

Court No. - 5

Case :- WRIT - A No. - 4991 of 2023

Petitioner :- Prabhat Mishra

Respondent :- State Of U.P. Thru. Secy. Higher Education Govt. U.P.
Lko. And 2 Others

Counsel for Petitioner :- I.M. Pandey Ist, Harsh Vardhan
Kediya, Saubhagya Mishra, Snigdha Singh

Counsel for Respondent :- C.S.C., Ashwani Kumar Agnihotri

Hon'ble Abdul Moin, J.

1. Vakalatnama and counter affidavit filed today by Shri Ran Vijay Singh, learned counsel for the respondent no. 4 is taken on record.

2. Heard Shri Rahul Bajaj, assisted by Shri Taha Bin Tasneem and Shri Harsh Vardhan Kedia, learned counsels for the petitioner, learned Standing Counsel appearing for the respondents no. 1 & 3, Shri Ashwani Kumar Agnihotri, learned counsel for the respondent no. 2 and Shri Ran Vijay Singh, learned counsel for the respondent no. 4.

3. At the very outset, learned counsel for the petitioner states that as there are no disputed questions raised in the counter affidavit, as such he does not intend to file reply thereto.

4. Under challenge is the order dated 19.6.2023, a copy of which is annexure 1 to the writ petition, whereby the claim of the petitioner for appointment on the post of Assistant Professor (English) under reserved quota of physically handicapped category has been rejected. Further prayer is for a writ of mandamus commanding the respondents to appoint the petitioner on the post of Assistant Professor (English) from final merit list of reservation quota of physically handicapped category.

5. Bereft of unnecessary details the facts set forth are that the petitioner suffers from 100% disability of optical atrophy of

both eyes and is a hundred percent permanently physically handicapped person. Copy of the physical handicap certificate is annexure 3 to the writ petition.

6. The respondents had advertised vacancies of Assistant Professors vide advertisement, a copy of which is annexure 6 to the writ petition. So far as the dispute is concerned the same pertains to 5 posts of Assistant Professor (English) out of total 133 posts of Assistant Professor (English). The five posts are reserved for the physically handicapped candidates as per table 2 of the said advertisement which is part of annexure 6 of the writ petition and would relate to clause 3 of the advertisement. Thus out of 133 posts of Assistant Professor (English) five posts were reserved for physically handicapped candidates to which there is no dispute.

7. The petitioner applied for the post of Assistant Professor (English) in pursuance to the said advertisement. A final merit list was declared on 02.07.2022, a copy of which is annexure 2 to the writ petition, in which the name of the petitioner finds place at serial 345 having secured 127.22 marks against physically handicapped category.

8. It is contended that a perusal of the selected physically handicapped unreserved selected candidates (General Category) to the final merit list would indicate as per the table made in paragraph 20 of the writ petition the following position :

Name	Total Marks
Neha Kumari	154.84
Astha Singh	137.34
Vijay Bux Singh	136.40

Rishabh Mishra 132.40

Durgesh Mishra 129.22.

9. In paragraph 21 of the writ petition, it is stated that the petitioner stood just below last selected physically handicapped candidate namely Shri Durgesh Mishra in terms of his merit against unreserved physically handicapped category.

10. Incidentally, there is no denial to the aforesaid averment in paragraph 24 of the counter affidavit filed by respondent no. 4 wherein the reply to paragraphs 20 and 21 of the writ petition have been given.

11. As per the averments made both in the writ petition and in paragraph 5 of the counter affidavit dated 21.07.2023 the candidate whose name found place at the top of the merit list of physically handicapped unreserved category i.e. Ms Neha Kumari did not join in the allotted institution with the result that name of the petitioner would stand placed at serial no 5 in the list of unreserved physically handicapped candidates which would make the petitioner as an eligible candidate fit for being appointed against 5 reserved vacancies for physically handicapped category as per his merit position, he being placed at serial no. 6.

