

**Court No. - 34**

**Case :-** WRIT - A No. - 12559 of 2023

**Petitioner :-** Akhilesh Kumar And 3 Others

**Respondent :-** State Of U.P. And 3 Others

**Counsel for Petitioner :-** Atipriya Gautam, Sr. Advocate, Utkarsh Birla

**Counsel for Respondent :-** C.S.C., A.K.S. Parihar

**Hon'ble Ajit Kumar, J.**

1. Heard Sri Utkarsh Birla, learned counsel for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri J.N Maurya, learned Chief Standing Counsel for the State-respondents and Sri A.K.S. Parihar, learned counsel appearing for the respondent-Board.

2. Petitioners before this Court have been applicants against the post of Assistant Teachers in Trained Graduate Teacher (TGT) by the UP Secondary Education Service Selection Board, Prayagraj vide advertisement No.1/2001 dated 15.03.2021.

3. The examination for selection namely the TGT Examination, 2021 was to be held in respect of 12,603 vacancies that were notified out of which 1742 vacancies were in the subject of Hindi and boys category. Out of 1742 vacancies, (Hindi Subject) 1054 were published for general category and 405 were published for OBC category (boys). Petitioners being eligible their candidature was considered. They duly participated in the selection process. However, they could not make it successful for having secured below 307.38 marks to find place in the final select list that formed panel of selected candidates in the OBC category.

4. Besides the final select list that was prepared and notified as per rules, the Selection Board also prepared a waiting list of 25% as a combined panel of waiting list candidates. This combined waiting list prepared was notified on 28.12.2021 and has been annexed as Annexure-5 to the writ petition and this document is admitted to the respondent-Board as well as State-respondents.

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5. This petition came to be filed with the plea that in respect of those vacancies where the candidates of the main panel list did not turn up to join and thus having remained vacant, respondents be directed to prepare a list out of the waiting list in order of preference considering merits for the purposes of recommendations and appointments against such vacancies.

6. It transpires that during pendency of this writ petition, the respondent proceeded to prepare a panel from the waiting list for the purposes of allotment of schools *qua* vacancies where the candidates originally placed in the merit list did not turn up to join.

7. It is argued by learned counsel appearing for the petitioners that in the notification of panel dated 01.09.2023, a large number of candidates of open category have been recommended for the allotment of college for the purposes of appointment as Assistant Teacher (TGT) though they were below in merit to the petitioners. For example, one Mr. Atul Singh s/o Ram Hriday Singh (general category) placed at Serial No.56 of the notification dated 01.09.2023 had secured 307.38 marks but is below in merit to Nisha Devi, she being senior in age vide Rule 12 of 1978 Rules as she is at serial No.150 of the waiting list whereas Atul Singh is at Serial No.158 (both have equal marks). Again, Ms. Jyotsana Pandey who is there in the notification dated 01.09.2023 at Serial No.67 is at Serial No.209 of the waiting list, is also below to petitioner No.2, namely Nisha Devi and also petitioner no.4 namely Ms. Vandana Yadav who is at Serial No.208 of the waiting list. The other candidates below to Ms. Jyotsana Pandey who have been given allotment vide notification dated 01.09.2023, are all lower in merit in the waiting list, to the petitioners.

8. Learned counsel for the petitioners, thus, has argued that respondents are not justified in giving appointments against the vacant situations from the waiting list of those general category candidates who are lower in merit than OBC/reserved category candidates. The arguments is based on the principle that in open category, all other category candidates can get entry if they are having higher merit to a candidate of open category candidate.

9. It is argued further that the 'Samekit' means consolidated list of selectees and in that case as and when the vacancy occurs on account of non joining of the selected candidates from the main panel and if there is no other candidate available in the main panel, the waiting list candidate shall be offered appointment in the order of merit. A candidate of open category having higher marks than the reserved category candidate will of-course be given preference

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if the vacancy is of open category, but in the event, reserved category candidates with higher marks are available then they will be taken to be of open category to be adjusted against the vacancy of general category, if it is still vacant.

10. Countering the submission so advanced by learned counsel for the petitioners, Sri Neeraj Tripathi, learned Additional Advocate General has contended that the Board has proceeded to make recommendations to make appointment from the waiting list on the basis of category of vacancy that has remained vacant. He argued vehemently that since the vacancies were of open category, the respondents in their wisdom rightly recommended the name of only those candidates who belonged to general category. He accordingly, tried to justify that once the reservation has been applied and vacancy becomes available, then there will be no further migration from one category to another category.

11. Having heard learned counsel for the respective parties and the arguments raised across the bar, the only point that emerges out for consideration of this Court is as to whether while making adjustment against the available vacancies already notified from the waiting list, the respondents are justified in making allotment in favour of those candidates who belong to that category of which the vacancy has been assigned. In other words, once the rule of reservation has been applied then the vacancy would stand assigned and no further migration from one category to another category will be permissible.

