

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12514 of 2022

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Sunil Kumar Son of Shyam Nandan Rai, Resident of Paharpur, Police Colony, Saheb Ka Ghar, P.S. - Anisabad, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The Deputy Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
4. The Secretary, State Election Commission, Sone Bhawan, Veer Chand Patel Marg, Patna.

... .. Respondent/s

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with
Civil Writ Jurisdiction Case No. 13513 of 2022

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Surendra Kumar Agrawal S/o Jagdish Chandra Agrawal Resident of Mohalla- Navratan Bazar, P.O. and P.S.- Sasaram, District- Rohtas at Sasaram.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Additional Chief Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission, Sone Bhawan, Birchand Patel Path, Patna through the State Election Commissioner (Municipality).
4. The State Election Commissioner (Municipality), The State Election Commission, Sone Bhawan, Birchand Patel Path, Patna.
5. The Secretary, The State Election Commission, Sone Bhawan, Birchand Patel Path, Patna.
6. The Divisional Commissioner, Patna Division, Patna.
7. The District Magistrate-cum-District Election Officer (Municipality), Rohtas at Sasaram, District- Rohtas at Sasaram.

... .. Respondent/s

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with
Civil Writ Jurisdiction Case No. 14193 of 2022



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Harsh Vardhan Narayan S/o Shivendra Narayan, Gram-Baksanda, Post-Bakdanda, Thana-Akbarpur, District-Nawada. Presently residing at Mayur Vihar Colony Lane-3, Near Bishop Scott School, Ward No. 3, Nagar Parishad-Sampatchak, P.S.-Ram Krishna Nagar, District-Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Urban Development and Housing Department, Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Bihar, Patna.
3. The District Magistrate-cum-District Election Officer (Municipality), Patna.
4. The District Deputy Election Officer (Municipality), Patna.
5. The State Election Commission through State Election Commissioner, Sone Bhawan, 3rd Floor, Birchand Patel Marg, Patna, Bihar.
6. The State Election Commissioner, Sone Bhawan, 3rd Floor, Birchand Patel Marg, Patna, Bihar.
7. The Secretary, State Election Commission, Sone Bhawan, 3rd Floor, Birchand Patel Marg, Patna, Bihar.

... .. Respondent/s

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with

Civil Writ Jurisdiction Case No. 14206 of 2022

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Nitish Kumar Son of Mahaveer Mahto, Resident of Mohalla - Bihiya, P.S.-Bihiya, District - Bhojpur.

... .. Petitioner/s

Versus

1. The State of Bihar through its Principal Secretary Urban Development Patna.
2. The State Election Commission through its Commissioner, Bihar, Patna.
3. The Secretary, State Election Commission Bihar, Patna.
4. The District Magistrate cum District Election Officer (Nagar Palika) Bhojpur.
5. The DCLR-cum-returning Officer, Piro, Bhojpur.
6. The B.D.O.-cum-Additional Returning Officer, Bihiya, Bhojpur.

... .. Respondent/s

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with



Civil Writ Jurisdiction Case No. 14207 of 2022

Suresh Prasad Son of Late Ram Das Resident of Mohalla- Kawaiya Road,
Panchayat Nagar, P.O. and P.S.- Lakhisarai, Block- Lakhisarai, District-
Lakhisarai.

... .. Petitioner/s

Versus

1. The State of Bihar Through the Chief Secretary, Government of Bihar, Main Secretariat, Bailey Road, Patna- 800014.
2. The Chief Electoral Officer Office of Chief Electoral Office, Bihar, 7-Sardar Patel Marg, Mangles Road, Bihar, Patna.
3. The State Election Commission, Bihar Sone Bhawan, 3rd Floor, Birchand Patel Marg, Patna- 800001, through its Commissioner.
4. The District Magistrate, Lakhisarai-cum- District Election Officer Lakhisarai.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14219 of 2022

Sanjay Kumar Kejriwal Son of Parmeshwar Lal Kejriwal Resident of
Jawahar Lal Road, Muzaffarpur, P.O.-Head Post Office, P.S. Muzaffarpur
Town, District-Muzaffarpur.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Additional Chief Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna through the State Election Commissioner.
4. The State Election Commissioner. The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna.
5. The Secretary, The State Election Commissioner. (Municipality), Sone Bhawan, Birchand Patel Path, Patna.
6. The District Magistrate-Cum-District Election Officer (Municipality), Muzaffarpur, District-Muzaffarpur.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14234 of 2022