12. Placing reliance on the Section 13(1) of the U.P. Higher Education Services Commission Act, 1980 (hereinafter referred to as the Act, 1980) the contention is that the Commission i.e. respondent no.2 as soon as possible after notification of vacancies to it, hold an interview of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, 25% more than the number of vacancies in that

subject, such names to be arranged in order of merit shown in the interview or in the examination and interview.

13. Further placing reliance on Subsection (4) of section 13 of the Act, 1980 the argument is that said provision categorically provides that where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in subsection (2) which provides that the list sent by the Commission shall be valid till the receipt of a new list from the Commission and such vacancies having not been notified to the Commission under Section 12(3) of the Act, 1980 the Director may intimate to the management the name of candidates from such list for appointment.

14. The argument is than when the person at serial no. 1 of the merit list of the physically handicapped unreserved category did not join and admittedly considering the provisions of Section 13 of the Act, 1980 as the respondents were enjoined to prepare a list of suitable candidates 25% more than the number of vacancies, as such, in case the Commission would have prepared the list in accordance with the provisions of the Act, 1980 and then the name of the petitioner would have found placed in the list against the reserved vacancies of physically handicapped candidates and consequently he should have been appointed.

15. Further argument is that even when the Commission as provided under the Act, 1980 has ceased to exist having been replaced by the U.P. Education Service Selection Commission Act, 2003 (hereinafter referred to Act, 2003) with effect from 21.07.2023 yet considering that the selection was of the year 2022 and also considering the provisions of Section 31(2) of the Act, 2023, notwithstanding such repeal of the Act 1980, anything done or any action taken under the Act 1980 shall be

deemed to have been done or taken under the Act 2023 and thus it is argued that irrespective of repeal of Act 1980 the respondents are required to appoint the petitioner on the vacant post of Assistant Professor (English).

16. Reliance has also been placed on the interim order of this Court dated 22.05.2025 to contend that keeping in view specific observations made in paragraph 5 the counter affidavit filed by the respondent no. 3 this Court had provided that till the next date of listing one post of Assistant Professor (English) if still vacant shall not be filled up.

17. Further without considering the aforesaid facts the representation of the petitioner was rejected by the respondents vide order impugned dated 19.06.2023 primarily on the ground that as there were only five reserved posts for physically handicapped candidates and name of petitioner did not find place amongst those five candidates as such he cannot be appointed.

18. Reliance has been placed on the judgements of Hon'ble Supreme Court in the case of in re: **Recruitment of Visually Impaired in Judicial Services, 2025 INSC 300, Reserve Bank of India and others vs A. K. Nair and others, 2023 SCC Online SC 801, Rekha Sharma vs High Court of Judicature for Rajasthan and another, 2025 INSC 551, Saurav Yadav and others vs State of U.P. and others, (2021) 4 SCC 542** and a division bench judgement of this Court in the case of **Dr Manoj Kumar Rawat vs State of U.P. and 5 others, 2025:AHC:71491-DB.**

19. On the other hand, learned Standing Counsel as well as Shri Ran Vijay Singh, learned counsel for the respondent no. 4 have supported the order impugned dated 14.06.2023 by which the

claim of the petitioner has been rejected. It is contended that of the 133 posts of Assistant Professor (English) which were advertised, 5 posts were reserved for physically handicapped category. The other posts were bifurcated into unreserved, OBC, EWS and SC category but there was no separate category in the categorization for physically handicapped category candidates who were all to be treated as unreserved.

20. It is contended that the petitioner was not included as a selected candidate because he failed to cross the cut off marks / merit and that the 5 physically handicapped candidates as per the quota have been selected according to merit position.

21. So far as waiting list of 25% of total vacancies is concerned it is contended that 25% waiting list of each category was published but as the five candidates of physically handicapped category were selected under 133 posts of Assistant Professor (English) and these five posts were not independently requisitioned to the Commission therefore they were included in the unreserved 63 posts and against the unreserved 63 posts 25% i.e. 16 posts of waiting list was declared in which the petitioner's name was not present.

