
Anoop Mishra Vs State of U.P.

Civil Misc. Writ Petition No. 28565 of 2012

Court: Allahabad High Court

Date of Decision: Dec. 20, 2013

Citation: (2014) 1 ADJ 27 : (2014) 3 AWC 3062

Hon'ble Judges: Vineet Saran, J; B. Amit Sthalekar, J

Bench: Division Bench

Final Decision: Allowed

Judgement

B. Amit Sthalekar, J.

This is a writ petition by the petitioner seeking a direction to the U.P. Public Service Commission, Allahabad

(hereinafter referred to as "Commission") to declare the petitioner as having been selected for the post of Assistant Commissioner

(Trade/Commercial Tax) in the State Combined/Upper Subordinate Services Examination, 2009 by treating three posts as belonging to reserved

category of dependents of freedom fighters instead of two posts. Certain other reliefs have also been sought by the petitioner with regard to

application of the scaling system and evaluation of the answer sheets. Briefly stated the facts of the case are that an Advertisement No. A-1/E-

A/209 dated 4.4.2009 was issued by the Commission inviting applications in respect of posts in the State Service known as the Combined

State/Upper Subordinate Services Examination, 2009. The total number of posts were 754 although initially the advertisement only mentioned 100

vacancies but the same were subject to increase or decrease.

2. The case of the petitioner is that in his application form for the Main Examination, he had given first preference for the post of Deputy Collector,

the second preference for Deputy S.P., the third preference for the post of Assistant Commissioner (Trade/Commercial Tax) and the fourth

preference for the post of Treasury Officer/Account Officer. The further contention of the petitioner is that reservation to the dependents of

freedom fighters has been provided in terms of the Provisions of the Uttar Pradesh Public Service Commission (Reservation for Physically

Handicapped, Dependents of Freedom Fighters, an Ex-Servicemen) Act, 1993 (Act, 4 of 1993). The reservation quota fixed for dependents of

freedom fighters was 2%. This reservation was to be applied horizontally and not vertically.

3. The contention further is that the number of posts of Assistant Commissioner (Trade/Commercial Tax) was 134 and by applying the reservation

quota of 2% for dependents of freedom fighters, the figure comes to 2.68 and if the 5 and above is rounded off to 1, the total number of posts

available under the dependents of freedom fighters quota would be 3 posts, but the Commission has illegally offered only 2 posts, which is totally

against the spirit of the reservation policy applicable to the reserved category. According to the petitioner if the 2% reservation for dependents of

freedom fighters had been correctly adopted and the principle of rounding off correctly applied then 3 posts would have become available under

the dependents of freedom fighters quota and the petitioner would have found a berth against the said post.

4. We have heard Sri Keshari Nath Tripathi, learned senior counsel assisted by Sri C.P. Gupta, learned counsel for the petitioner as well as Sri

Yogendra Kumar Yadav, learned Standing Counsel and Sri A.K. Sinha, learned counsel appearing for the respondent No. 2-Commission.

5. The short controversy in the case is as to whether the principle of rounding off ought to have been applied in the case of horizontal reservation

and, if so applied, 2.68 could be treated as 3, in which case instead of 2 posts reserved for dependents of freedom fighters, 3 posts would have

become available. It has been submitted by Sri Keshari Nath Tripathi, learned Senior Counsel that the minimum marks obtained by the last

selected candidate for the post of Assistant Commissioner (Trade Tax) in the dependents of freedom fighters category was 1059.24, whereas, the

petitioner had obtained 1058.42 marks out of 1700 marks and thus he has missed appointment by a narrow margin of only 0.82 marks which is

less than 1 mark.

