018, one of the argument raised was whether more than 50% advertised posts could be reserved for reserved category and thus, violating the Constitutional mandate. Considering the said argument, the Court held as under:-

“14. In respect of the fourth argument that the State is not sure as to how many vacancies are available in each subject and how many are occupied by the reserved categories, therefore, it is reasonably believed that more than 50% vacancies are being filled up from amongst the candidates from the reserved categories. It is contended that in the affidavit filed on behalf of the State Government in the year 2011 by one Shri C.B. Padwar, Deputy Secretary, Department of Higher Education, Bhopal in W.P. No.9739/2009 (Bhawani Singh vs. State of M.P. and others) (Annexure RJ/2 to W.P. No.9739/2009), the State has disclosed 6166 posts of Assistant Professor out of which 3196 posts are occupied by general category candidates as against 3083 posts. Thus, it was asserted that general category candidates are in excess of their quota. It is pointed out that the Rules provide for 7426 posts of Assistant Professor but such posts include the posts, which were in existence in the State of Madhya Pradesh prior to creation of separate State of Chhattisgarh. It is pointed out that pursuant to amendment made in the year 2015, the total

numbers of posts of Assistant Professor were shown as 7348 as per the Notification dated 27.08.2015 [Annexure RJ/3 to W.P. No.9739/2009 (supra)]. Therefore, the State is not sure of the number of posts and the posts which are vacant as with each advertisement issued, the numbers of vacant posts are at variance. Learned counsel for the petitioners have placed reliance upon a Division Bench decision of Allahabad High Court reported as (2017) 7 ADJ 738 (Vivekanand Tiwari vs. Union of India) rendered in Civil Misc. Writ Appeal No.43260/2016 decided on 07.04.2017 [Annexure RJ-6 to W.P. No.9739/2009 (supra)] wherein it was held that the object behind the impugned Constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotion subject to the circumstances and the constitutional limitations indicated in the decision. The Court went on to remind and request the UGC to examine all aspects and submit its recommendations to the Ministry of Human Resource Development for its consideration and appropriate decision. The matter travelled upto the Supreme Court and vide order dated 21.07.2017 passed in SLP (C) No.16515/2017 (Dr. Lal Chand Prasad and another vs. Union of India and others), the Supreme Court dismissed the petition. After dismissal of the SLP against the said order, the UGC has issued a circular on 5th March, 2018 that the posts of Assistant Professors have to be subject-wise. Thus, it is argued that the advertisement issued on 12.12.2017 is not in consonance with the amended Regulations issued on 05.03.2018.

15. We do not find any merit in the said argument raised. It is not in dispute that not more than 50% of the posts can be filled by the reserved category candidates but such question of limit of 50% will arise only at the time of appointment and not at the time of advertisement as the advertisement is only to find a suitable candidate for appointment but to give effect to the Regulations as amended by the UGC. Still further, if a post has not been advertised though vacant, it will not confer any right in any candidate that such posts should be advertised.

16. But, to provide a transparent and fair recruitment process, the State Government is directed to put on its website the number of posts of each subject and the posts which are to be filled in each category within one month so that all the candidates are aware of the vacant posts, against which they are competing for appointment. But, non-advertisement of any vacant post does not confer any right with any aspiring candidate to seek inclusion of such posts in the recruitment process.

However, at this stage the number of posts advertised cannot be interfered with only on the ground that the posts of reserved categories have been advertised in excess of 50% limit. We do not find any merit in the said argument.”

6. In pursuance to the direction contained in the said order dated 26.04.2018 passed in the case of **Niharika Shukla's** case (*supra*), the State Government has uploaded information on the website though not within one month but on 21.06.2018. As per the information published, the total posts are 8065, out of which, 4040 are for general category, 1287 posts for scheduled castes, 1614 posts for scheduled tribes and 1124 posts for other backward classes in 50 different subjects. Out of which, the vacant posts are said to be 3658 i.e. 1202 posts of general category, 590 posts for scheduled castes, 1069 posts for scheduled tribes and 797 posts for other backward classes whereas the posts advertised are said to be 957 posts for general category, 506 posts for scheduled castes, 992 posts for scheduled tribes and 649 posts for other backward classes totaling to 3424 advertised posts but the total posts of four different categories, in fact, comes out to be 3104 posts. It is, thus, contended that there are mistakes at all steps in the advertisement issued while calculating backlog vacancies and the information published on the website.

