

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5493 of 2022

Snehi Kumari D/o- Dharendra Kumar Sinha, resident of Birpur, Hospital Road, Near Shiv Mandir, Ward No.1, Basantpur, Supaul Bazar, Pin Code- 854340.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, General Administration Department Govt. of Bihar, Patna.
2. The Additional Secretary, General Administration Department Govt. of Bihar, Patna.
3. The Chairman, Bihar Public Service Commission (B.P.S.C), Bailey Road Patna- 2.
4. The Secretary, Bihar Public Service Commission (B.P.S.C), Bailey Road Patna- 2.
5. The Joint Secretary, Bihar Public Service Commission (B.P.S.C), Bailey Road Patna- 2.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 15520 of 2021

Sushma Kumari Wife of Sri Pritam Kumar, Resident of Mohalla - Mayur Vihar Colony (Shyam Nagar), P.O. - Khajpur, P.S. - Rajiv Nagar, District - Patna.

... .. Petitioner/s

Versus

1. The Bihar Public Service Commission, Patna through its Secretary,
2. The Chairman, Bihar Public Service Commission, Patna.
3. The Secretary Bihar Public Service Commission, Patna.
4. The Joint Secretary - Cum - Examination Controller Bihar Public Service Commission, Patna.
5. The State of Bihar through Principal Secretary, General Administrative Department, Government of Bihar, Patna.
6. The Additional Secretary, General Administrative Department, Government of Bihar, Patna.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 13884 of 2022

Bhawna Mishra Daughte rof Sri Pradeep Kumar Mishra, Resident of Village- Dhakauli, P.O.-Somaiya Nagar, P.S.-Kotwali Nagar, District-Barabanki (Uttar Pradesh).

... .. Petitioner/s

Versus

1. The Bihar Public Service Commission, Patna through its Secretary.
2. The Chairman, Bihar Public Service Commission, Patna
3. The Secretary, Bihar Public Servie Commission, Patna
4. The Joint Secretary-cum-Examination Controller, Bihar Public Servie Commission, Patna
5. The State of Bihar through Principal Secretary, General Administrative Department, Government of Bihar, Patna.
6. The Additional Secretary, General Administrative Department, Government of Bihar, Patna.
7. The Additional Chief Secretary, Road Construction Department, Government of Bihar, Patna.

... .. Respondent/s

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with

Civil Writ Jurisdiction Case No. 13970 of 2022

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1. Khushboo Kumari daughter of Sri Gopal Jha, resident of Village- Sangi, P.O.- Sangi, P.S.- Phulparas, District- Madhubani.
2. Ritu Shukla, daughter of Sri Girish Kumar Shukla, resident of Mohalla- Old Postal Colony No. 1, Mahmood Chowk, Chapra, P.S.- Chapra Sadar, District- Saran.
3. Himanshi Nag, daughter of Sri Shiv Gopal Nag, resident of 545 KA/AR-25, Arjun Vihar, Para Road, Rajajipuram, P.S.- Para Chowki, District- Lucknow (Uttar Pradesh).

... .. Petitioner/s

Versus

1. The Bihar Public Service Commission, Patna through its Secretary.
2. The Chairman, Bihar Public Service Commission, Patna.
3. The Secretary, Bihar Public Service Commission, Patna.
4. The Joint Secretary-cum- Examination Controller, Bihar Public Service Commission, Patna.
5. The State of Bihar through Principal Secretary, General Administrative Department, Government of Bihar, Patna.
6. The Additional Secretary, General Administrative Department, Government of Bihar, Patna.
7. The Additional Chief Secretary, Road Construction Department, Government of Bihar, Patna.

... .. Respondent/s

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with

Civil Writ Jurisdiction Case No. 14202 of 2022

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Nancy Shubham Daughter of Sunil Dhari Prasad Singh Resident of House No.- 30, Sardar Patel Path, North S.K. Puri, Post Office- Patliputra, Police Station- S.K. Puri, District- Patna, Pin Code- 800013.

... .. Petitioner/s

Versus

1. The State of Bihar Through the Principal Secretary, General Administration Department, Government of Bihar, Patna.
2. The Principal Secretary General Administration Department, Government of Bihar, Patna.
3. The Additional Secretary General Administration Department, Government of Bihar, Patna.
4. The Chairman Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, (Beli Road), Patna- 800001.
5. The Joint Secretary-cum- Examination Controller Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, (Beli Road), Patna- 800001.
6. The Secretary Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, (Beli Road), Patna- 800001.
7. Sushma Kumari Wife of Sri Pritam Kumar Resident of Mohalla- Mayur Vihar Colony (Shyam Nagar), P.O.- Khajpur, P.S.- Rajiv Nagar, District- Patna.
8. Saurav Kumar Rai, (UR) Roll No. 228265 and Merit Sl No. 2905.

... .. Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No.5493 of 2022)

For the Petitioner/s	:	Mr. Rajendra Narain, Sr. Advocate Mr. Ashok Kumar Choudhary, Sr. Advocate Mr. Bhola Kumar, Advocate Mr. Akshansh Ankit, Advocate
For the State	:	Mr. Manish Kumar (G.P.-4)
For the B.P.S.C.	:	Mr. Lalit Kishore, Sr. Advocate Mr. Sanjay Pandey, Advocate Mr. Nishant Kumar Jha, Advocate

(In Civil Writ Jurisdiction Case No. 15520 of 2021)

For the Petitioner/s	:	Mr. Rajendra Narain, Sr. Advocate Mr. Ashok Kumar Choudhary, Sr. Advocate Mr. Bhola Kumar, Advocate Mr. Akshansh Ankit, Advocate
For the State	:	Mr. Sheo Shankar Prasad (S.C.-8)
For the B.P.S.C.	:	Mr. Lalit Kishore, Sr. Advocate Mr. Sanjay Pandey, Advocate Mr. Nishant Kumar Jha, Advocate

(In Civil Writ Jurisdiction Case No. 13884 of 2022)

For the Petitioner/s : Mr. Rajendra Narain, Sr. Advocate
 Mr. Ashok Kumar Choudhary, Sr. Advocate
 Mr. Bhola Kumar, Advocate
 Mr. Akshansh Ankit, Advocate
 For the State : Mr. Sheo Shankar Prasad (S.C.-8)
 For the B.P.S.C. : Mr. Lalit Kishore, Sr. Advocate
 Mr. Sanjay Pandey, Advocate
 Mr. Nishant Kumar Jha, Advocate

(In Civil Writ Jurisdiction Case No. 13970 of 2022)

For the Petitioner/s : Mr. Rajendra Narain, Sr. Advocate
 Mr. Bhola Kumar, Advocate
 Mr. Akshansh Ankit, Advocate
 For the State : Mr. Md. Nadim Seraj (G.P.-5)
 For the B.P.S.C. : Mr. Lalit Kishore, Sr. Advocate
 Mr. Sanjay Pandey, Advocate
 Mr. Nishant Kumar Jha, Advocate

(In Civil Writ Jurisdiction Case No. 14202 of 2022)

For the Petitioner/s : Mr. Rajendra Narain, Sr. Advocate
 Mr. Swami Parth Sarthy, Advocate
 Mr. Bhola Kumar, Advocate
 Mr. Akshansh Ankit, Advocate
 For the State : Mr. P.K. Shahi, (A.G.)
 Md. Nadim Seraj (G.P.-5)
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 Mr. Sanjay Pandey, Advocate
 Mr. Nishant Kumar Jha, Advocate

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Constitution of India---Article 15(3), 16(1),(4), 226---Horizontal Reservation vs. Vertical Reservation---writ petition for a direction upon the Respondent Bihar Public Service Commission to consider the candidature of the Petitioner for the post of Assistant Engineer (Civil) and recommend the name of the Petitioner for

the said post as Petitioner has been illegally omitted from the final result by denying the benefits of 35% horizontal reservation for female candidates---plea that only 192 female candidates (out of total 702) were selected under Unreserved Category which comes to about only 26.64% of the total selected candidates whereas 35% horizontal reservation is stipulated and that vacancies still remain as lesser number of candidates was selected than the total vacancies.

Findings: vertical reservation is a social reservation for Schedule Castes, Schedule Tribes and Other Backward Classes under Article 16(4) of the Constitution of India. It is the higher form of special provision and cannot exceed 50% of total seats. Horizontal reservation, on the contrary, is a special reservation for other disadvantage citizens, such as women, persons with disabilities, and the transgender community, under Article 15(3) and 16(1) of the Constitution of India. It is a lesser form of special provision and cuts across vertical reservation---it is incumbent upon the Public Service Commission to fill up 35% of horizontal reservation, reserved for women from different quota of unreserved and reserved candidates---if on merit some female candidate is already recruited in the selection list, the percentage of number would be deducted from total 35% of women reservation---the State-Respondents have not done the said exercise before publication of selected list and recruitment of candidates---In a writ petition the statement made in counter affidavit can be equated with the counter evidence, wherein it is the incumbent duty of the respondents not only to deny the prosecution case but to assert its own case to the effect that the number of vacancies advertised were inclusive of backlog vacancies----in the absence of such case, subsequent argument cannot be relied on and accepted for consideration by this Court---writ petition disposed of directing the B.P.S.C. to recalculate the horizontal vacancy in terms of the declared percentage against the declared unreserved quota and re-write the cut off mark within 60 days from the date of communication of this order. **(Para 4, 12, 104, 106, 107, 110)**

1992 Supplementary 3 SCC 217, (2021) 4 SCC 686, (2021) 4 SCC 542, (2012) SCC Online Mad. 5451, AIR 1961 Calcutta 359

.....**Relied Upon.**

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2. The Additional Secretary, General Administration Department Govt. of Bihar, Patna.
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8. Saurav Kumar Rai, (UR) Roll No. 228265 and Merit Sl No. 2905.