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Firoj Alam son of Anvar Ahamad Resident of Mohalla- Azad Nagar,
Mahisaudhi, P.O. and P.S. Jamui, District- Jamui.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Additional Chief Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna through the State Election Commissioner.
4. The State Election Commissioner, The State Election Commission (Municipality), Sone, Bhawan, Birchand Patel Path, Patna.
5. The Secretary, The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna.
6. The District Magistrate-cum-District Election Officer (Municipality), Jamui, District- Jamui.

... .. Respondent/s

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with

Civil Writ Jurisdiction Case No. 14240 of 2022

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Ujjawal Kumar Son of Anil Kumar Singh Resident of Village- Shanti Bihar Colony, Near- Shiv Mandir, Chandli, Aurangabad, Bajauli, District- Aurangabad, Bihar- 824102.

... .. Petitioner/s

Versus

1. State Election Commission, Bihar through the Secretary, Government of Bihar, at Patna.
2. Secretary, State Election Commission, Bihar at Patna.
3. Principal Secretary, Bihar Urban and Development Housing Department, Government of Bihar at Patna.
4. Under Secretary, Urban Development and Housing Department, Government of Bihar at Patna.
5. Commissioner, Gaya Division, Gaya, District- Gaya.
6. District Magistrate-cum-District Election Officer, (Nagar Parisad), Aurangabad, District- Aurangabad.

... .. Respondent/s

=====

with



Civil Writ Jurisdiction Case No. 14241 of 2022

Gautam Kumar Son of Sri Gulab Singh, Resident of Village- Repura Sirsa,
P.O. Baidyanathpur, P.S. Sitamarhi, District- Nawada.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Additional Chief Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna through the State Election Commissioner.
4. The State Election Commissioner, The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna.
5. The Secretary, The State Election Commission (Municipality), Sone Bhawan, Birchand Patel Path, Patna.
6. The District Magistrate-cum-District Election Officer (Municipality), Nawada, District- Nawada.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14242 of 2022

Narayan Singh son of Jagdish Singh, Resident of Village- Sahidih, Ward
No. 3, P.O. and P.S. Nauhatta, District- Saharsa.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Additional Chief Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission (Municipality), Sone Bhawan Birchand Patel Path, Patna through the State Election Commissioner.
4. The State Election Commissioner, The State Election Commission (Municipality), Sone Bhawan Birchand Patel Path, Patna.
5. The Secretary, The State Election Commission (Municipality), Sone Bhawan Birchand Patel Path, Patna.
6. The District Magistrate-cum-District Election Officer (Municipality), Saharsa, District- Saharsa.

... .. Respondent/s



with

Civil Writ Jurisdiction Case No. 14245 of 2022

Sanjeet Kumar Singh S/o Sri Vishnu Vijay Singh Resident of Ward No.-
33, Rajputana Muhalla, Dehri- Dalmia Nagar, Rohtas, Sasaram.

... .. Petitioner/s

Versus

1. The State of Bihar Through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission, Bihar, Sone Bhawan, Bir Chand Patel Marg, Patna through the State Election Commissioner, Bihar.
4. The District Election Officer-cum- District Magistrate, Rohtas.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14246 of 2022

1. Om Prakash Singh S/o Anil Kumar Singh R/o Near Police Line Middle School, Shanti Lodge, P.S. Rampur, Gaya Bihar 823001.
2. Rajesh Kumar Singh S/o Ram Uchit Singh R/o Jethian Kothi, Lala Babu Road, Maharani Road, P.S.- Delha, Gaya Bihar 823002.
3. Akhoury Onkar Nath @ Mohan Shrivastva S/o Late Akhoury Bhola Nath R/o New Godown, Mode, P.S. Kotwali, District- Gaya, Bihar- 823001.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
2. The Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
3. The State Election Commission, Bihar, Through the State Election Commission, Patna Bihar- 800001.
4. The Gaya Municipal Corporation, Through its Municipal Commissioner, Gaya- 823001 (Bihar).