6. The further contention of the learned counsel for the petitioner is that out of the total 134 posts of Assistant Commissioner (Trade Tax), 2%

reservation in favour of dependents of freedom fighters would come to 2.68 and if the principle of rounding off had been applied, 3 posts would

have become available in the category of dependents of freedom fighters but the respondents have wrongly calculated the number of posts as being

only 2 in the category of dependants of freedom fighters. He has further referred to the Annexure-1 to the counter-affidavit filed by the State in

order to illustrate that so far as vertical reservation is concerned, the respondents have applied the rule of rounding off. By way of illustration he has

referred to the post of Deputy Collector for which 3 posts have been allocated under the Scheduled Castes category out of a total number of 14

posts, whereas, if the quota reserved for Scheduled Castes is applied the figure comes to 2.94. Similarly for Other Backward Class reserved

category, the total number of posts allocated for the post of Deputy Collector is 4, whereas if the quota prescribed for the Other Backward

Classes is applied to the total 14 posts of Deputy Collector the figure comes to 3.78. Thus, it has been submitted that it is not that the respondents

are not aware of the rule of rounding off but while they have applied the said principle to the vertical reservation, namely, the quota fixed for

Scheduled Castes, Scheduled Tribes and Other Backward Classes, the same principle has not been followed in the matter of horizontal

reservation. By way of illustration, it has been shown from Annexure-1 to the counter-affidavit that while the posts in the women's category against

the total posts of 14 on the posts of Deputy Collector has been shown as only 2 but as per the quota available for women category i.e. 20% the

figures come to 2.80 and therefore 3 posts should have been made available for women. By way of illustration, it has further been pointed out that

for the post of Assistant Commissioner (Trade Tax), 26 posts out of a total of 134 have been allocated in the women's category and 2 posts in the

category of dependents of freedom fighters, whereas, as per the quota of 20% for women's category and 2% for dependents of freedom fighters

the figure would come to 26.80 and 2.68 i.e. 27 posts and 3 posts respectively. However, for reasons best known to the respondents the principle

of rounding off has not been applied for horizontal reservation while giving the benefit of the same against vertical reservation.

7. In the counter-affidavit, at the outset a preliminary objection was raised on behalf of the learned counsel for the Commission, Sri A.K. Sinha that

although initially the advertisement mentioned 100 posts but subsequently the number of posts were increased to 134 posts. Subsequently, the

number of posts of Assistant Commissioner (Trade Tax) was increased to 134 when the requisition was sent to the Commission, in which the

posts reserved for dependents of freedom fighters against the 2% quota was shown to be only two and this requisition has not been challenged by

the petitioner. This document, that is, the requisition dated 25.3.2009 has been filed as Annexure-2 to the counter-affidavit filed by the

Commission and there is no dispute that in the said requisition the posts allocated to the dependents of freedom fighters in their respective quota

was shown as 2.

8. The only other submission of Sri A.K. Sinha, learned counsel for the Commission was that under the Act, 4 of 1993, the reservation quota

prescribed for dependents of freedom fighters was 2% and therefore, it could not have exceeded 2% and if the 2% quota of dependents of

freedom fighters is applied to the 134 posts of Assistant Commissioner (Trade Tax), the figure would come to 2.68 which would be in excess of

2% reservation quota prescribed for dependents of freedom fighters.

9. The State-respondents in their counter-affidavit have also taken the same plea in para 17 that the quota of dependents of freedom fighters is

only 2% and if 2% is applied to the 134 posts of Assistant Commissioner (Trade Tax) it would come to 2.68 and if 2.68 is rounded off and

treated as 3 posts the resultant figure would exceed the 2% quota fixed for dependents of freedom fighters. The other plea taken by the State-

respondents in their counter-affidavit is that reservation is to be applied according to roster in the form of a running account from year to year and

when a vacancy arises against a particular post the same is to be filled from amongst persons belonging to the category to which the post belongs in

the roster.

10. We have given our anxious consideration to the various submissions of the learned counsel and have perused the documents on record.

11. First, the contention of the petitioner in para 11 of the writ petition is that the minimum cut off marks for the posts of Assistant Commissioner

(Trade Tax) in dependents of freedom fighters category was fixed as 1059.24 whereas the petitioner had obtained 1058.48 marks and thus the

petitioner was not selected for the said post by a narrow margin of only 0.82 marks. The averments in para 11 of the writ petition, have not been

denied by the Commission rather it has been stated that ""the contents of para 11 of the writ petition are matter of record need no comments."" The

result of the Examination, 2009 in question is filed as Annexure-7 to the writ petition and at Page 53 of the paper book the minimum marks

obtained by the last dependent of freedom fighter candidate is shown as 1059.24 which bears out the averment of the petitioner in para 11 of the

writ petition, and the same has not denied by the respondents.