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For the B.P.S.C.	:	Mr. Lalit Kishore, Sr. Advocate Mr. Sanjay Pandey, Advocate Mr. Nishant Kumar Jha, Advocate

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(In Civil Writ Jurisdiction Case No. 13884 of 2022)

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Mr. Ashok Kumar Choudhary, Sr. Advocate
Mr. Bhola Kumar, Advocate
Mr. Akshansh Ankit, Advocate
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For the B.P.S.C. : Mr. Lalit Kishore, Sr. Advocate
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(In Civil Writ Jurisdiction Case No. 13970 of 2022)

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Mr. Akshansh Ankit, Advocate
For the State : Mr. Md. Nadim Seraj (G.P.-5)
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Mr. Nishant Kumar Jha, Advocate

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
CAV JUDGMENT

Date : 07.02.2025

1. These batch of writ petitions having similar set of questions of law and fact have been heard together and this court proceeds to deliver the following judgment to dispose of aforementioned writ petitions by a composite judgment

2. In all the aforementioned writ petitions the petitioners appeared for selection and appointment the post of assistant engineer (civil) on the basis of an advertisement bearing number 2 of 2017 issued by Bihar Public Service Commission on 3rd march 2017, which was subsequently



amended by another notification having same advertisement number dated 6th February 2019, whereby and where under the number of posts were increased by the BPSC in consultation with the concerned department of the state government.

3. There are certain factual differences in respect of in the cases of the petitioner which I propose to discuss at the relevant point of time.

4. In all the writ petitions the petitioners have invoked extra ordinary constitutional writ jurisdiction of this court under article 226 of the constitution for the following reliefs:

1. For a direction upon the Respondent Bihar Public Service Commission to consider the candidature of the Petitioner for the post of Assistant Engineer (Civil) pursuant to Advt. No, 02/2017 and recommend the name of the Petitioner for the said post as Petitioner has been illegally omitted from the final result by denying the benefits of 35% horizontal reservation for female candidates under Letter No. 2342 dated 15.02.2016 issued by the General Administrative Department, Bihar.
2. To pass any other order/orders in shape of a



consequential relief to which the Petitioner may be found to be legally entitled to in the facts and circumstances of the instant case at hand.

5. It is on record that in the above mention writ petition, the contesting parties have submitted series of affidavits which would be profitable to discuss in brief chronologically.

6. Petitioner, namely Sushma Kumari filed the writ application under Article 226 on 31.08.2021. The fact in brief is that the Petitioner applied for the post of Assistant Engineer (Civil), under Unreserved Category, pursuant to Advertisement No. 02/2017 issued by the Bihar Public Service Commission. It is stated that a total number of 1284 vacancies under different departments of the State of Bihar was advertised vide Advertisement No. 02/2017. Petitioner was allotted Roll No. 213988 in the selection process and she cleared the preliminary examination conducted on 15.09.2018. Thereafter, a Notification dated 06.02.2019 was published by the Commission inviting applications from candidates who had cleared preliminary examination. Further, terms and conditions of the Advertisement No. 02/2017 was reiterated in the said Notification. There is a specific stipulation in the aforesaid



Advertisement that 35% horizontal reservation for women would be maintained in light of Letter No. 2342 dated 15.02.2016 issued by the General Administrative Department, Bihar. It is further clarified in the said Letter that in case of any vacancy reserved for female being unfilled can be filled in by male candidates. Petitioner appeared in mains examination from 27.03.2019 to 31.03.2019 and was subsequently declared successful in the mains examination vide result dated 24.01.2021. Petitioner was called for interview on 18.03.2021 and performed at par with other candidate. Name of the Petitioner was omitted from the Final Result dated 14.07.2021 and only 1240 candidates were declared successful against 1284 vacancies. It is stated that a bare perusal of the final result would reveal that under Unreserved (01) category only 702 candidates were declared successful whereas total number of vacancies under Unreserved Category was 733.

7. Under Unreserved Category, benefit of horizontal reservation has been given to Physically Handicapped and under Freedom Fighter quota. However, such benefit of horizontal reservation has not been given to female candidates, in as much as, only 187 female candidates (out of total 702) were selected under Unreserved Category which comes to



about only 26.64% of the total selected candidates. It is stated that such an action by the Respondent Commission is in utter violation of Letter No. 2342 dated 15.02.2016 and cannot be sustained in the eyes of law. Learned advocate for Petitioner contends that when eligible female candidates like the Petitioner was available then Respondent Commission could not have proceeded to fill the vacancies with male candidates by breaching the horizontal reservation of 35% available to female candidates. It is pertinent to mention here that Petitioner secured a total of 390 marks [340 in written examination and 50 in interview] in the selection process. However, the Petitioner was declared unsuccessful by fixing the cut-off marks as 394 [Unreserved (Female)]. It is stated that the Respondent Commission has erred in fixing the cut-off for Unreserved (Female) as 394 when 35% female candidates were not already in select list as stated hereinabove.

8. It is stated by the Petitioner that another error which has crept in the Final Result dated 14.07.2021 is that the Respondent Commission has erroneously extended the benefit of horizontal reservation under Letter No. 2342 dated 15.02.2016 to even such candidates who are domiciled outside the State of Bihar. It is trite law that when a vacancy/post is



under the control of Central Government then reservation status remains same throughout the Country. However, it has been settled by the Hon'ble Apex Court that when a vacancy/post is under the control of respective State Government, like Advertisement No. 02/2017 in question, then migration results in loss of status. Thus, benefit of horizontal reservation under Letter No. 2342 dated 15.02.2016 [Annexure P2] is restricted to residents / domiciles of the State of Bihar. It is stated that the Respondent Commission has followed the same principle in other horizontal reservation granted by the State of Bihar i.e. for family members of freedom fighters, however, in the case of female reservation the Respondent Commission to give the settled position of law a complete go-by which cannot be sustained in the eyes of law.

9. It is finally stated by the Petitioner that she is eligible under the terms of the Advertisement to be appointed for the post of Assistant Engineer (Civil). It is stated that the Petitioner obtained B.Tech. in Civil Engineering from B.I.T., Sindri (Vinoba Bhave University) in 2013 and secured first division (7.20 CGPA). Thereafter, the Petitioner duly qualified in both preliminary and main examination pursuant to Advertisement No. 02/2017. It is stated that the Petitioner



secured 340 marks in main written examination while cut-off for Unreserved (Female) was merely 275. Thus, it is stated that Petitioner is qualified to be selected and as such the Respondent Commission could not have selected male candidates on the posts meant for Female candidates under the benefit of horizontal reservation.

10. Supplementary Affidavit was filed on behalf of the petitioner dated 01.09.2021 and submits that in compliance of the order dated 16.08.2021 passed in C.W.J.C. No. 13107 of 2021 and analogous case passed by this Hon'ble Court, the Respondent Bihar Public Service commission has revised the final Result dated 14.07.2021 and again published final result of Assistant Engineer (Civil) pursuant to advertisement No.02/2019 on 24.08.2021 (Annexure-P/11 page 25) in which again the name of the petitioner was omitted from the revised final Result dated 24.08.2021 and only 1241 candidates were declared successful against 1284 vacancies. It is stated that a bare perusal of the final result would reveal that under unreserved (01) category only 703 candidates were declared successful whereas total number of vacancies under unreserved category was total number of vacancies under unreserved category was 735.



11. Counter Affidavit on behalf of Bihar Public Service Commission was filed on 15.12.21. The commission submits that it has published the final result in the light of letter no. 2342 dated 15.02.2016 and letter no. 11364 dated 04.09.2017 of the General Administration Department, Government of Bihar keeping in view the provision of 35% horizontal reservation available to women candidates of all categories and in accordance with the number of vacancies and roster prepared by the Department concerned. It is stated and submitted that the benefit of 35% horizontal reservation to women candidates of all categories has been extended in accordance with the opinion rendered by the Advocate General in this behalf. Moreover, memo no. 2342 dated 15.02.2016 does not restrict the said benefit to the women candidates belonging to the State of Bihar only. It is stated that the Commission has not violated the terms of memo no. 2342 dated 15.02.2016 and the final result has been published by the Commission on 14.07.2021 strictly in accordance with terms of the requisition, reservation rules and roster prepared by the Department concerned. It is further stated that the petitioner was not declared successful as she secured finally 390 marks which is less than the cut off marks in her category, i.e., 394.