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14247 of 2022



Gulfisana Daughter of Mohammad Ezahar, Resident of Village-
Ababakarpur Kowahi, Police Station - Patepur, District - Vaishali.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Principal Secretary, Urban Development and Hosing Department, Govt. of Bihar, Patna.
3. The Deputy Secretary Urban Development and Housing Department, Govt. of Bihar, Patna.
4. The Secretary, State Election Commission Sone Bhawan, Veerchand Patel Marg, Patna.

... .. Respondent/s

with

Civil Writ Jurisdiction Case No. 14249 of 2022

1. Bhekhari Sah Son of Kedar Sah, Resident of Areraj, P.O. Areraj, District East Champaran, Bihar 845411.
2. Om Prakash Sharma, Son of Bhup Sharma, Resident of Ward no. 6, Sharma Tola, Areraj, District East Champaran, Bihar 845411.
3. Deepak Kumar Tiwari, Son of Tripurari Sharan, Resident of ward no. 11, Barwa, Areraj, District East Champaran, Bihar 845411.
4. Rajnish Kumar, Son of Mohan Giri, Resident of ward no. 3, Areraj, District East Champaran, Bihar 845411.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. Principal Secretary Urban Development and Housing Department, Government of Bihar, Patna.
3. The Joint Secretary, Urban Development and Housing Department Government of Bihar, Patna.
4. The Divisional Commissioner, Tirhut Division, Muzaffarpur.
5. The District Magistrate, East Champaran.
6. State Election Commission through its Secretary, 3rd floor, Sone Bhawan, Beerchand Patel Path, Patna.
7. Secretary, State Election Commission, 3rd floor, Sone Bhawan, Beerchand Patel Path, Patna.

... .. Respondent/s



with
Civil Writ Jurisdiction Case No. 14303 of 2022

1. Mahanand Sahni Son of Jagdish Sahni, Resident of Village Madhuban, P.O. Chopra, Ram Nagar, P.S. Jankinagar, District Purnia, Bihar 854102
2. Birendra Prasad Yadav, Son of Bhuvaneshwari Yadav, Resident of Ward No. 4, Khunt, Ramnagar Pharsahi, District- Purnia, Bihar 854102
3. Sudarshan Kumar, Son of Dinesh Prasad Yadav, Resident of Ward No. 4, Khunt, Ramnagar Pharsahi, District Purnia, Bihar 854102.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. Principal Secretary Urban Development and Housing Department, Government of Bihar, Patna.
3. The Joint Secretary, Urban Development and Housing Department, Government of Bihar, Patna.
4. The Divisional Commissioner, Purnia Division, Purnia.
5. The District Magistrate, Purnia.
6. State Election Commission through its Secretary, 3rd Floor, Sone Bhawan, Beerchand Patel Path, Patna.
7. Secretary, State Election Commission, 3rd Floor, Sone Bhawan, Beerchand Patel Path, Patna.

... .. Respondent/s

Appearance :

(In Civil Writ Jurisdiction Case No. 12514 of 2022)

For the Petitioner/s	:	Mr. Mrigank Mauli, Sr. Advocate Mr. Rajeev Ranjan, Advocate Mr. Dayanand Singh, Advocate Mr. Nagdeo Choubey, Advocate Mr. Dhananjay Kashyap, Advocate Ms. Pallavi Trivedi, Advocate Mr. Amit Shrivastava, Sr. Advocate <i>(Amicus Curiae)</i>
For the State	:	Mr. Vikash Singh, Sr. Advocate Mr. Lalit Kishore, AG Mr. Pawan Kumar (A.C. to A.G.) Mr. Anmol Chandan, Advocate Ms. Deepika Kaha, Advocate Mr. Kumar Shanu, Advocate
For G.M.C.		Mr. Ravindra Kumar Priyadarshi, Advocate
For State Election Commission:		Mr. Rajendra Narain, Sr. Advocate Mr. Sanjeev Nikesh, Advocate Mr. Girish Pandey, Advocate



(In Civil Writ Jurisdiction Case No. 13513 of 2022)

For the Petitioner/s : Mr. S.B.K. Mangalam, Advocate
Mr.Awnish Kumar, Advocate
Mr. Kumar Gaurav, Advocate
Mr. Amit Shrivastava, Sr. Advocate
(Amicus Curiae)