7. Learned counsel appearing for the petitioners raised the following questions of law:

1. Whether huge and unnecessary backlog shown in the impugned advertisement, without data, is arbitrary, illegal and contrary to the judgment reported in AIR SC 1993 477?

2. Whether unlimited carry forward is permissible under the law or posts advertised in year, shall be treated as unit for counting/backlog and reservation and the carry forward seats shall be only those seats which remained unfilled due to non-availability of eligible candidates and last backlog advertisement/selection of year 2008 shall be considered for counting backlog seats?
3. Whether the Respondents by way of present notification/ advertisement dt. 12.04.2018 and 12.12.2017 have violated the well settled principle that the reservation in total should not exceed the limit of 50%, as propounded by the Hon'ble Supreme Court in catena of judgments?
4. Whether the Respondents have failed to provide quantifiable data even after judicial order dt. 26.04.2018 in W.P. No.2919/2018 and in absence thereof point of roster and backlog cannot be counted and determined properly?
5. Whether the Respondents have failed in establishing any extreme circumstances that warrant reservation beyond the general limit of 50% in one single advertisement?
6. Whether ratio/cap of 50% reservation shall be looked into at the time of advertisement and not at the time of selection/appointment?
7. Whether the Respondents have failed in adopting the roster system in the present notification by issuing a composite advertisement for all categories including the general category?
8. Whether the Respondents previously followed the roster system by conducting separate recruitment process for backlog category and thus, the present composite advertisement amounts to gross discrimination for general category students?
9. Whether the variation in statistics of the seats for backlog category in last 3 notifications, reflect the lack of empirical

data available with the Respondent State before issuing the notification?

10. Whether the fact that the enhancement in backlog category seats within 3 months up-to 45 seats in the advertisement the notification of previous year, without even filling up the posts in interim period, again reflect the lack of concrete data and statistics with the Respondents?
11. Whether the reduction in the number of seats each year for the general category candidate from the last year without conducting any recruitment process for the general category candidates in the interim period reflect the non-application of mind of the Respondents, which results in dilution of merit and denial of equal opportunity to the candidates of general/unreserved category?

8. With this background, we have heard learned counsel for the parties at length and find no merit in the present petitions.

9. The first argument is based upon the judgment of the Supreme Court reported as **AIR 1993 SC 477 (Indira Sawhney etc. etc. vs. Union of India and others etc.)** but the argument is untenable. The reservation under the 1990 Rules is carried out in terms of the 1994 Act. There is no challenge to the extent of reservation prescribed under 1994 Act. Therefore, the extent of reservation fixed under the 1990 Rules cannot be permitted to be disputed without there being any challenge to a Statute prescribing the reservation.

10. In respect of question Nos.2, 9 and 10, the reliance of the learned counsel for the petitioners is on the judgment of the Supreme Court reported as **(2011) 2 SCC 105 (State of U.P. vs. Sangam Nath Pandey)** wherein the Court while examining the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (4 of

1994). In the aforesaid case, different advertisements were issued for filling the posts of Junior Engineer (Civil). The Commission invited the applications for 520 posts by way of general recruitment. Another advertisement was issued for filling of 367 posts by way of a special recruitment exclusively for the reserved category candidates. The Public Service Commission gave an option to the reserved category candidates as to whether they would like to be considered against 520 posts of general recruitment or against 367 posts of special recruitment. The challenge to the selection was by general category candidates to 367 posts of special recruitment. Considering the provisions of the Act, it was held as under:

“38. The exercise of identifying the yearwise and cadre-wise vacancies ought to have been conducted by the State prior to the issuance of the advertisement as rightly noticed by the learned Single Judge. The purpose of introducing a roster system was to ensure that the percentages of reservation provided for various categories of persons is effectively and speedily achieved. This can only be done if the department concerned identifies the yearwise vacancies in the cadre. Once the vacancies are identified, it is enjoined upon the authorities to ensure that the selection procedure is completed speedily. This is necessary to avoid uncertainty to all categories of candidates.