The petitioner being a General category candidate is placed at merit sl.no. 2155 and the last candidate selected is placed at merit sl.no. 501 and the last selected candidate under 35% horizontal reservation for women in General category is at merit sl. no. 2092 and the petitioner's merit sl.no. is 2155 in the combined merit list. Respondents further states and submit that the Commission has published revised final result on 24.08.2021 in view of the order passed by the Hon'ble High Court in CWJC No. 13107/2021 and another analogous matter. Thereafter, the Commission sent the revised recommendation of the successful candidates to the concerned Department vide letter no. 30 dated 25.08.2021. Thus, the selection process is over.

12. Petitioner files the rejoinder to the Counter Affidavit filed by the Respondent i.e. Bihar Public Service Commission dated 13.01.2022. In the rejoinder the petitioner submits that in the counter affidavit, under reply, is completely silent about number of posts reserved for female under 35% horizontal reservation given to female candidates. It stated that only 192 female candidates (out of total 702) were selected under Unreserved Category which comes to about only 26.64% of the total selected candidates whereas 35%



horizontal reservation is stipulated. It is stated that vacancies still remain as lesser number of candidates was selected than the total vacancies. Therefore, the Petitioner may be selected against one such vacant post without interfering with the rights of other candidates created under Final Result dated 14.07.2021.

13. Supplementary counter affidavit on behalf of the Respondent i.e. Bihar Public Service Commission was filed on 07.02.2022. Respondents in compliance of the order dated 24.01.2022 passed in the instant matter, presents the chart giving details of number of vacancies advertised in various categories including that for female category and selected candidates under different categories are as follows:

Sn No	Category	No. of vacancy	No. of selected candidates	No. of vacancies for female	Total number of females Candidates selected	Details of the last selected candidates
	UR (01)	719	703	192	192	Roll no- 220116 Name- Pooja
	SC (02)	147	147	50	31	Roll no- 212173 Name-Jyoti kumari



	ST (03)	04	04	02	02	Roll no - 210416 Name- Supriya Kumari
	EBC (04)	230	230	58	58	Roll no.- 228047 Name- Archana Kumari
	BC (05)	92	92	21	21	Roll no.- 216744 Name- Tripti Jaiswal
	BCL (06)	65	65	65	65	Roll no.- 212350 Name- Ankita kumari
	TOTAL	1257	1241	388	369	

14. In the supplementary counter affidavit the Respondent submits that the General Administration Department, Government of Bihar vide letter no. 2342 dated 15.02.2016 (Annexure - E to the counter affidavit) clearly stipulates that in the event of non-availability of eligible female candidates, the posts may be filled by male candidates of the relevant category (reserved/unreserved) in the same recruitment year. In the light of above-mentioned letter remaining vacant 19 seats of SC (02) Category which were reserved for female candidates has been filled with male



candidates of SC (02) Category due to non-availability of suitable eligible female candidates of SC (02) Category.

15. Respondent namely the State and Additional Secretary, General Administrative Department filed the Counter Affidavit for the first time on 29.03.2022. Vide letter No. 3836 dated 14.03.2022 of General Administration Department, Bihar, Patna, the Additional Chief Secretary / Principal Secretary / Secretary of the concerning departments viz. Construction Department, Bihar, Patna / Public Health Engineering Department Bihar, Patna Department, Bihar, Patna Resources Department, Bihar, Patna Building Construction Department, Bihar, Patna / Rural Works Department, Bihar, Patna and Planning and Development Department, Bihar, Patna were requested / Minor Water Resources Road / Water Building Construction Department, Bihar, Patna / Rural Works Department, Bihar, Patna and Planning and Development Department, Bihar, Patna were requested to furnish the copy of the roster clearance done by their Department and sent to the General Administration Department, Government of Bihar in the matter of Advertisement No. 02/2017, for appointment of the published Assistant Engineer (Civil). All the seven departments came



with its report regarding roster clearance for advertisement in question. I would like to reiterate the data as it is presented to me in the counter affidavit of the Respondent.

16. The Building Construction Department- For this department, there were 122 vacancies reported in which 38 posts were calculated as a back log. In this way, the current vacancies were only 84 against which 22 posts available to the women as a horizontal reservation. The roster clearance for 122 posts were made in two transactions; naturally there is a short fall of horizontal reservation in the said case.

17. The Rural Works Department- For this department there were 250 vacancies reported, against which 17 posts were calculated as a back log, in this way the current vacancies available were only 233. Wherein roster clearance for 59 posts were given to the women as a horizontal reservation. As the roster clearance for 250 posts has been done in two transactions, hence there is minor short fall too of horizontal reservation for women in this case.

18. The Road Construction Department- For this department there were 236 vacancies were reported against which 57 posts were calculated as a back log, in this way the current vacancies were only 179. In this roster clearance 56



posts were given to the women as a horizontal reservation. As roster clearance for 236 posts have been done in two transactions, hence there is minor short fall too of horizontal reservation for women in this case.

19. The Public Health Engineering Department- For this department there were 64 vacancies reported against which 17 posts were given to the women as horizontal reservation. Since the roster clearance for 64 posts have been done in three transactions, hence there is an automatic short fall in the horizontal reservation for women in this case.

20. The Planning and Development Department- For this department there were 270 vacancies reported against which 92 posts were given to the women as a horizontal reservation. As the roster clearance for 270 posts has been done in one transaction, hence in this case, the quota of horizontal reservation has been fully filled up.

21. The Water Resources Department- For this department there were 284 vacancies reported, against which 73 posts were given to the women as a horizontal reservation. Also 23 posts were given to the women for backward classes (W.B.C.) as a back log. There is a short fall of horizontal reservation in this case, but it is due to calculation of back log



for W.B.C. in this roster clearance.

22. The Minor Water Resources Department- For this department there were 56 vacancies reported earlier but on later part, the vacancies were revised and it was reported as a 31 posts only. Against which 2 posts calculated as a back log and 5 posts were given to the women as horizontal reservation. As roster clearance for 31 posts has been done in two transactions, hence there is also a minor short fall in horizontal reservation for women in this case. But it is due to revision of vacancies made by the administrative department.

23. Above data in simplified form has been traced down in the chart form:

S.no.	Name of the department	Total no. of vacancies	35% of total vacancies	Actual horizontal reservation (female) provided by the department
1)	Planning And Development Department	270	94.5-95	92
2)	Public Health Engineering Department	64	22.4-22	17
3)	Minor Water Resources Department	31	10.85-11	5
4)	Road Construction Department	236	82.6-83	55
5)	Water	284	99.4-99	73



	Resources Department			
6)	Building Construction Department	122	42.7-43	22
7)	Rural Works Department	250	87.5	59
	Total	1257	441	323

24. State further mentions the Letter No. 3862 dated 16.03.2022 which reports about the 719 posts or vacancies being calculated for unreserved category against which 192 posts have been made available to the female candidates of unreserved category. In the combined merit list prepared for the final result the name of the petitioner i.e. Sushma Kumari (Roll No. 213988) has been shown at Sl. No. 2155, whereas the last successful candidate in this category is at Sl. No. 2092. It is also relevant to point out and submit that there are 9 female candidates placed in between combined merit list from 2092 to 2155 who have not been selected due to lack of vacancies in this category.

25. Second 2nd Supplementary Affidavit on behalf of the petitioner was filed on 29.03.2022. It is being filed in in compliance of the order dated 03.03.2022 passed in the instant writ application by this Hon'ble Court whereby and whereunder direction was issued to the Petitioner in the



following terms: "*Learned counsel for the petitioner is hereby directed to ascertain from the internal correspondence between the State Government (Seven departments) and B.P.S.C. in respect of reservation for number of posts to be recruited with reference to reservation policy. He is hereby directed to apprise by means of a chart or statement with reference to various notifications issued by the seven departments to the B.P.S.C. in order to arrive whether is there any violation of percentage of reservation for women candidates in the process of recruitment to the post of Assistant Engineer (Civil) or not?*". Upon the direction, the internal communication between the respective departments of Government of Bihar and Respondent Bihar Public Service Commission regarding number of vacancies and applicable reservation was handed over to the Petitioner pursuant to the direction of this Hon'ble Court. According to the internal communication all the respective seven Departments of Government of Bihar, in unison, acknowledge and accept applicability of Letter No. 2342 dated 15.02.2016 [Annexure P2 to the Writ Application] in the instant selection process whereby 35% horizontal reservation has been granted to female candidates in all the categories including unreserved



category. Petitioner vehemently points out the error has crept into the requisitions made by the respective Departments, in as much as, 35% horizontal reservation to female candidates in light of Letter No. 2342 dated 15.02.2016 [Annexure P2 to the Writ Application] has not been extended in its true letter and spirit. It is stated that as many as 118 seats have not been reserved for Female Candidate in violation of Letter No. 2342 dated 15.02.2016 as 35% of total requisitioned vacancies by the respective Department i.e. 1257 [as stated in the internal communications) comes to about 441 vacancies but reservation has been extended only to 323 candidates. Denying the chart proposed by the state, the petitioner put forth its own detailed chart as follows:

Sno.	Name of the department	Total no. of vacancies	35% of total vacancies	Actual-horizontal reservation(female) provided by the department
1)	Planning And Development Department	135	47.25-47	46
2)	Public Health Engineering Department	32	11.2-11	9
3)	Minor Water Resources Department	28	9.8-10	5
4)	Road Construction Department	104	36.4-36	31
5)	Water Resources Department	196	68.9-69	48



6)	Building Construction Department	54	18.9-19	14
7)	Rural Works Department	170	59.5-59	39
	Total	719	251	192

26. Petitioner pleads that it is crystal clear from the chart herein above that even in unreserved category, to which the Petitioner belongs, benefit of horizontal reservation was not provided for 35% female candidates as provided under Letter No. 2342 dated 15.02.2016 (Annexure P2 to the Writ Application). It is stated that as many as 59 seats have not been reserved for Female Candidate as 35% of total requisitioned vacancies by the respective Department i.e. 719 [as stated in the internal communications] comes to about 251 vacancies but reservation has been extended only to 192 candidates. Petitioner reiterates that total number of vacancies still remain unfilled, in as much as, lesser number of candidates were selected against total number of vacancies, Therefore, the Petitioner may be selected against one such vacant post without interfering with the rights of other candidates created under Final Result dated 14.07.2021 and 24.08.2021.

27. Supplementary Counter Affidavit was filed on behalf of The State on 13.05.2022. The state emphasis on



adoption of 100 point modal roster in which 35 percent horizontal reservation has been granted to all unreserved and reserved category and presented the chart below:

i)	Unreserved	Roster Point- 3,9,15,21,27,33,39,45,49,55,61,67,73,79, 85,91,97= 17 posts
ii)	Schedule Cast	Roster Point- 10,24,40,62,78,98= 6 posts
iii)	Schedule Tribe	Roster Point- 0 posts
iv)	Extremely Backward Class	Roster Point-8,26,42,60,70,94,100= 7 posts
v)	Backward Class	Roster Point- 12,38,64,90= 4 posts
		Total – 34 posts

28. For the matter relating to 35% horizontal reservation of women, state contends that it may be saturated only in the situation, when roster clearance falls under roster point 1 to roster point 100. In case of such roster clearance not falling under roster point 1 to roster point 100, it may be less than 35%, more than 35%, 0% and 100%.

29. Case of the other petitioners are factually similar with that of Sushma Kumari’s. They also have filed the writ petition for similar relief. Only difference in the above-mentioned cases are, while Sushma Kumari got 390 marks, Snehi Kumari, petitioner of CWJC No.5493/2022 got 392 marks, Bhavana Mishra, petitioner CWJC No.13884/2022 also got 392 marks, Kushboo Kumari, petitioner of CWJC No.13970/2022 got 390 marks & Nancy Shubham, petitioner



in CWJC No.14202 of 2022 got 375 marks.

30. Mr. Rajendra Narain, learned Senior Counsel appearing on behalf of the petitioners in CWJC No. 5493 of 2022, CWJC No.15520 of 2021, CWJC No.13884 of 2022, CWJC No.13970 of 2022 and CWJC No.14202 of 2022. In the above mentioned writ petitions, at the outset draws my attention to the contents of Advertisement No.02/2017. The said advertisement states consolidated number of vacancy to be filled up in different departments of Engineering Service which was initially declared as 963.

31. It is stated in the said advertisement that 35% of horizontal reservation would be available to the female candidates. There are other horizontal reservations stated in the said advertisement. However, these are not relevant for our purpose. In Clause-6(ka)(i) it is further stated that the candidates who want to claim reservation must state the said fact in their application. The reservation policy would be applicable for the candidates, who are permanently residing in the State of Bihar. The said policy also is not applicable for the candidates residing outside the State of Bihar.

32. Subsequently, another notification under same advertisement number was released, enhancing the number of



total candidates to 1284.

33. The learned Senior Counsel next submits that the General Administrative Department, Government of Bihar was at a fix, as to how 35% of horizontal vacancy is to be filled up in relation to roster point. The issue was referred to the learned Advocate General of the State of Bihar. The learned Advocate General placing reliance on the Supreme Court decision in ***Rajesh Kumar Dariya Vs. Rajasthan Public Commission and others, (2007) 8 SCC 785*** and ***Anil Kumar Gupta Vs. The State of Uttar Pradesh, (1995) 5 SCC 173 at Page-185***, opined inter-alia as follows:-

“However, a three Judge Bench of the Hon’ble Supreme Court in the case of ***Rajesh Kumar Dariya Vs. Rajasthan Public Commission and others***, reported in ***(2007) 8 SCC 785*** quoted with approval, in para-7 the method of implementing special reservation, which is horizontal reservation as explained in the case of ***Anil Kumar Gupta Vs. The State of Uttar Pradesh***, reported in ***(1995) 5 SCC 173 at Page-185***. The proper and correct course is to first fill-up the Open Competition (O.C.) (50%) on the basis of merit, then fill up each of the social reservation quotas i.e. S.C., S.T. and B.C.. The third step would be to find out, how many candidates to special reservations have been



selected on the above basis. If the quota fixed for horizontal reservation is already satisfied- in case it is an over all horizontal reservation-no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (if, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/ accommodation, as stated above, should be applied separately to each of the vertical reservation. **In such a case, the reservation of 15% in favour of special categories, over all may be satisfied or may not be satisfied.**”

34. It is pertinent to mention here that above underlined portion is stressed upon by the learned Advocate General in his argument, which I proposed to discuss at the relevant point of time.

35. The said Notification No.2342 dated 15.02.2016 was further explained by illustration as follows :-

“ If 100 vacant posts are to be selected-

(a) First, 50% of such vacant post shall be filled up on the basis of merit. In the said merit list unreserved candidates, reserved candidates,



women, men, all shall be accommodated.

(b) On the next phase 50% of reserved candidates would be selected and filled up. Out of the said 50% reserved candidate, 47% candidates would be either male or female candidates and 3% would be reserved female candidates.

(c) In the third phase of selection process calculation will be made on the basis that how many women are selected in different reserved/non-reserved categories without 35% horizontal reservation in the selected list of 100 posts. If their 35% horizontal reservation quota is completed, then this selection list will be considered final for appointment. If on this basis of the 35% horizontal reservation quota for women is not completed, then in the particular category (reservation/unreserved) in which there is a shortage of women, to complete it upto the limit of 35% in that category, that number of male candidates having the lowest position in the merit order will be removed so that the reservation limit of 35% for women is completed. If there are female candidates in the lowest position, then instead of removing them, the male candidate above them in the merit order will be removed.

36. On the basis of the above illustration, the State-Respondents in their supplementary counter affidavit dated



13.05.2022 stated the roster points in respect of 34 posts against 100 posts to be applicable for horizontal reservation.

37. The learned Senior Counsel on behalf of the petitioners next refers to Page-43 of the writ petition stating, inter-alia, that in different departments of Engineering Service after examination 733 candidates were selected and out of the said 733 candidates, 196 female candidates were selected under 35% reservation, meaning thereby the State only filled-up 26.74% of the vacancy.

38. Similarly in respect of Extremely Backward Class quota 240 candidates were selected, out of which 62 candidates were women, meaning thereby 25.83% of horizontal reservation was filled up.

39. In time it is submitted by the learned Senior Counsel on behalf of the petitioners that out of 1282 candidates, 331 female candidates were selected, whereas 448 female candidates ought to have been selected had 35% of horizontal reservation been taken care of.

40. The learned Senior Counsel on behalf of the petitioner simultaneously takes me to Annexure-C of the counter affidavit filed by the BPSC refers to a corrigendum dated 20.02.2021, which refers to the number of total post of



Engineering Service, which were filled up, was 1257 and out of the said 1257 candidates, 323 women candidates were selected in respect of 35% quota, while 35% of 1257 would come to 440, so shortage remains the same.

41. It is submitted by the learned Senior Counsel on behalf of the petitioners that cut off mark for unreserved female candidates was fixed by the Public Service Commission by its notice dated 14.07.2021 as 394 marks. It is contended on behalf of the petitioners that had entire 35% of horizontal reservation been accommodated in the reserved quota of unreserved candidates, the cut off mark would have been come down and the petitioners could have been selected in service.