For the Respondent/s : Mr.Kinkar Kumar, SC-9
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14193 of 2022)

For the Petitioner/s : Mr. Siddhartha Prasad, Advocate
Mr.Shashi Shekhar Kumar Prasad, Advocate
Mr. Prashant Kumar Sinha, Advocate
Mr. Sunit Kumar, Advocate
For the State : Mr. Kinkar Kumar, SC-9
For State Election Commission: Mr. Rajendra Narain, Sr. Advocate
Mr. Sanjeev Nikesh, Advocate
Mr. Girish Pandey, Advocate

(In Civil Writ Jurisdiction Case No. 14206 of 2022)

For the Petitioner/s : Mr.Sunil Kumar Yadav, Advocate
Mr. Rajesh Kumar, Advocate
Mr. Jaishree Kumar, Advocate
For the Respondent/s : Mr.Yogendra Prasad Sinha, AAG-7
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14207 of 2022)

For the Petitioner/s : Mr.Ajay Prasad, Advocate
Mr. Kaushal Kumar, Advocate
For the State : Mr.Subhash Prasad Singh, GA-3
For State Election Commission : Mr. Rajendra Narain, Sr. Advocate
Mr. Sanjeev Nikesh, Advocate
Mr. Girish Pandey, Advocate

(In Civil Writ Jurisdiction Case No. 14219 of 2022)

For the Petitioner/s : Mr. S.B.K. Mangalam, Advocate
Mr.Awnish Kumar, Advocate
For the Respondent/s : Mr.Yogendra Pd. Sinha, AAG-7

(In Civil Writ Jurisdiction Case No. 14234 of 2022)

For the Petitioner/s : Mr. S.B.K. Mangalam, Advocate
Mr.Awnish Kumar, Advocate
For the Respondent/s : Mr.Kinkar Kumar, SC-9
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14240 of 2022)

For the Petitioner/s : Mr. Sumeet Kumar Singh, Advocate
Ms.Alka Singh, Advocate
Mr. Satyendra Prasad Singh, Advocate
For the State : Mr.Subhash Pd. Singh, GA-3
For State Election Commission: Mr. Rajendra Narain, Sr. Advocate
Mr. Sanjeev Nikesh, Advocate
Mr. Girish Pandey, Advocate

(In Civil Writ Jurisdiction Case No. 14241 of 2022)

For the Petitioner/s : Mr. S.B.K. Mangalam, Advocate
Mr.Awnish Kumar, Advocate
Mr. Kumar Gaurav, Advocate
Ms. Anita Kumari, Advocate
For the Respondent/s : Mr.Yogendra Prasad Sinha,AAG-7



Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14242 of 2022)

For the Petitioner/s : Mr. S.B.K. Mangalam, Advocate
Mr. Krishna Chandra, Advocate
Mr. Awnish Kumar, Advocate
For the Respondent/s : Mr. Yogendra Pd. Sinha, AAG-7
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14245 of 2022)

For the Petitioner/s : Mr. Mrigank Mouli, Sr. Advocate
Mr. Avinash Kumar, Advocate
Mr. Krishna Chandra, Advocate
For the Respondent/s : Mr. Vikash Singh, Sr. Advocate
Mr. Lalit Kishore, A.G.
Mr. Yogendra Pd. Sinha, AAG-7
For the State Election Commission: Mr. Rajendra Narain, Sr. Advocate
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14246 of 2022)

For the Petitioner/s : Ms. Meenakshi Arora, Sr. Advocate
Mr. Y. V. Giri, Sr. Advocate
Mr. Rahul Shyam Bhandari, Advocate
Mr. Dayanand Singh, Advocate
Mr. Dhananjay Kashyap, Advocate
Ms. Pallavi Trivedi, Advocate
Mr. Nagdeo Choubey, Advocate
For the Respondent/s : Mr. Subhash Pd. Singh, GA-3
Mr. Rabindra Kumar Priyadarshi, Advocate
For State Election Commission: Mr. Rajendra Narain, Sr. Advocate
Mr. Sanjeev Nikesh, Advocate
Mr. Girish Pandey, Advocate

(In Civil Writ Jurisdiction Case No. 14247 of 2022)