12. Secondly, so far as the objection raised by the learned counsel for the Commission that the petitioner has not challenged the requisition dated

25.3.2009 sent by the State Government is concerned, it has been submitted by the learned counsel for the petitioner that this was an internal

communication between the State Government and the Commission and no corrigendum to that effect was issued or published making any

amendment in the initial advertisement and in any case it was not necessary for the petitioner to challenge the requisition or any handwritten

calculation made therein fixing the quota of dependants of freedom fighters, inasmuch as it was for the Commission to ultimately calculate the

vacancies available for the reserved category of dependents of freedom fighters, according to the reservation quota prescribed for them in the Act,

4 of 1993 irrespective of any handwritten figure mentioned in the requisition by the State Government and the relief in the nature of mandamus

sought by the petitioner to the respondents to treat 3 posts instead of 2 posts in the category of dependents of freedom fighters for the post of

Assistant Commissioner (Trade Tax) is perfectly correct in the circumstances. In support of his contention, reliance has been placed by the

petitioner upon the decision of the Division Bench of this Court in Akhila Nand Pandey Vs. State of U.P. and another, In that case also the

petitioner therein had prayed for a writ of mandamus commanding the respondents to appoint him in the Agricultural Group Services on the basis

of the result of Combine State Services Examination, 1993 claiming to be in the category of dependents of freedom fighters entitled to reservation.

The Division Bench held that it was the duty of the Commission to enforce the notification dated 4.5.1995 issued in terms of the provisions of Act,

4 of 1993 and therefore, the Commission cannot take shelter of an alleged default made by the State in not intimating to the Commission the

vacancies required to be reserved for the dependents of freedom fighters. The Division Bench further held that the Commission failed to act in

accordance with law inasmuch as it did not give benefit of reservation to the dependents of freedom fighters on the pretext that the reservation was

not made by the State Government. Paras 1, 9 and 10 of the said judgment read as follows:

1. The petitioner has prayed for a writ of mandamus commanding the respondents to appoint him in the agricultural group services on the basis of

the result of Combined State Services Examination of 1993 claiming to be in the category of dependants of freedom fighters entitled to reservation.

9. The provisions of U.P. Act No. IV of 1993 as contained in Annexure-2 to the writ petition, provide for reservation to the dependants of

freedom fighters. The reservation to this category to the extent of 2% of the post, is admitted to the U.P. Public Service Commission respondent in

paragraph 5 of the counter-affidavit wherein, it has been specifically stated that according to the Notification No. 18.1.95-ka-2/95, issued by the

State Government on 4th May, 1995, the reservation for dependants of freedom fighters of physically handicapped and ex-army personnel are in

the ratio of 2:2:1 respectively.

10. It is, therefore, evident that the dependants of freedom fighters were entitled to reservation on the 2% posts for which the examination was

conducted by the U.P. Public Service Commission. The advertisement was made for 200 posts and, it appears that ultimately, selection was made

for 206 posts. Hence quota available to the category of dependants of freedom fighters, comes to 4 in number. The reservation, therefore, should

have been made on the 4 posts in the Combined State Services/Upper Subordinate Services. It was the duty of the Commission to enforce the

Notification dated 4.5.1995 and, therefore, the Commission cannot take the shelter of an alleged default made by the State Government in not

intimating the vacancies to the Commission required to be reserved for the dependants of freedom fighters. The Commission thus, appears to have

failed to act in accordance with law inasmuch as it did not give the benefit of reservation to the dependants of freedom fighters on the pretext that

the reservation was not made by the State Government.

13. We are in respectful agreement with the observations made by the Division Bench in the case of Akhila Nand Pandey (supra) and in view

thereof we find absolutely no substance in the preliminary objection raised by Sri A.K. Sinha, learned counsel for the Commission and reject the

same.