42. The learned senior counsel on behalf of the petitioner next refers to the counter affidavit filed on behalf of the Bihar Public Service Commission on 15.02.2021. In paragraph No.13 of the said counter affidavit it is claimed by the Commission that it had published the final result in the light of Letter No.2432 dated 15.02.2016 and the letter No.11364 dated 04.09.2017 issued by the General Administration Department, Government of Bihar keeping in view the provision of 35% horizontal reservation available to



women candidates of all categories and in accordance with the number of vacancies and roster prepared by the department concerned. It is also contended on behalf of the B.P.S.C. that before publication of result legal opinion of the Advocate General of the State was obtained and the result was published on the basis of the said legal opinion. On 24.08.2021, in view of the order passed by this Court in C.W.J.C. No.13107 of 2021. In view of such circumstances, it is contended on behalf of the B.P.S.C. that selection process being over, these batch of writ petitions are not maintainable.

43. In reply to such objection, the learned Senior Advocate on behalf of the petitioners refers to paragraph No.7 of the rejoinder affidavit filed on behalf of the petitioners on 31.01.2022, it is contended on behalf of the petitioners in CWJC No.15520 of 2022 that the petitioners failed to clear cut off marks of 394 and she was not selected in the horizontal reservation of 35% meant for female candidates. However, both the States Government as well as B.P.S.C. remain complete silence about number of posts reserved for female under 35% horizontal reservation given to the female candidates. It is stated that only 192 female candidates out of total 703 were selected under unreserved quota, which comes



to about only 26.64% of the total selected list, whereas 35% of horizontal reservation is stipulated.

44. In this regard, the learned Senior Advocate on behalf of the writ-petitioners refers to Order No.7 dated 22.02.2022, Order No.8 dated 03.03.2022, Order No.9 dated 09.05.2022 and Order No.10 dated 17.05.2022 passed by a Coordinate Bench during the pendency of the instant writ petitions. I have carefully perused the said order, in Order No.7 dated 22.02.2022 it is observed by this Hon'ble Court:-

"If one go by arithmetic calculation for 703 selected candidates 35% would be 246 that apart it is confusing process for the reasons that the number of vacancies were notified 1284. In other words, there is no corrected figure in respect of filling up of Assistant Engineer (Civil) pursuant to the Advertisement No.2/2017 since several time number of vacancies have been altered".

45. With the above observations, next date of hearing was fixed on 03.03.2022. On 03.03.2022, this Court passed order No.8 directing the Principal Secretary, General Administration Department, how each of the department have arrived to the percentage of women reservation for the purpose of present recruitment to the post of Assistant Engineer (Civil), since 35% of the number of vacancies notified are not tallying



with the percentage of reservation. From the date of reservation policy to the extent of 35% for general women till the present recruitment how many vacancies for women reservation have been filled up be made known with necessary material information so as to ascertain as to whether any excess reservation to the women has been provided in earlier recruitment so as to reduce the percentage of women reservation in the present process of recruitment or not? The aforesaid material shall be placed on record by means of supplementary affidavit by the 5th respondents in the form of statement.

46. B.P.S.C. was also directed to furnish internal information between the State Government Departments (Seven) and the B.P.S.C. in respect of process of recruitment to the post of Assistant Engineer (Civil) by various notifications which has been made available to the Court during the course of the day. The petitioner was also directed to ascertain from the internal correspondence between the State Government (Seven departments) and B.P.S.C. in respect of reservation for number of posts to be recruited with reference to reservation policy. The petitioner was further directed to apprise by means of a chart or statement with reference to various notified issued



by seven Department to the B.P.S.C. in order to arrived at whether is there any violation of percentage of reservation for women candidates in the process of recruitment to the post of Assistant Engineer (Civil) or not? On 09.05.2022 the Under Secretary, General Administration Department, Government of Bihar was directed to be present in Court to apprise as to how he has calculated women reservation as 35%. By order No.10 dated 17.05.2022 it is observed by the Coordinate Bench that by virtue of Additional Supplementary Counter Affidavit, the State Government has admitted in Annexure-G that some error was committed in respect of non adherence to 35% women reservation by the respective department while forwarding the material information to Government Commission to fill up Assistant Engineers post. In the light of such admission on behalf of the State, the State- General Administration Department was directed to rectify the classification of vacancies earmarked for women reservation and to that effect necessary correction was directed to be made to the original proposal to fill up the post of Assistant Engineer in various departments to the Public Service Commission.

47. The learned Senior Advocate on behalf of the petitioners refers to paragraph No.10 of the counter affidavit



filed by the General Administration Department at Page-174 and submits that there are in all 75 posts which remains unfilled from 35% quota alongwith the statement made in paragraph No.10 of the aforesaid counter affidavit.

48. The learned Senior Counsel on behalf of the petitioners draws my attention to Annexure-G at running page-376 of the supplementary counter affidavit filed by respondent No.5. Annexure-G shows that in Planning and Development Department, 270 numbers of posts of Assistant Engineer (Leaving Behind) P.H.C. candidate was 270 and the calculation of 35% / 34% of horizontal vacancies for women was fixed at 92. However, 35% of such vacancies ought to have been 94/95 so there are two vacancies to be filled up in Planning and Development Department. In Minor Water Resources Department, total number of vacancies in unreserved category was shown as 31 and the number of horizontal vacancy was shown as 11; out of the said 11 candidates, 05 candidates were appointed. In Water Resources Department, out of 270 candidates, 92 was shown as the percentage of horizontal vacancy and out of them 73 vacancies were filled up. In Building Construction Department, there were 84 unreserved candidates out of them 29 women candidates were recruited in



35% quota and the vacancy is 22. In Rural Construction Department, out of 233, 79 posts were filled up, in 35% women reservation quota leaving behind 59 posts. In Road Construction Department out of 179 unreserved posts, 80 posts were filled up in 35% quota but 56 posts were created. In Public Health Engineering Department, out of 64 unreserved quota, 22 posts were filled up by 35% reservation and 17 posts were filled and explanation was supplied in Annexure-G stating the reasons of lesser number of appointment in 35% reserved quota for the women. I proposed to deal with the reasons subsequently.

49. The learned Senior Advocate on behalf of the petitioners also submits that the State Government filed L.P.A. against the order dated 17.05.2022 passed by this Court. The said L.P.A. bearing L.P.A. No.309 of 2022 was disposed of on 17.04.2023 wherein the Division Bench noticed that the interim order dated 17.05.2022 effectively disposed of the writ petition directing revision of seniority list. The argument of the reservation not being employed on the cumulative posts available in the notification and roster points having been identified with respect to the different categories, both reserved and unreserved, for the purpose satisfying horizontal



reservation at the rate of 35% was not considered. The learned Advocate General has made further submission that 3% of the posts are reserved for Schedule Backward Class Tribes Women and in the circumstances applying 35% reservation can only lead to such percentage being applied on 97 vacancies which essentially would work out to 34% of the total vacancies.

50. Considering such aspect of the matter, the Division Bench was pleased to set aside the impugned order with liberty to the parties to agitate every point before this Court on merit.

51. The learned Single Judge was also given liberty to consider the validity of the argument advanced on behalf of the State.

52. Mr. Rajendra Narain, learned Senior Counsel on behalf of the petitioners next draws my attention to Annexure-SA/2 appended to the 3rd supplementary affidavit on behalf of the petitioners. Annexure-SA/2 is a Notification No.14762 issued by the General Administration Department, Government of Bihar. Paragraph No.2 of the said notification is important and reproduced below in English :-

"2. It is noteworthy, in this regard from the observation of the mark sheet of the petitioner (Ms. Sushma Kumari) attached with the affidavit filed by



the Commission in the writ petition No.15520 of 2021 (Sushma Kumari Vs. Bihar Public Service Commission and others) that she is a candidate of unreserved category. It was also considered that while publishing result of the concerned examination, in the event of non-availability of total 17 eligible disabled candidates, a total 17 posts of unreserved candidates have been kept reserved by forwarding them by further transaction, i.e. there are total 17 such posts, the requisition of which has already been sent to the Bihar Public Service Commission but against this no recommendation has been made at present."

53. In the subsequent clauses of the said notification, it is stated :-

"3. In clause-9 of the Resolution No.962 dated 22.01.2021 of the General Administration Department, it is provided that – **“Where a vacancy cannot be filled in any recruitment year due to non-availability of persons with disabilities referred to above or for any other sufficient reason, such vacancy shall be carried forward to the subsequent recruitment year by marking it in the unreserved category.....**

4. Therefore, in the light of the order passed by High Court, Patna on 17.05.2022 in C.W.J.C. No.15520 of 2021 (Sushma Kumari Vs. Bihar Public Service Commission and others) and on 18.08.2022 in M.J.C. No.1247 of 2022 (Sushma Kumari Vs.



Bihar Public Service Commission and others) and subject to the final order passed in L.P.A. No.309 of 2022 (State of Bihar and others Vs. Sushma Kumari), filed by the State against order passed in C.W.J.C. No.15520 of 2021, Bihar Public Service Commission permitted to select the petitioner Ms. Sushma Kumari against a vacant posts from the 17 unreserved vacant posts earlier requisitioned but earmarked for disabled persons against the horizontal reservation of 35% for women under the unreserved category, for the time being, revised requisition for only one (01) post is being sent to the Bihar Public Service Commission."