For the Petitioner/s : Mr. Manohar Prasad Singh, Advocate
Mr. Samir Kumar Sinha, Advocate
Mr. Prem Prakash Poddar, Advocate
For the State : Mr. Lalit Kishore, AG
Mr. Subhash Prasad Singh, GA-3

(In Civil Writ Jurisdiction Case No. 14249 of 2022)

For the Petitioner/s : Mr. Ravi Ranjan, Advocate
Mr. Raja Kumar, Advocate
Ms. Suruchi Priya, Advocate
For the Respondent/s : Mr. Abbas Haider, SC-6
Mr. Sanjeev Nikesh, Advocate

(In Civil Writ Jurisdiction Case No. 14303 of 2022)

For the Petitioner/s : Mr. Rajeev Kumar Singh, Advocate
Mr. Prabhojot Singh, Advocate
Mr. Gyanendra Kumar Diwakar, Advocate
Mr. Pranab Kumar, Advocate
For the Respondent/s : Mr. Yogendra Pd. Sinha, AAG-7
Mr. Sanjeev Nikesh, Advocate



**CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)**

Date : 04-10-2022

The short point which arises for consideration in these petitions is as to whether the following three fold test, as elucidated by a Bench headed by Hon'ble Dr. Justice D.Y. Chandrachud vide order dated 19.09.2022 passed in **Sunil Kumar v. The State of Bihar & Ors.**¹ stands followed and complied with in the conduct of election to the numerous "Municipalities" in the State of Bihar or not?

"(i). Having a dedicated commission to conduct an empirical inquiry into the nature and implication of backwardness in relation to local bodies;

(ii) Specification of the proportion of reservation required in light of the recommendations of the Commission; and

(iii) Observance of the limit of 50% on reservations."

2. The test is based on the principles enunciated by Hon'ble the Apex Court in **Sunil Kumar**¹; **K. Krishna Murthy & Ors. v. Union of India & Ors.**²; **Vikas**

¹ Special Leave to Appeal (C) No(s). 16081/2022

² (2010)7 SCC 202



Kishanrao Gawali v. State of Maharashtra,³; (4) Suresh Mahajan v. State of M.P.,⁴; Rahul Ramesh Wagh v. The State of Maharashtra,⁵; Manmohan Nagar v. The State of Madhya Pradesh,⁶.

3. If the finding of this Court is that the triple test condition is not complied with, the seats reserved for OBC/EBC Category shall be declared as open category seats and elections to the said seats will be carried out in that effect.

4. A brief background to the passing of the order dated 19.09.2022 in **Sunil Kumar¹**.

5. In Bihar, with the completion of its five year term, elections to all the Municipalities (various Municipal Bodies) as constituted under the Bihar Municipal Act, 2007 (hereinafter referred to as the Municipal Act) were due to be held in June 2022. Prior thereto, certain amendments were brought in the Municipal Act.

6. For conducting the elections, the Bihar State Election Commission (hereinafter referred to as the “Election Commission”) sought certain clarification from the Government of Bihar (referred to as the ‘Government’) vide

³ (2021) 6 SCC 73

⁴ 2022 SCC OnLine SC 589

⁵ Special Leave to Appeal (C) No(s). 19756/2021

⁶ SLP (C) No. 20734/2021



communication dated 04.01.2022 (Page 280); 24.01.2022 (Page 281); 28.01.2022 (Page 292); 28.03.2022 (Page 303). Reference of direction in the cases referred supra was made therein.

7. Based on a legal opinion, consciously, the Government vide Communication No. 850 dated 01.04.2022 (Page No. 66) directed the Election Commission to proceed with the elections. Nonetheless, later, vide communication dated 20.04.2022; 11.05.2022 and 16.06.2022 (Page No. 306, 307 and 323 respectively), the position of law enunciated by Hon'ble the Supreme Court was reiterated by the Election Commission.

8. Well, what transpired thereafter is not clear, but, vide communication dated 19.08.2022 (Page 92), the Election Commission asked all the Divisional Commissioners and District Magistrate-cum-District Election Officer (Municipality) of the State to undertake the “exercise of reservation and allotment of seats for Scheduled Caste/Scheduled Tribe/Other Backward Caste/Women for the post of Councillors in 172 newly formed/reversed/area expanded and in 10 previous Municipalities.”