22. It is also contended that the last selected candidate of physically handicapped category has secured 129.22 marks vis a vis the petitioner who has only secured 127.22 marks while the general category list candidates who find place in the waiting list has secured 149.77 marks and therefore the petitioner has failed to secure the cut off marks / merit and thus the name has not been included neither in the final select list nor in the waiting list. However, it is not disputed that in terms of merit of physically handicapped unreserved candidates the name of petitioner would find place at serial no. 6.

23. Thus it is contended that no error has been committed by the respondents while rejecting the claim of the petitioner vide order impugned dated 19.06.2023.

24. Heard learned counsel for the parties and perused the record.

25. From the arguments as advanced by learned counsel for the parties and from perusal of record it emerges that the petitioner is a physically handicapped unreserved candidate suffering from 100% disability and is a 100% permanently handicapped person. An advertisement was issued for various vacancies of Assistant Professors. The petitioner finding himself eligible for the post of Assistant Professor (English) (to which the dispute also pertains to) applied for the same. Admittedly there were 133 posts of Assistant Professor (English) of which 5 posts were reserved for physically handicapped candidates as per table 2 of the advertisement. A final merit list was declared on 02.07.2022 in which name of the petitioner finds place at serial number 345 having secured 127.22 marks having physically handicapped unreserved category. As per final merit list, name of the petitioner would stand at serial number 6 in terms of merit for physically handicapped candidates to which there is no dispute. However considering that there are only five reserved posts for physically handicapped category, as such name of the petitioner did not find place against those five posts. One Ms Neha Kumari stood at serial number 1 in terms of merit for physically handicapped unreserved category. Admittedly, Ms Neha Kumari did not join in the allotted institution thus leaving only four persons in fray against five vacancies against physically handicapped unreserved category.

26. The grievance of the petitioner is that considering that there were five physically handicapped unreserved vacancies against

133 posts of Assistant Professor (English) and considering non joining of the person who stood first in the said category i.e. Ms Neha Kumari, name of petitioner should have been placed in the said final merit list which should have resulted him in he being appointed as an Assistant Professor (English). The representation filed in this regard was rejected by the respondents vide order impugned dated 19.06.2023 primarily on the ground that as there were only five reserved posts for physically handicapped candidates and name of petitioner did not find place amongst those five candidates as such he cannot be appointed.

27. The respondents have also supported the order impugned by contending that even while following the provisions of the Act, 1980 and after considering the 25% i.e. 16 posts of waiting list, name of the petitioner did not find place as he failed to secure requisite marks in terms of merit and consequently he has not been appointed.

28. In this regard it would be apt to refer to provisions of Section 34 of the Right of Persons with Disabilities Act, 2016 (hereinafter referred to as the Act, 2016), which reads as under:

"Reservation: (1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e), namely:

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured,

dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit."

29. A perusal of Section 34 of the Act, 2016 would indicate that every appropriate government shall appoint in every

government establishment not less than 4% of total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities. The word used by legislature is "shall appoint" meaning thereby that not less than 4% of total number of vacancies in cadre strength would be occupied by persons with benchmark disability by way of appointment.

30. There is no dispute to the fact that the petitioner is suffering from a benchmark disability rather is suffering from 100% disability of optical atrophy of both eyes and is duly certified to be a hundred percent permanently physically handicapped person as per physically handicapped certificate.