54. Thus, it is contended on behalf of the learned Senior Counsel on behalf of the petitioners that in case of horizontal vacancy, first the unreserved meritorious candidates are to be filled up in their 50% quota. Thereafter, as a result of horizontal vacancy within a particular quota (here it is unreserved), the successful women candidates will march into the position from below the list till completion of the special quota of 35% / 34%. The quota of female unreserved candidates within the same unreserved category was stipulated by the State in order to implement Article 15(3) and Article 16(4) of the Constitution of India because of inadequate representation of women in the services under the State.

55. In support of his argument, he first refers to the



decision of the Hon'ble Supreme Court in *Anil Kumar Gupta and others Vs. State of U.P. and others*, reported in (1995) 5 SCC 173, it is submitted by the learned Senior Counsel on behalf of the petitioners that the learned Advocate General submitted his opinion on the basis of paragraph No.17 & 18 of the aforesaid report in Anil Kumar Gupta (supra). However, State Government has not taken care of Paragraph No.20 of the aforesaid judgment.

56. In paragraph No.19 of the said judgment, the Hon'ble Supreme Court reiterated the observation of *Indra Sawhney case, 1992 Supplementary 3 SCC 217*.

57. In Indra Sawhney, it was observed :-

"(B) But at the same time, one think is clear. It is in very exceptional situation – and not for all and sundry reasons – that any further reservations and whatever kind should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress the specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be



correspondingly whittled down and that is not a reasonable think to do."

58. Acquitting the said observation, it is decided by the Hon'ble Supreme Court in Anil Kumar Gupta :-

"Though, the said observation was made with reference to clause (1) and (4) of Article 16, the same apply with equal force to clauses (1) and (4) of Article 15 as well in this case, the reservation of 15% of seats for special categories was on very high side. As pointed out above, two categories out of them representing 6% out of 15% are really reservations under Article 15(4) wrongly treated as reservations under Article 15(1). Even otherwise the special reservation would be 9%. The respondents would be well advised to keep in mind the admonition administered by this Court and ensure that the special reservations (horizontal reservations) are kept at the minimum."

59. Subsequently, in paragraph No.20, the Hon'ble Supreme Court was pleased to state the reason for its decision :-

"20. Having pointed out the errors in the rule of reservations and its implementation, the question arises what should be done now? Should we interfere with the admissions already finalised? We think it inadvisable to do so. It may be remembered that the admissions now finalised (in June-July, 1995) are really the admissions which ought to have



been finalized one year back. The delay has occurred on account of first faulty notification (issued on 17.05.1994). When a writ petition was filed in this Court – probably some writ petitions in High Court also – the Government realised its mistake and issued the revised notification on 17.12.1994. It dropped the reservation in favour of women in stages. The University had then to issue a corrigendum asking the special category candidates to indicate their social status. This was a delayed exercise which ought to have been undertaken at the beginning itself. Even the manner in which the seats have been filled up, as indicated above, is faulty. What we have laid down herein is more for the purpose of future guidance for the respondents. At the same time, we have to rectify the injustice done to the open competition candidates in the admissions in question, to the extent feasible. Accordingly, we direct that in the matter of admission made pursuant to CPMT 1994, while the admissions are already finalized shall not be disturbed, the Uttar Pradesh Government shall create 34 additional seats in the M.B.B.S. course and admit 34 students from the OC category against those seats. If any seats are vacant as on today, they shall also be filled from the O.C. category alone. (It is made clear that O.C. category means, the merit list and not distinction shall be made among the candidates in the O.C. list on the basis of their social status because it is well settled that even a ST/SC/OBC candidates is entitled to obtain a seat in



the O.C. category on the basis of his merit). The Counsel for the petitioners complain that 54 students belonging to O.C. category have been deprived on account of respondents faulty actions and that it should be directed to be made up. We cannot agree. The factual basis of this submission is debatable in view of ambiguity mentioned herein before. We have directed creation of 34 seats (making a total of 780 seats this year) having regard to all the facts and circumstances of the case, this creation of additional seats is restricted to current admissions only and shall not be a permanent future. The Uttar Pradesh Government/concerned Authorities shall allocated the said 34 additional seats appropriately among the government medical colleges and make admission thereto as early as possible.”

60. Thus, it is contended by Mr. Rajendra Narain, learned Senior Counsel for the petitioners that if the Court finds that the petitioners are entitled to be appointed in 35% of reserved quota for the women and due to faulty calculation they were deprived from getting their service, the Court can very well direct the State Government to absorbed these 09 petitioners in the Engineering Service to correct the wrong committed by the respondents.

61. It is further submitted by the learned Senior Advocate on behalf of the petitioners that relying on the latest



decision of the Hon'ble Supreme Court reported in *State of Tamil Nadu and others Vs. K. Shobana*, reported in (2021) 4 SCC 686 that the Hon'ble Supreme Court in the aforesaid report has clearly stipulated the method in which different categories of selected candidates would be appointed. It is stated by the Hon'ble Supreme Court in Paragraph No.16 :-

"16. That thus, first the meritorious candidates would take their place in the general merit list where no reservation would apply. Reservation would apply thereafter, whereby the backlog vacancies would be filled in first, followed by the current year vacancies. In a nutshell, his contention was that Section 27 of the Act has nothing to do with the selection based on merit, and only applies to the mode of reservation post that stage. Two lists for "the distinct groups" are required to be made as provided for the reserved vacancies, which would be-first, a backlog list and then, secondly, the current list. The meritorious selected candidates have nothing to do with this part of the list. Our attention was also drawn to the provisional selection list dated 20-11-2019 to point out how the merit list had been drawn up. The submission, thus, was that this is the consistent and correct practice, and the fact that this problem arose only in case of Chemistry would make no difference even though practically now all the backlog vacancies would be filled in."

62. The Hon'ble Supreme Court then refers to the



steps to be taken in implementing filling up of posts of unreserved and reserved quota as held by the Apex Court in ***Saurav Yadav Vs. State of U.P.***, reported in **(2021) 4 SCC 542**, the Hon'ble Supreme Court held in paragraph No.22 :-

"22. First we would like to turn to the judgment (K. Shobana & Ors. Vs. State of Tamil Nadu and others), 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 accommodated 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.”

63. Thus, the Hon’ble Supreme Court reiterated the steps to be taken by the concerned authority in filling up of posts. The steps are clear in their terms: in the given facts of the case, application of those principles or steps would imply:

(a) the general merit list to be first filled in;

(b) the backlog vacancies of the particular reserved category to be thereafter filled in “first”; and

(c) the remaining reserved vacancies for the current year to be filled thereafter.”

64. It is contended by Mr. Rajendra Narain, learned Senior Counsel on behalf of the petitioners that Advertisement No.02/2017 did not disclose the number of backlog vacancies. Entire vacancies were shown as current vacancies in respect of filling up of horizontal reservation amongst unreserved



candidates, first the entire merit list in unreserved candidates are to be filled in. Thereafter, the requisite percentage of unreserved women candidates should march ahead of the male candidates to fulfill the quota.

65. In case of horizontal vacancy there cannot be any roster point. Roster point refers to vertical vacancy in respect of separate class of people on the basis of their backwardness on the ground of caste, religion, extremely economic backwardness. Therefore, it is submitted by Mr. Rajendra Narain, learned Senior Counsel that if horizontal reservation would have been filled up without leaving the percentage of their quota, all the petitioners would have been appointed to the post of Assistant Engineer.

66. Per-contra, learned Advocate General on behalf of the State-Respondents submits that the case of the petitioners suffers from three inherent fallacies :-

“(i) horizontal reservation for the women in unreserved quota is not 35%, but 34%,

(ii) foundation of the case of the petitioners is based on the basis of calculation of vacancies taking into account the total vacancies in the quota. They did not take into consideration the backlog vacancies which were required to be filled in, in the selection process conducted on the basis of Advertisement



No.02/2017.

(iii) it is submitted by the learned Advocate General that the circular in Advertisement No.02/2017 which was issued for providing horizontal reservation ought to be read with roster. Any discussion of reservation policy without roster system is an incomplete and truncated argument which the Court cannot consider.”

67. The learned Advocate General first refers to the legal opinion contained in Annexure-P/2 of the writ petition. The rule relating to filling up of posts on the basis of reservation as per the guideline made by the Hon’ble Supreme Court in the case of Anil Kumar Gupta (supra) is to fill up the 50% vacancy which is sought to be filled up on the basis of merit, first, from the category of selected candidates in Open Competition, then fill up each of social reservation quotas i.e. SC, ST and BC; the third steps would be to find out how many candidates belonging to special reservation have been selected on the above basis. If the quota fixed for horizontal reservation is already satisfied, in case it is an over all horizontal reservation – no further question arises but if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted and accommodate against the respective social reservation categories by deleting the



corresponding number of candidates therefrom. If, however, it is a case of compartmentalized horizontal reservation, then the process of verification of adjustment/accommodation as stated above, should be applied separately to each of the vertical reservation. In such a case, the reservation of 15% in favour of special categories, over all may be satisfied or may not be satisfied.