9. Assailing the Communication No. 850 dated 01.04.2022 (Page-66), as also praying for a writ of mandamus for the authorities to comply with the dicta laid down by Hon'ble the Apex Court, on 26th of August, 2022, petitioner Sunil Kumar (CWJC No. 12514 of 2022) filed the instant petition. In effect, the petitioner wanted the elections to the Municipal Body i.e. Patna Nagar Nigam, to be conducted without providing reservation to the Backward Class Category, for it be in breach of the three-fold test. In the absence of reservation, the seats would be left open for General Category.

10. When the instant petition was firstly taken up on 2nd of September, 2022, notice was issued with the direction to the Government and the Election Commission to file response within two weeks. However, pending adjudication, on 9th of September, 2022 (Page-116) the Election Commission issued a notification fixing the schedule for elections. In terms thereof, elections to all the “municipalities” within the State of Bihar are scheduled to be held on 10th and 20th of October, 2022. Also, vide communication dated 8th of September, 2022, the posts of



Deputy Chief Councillor of Municipalities are reserved for specified categories.

11. Inviting attention of all such fact(s), petitioner preferred a Special Leave Petition (SLP), which was disposed of vide order dated 19.09.2022 in **Sunil Kumar**¹ with a direction to this Court to take up the matter in the week ending 23rd September, 2022.

12. In the intervening period, several other petitions were filed, *inter alia*, seeking the very same and similar action qua other orders/notifications, dealing with other Municipal Bodies. Consequently, on 20th of September, 2022, when this matter was taken up, parties jointly prayed for an adjournment and, as such, all the petitions were posted for hearing on 22.09.2022, on which date the petitioners were permitted to amend their pleadings and the State of Bihar permitted to withdraw its affidavit filed in terms of the statement made in **Sunil Kumar**¹ and file afresh.

13. In the original petition filed on 26.08.2022, in which we issued notice on 02.09.2022, an amendment petition is filed in C.W.J.C. No. 12514 of 2022, titled as Sunil Kumar v. The State of Bihar & Ors., the Government and the Election Commission have filed composite but separate



affidavits dealing with all the issues raised in these batch of writ petitions.

14. All the learned counsel for the parties were heard on 28.09.2022 and on 29.09.2022, when the judgment reserved.

RESERVATION FOR OBC AND ITS CONSTITUTIONAL STATUS

15. With the insertion of Part IX-A in the Constitution of India, by way of Constitution 74th Amendment Act, 1992 with effect from 1st of June, 1993, the process of “democratic decentralization, greater accountability between the citizens” and the “empowerment of the weaker sections” a scheme of a hierarchical structure of elected local bodies, was initiated. For a notified municipal area, a Municipality, be it the Nagar Panchayat for a transitional area; Municipal Council for smaller urban areas; and a Municipal Corporation for larger urban areas, were required to be constituted in a State.

16. To similar effect, for the Rural Area was the insertion of Part-IX of in the Constitution of India under Constitution 73rd Amendment Act, 1992, notified with effect from 24th of April, 1993.



17. Article 243-D of Part-IX and Article 243-T of Part IX-A provides for reservation of seats in the bodies for-

- (a) Scheduled Castes
- (b) Scheduled Tribes and
- (c) Backward Class Citizens.

18. The Constitutional amendment was brought to ensure fair representation of social diversity in the composition of elected local bodies to contribute to the empowerment of the traditionally weaker sections in society. In so far, reservation of seats in favour of Scheduled Castes and Scheduled Tribes candidates is concerned, it has to be based on the proportion of the population belonging to these categories and the total population of the area in question.

19. Both Article 243-D (6) (Part-IX) and 243-T(6) (Part-IX) enable and empower the State Legislators to reserve seats including Chairperson, in favour of “Backward Class Citizens”.

20. Upholding the validity of the aforesaid amendments to the Constitution, in **K. Krishna Murthy**², the Court held that Articles 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions. The nature and purpose are different and distinct from the reservation policies designed to improve



access to higher education and public employment as contemplated under Articles 15(4) and 16(4). The principles evolved for conferring the benefits of reservation as contemplated in the latter could not be “mechanically applied” in the context of reservations to the former. On this issue, the opinion is extracted as under:

“51. Before addressing the contentious issues, it is necessary to examine the overarching considerations behind the provisions for reservations in elected local bodies. At the outset, we are in agreement with Shri Rajeev Dhavan’s suggestion that the principles that have been evolved for conferring the reservation benefits contemplated by Articles 15(4) and 16(4) cannot be mechanically applied in the context of reservations enabled by Article 243-D and 243-T. In this respect we endorse the proposition that Articles 243-D and 243-T form a distinct and independent constitutional basis for reservations in local self-government institutions, the nature and purpose of which is different from the reservation policies designed to improve access to higher education and public employment, as contemplated under Articles 15(4) and 16(4) respectively.”