43. We, therefore, reiterate that it is necessary for the Department to identify yearwise vacancies for the cadre. It is also necessary to fill up the posts speedily in order to avoid certain candidates being rendered ineligible as they may have become overage. It is for this reason that Section 3 has placed importance on the year of recruitment as also on the process of selection.

It is on the strength of this judgment that it is argued that unless the number of posts is clearly disclosed in the advertisement, the selection process cannot be fairly conducted.

11. We do not find any merit in the said argument. In **Sangam Nath Pandey's case (supra)**, the selection of reserved category candidates was challenged after selection was completed when it was found that backlog vacancies have not been properly calculated but in the present case, the petitioners have invoked the jurisdiction of this Court challenging the number of posts advertised inter alia on the ground that backlog vacancies have not been properly calculated or that the posts advertised are at variance with the posts available. It has been held in **Niharika Shukla's case (supra)** that even if there is a vacant post, the decision is of the employer whether the posts should be advertised or not. It was held as under:-

“12. In respect of the third set of cases, the grievance is that the posts of Assistant Professor in certain subjects have not been advertised though they were advertised in Advertisement No.01 of 2016 dated 19.02.2016. We have heard the learned counsel for the parties and find no merit in the said argument as well. Whether a post should be advertised or not is to be considered by the employer. The advertisement issued in the year 2016 was withdrawn; therefore, the posts advertised in the said advertisement are not necessarily to be advertised in the subsequent advertisement. It is the decision of the employer to fill the posts. The Supreme Court in its judgment reported as **(1985) 1 SCC 122 (Jatinder Kumar and others vs. State of Punjab and others)** has held as under:-

“12..... But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. We are supported in our view by the two earlier decisions of this Court in *A.N. D'Silva v. Union of India* (AIR 1962 SC 1130) and *State of Haryana v. Subash Chander Marwaha & others* [(1974) 3 SCC 220]. The contention of Mr. Anthony to the contrary cannot be accepted.”

13. In a yet another decision reported as **(2016) 6 SCC 532 (Kulwinder Pal Singh and another vs. State of Punjab and others)**, the Supreme Court held as under:-

“17. The learned counsel for the appellants submitted that the appellants have been pursuing the matter for about eight years and even today there are vacancies in Punjab Judicial Service and thus prayed that direction be issued to the respondents to consider the case of the appellants as against the existing vacancies. This contention does not merit acceptance. Appointment to an additional post or to existing vacancies would deprive candidates who were not eligible for appointment to the post on the date of submission of the applications mentioned in the advertisement but became eligible for appointment thereafter. After referring to *Rakhi Ray vs. High Court of Delhi [(2010) 2 SCC 637]*, *State of Orissa vs. Rajkishore Nanda [(2010) 6 SCC 777]* and other decisions, High Court rightly held that the candidates much more than the vacancies advertised have already been permitted to join and thus the appellants cannot claim any legal right in respect of the posts of reserved category remaining unfilled. The impugned judgment (*Kulwinder Pal Singh vs. State of Punjab, 2012 SCC Online P&H 2975*) does not suffer from any infirmity warranting interference in exercise of our jurisdiction under Article 136 of the Constitution of India.”