12. In matters of rule of reservation, the law is very clear. While preparing a merit list, the selecting body has to see what is the last cut-off marks of each category in respect of vertical reservation. There is no migration from general to reserved category but there is migration from reserved category to general category so there is only one way traffic and this is why general category is called 'open category'. In other words, on the principle that merit is to be reckoned with in public employment and the candidates having merit have to be given preference despite the categories to which they belong to. So, in such event when merit of general category is higher and a reserved category candidate is able to score higher than the last cut off of the general category then such reserved category candidate would be migrated to open category. But in the matter of reserved category if a candidate has applied as an general category candidate may be he belongs to reserved category he would be taken to be general category candidate only. So there is no migration from general to reserved category. Similarly once the post has stood assigned to a particular category of reservation then

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for all purposes that category would continue to belong to that reserved category even while a candidate is taken from the waiting list.

13. For instance, if a post for reserved category is assigned and post assigned to reserved category remains vacant for the reserved category person not turning up, then a candidate of that reserved category will be taken from that merit list may be lower than the candidate of a general category available in the waiting list. But in the event a post assigned to general category remain vacant for a selected candidate not turning up to join and the main panel has got exhausted then the candidate who is higher in merit, may be of reserved category would stand migrated to open category than a candidate of general candidate having lesser marks. This migration is absolutely permissible and is in tune with the principles of reservation so discussed from time to time by this Court and the Supreme Court.

14. In my above view, I find support from the judgment of Supreme Court in the case of ***Indra Sawhney Etc. Etc v. Union of India; 1992 (3) SCC (SUPP) 217***, applying test of merit on the touchstone of Article 14 of the Constitution vis-a-vis the reservation in public employment under Article 16(4) of the Constitution, the Court justified migration of reserved category candidates from their reserved category to the open category upon scoring above or matching the last cut off/merit of the open category which is otherwise also known as general category. Vide paragraph 811 of the judgment, the Court has observed "*it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging, to say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.*" This above principle by the Constitution Bench was further more elaborated and precisely too in the case of ***Saurabh Yadav and ors vs. State of UP & ors; 2021 (4) SCC 542***. The Court though in that case was also dealing with horizontal reservation more especially in the matter of female reservation, but supplementing the view of majority, Ravindra Bhatt, J. observed that open category is not a quota but is available to all men and women alike to vertical and horizontal reservations. The Bench referring to judgment of another Constitution Bench in case of ***R.K. Sabharwal v. State of Punjab; 1995 (2) SCC 745*** vide its paragraph 15 held thus:

15. In *R.K. Sabharwal v. State of Punjab* the Constitution Bench of this

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Court considered the question of appointment and promotion and roster points vis-à-vis reservation and held thus:

*When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition.”*

*(emphasis added)*

15. In the case in hand, it is clear that the merit list was finally prepared and the cut-off of the open category was much more than the OBC and SC/ST category and so there was no question of any migration of a reserved category candidate to open category but once merit panel got exhausted and there arose question of getting candidates from the waiting list against unfilled vacancies then in that waiting list, an open category candidate whose merit was less than the reserved category candidate could not have marched ahead of such reserved category candidate to occupy the post only on the ground that the post had fallen vacant in the open category. This upon the above principles of law discussed was absolutely

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impermissible. Concluding on the principles of migration from reserved category to open category and the concept of reservation, supplementing the judgment (delivered by Justice U.U. Lalit, J. as His Lordship then was), Justice Ravindra Bhatt observed 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."*

16. In such above view of the matter and legal proposition conceived and applied as law of reservation, since the respondents have admitted that they have adjusted the general category candidate against the vacancy that remained vacant even after the main merit panel got exhausted, despite their marks being lesser to the OBC category candidate, in my considered view, it was a wrong that needed to be rectified by offering appointment to OBC category candidate or those having higher marks than the general category candidates in the waiting list.

17. The stand taken by the selection board and the state respondents, thus, cannot be sustained in law. No one can be appointed against rules in public employment, may be interpreting it wrongly or mistakenly and if a wrong has been done it must be undone. Accordingly, respondents are directed to prepare panel afresh in the light of law discussed above and the observations made to make adjustments of waiting list candidates against available vacancies that got wrongly allotted vide notification dated 01.09.2023. The respondents shall be issuing notices to the candidates who have been notified for the purposes of allotment on 01.09.2023, if already joined inviting their objections and thereafter fresh panel shall be prepared from the waiting list. The notification dated 01.09.2023 shall abide by the fresh notification.

18. This petition stands ***disposed of*** in above terms.

**Order Date :-** 07.03.2024

P Kesari