(Emphasis supplied)

21. Further, in the domain of political participation, there cannot be any objective parameters for determining the likelihood of being elected to represent the institutions at any level, and as such, in Paragraph 54 of the report, it was



observed that: “When it comes to creating a level playing field for the purpose of elections to local bodies, backwardness in the social and economic sense can indeed be one of the criteria for conferring reservation benefits.”

22. However, it clarified that-

(a) The objective of democratic decentralization, *inter alia*, was to make governance participatory; inclusive; and accountable to the weaker sections of the society; (Para 58)

(b) Reservation in local self Government was intended to directly benefit the community as a whole rather the elected representative; (Para 58)

(c) Thus, negating the plea for exclusion of creamy layer in the context of political representation; (Para 58)

(d) The State Legislatures, in its discretion, could design and confer benefits in favour of Backward Classes. (Para 58);

(e) The identification of backward classes for the purpose of reservation, being an executive function, was required to be carried out by a **dedicated commission appointed to conduct a rigorous empirical inquiry into**



the nature and implications of backwardness with such policies to be reviewed periodically, to guard against overbreadth. (Para 61)

(f) Groups conferred the benefit of reservation in the domain of education and employment need not necessarily require reservations in the sphere of local self-government, for "barriers to political participation are not of the same character". (Para 63).

(g) Chairpersons in Panchayats and Municipalities are reserved as a measure of “protective discrimination”, enabling the weaker sections to assert their voice against the entrenched interests at the local level, for the pattern of disadvantage and discrimination suffered by them are more pervasive at the local level. (Para 74).

23. The opinion resulted in the formation of the following conclusions:-

“82. In view of the above, our conclusions are:

(i) The nature and purpose of reservations in the context of local self-government is considerably different from that of higher education and public employment. In this sense, Article 243-D and Article 243-T form a distinct and independent constitutional basis for affirmative action and the principles that have been evolved in relation to the reservation policies enabled by Articles 15(4) and 16(4) cannot be readily



applied in the context of local self-government. Even when made, they need not be for a period corresponding to the period of reservation for the purposes of Articles 15(4) and 16(4), but can be much shorter.

(ii) Article 243-D(6) and Article 243-T(6) are constitutionally valid since they are in the nature of provisions which merely enable the State Legislatures to reserve seats and chairperson posts in favour of backward classes. Concerns about disproportionate reservations should be raised by way of specific challenges against the State legislations.

(iii) We are not in a position to examine the claims about over breadth in the quantum of reservations provided for OBCs under the impugned State legislations since there is no contemporaneous empirical data. The onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation which are indeed quite different from the patterns of disadvantages in the matter of access to education and employment. As we have considered and decided only the constitutional validity of Articles 243-D(6) and 243-T(6), it will be open to the petitioners or any aggrieved party to challenge any State legislation enacted in pursuance of the said constitutional provisions before the High Court. We are of the view that the identification of “backward classes” under Article 243-D(6) and Article 243-T(6) should be distinct from the identification of SEBCs for the purpose of Article 15(4) and that of backward classes for the purpose of Article 16(4).



(iv) The upper ceiling of 50% vertical reservations in favour of SCs/STs/OBCs should not be breached in the context of local self-government. Exceptions can only be made in order to safeguard the interests of the Scheduled Tribes in the matter of their representation in panchayats located in the Scheduled Areas.

(v) The reservation of chairperson posts in the manner contemplated by Articles 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment.”