31. Hon'ble Supreme Court in the case of **Recruitment of Visually Impaired in Judicial Services (supra)** has held as under:

"63.3. Taking note of all these aspects, we are of the opinion that maintaining and operating a separate cut-off list is mandatory for each category, which axiomatically includes PwD category as well. Non-declaration of cut-off marks affects transparency and creates ambiguity, and candidates being not informed about the basis of their results. Such candidates are left uninformed about the last mark scored by the qualifying candidate belonging to the particular category, to be able to get through to the next stage of selection process. In effect, it compels PwD candidates to compete with other category candidates on unequal terms. Further, when the Rules referred to above, considered the PwD as a separate category and provided them with reservations, it is indispensable on the part of the authorities concerned to declare separate cut-off marks for PwD category at each stage to ensure that those similarly placed candidates are adequately represented in the service fulfilling the very purpose of reservation. The non-disclosure of cut-off marks would lead to a situation, where such candidates may not be adequately represented in the judicial service, which is against the provisions of the RPwD

Act, 2016. Therefore, we direct the authorities concerned to declare separate cut-off marks and publish separate merit list for the PwD category at every stage of the examination and proceed with the selection process accordingly. "

(emphasis by Court)

32. Again Hon'ble Supreme Court in the case of **Rekha Sharma (supra)** has held as under:

"14. What emerges from the submissions made on behalf of the petitioner as well as the respondents herein is the fact that the petitioner herein has secured the minimum qualifying marks being 119 which is an undisputed fact. Secondly, although only two posts were reserved for persons with disability of being blind and having low vision, the fact remains that the candidate Anu Meena who has secured 137 marks belongs to the Scheduled Tribes category and she could have been considered in that category, in which event two posts would have been remained available for persons with blind and low vision disability and the petitioner herein could have been one of the persons who could have been accommodated. In this regard, our attention was drawn to the Office Memorandum dated 27.09.2022 and particularly paragraph '4(i)' of the said Office Memorandum which reads as under:

"(i). In line with the spirit of the O.M. No.36035/2/2017-Estt. (Res.), dated 15.1.2018, and O.M. No.36012/1/2020-Estt(Res-II), dated 17.5.2022 on the subject, the concept of own merit for PwBD shall be implemented in all direct recruitment examinations, including the CSE and promotions, wherever applicable. In other words, PwBD category candidates selected without relaxed standard, along with other unreserved candidates, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with benchmark disabilities, who are lower in merit than the last unreserved candidate in general merit list, but otherwise found suitable for appointment, if necessary, by relaxed standards."

(emphasis by Court)

33. Hon'ble Supreme Court in the case of **Saurav Yadav**

(supra) has held as under:

"60. Horizontal reservations on the other hand, by their nature, are not inviolate pools or carved in stone. They are premised on their overlaps and are 'interlocking' reservations 21. As a sequel, they are to be calculated concurrently and along with the inviolate 'vertical' (or "social") reservation quotas, by application of the various steps laid out with clarity in paragraph 11 of Justice Lalit's judgement. They cannot be carried forward. The first rule that applies to filling horizontal reservation quotas is one of adjustment, i.e. examining whether on merit any of the horizontal categories are adjusted in the merit list in the open category, and then, in the quota for such horizontal category within the particular specified/social reservation. "

(emphasis by Court)

34. In view of the aforesaid judgements it clearly emerges that physically handicapped category is to be considered as a separate category and provided with reservations and it is indispensable on the part of the authorities to declare separate cut off marks for physically handicapped category for each stage to ensure that those similarly placed candidates are adequately represented in service fulfilling the very purpose of reservation.

35. The argument on the part of respondents that name of petitioner was not contained in the result of 25% waiting list is found misconceived considering the fact that when there were 5 posts reserved for physically handicapped candidates and the person at the serial number 1 of the merit namely Ms Neha Kumari did not join as such the respondents should have considered the others eligible towards physically handicapped posts also instead of declaring a general waiting list in terms of merit without considering merit towards reserved posts for physically handicapped candidates more particularly when

the Hon'ble Supreme Court in the judgement of **Recruitment of Visually Impaired in Judicial Services (supra)** has observed regarding declaring of separate cut off marks for physically handicapped category.