68. Thus, it is urged by the learned Advocate General that while filling up backlog vacancy in unreserved quota on the basis of merit, a list is to be prepared in respect of successful candidates in 50% unreserved quota, then it is to be looked into how many women candidates in the open category were selected and the said number of selected women candidates would be subtracted from the number of 35% horizontal reservation. The remaining women candidates would be accommodated under horizontal reservation to complete 35% quota of women. Therefore, the petitioners were absolutely wrong in pleading that they are entitled to 35 posts of total vacancy in unreserved quota and the B.P.S.C. failed to accommodate.

69. The learned Advocate General further submits that prior to 2016, there was no horizontal reservation so



backlog vacancy was declared to be considered on the basis of roster for fixing reservation. In support of his contention, he refers to the Appendix of Notification No.2342 (Annexure-P/2 at Page-37 of the writ petition). In the notification in respect of 34% of vacancies in unreserved category, roster point was stated to be 3, 9, 15, 21, 27, 33, 39, 45, 49, 55, 61, 67, 73, 79, 85, 91 and 97, in all 17 posts out of 100 posts. Similarly, roster point in respect of the horizontal vacancy in the quota of Extremely Backward Class and Backward Class was stated as illustration.

70. The learned Advocate General repeatedly submits that percentage of posts and roster point are integral part of reservation and it cannot be applied sans either of the two.

71. It is pointed out by the learned Advocate General that the petitioners did not challenge the validity of the circular dated 15.02.2016.

72. The learned Advocate General next refers to Paragraph Nos.9 & 10 of the counter affidavit filed on behalf of respondent Nos. 5 & 6. In paragraph No.9 it is clearly stated that 35% horizontal reservation for women candidates in the recruitment process of post and services of the State is in principle. In fact, 3% vertical reservation for women of



Backward Classes (WBC) are admissible prior to this horizontal reservation, meaning thereby 35% horizontal reservation is admissible only against 97% posts and 35% of 97% comes only as 34.

73. Thus, it is contended on behalf of the State-Respondents that if 100 candidates are selected in unreserved category, 34% of the same would be women.

74. It is also stated on behalf of State-Respondents that 35% horizontal reservation for women has been formulated vide Circular No.2342 dated 15.02.2016 issued by the Administration Department (Annexure-P/2 of the writ petition), whereas the advertisement in question was published in 2017. In the course of roster clearance some posts were so calculated as a backlog for different categories, which were prior to the enforcement of the said circular, hence, against the backlog vacancies, the horizontal reservation for women were not admissible.

75. Thirdly, the case of the respondents is that as the percentage of horizontal reservation was declared on principle as State policy, therefore, only in ideal condition where roster point 1 to 100 are used, the equilibrium of 35% horizontal reservation for women is maintained i.e. 34 posts for women



are essentially been provided to them. In such case, all the earmarked roster points go to the women category.

76. It is further contended on behalf of the State that if 35% of posts in horizontal vacancy is attempted to be filled up, this will violate the equilibrium of horizontal reservation. For example, when roster point 8, 9 and 10 are used, in such situation, all the three roster points go to women for different categories. Because of the fact, roster point 8 is earmarked for E.B.C. (female), roster point 9 is earmarked for U.R. (Female) and roster point 10 is earmarked for S.C. (Female). Again where roster point between 8 to 12 are used, reservation for women is 80% on the other hand when roster point 50 to 54 are used, there is no post earmarked for women, i.e. no post falls under horizontal reservation among the said roster points. In support of such contention, the learned Advocate General refers to Annexure-D of the counter affidavit.

77. Coming to the factual aspect of the instant case, it is stated by the respondents that the Building Construction Department, there were 122 vacancies reported out of which 38 posts were calculated as backlog. In this way, the current vacancies were only 84 against which, 22 posts were made available to the women as a horizontal reservation. Roster



clearance for 122 posts was made in two transactions. Naturally, there is a shortfall of horizontal reservation in the said case.

78. In Rural Works Department, there were 250 vacancies reported, against which 17 posts were calculated as backlog. In this way the current vacancies available were only 232 wherein roster clearance for 59 posts were given to the women as a horizontal reservation as the roster clearance for 250 posts has been done in two transactions, there is minor shortfall of horizontal reservation for women in this case.

79. In respect of Road Construction Department, there were 236 vacancies, against which 57 posts were calculated as a backlog. Thus, the current vacancies were only 179 in the roster clearance 56 posts were given to the women as a horizontal reservation, as roster clearance for 236 posts have been done in two transactions there was minor shortfall of horizontal reservation for woman.

80. Again in Public Health Engineering Department, there were 64 vacancies reported against which 17 were given to the women as horizontal vacancies. Since, the roster clearance for 64 posts have been done in three transactions, there is an automatic shortfall in the horizontal reservation for



women in this case.

81. Again in Planning and Development Department, there were 270 vacancies, out of which 92 posts were given to the women as a horizontal reservation. As the roster clearance for 270 posts has been done in one transaction. The quota of horizontal reservation has been fully filled up.

82. In Water Resources Department, there were 280 vacancies, against which 73 posts were given to the women as a horizontal reservation also 23 posts were given to the women for Backward Classes (WBC), as a backlog there is a shortfall of horizontal reservation in this case but it is due to calculation of backlog for WBC in the roster clearance.

83. In Minor Resources Department, there were 56 vacancies reported earlier but on letter pad, the vacancies were revised and it was reported that only 31 posts were vacant, against which two posts calculated as backlog and 5 posts were given to the women as horizontal reservation, as roster clearance for 31 posts has been done in two transaction, there is also a minor shortfall in horizontal reservation for women in this case.

84. Thus, it is admitted in Paragraph No.10 (i to vii) that backlog vacancies were also filled up by virtue of



Advertisement No.02/2017. In respect of backlog vacancies there was no reservation. Thirdly, 35% of horizontal vacancies were calculated only after deducting the backlog vacancies from the declared vacant seats in the aforesaid advertisement and fourthly, in respect of filling up of 35 / 34% reservation of women, there was some shortfall in the process of calculation.

85. The learned Advocate General next relies on Annexure-G of the supplementary counter affidavit filed on behalf of respondent No.5 on 13.05.2022. In the remark column of Annexure-G which is not a document duly signed by any Member of Authority of the State Government or the B.P.S.C., it is stated that in Planning and Development Department, out of 270 candidates permissible number of horizontal reservation is 92 and 92 candidates were recruited because of the fact that the roster clearance of total 270 posts was done in only one transaction, hence, the number of posts under horizontal reservation for women was fully filled up.

86. In Minor Resources Department, out of 31 posts excluding backlog vacancies there were 11 posts to be filled up by horizontal reservation and 5 post were filled up, due to the reason that earlier the Administrative Department reported the total vacancy was 56. Later, it was revised and roster was



made for 31 posts, in which 02 posts have been made available as backlog for women of backward classes. The deficiency in the number of posts under horizontal reservation for women is visible due to the aforesaid revision of roster.

87. In respect of Water Resources Department, there were 270 vacancies out of which 92 posts were fixed as horizontal reservation and 73 posts were filled up. It is clearly stated in the remark column that 23 posts have been made available for women of Backward Classes. Thus, the shortage of posts under reservation for women is visible due to availability of 23 posts for women of Backward Classes in the form of backlog.

88. In respect of Building Construction Department, 84 posts were declared, out of which, 29 posts in horizontal reservation were fixed out of the said 29 posts, 22 posts were filled up. Due to the reason that roster clearance for total 122 posts (with 32 posts backlog) has been done in two transactions. Hence, there was some vacancy in the number of posts under horizontal reservation for women.

89. In Rural Development Department, out of 233 vacant posts, the number of horizontal reservation for women was 79 but 59 posts were filled up. Due to the reason that



roster clearance for a total 250 posts (with 17 posts backlog) has been done in two transactions. Therefore, there was some vacancies under horizontal reservation for women.

90. In respect of Road Construction Department, out of 179 declared vacant posts, the number of horizontal reservation was 80 and out of the said 80 posts, 56 posts were filled up. It is stated in remark column that roster clearance for total 236 posts (with 57 posts backlog) has been done in two transaction, therefore, there was some mismatch in filling up of horizontal vacancies.

91. In Public Health Engineering Department, there was 64 posts, out of which, the number of horizontal vacancy was 22 and 17 posts were filled up, due to the reason that the roster clearance was done in three transactions and it is natural that there would be a reduction in number of posts under horizontal reservation for women.

92. I have already pointed out that the petitioner of CWJC No.15520 of 2021 has filed third supplementary affidavit on 01.03.2023. In the said supplementary affidavit the petitioner has annexed a letter written by the Deputy Secretary of the General Administration Department to the Secretary, Bihar Public Service Commission on 24.08.2022.