14. In Dr. Rajesh Kumar Tiwari Vs. State of U.P. and Others, also the challenge was to the inappropriate application of reservation quota to the

post of Lecturer in Hindi. The relief in the writ petition was one of mandamus commanding respondents to allow the petitioner to appear in the

interview for the post of Lecturer Hindi under the category of dependents of freedom fighters. There also a preliminary objection was raised on

behalf of the State that the petitioner had not laid any foundation for the application of quota nor had any relief been sought in this regard. Rejecting

this objection the Court in para 19 of the said judgment held as follows:

19. With regard to the question of relief being granted to the petitioners, learned counsel or the respondents have urged that the petitioners have

not Laid any foundation with regard to application of quota nor have they sought any relief in this regard and, therefore, this Court may not go in

this question at all. We are afraid that such an argument can sustained. We are hearing these petitions under Article 226 of the Constitution. Once it

has come to the knowledge of the Court that the respondents have failed to follow the statutory provisions or have acted in violation of statutory

provisions, this Court in its extraordinary jurisdiction can always issue a writ commanding the respondents to apply the provisions correctly. Article

226 of the Constitution confers ample power on High Court to correct an error which is manifest and apparent on the face of the record and also

where there is apparent miscarriage of justice. In the present case, both the grounds are established. The contention of the respondents is,

therefore, rejected.

15. So far as the principle of rounding off is concerned, the Supreme Court in the case in State of U.P. and Another Vs. Pawan Kumar Tiwari and

Others, has held that the rule of rounding off is based on logic and common sense. Para 7 of the judgment reads as follows:

7. We do not find fault with any of the two reasonings adopted by the High Court. The rule of rounding off based on logic and common sense is: if

part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been

rounded off to 47 and not to 46 as has been done. If 47 candidates would have been considered for selection in general category, the respondent

was sure to find a place in the list of selected meritorious candidates and hence entitled to appointment.

16. In the case of Shiv Prasad Vs. Government of India and Others, the Supreme Court while dealing with vertical reservation and horizontal

reservation has held as follows:

25. In *Indra Sawhney* (I), Justice Jeevan Reddy, J. dealt with this aspect. His Lordship observed that there are two types of reservations; (i)

vertical reservations; and (ii) horizontal reservations. They must be so applied as not to exceed the percentage of reservations which is permissible

under law. This can be done by "interlocking reservations". His Lordship proceeded to state:

812.....There are two types of reservations, which may, for the sake of convenience, be referred to as Vertical reservations" and "horizontal

reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called

vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal

reservations. Horizontal reservations cut across the vertical reservations what is called interlocking reservations. To be more precise, suppose 3%

of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The

persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by

making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary

adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains

and should remain the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

(Emphasis supplied)

26. A similar question came up for consideration in *Swati Gupta*. There, the petitioner appeared in the Combined Pre-Medical Test (CPMT) held

by the State. She was not selected. She challenged a notification of the State Government on the ground that the reservation was 65% which

exceeded 50% and was thus violative of the constitutional guarantee under Articles 14, 16, 19 and 21 of the Constitution as also the ratio laid

down in *Indra Sawhney* (I). The Government of U.P., however, issued another notification clarifying its stand on reservations.

27. In the amended notification, it was clarified that the reservations for the candidates belonging to other categories, such as, dependents of

freedom-fighters, sons/daughters of deceased/disabled soldiers, physically handicapped candidates, etc. would be "horizontal" and the candidates

selected in those categories would be adjusted in the categories to which they belong, i.e. either reserved category of Schedule Castes (SC),

Schedule Tribes (ST), Other Backward Class (OBC) or Open Category (OC) in "vertical" reservation and it would not violate constitutional

guarantee.

28. The Court considered *Indra Sawhney* (I), applied it to the case on hand and held that the submission of the State was well founded and the

contention of the petitioner that the reservation violated constitutional guarantee of 50% was not well-founded. The Court stated:

3.....The vertical reservation is now 50% for general category and 50% for Scheduled Castes, Scheduled Tribes and Backward Classes.