36. A bald argument has also been advanced on behalf of respondent no. 4 and specific plea in this regard is taken on paragraph 11 of counter affidavit filed on behalf of respondent no. 4 that the petitioner failed to secure requisite marks/merit without in fact disclosing the cut off marks which were fixed for physically handicapped category.

37. The aforesaid argument has been sought to be supported on the ground that in the final result dated 02.07.2022 the last selected candidate of physically handicapped category had secured 129.22 marks (in paragraph 20 of the writ petition the name indicated is Shri Durgesh Mishra having 129.22 marks). However in the absence of any cut off marks being declared separately as directed by Hon'ble Supreme Court in the case of **Recruitment of Visually Impaired in Judicial Services (supra)** it is apparent that the said argument is patently fallacious and misconceived particularly considering that the merit list of physically handicapped category included only five candidates, the last person in the merit list having secured 129.22 marks, there being no dispute to no other candidate of physically handicapped category in between Shri Durgesh Mishra and the petitioner meaning thereby that it is only the petitioner who should have been given fifth reserved post against physically handicapped category more particularly when Section 34 of the Act, 2016 specifically stipulates that the Government **shall appoint** not less than 4% of total number of vacancies meant to be filled with persons with benchmark disability. Thus non appointment of petitioner would be clearly

violative of Section 34 of the Act, 2016.

38. Even though no argument has been raised by learned counsel appearing for the respondent no. 4 of the Act 1980 and the Uttar Pradesh Secondary Education Services Selection Board Act, 1982, having been repealed (and the said selection having been carried out by respondent no. 2) and having been replaced by the Act, 2023 yet as an abundant precaution it is indicated that this aspect of matter has been considered by a Division Bench of this Court in the case of **Dr. Manoj Kumar Rawat (supra)** has held after considering the provisions of Section 31(2) of the Act, 2023 has held as under:

"17. A careful reading of sub-section (2) would reveal that notwithstanding repeal of the Act of 1980 anything done or any action taken under the acts referred to in sub-section (1) is to be deemed to have been done or taken under the new Act and for such purposes the new Act were to be treated to have been in force at all material times. Once we find that the new Act contains no power with the Director to fill up a substantive vacancy which has come into existence later, to be filled from a candidate selected in an earlier advertisement, the action of the Director would be without jurisdiction. This is particularly so as the powers of the Director under the previous Act would continue under the new Act by virtue of section 31(2) of the Act of 2023 insofar as it is not inconsistent with the Act. A power which is not conferred upon the Director during the currency of new Act cannot be exercised by tracing the source of such power from the previous Act, which has already been repealed."

39. Considering the aforesaid discussion it is thus apparent that the respondents have patently erred in law in not appointing the petitioner against fifth reserved post for physically handicapped candidates of Assistant Professor (English). The matter may have been sent for consideration of the petitioners appointment but at the same time considering that the objections and arguments of the respondents indicating as to why the petitioner

was not appointed against fifth post have been considered threadbare and the fact that there is no dispute that the petitioner stood sixth in terms of merit of physically handicapped candidates and the fact that the respondents did not declare any cut off marks in the physically handicapped category as per judgement of Hon'ble Supreme Court in the case of **Recruitment of Visually Impaired in Judicial Services (supra)** and the mandatory provisions of Section 34 of the Act, 2016 which mandates every appropriate government **to appoint** not less than 4% of total number of vacancies as such instead of sending the matter to the competent authority the Court while exercising powers under Article 226 of the Constitution of India deems it fit to pass the following orders.

40. Keeping in view the aforesaid discussion, the writ petition is **allowed**. The order impugned dated 19.06.2023, a copy of which is annexure 1 to the writ petition is quashed. A writ of mandamus is issued commanding the respondents to appoint the petitioner on the post of Assistant Professor (English) against physically handicapped category.

41. Let the order be complied within six weeks from the date of receipt of a certified copy of this order.

Order Date :- 14.7.2025

J. K. Dinkar