12. In the context of the aforesaid decision, even if there is a mistake in the advertisement in respect of available posts for general category candidates or for reserved category candidates, that will not confer any cause of action upon the petitioners to dispute the selection process as the candidates have to be appointed in respect of posts advertised and generally not exceeding the posts advertised. Even if the backlog vacancies have not been properly calculated, the State would be well advised to calculate the backlog vacancies and to fill the seats keeping in view the advertisement

already issued and fill the seats which fall to the quota of backlog vacancies but the petitioners who are general category candidates cannot be permitted to dispute the entire selection process as even the examination for filling of such posts is yet to be held on 23.06.2018. Therefore, we do not find any cause with the petitioners to dispute the number of backlog vacancies at this stage as such backlog vacancies are required to be re-verified at the time of filling of the posts. Even if the backlog vacancies advertised are less than the vacancies available, it is always open to the employer to advertise as many vacancies as it wants to make appointment. Incorrect calculation of backlog vacancies will not confer any right with the petitioners to seek appointment against the consequential vacancies, which may fall to the quota of general category as the general category seats have been advertised under the second and third block.

13. The question Nos.3 and 6 raised by the learned counsel for the petitioners have been dealt with in the matter of **Niharika Shukla's case (supra)**. It is again reiterated that whether the quota of 50% is violated or not is a matter which will require consideration at the time of appointment. The State having invited the applications for the general and reserved category candidates is required to verify the quota of each category so as to satisfy the Constitutional mandate but generally speaking, the State is not expected to appoint large number of candidates over and above the posts advertised.

14. In respect of the fourth argument, it is observed that the quantifiable data for reservation does not arise for consideration as the 1994 Act is not

the subject matter of dispute in the writ petitions. Therefore, the question No.4 does not arise for consideration. The reservation has been provided in terms of 1994 Act. The question is in respect of posts which fall within quota of the different categories. Still further, the information directed by this Court in **Niharika Shukla's** case (**supra**) has to be kept in view by the State while making appointment. Similarly, the extent of backlog vacancies is to be re-verified by the State before making appointment but that will not confer any right for the petitioners to dispute the entire selection process.

15. In respect of the question No.5, it may be stated that backlog vacancies have been advertised as a separate block whereas the reservation in respect of posts falling vacant on account of promotion and retirement have been advertised keeping in view the category of candidates, who have retired or promoted. But in respect of newly sanctioned posts, not more than 50% seats are reserved for three reserved categories.

16. As regards the question No.7 raised by the petitioners, the judgment of the Supreme Court reported as **(1995) 2 SCC 745 (R.K. Sabharwal and Others vs. State of Punjab And Others)**, was dealing with the instructions issued to supplement the Punjab Service of Engineers Class-I P.W.D. (I.B.) Rules, 1964. The Instructions provided for roster i.e. posts to be reserved for scheduled castes and other categories. Whereas neither the 1990 Rules or the M.P. Civil Services (General Conditions of Service) Rules, 1961 or the 1994 Act provides for roster for appointment under the State. The 1994 Act or the Rules provide for quota and not roster. Therefore, there is no illegality in issuing of a composite advertisement for all categories.

17. The question No.8 is again not tenable for the reason that the backlog vacancies have been separately advertised and in different subjects. The advertisement reflects backlog vacancies separately than the vacancies which have been newly sanctioned. Such advertisement is neither unreasonable nor arbitrary. Even if the backlog vacancies are less than the posts available for the reserved category candidates; the petitioner cannot have any claim against such posts. The petitioners would compete only against the posts advertised for General Category. Even if the vacancies against the backlog posts are not worked out properly, the petitioner as a General Category cannot assert that such posts need to be made available for the general category. It is the decision of the State Government that certain number of posts are falling vacant under the backlog category. It may not be correct calculations but the petitioners are required to compete for the posts meant for general category alone.

18. The question No.11 is based upon self-determination of seats falling to the quota of general category. The extent of seats which fall to the quota of general category has to be kept in view by the State while making the appointment.

19. In view of the above, we do not find any merit in the present writ petitions. The same are **dismissed**.

(HEMANT GUPTA)
CHIEF JUSTICE

(AKHIL KUMAR SRIVASTAVA)
JUDGE