Reservation of 15% for various categories mentioned in the earlier circular which reduced the general category to 35% due to vertical reservation

has now been made horizontal in the amended circular extending it to all seats. The reservation is no more in general category. The amended

circular divides all the seats in CPMT into two categories one, general and other reserved. Both have been allocated 50%. Para 2 of the circular

explains that candidates who are selected on merit and happen to be of the category mentioned in para 1 would be liable to be adjusted in general

or reserved category depending on to which category they belong, such reservation is not contrary to what was said by this Court in Indra

Sawhney.

(Emphasis supplied).

17. In Bhudev Sharma Vs. District Judge, Bulandshahr and Another, the Supreme Court referring to the facts of that case held that the 2% quota

fixed for physically handicapped persons if applied to 30 posts, the figure would come to 0.6 and since 0.6 is more than half, it should be rounded

off to 1. Paras 2 and 3 of the said judgment read as follows:

2. The appellant is a blind man. He appeared in the recruitment test held in the year 1992 for selecting candidates for Class-III Posts in

Bulandshahr Judgeship in U.P. However, he was not selected and hence he filed a writ petition which was allowed by a learned Single Judge of the

Allahabad High Court by his judgment dated 25.9.1997. Against that judgment the State Government filed a letters patent appeal which has been

allowed by the impugned judgment by the Division Bench. Hence this appeal.

3. The appellant has relied on G.O. dated 26.8.1993 which is Annexure P-I to this appeal. That G.O. states that the U.P. Government has

reserved 2 per cent posts for physically handicapped persons for direct recruitment in all groups of Government services. The physically

handicapped persons are those who are blind, deaf and dumb and otherwise handicapped. There were altogether 30 posts for which the selection

was held. 2 per cent of 30 is 0.6. Since 0.6 is more than half we round it off and hold that one out of the 30 posts is reserved for physically

handicapped persons. Since there was no other physically handicapped person who applied, in our opinion, the appellant was entitled to the post

reserved for physically handicapped persons.

18. A Division Bench of this Court in the case of Dr. Rajesh Kumar Tiwari Vs. State of U.P. and Others, , while dealing with the question of

rounding off with regard to the quota fixed for dependents of freedom fighters has held as follows:

13. In the present case, it is admitted fact that 82 vacancies were advertised and the quota fixed for the dependents of freedom fighters is 2%.

Thus, 2% of 82 being more than 1.5 would result in 2 posts in that quota. The law with regard to rounding off is very clear and well-settled.

Where the value is one-half or more, it has to be rounded off to the next whole number and where it is less than one-half, it has to be ignored. In

the present case, 2% of 81 comes to 1.62. It being more than one-half, the value to be taken is 2. This view is supported by the decision of the

Hon'ble Apex Court in the case of *State of U.P. and another v. Pawan Kumar Tiwari and others*.

19. The state-respondents in their counter-affidavit have stated that the reservation has to be applied on the basis of roster in the form of a running

account from year to year and the post, which falls against a particular roster has to be filled from the category to which that post belongs in the

roster. The plea taken by the State Government is in the abstract as no figures have been given to show as to whether the roster is complete or not.

From the facts of the case what emerges is that the reservation is being applied to the vacancies and not to the entire cadre strength. Moreover, the

stand taken by the respondents is in respect of vertical reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes

as provided in Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward

Classes) Act 1994, Act 4 of 1994. Sub Section (5) of Section 3 of the Act 4 of 1994 provides for application of reservation on the basis of roster

comprising total cadre strength of the public services and posts and the roster so issued is to be implemented in the form of a running account from

year to year until the reservation for various categories of persons mentioned in sub-section 1, namely, persons belonging to the Scheduled Castes,

Scheduled Tribes and Other Backward Classes categories, is achieved and the operation of the roster and the running account shall thereafter

come to an end and any vacancy occurring thereafter shall be filled from amongst persons belonging to the category to which the post belongs in

the roster sub-section 5 of section 3 of the Act, 1994 reads as follows:

3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.--[(1) In public services and posts, there shall be

reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the

roster referred to in subsection (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of

citizens,-

20. So far as the category of persons belonging to the category of physically handicapped dependents of freedom fighters, Ex-Servicemen are

concerned, the Act No. 4 of 1993 makes it clear that the reservation of these categories, which are otherwise known as horizontal reservation is to

be applied to the vacancies and not on the basis of cadre strength as horizontal reservation is applicable across all the categories including general

candidates. So far as dependents of freedom fighters are concerned, Section 3(1) (i) reads as follows:

3 (1) (i) in public services and posts two percent of vacancies for dependents of freedom fighters;

21. This question came up before the Lucknow Bench of this Court for consideration in Writ Petition (S.B.) No. 1049 of 2010, Atul Awasthi v.

U.P. Cooperative Institutional Service Board, Lucknow through its Chairman and another and the Division Bench of this Court in paras 5, 6 and 7

held as follows:

5. Learned counsel for the respondents has argued that the quota provided to dependents of freedom fighter, ex-serviceman and physically

handicapped as per rules, is a horizontal reservation and it has to be worked out on the basis of the vacancies advertised and not on the basis of

the total cadre strength. It is further submitted that representation of the petitioner was rightly rejected.

6. Now the short question to be determined in this writ petition is whether 2% quota of freedom fighter has to be calculated on the basis of the

total cadre strength or on the basis of the actual vacancies.

7. The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) Act, 1993

(in short referred to as U.P. Act No. 4 of 1993) was promulgated and came in to force with effect from 30.12.1993. According to Section 3 of

the U.P. Act No. 4 of 1993, it was provided that there shall be reserved 5% of vacancies at the stage of direct recruitment in favour of the

physically handicapped, dependents of freedom fighters and ex-servicemen. Subsection (2) of Section 3 of U.P. Act No. 4 of 1993 provided that

the respective quota of the categories shall be such as the State Government may from time to time determine by a notified order. Further, sub-

section (3) of Section 3 of U.P. Act No. 4 of 1993 provided the manner in which the reservation was to be applied. For sake of convenience,

Section 3 of U.P. Act No. 4 of 1993 is quoted hereunder:

3. Reservation of vacancies in favour of physically handicapped etc.--(1) in public services and posts in connection with the affairs of the State

there shall be reserved five per cent of vacancies at the stage of direct recruitment in favour of:

(i) physically handicapped

(ii) dependents of freedom fighters, and

(iii) ex-servicemen

(2) The respective quota of the categories specified in subsection (1) shall be such as the State Government may from time to time determine by a

notified order.

(3) The persons selected against the vacancies reserved under sub-section (1) shall be placed in the appropriate categories to which they belong.

For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he

belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to Backward Classes

category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed

in that category by making necessary adjustments.

(4) For the purpose of subsection (1) an year of recruitment shall be taken as the unit and not the entire strength of the cadre or service, as the

case may be:

Provided that at no point of time the reservation shall, in the entire strength of cadre, or service, as the case may be, exceed the quota determined

for respective categories.

(5) The vacancies reserved under sub-section (1) shall not be carried over to the next year of recruitment.

22. Applying the ratio of the case law referred to hereinabove, to the facts of the present case, we are satisfied that the respondents had clearly

erred in calculating the vacancies for the category of dependents of freedom fighters. It has not been disputed by the respondents that against 134

posts, 2% reservation for dependants of freedom fighters would come to 2.68. That being the factual position, we are satisfied that in view of the

law settled by the Supreme Court as well as this Court the principle of rounding off ought to have been applied against horizontal reservation and if

so applied the posts falling in the category of dependents of freedom fighters would be 3 and not 2.

23. Besides the averments in para 11 of the writ petition that the petitioner had secured 1058.42 marks, whereas, the cut off marks or minimum

obtained by the last candidate for dependents of freedom fighters was 1059.24, has not been denied by the respondents in their counter-affidavit.

All that has been submitted by learned Standing Counsel, during the course of argument is that 1059.24 was not the cut off marks fixed for

dependents of freedom fighters.