93. In paragraph No.3 of the said letter, The Deputy Secretary, General Administration Department has referred to Clause (9) of the Resolution No.962 dated 22.01.2021 issued by the General Administration Department, stating, inter-alia, as follows :-

“Where a vacancy cannot be filled in any recruitment year due to non-availability of persons with disabilities referred to above or for any other sufficient reason, such vacancy shall be carried forward to the subsequent recruitment year by marking it in the unreserved category.”

94. It is also stated in the said letter in Paragraph No.4:-

“4. Therefore, in the light of the order passed by the Hon’ble High Court, Patna on 17.05.2022 in CWJC No.15520 of 2021 (Sushma Kumari Vs. Bihar Public Service Commission and others) and on 18.08.2022 in MJC No.1247 of 2022 (Sushma Kumari Vs. Bihar Public Service Commission and others) and subject to the final order passed to be passed in LPA No.309 of 2022 (State of Bihar and others Vs. Sushma Kumari), filed by the State Government against order passed in CWJC



No.15520 of 2021, Bihar Public Service Commission is permitted to select the petitioner Ms. Sushma Kumari against a vacant post from the 17 unreserved vacant posts earlier requisitioned but earmarked for disabled persons against the horizontal reservation of 35 percent for women under the unreserved category, for the time being, revised requisitioned for only 1(one) post is being sent to the Bihar Public Service Commission.

95. Thus, the petitioner of CWJC No.15520 of 2021 was appointed in respect of one post earmarked for physically challenged candidates by way of backlog vacancy.

96. In reply, the learned Senior Counsel on behalf of the petitioners submits that 100 Points Modal Roster is not applicable in the case of horizontal reservation, inasmuch as, the cases in hand are for recruitment carried out after coming into effect of Bihar Act 02/2019 (Reservation made for EWS category). However, the present case relates to Assistant Engineer (Civil) pursuant to the Advertisement No.02/2017 dated 03.03.2017 and as such the 100 Point Modal Roster as produced by the learned Advocate General has no relevance in the adjudication of the present case.



97. The learned Senior counsel for the petitioner also submits that the basis for calculation arrived at by the respondent-State is not apparent from the department wise candidate shown in the comparative chart. In fact, through the comparative chart too, the respondents-State has admitted to the fact that there was shortfall in providing category wise 35% horizontal reservation to women in the recruitment process in question.

98. It is also submitted by the learned Senior Counsel on behalf of the petitioners that as per the comparative chart, department wise vacancies advertised in the Advertisement No.02/2017 has been reduced for computation of women reservation on the ground of their being backlog vacancies which were purportedly carry forward for the previous recruitment process. However, neither the advertisement nor any pleading support this claim of the respondents-State and as such the same may be ignored at this stage of argument.

99. The learned Senior Advocate for the petitioners further submits that a bare perusal of the comparative charge as produced would reveal that the respondents have erred in properly implementing the 35% horizontal reservation made for women.



100. It is further submitted by the learned Senior Advocate for the petitioners that the problem has arisen due to the fact that the respondents are implement to the horizontal reservation in the same manner as they would have implemented vertical reservation. This misapplication by the respondents has resulted in a particular situation, where 35% horizontal reservation could not be achieved.

101. The respondents, tried to explain the shortfall, by relying on Model Roster Point for each department. The argument is flawed on two counts: Firstly, there is no pleading or documentary basis for implementation of given roster points. Secondly, it does not stand to reason that 35% horizontal reservation, under a given policy, can never be achieved due to given roster points.

102. The learned Senior Counsel on behalf of the B.P.S.C. has adopted the submission made by the learned Advocate General, for the State.

103. Having considered the submissions made by the learned Senior Counsels in most erudite and comprehensive way, I like to state at the outset that the issue relating to horizontal and vertical reservations and the actual concept between the two as well as differences, if any, and subject



matters of decision by the Hon'ble Supreme Court in number of cases. In *Indra Sawhney Vs. Union of India*, reported in *1992 Supplementary 3 SCC 217*, the Supreme Court held that there are two types of reservations; vertical and horizontal, in *Saurav Yadav Vs. State of U.P.* (supra) it was decided by the Hon'ble Supreme Court that vertical reservation is not compatible with the concept of horizontal reservation.

104. In short, vertical reservation is a social reservation for Schedule Castes, Schedule Tribes and Other Backward Classes under Article 16(4) of the Constitution of India. It is the higher form of special provision and cannot exist 50% of total seats. Horizontal reservation, on the contrary, is a special reservation for other disadvantage citizens, such as women, persons with disabilities, and the transgender community, under Article 15(3) and 16(1) of the Constitution of India. It is a lesser form of special provision and cuts across vertical reservation.

105. In the *State of Tamil Nadu and others Vs. K. Shobana and others*, reported in *(2021) 4 SCC 686*, the Hon'ble Supreme Court relying on its previous decision in *Saurav Yadav Vs. State of U.P.*, reported in *(2021) 4 SCC 542* approved the ways and means of filling up of posts on



horizontal reservation relying on the decision of the Single Bench of Madras High Court in *K.R. Shanthy Vs. State of Tamil Nadu*, reported in (2012) SCC Online Mad. 5451, Paragraph No.14 of the said judgment, which is reproduced by the Hon'ble Supreme Court is quoted below :-

“14. A perusal of the above judgments would keep at least two things beyond any pale of doubt. Firstly, the roster is not vacancy based, but the same is only post based. It identifies the number of posts earmarked for various categories under the vertical reservations and posts left behind for open quota as well as special reservations. Secondly, after so identifying the posts, it should be calculated as to how many vacancies are to be filled up under various categories in the current selection. If once the number of vacancies earmarked for each category in the current selection is identified by using the roster, thereafter the roster will have no further role to play in the matter of selection. After identifying the number of vacancies earmarked for various categories, the selection for each category has to be made purely based on merit following the method detailed below:

First Step:

(i) As against the number of vacancies identified for open quota, irrespective of caste, sex, physically challenged, etc. everyone should be allowed to compete based on merits.

(ii) The meritorious candidates should be



first selected as against the above vacancies under open quota.

Second Step:

(iii) After completing the first step, moving on to the vertical reservation categories, selection has to be made for each category from amongst the remaining candidates belonging to the particular reserved category (vertical) based on merits.

Third Step:

(iv) After completing the second step, horizontal reservation which cuts across the vertical reservation has to be verified as to whether the required number of candidates who are otherwise entitled to be appointed under the horizontal reservation have been selected under the vertical reservation.

(v) On such verification, if it is found that sufficient number of candidates to satisfy the special reservation (horizontal reservation) have not been selected, then required corresponding number of special reservation candidates shall have to be taken and adjusted/ accommodated as against social reservation categories by deleting the corresponding number of candidates therefrom.

(vi) Even while filling up the vacancies in the vertical reservation, if, sufficient number of candidates falling under the horizontal reservation have been appointed, then, there will be no more appointment exclusively under the horizontal reservation.



Caution:

(vii) At any rate, the candidates who were selected as against a post under open quota shall not be adjusted against the reserved quota under vertical reservations.”

106. In view of such circumstances, it is incumbent upon the Public Service Commission to fill up 35% of horizontal reservation, reserved for women from different quota of unreserved and reserved candidates. If on merit some female candidate is already recruited in the selection list, the percentage of number would be deducted from total 35% of women reservation.

107. Neither the B.P.S.C., nor the State-Respondents have done the said exercise before publication of selected list and recruitment of candidates.

108. In view of such circumstances, the B.P.S.C. is directed to make the exercise as per the direction of the Hon’ble Supreme Court in *State of Tamil Nadu Vs. K. Shobana, (2021) 4 SCC 686*.

109. Since, the B.P.S.C. has not stated anything regarding backlog vacancy in the advertisement at the subsequent stage of filling up of horizontal reservation or at the stage of argument, the respondents cannot take such plea as a matter of defence. In this regard, this Court may profitably



rely on the celebrated decision on the Division Bench of Calcutta High Court in the case of *A.E.G. Carapiet Vs. A.Y. Derderian*, reported in *AIR 1961 Calcutta 359*, it is observed in Paragraph No.10 of the said judgment :-

“10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that



witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.”

110. In a writ petition the statement made in counter affidavit can be equated with the counter evidence, wherein it is the incumbent duty of the respondents not only to deny the prosecution case but to assert its own case to the effect that the number of vacancies advertised in Advertisement No.02/2017 were inclusive of backlog vacancies. In the absence of such case, subsequent argument cannot be relied on and accepted for consideration by this Court.

111. For the reasons stated above, the instant writ petition is disposed of directing the B.P.S.C. (respondent No.4 & 5) to recalculate the horizontal vacancy in terms of the declared percentage against the declared unreserved quota and re-write the cut off mark. The respective case of the petitioners



shall be decided on the basis of the new cut off mark to be fixed by the Public Service Commission in the light of the observation made herein-above. Entire exercise shall be done within 60 days from the date of communication of this order.

112. With the above direction, the writ petitions are disposed of.

(Bibek Chaudhuri, J)

mdrashid/-

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