24. From a perusal of the documents on record, it may be concluded that this may be at the most be a typographical error on the part of the

petitioner, but the result of the examination in question, which has been filed as Annexure-7 to the writ petition at page 53, clearly shows that the

minimum marks obtained by the candidate belonging to the dependent of freedom fighter category was in fact 1059.24.

25. Sri A.K. Sinha, learned counsel for the Commission has placed reliance upon the decision of the Supreme Court in The Registrar, Rajiv

Gandhi University of Health Sciences, Bangalore Vs. G. Hemlatha and Others, wherein, referring to the minimum marks prescribed for Post

Graduate Course, which was 55%, the petitioner who had obtained 54.71% aggregate in the Bachelor of Science was held ineligible for the said

post. The Supreme Court in the said case has upheld the contention of the appellant-University and held that. 71 % could not be rounded off and

54.71 could not be read as 55% in order to make the petitioner eligible to take the examination for the P.G. Course in M.Sc. (Nursing). In the said

judgment the Supreme Court has referred to its earlier judgment in Orissa Public Service Commission and Another Vs. Rupashree Chowdhary

and Another, In the judgment of Rupashree Chowdhary (supra), the Supreme Court has declined to round off.1 as 1. Reliance in that case was

placed upon the decisions of the Supreme Court in the case of Pawan Kumar Tiwari (supra), Bhudev Sharma (supra) and similar other judgments.

The Supreme Court rejected the contention of the respondents therein (Rupashree Chowdhary) and while distinguishing the facts of the case in

hand from that of Pawan Kumar Tiwari and Bhudev Sharma and others judgments, held that those cases dealt with posts or vacancies where, it

was allowed to be rounded off to make 1 whole post but the same principle would not apply in the case of the minimum eligibility criteria/marks

prescribed for a particular course. Para 7 of the Rupashree Chowdhary (supra) judgment reads as follows:

7. The learned counsel appearing for the respondents during the course of his arguments relied upon the decisions of this Court in State of Orissa

v. Damodar Nayak, State of U.P. v. Pawan Kumar Tiwari, Union of India v. S. Vinodh Kumar and Bhudev Sharma v. District Judge, Bulandshahr. On scrutiny, we find that the findings recorded in the abovereferred cases are not applicable to the facts of the present case. The

facts and findings recorded by this Court in the abovereferred cases are distinguishable to the facts of the case in hand. Almost all the aforesaid

cases dealt with post or vacancies where it was allowed to be rounded off to make one whole post. Understandably there cannot be a fraction of a

post.

26. Thus, in view of the observations made by the Supreme Court in the case of Rupashree Chowdhary (supra) the case of Rajiv Gandhi

University (supra) has no application to the facts of the present case.

27. At this stage Sri Keshari Nath Tripathi, learned Senior Counsel submitted that out of 134 vacancies, only 121 candidates actually joined and

therefore there would have been no difficulty for the respondents in calculating the posts in the category of dependents of freedom fighters by

applying the principle of rounding off and thereafter making one post available for the petitioner.

28. The fact that out of 134 posts of Assistant Commissioner (Trade Tax) only 121 persons joined has not been denied by the learned Standing

Counsel, who has very fairly placed before this Court the order dated 11.7.2013, passed by the Joint Commissioner (Trade Tax) Headquarters,

Lucknow, which shows that in the 2009 Batch Examination, out of 134 posts, advertised, only 121 candidates had actually joined.

29. Thus, on a conspectus of the facts and the law laid down by the Supreme Court as well as this Court, we are of the firm opinion that the

reservation prescribed for the category of dependents of freedom fighters as provided in the Act 4 of 1993 has not been applied in its true letter

and spirit by the respondents and, therefore, the writ petition deserves to be allowed. The writ petition is, accordingly, allowed. A direction is

issued to the respondents to apply the principle of rounding off in the quota of dependants of freedom fighters in the batch of examination 2009 in

the light of the observations made above and allocate posts in the category of dependents of freedom fighters for the post of Assistant

Commissioner (Trade Tax) and thereafter consider the petitioner for appointment against the said post on the basis of the marks obtained by him.