(Emphasis supplied)

24. However, in upholding the validity of the constitutional amendment, issue of specific challenge to the State Legislation(s) was left open with liberty to raise a specific challenge thereto. In **K. Krishna Murthy**², the petitioners had also challenged the reservation policy to the OBC group as legislated in the State of Karnataka and the State of Uttar Pradesh. But the Court did observe that in the case of Karnataka, the empirical data was prepared at least two decades before the submission of the report (Chennapa Reddy Commission Report), and in the case of Uttar Pradesh, the policy was based on the 1991 census, and there is, no updation, based on contemporaneous empirical data.



25. Whether specific State Legislation was challenged or not is not known, nor is it a relevant fact for adjudication of the instant *lis*.

26. Based on the principles enunciated in **K. Krishna Murthy**², the Hon'ble Apex Court in **Vikas Kishanrao Gawali**³ directed that:-

“13. Be that as it may, it is indisputable that the triple test/conditions required to be complied with by the State before reserving seats in the local bodies for OBCs has not been done so far. To wit, (1) to set up a dedicated Commission to conduct contemporaneous rigorous empirical inquiry into the nature and implications of the backwardness qua local bodies, within the State; (2) to specify the proportion of reservation required to be provisioned local body-wise in light of recommendations of the Commission, so as not to fall foul of overbreadth; and (3) in any case such reservation shall not exceed aggregate of 50 per cent of the total seats reserved in favour of SCs/STs/OBCs taken together. In a given local body, the space for providing such reservation in favour of OBCs may be available at the time of issuing election programme (notifications). However, that could be notified only upon fulfilling the aforementioned preconditions. Admittedly, the first step of establishing dedicated Commission to undertake rigorous empirical inquiry itself remains a mirage. To put it differently, it will not be open to the respondents to justify the reservation for OBCs without fulfilling the triple test, referred to above.”



(Emphasis supplied)

27. Reading of the said report reveals that the State of Maharashtra, (a) without constituting the Commission; (b) carrying out any empirical study, (c) straightaway provided statutory reservations for the OBC category, which cumulatively along with the other reserved categories, exceeded the limit of 50%. Hence, the legislative action in providing a quantum of reservation across the spectrum for the OBC category uniformly at 27% without conducting a contemporaneous rigorous empirical inquiry into the nature of implications of backwardness in the local bodies was held to be bad in law.

28. In Paragraph 9 of said report, the Court itself clarified the nature and character of the Commission to be “an independent Commission” for ascertaining the “imperativeness of reservation”, which “cannot be a static arrangement” to be reviewed from time to time so as not to “violate the principle of overbreadth”.

29. Dealing with the provisions of the Madhya Pradesh Municipal Act, 1956, which also had provided for reservation without fully following the principle/prong of the triple-test, the Court directed the seats reserved for the OBC



to be notified as General Category. This was **Suresh Mahajan**⁴, in which the Court observed that:-

“13. For, until the triple test formality is completed “in all respects” by the State Government, no reservation for Other Backward Classes can be provisioned; and if that exercise cannot be completed before the issue of election programme by the State Election Commission, the seats (except reserved for the Scheduled Castes and Scheduled Tribes which is a constitutional requirement), the rest of the seats must be notified as for the General Category.”

“15. We once again reiterate that the process of delimitation work and/or triple test compliance is a continuous, complex, time consuming and more so without any timeline (directly linked to the expiry of the term of the outgoing elected body). Whereas, the conduct of elections for installing newly elected body to take over the reins from the outgoing elected representative whose term had expired, is explicitly provided for by the Constitution and the relevant enactments. Therefore, the former need not detain the issue of election programme by the State Election Commission, in respect of local bodies as and when it becomes due much less overdue, including where the same is likely to become due in the near future.”

“24. In other words, the exercise of collation of empirical data and after analysis thereof, the Commission is expected to make recommendation regarding the number of seats to be reserved for Other



Backward Classes “local body wise”. Apparently, that exercise has not been undertaken by the Commission. The State Government can act upon only thereafter and as per the recommendations of the Commission - which is an independent body created to ensure that there is no over-breadth of such reservation in the “concerned local body”.

“31. We also make it clear that this order and directions given are not limited to the Madhya Pradesh State Election Commission/State of Madhya Pradesh; and Maharashtra State Election Commission/State of Maharashtra in terms of a similar order passed on 04.05.2022, but to all the States/Union Territories and the respective Election Commission to abide by the same without fail to uphold the constitutional mandate.”

(Emphasis supplied)

30. In dealing with the validity of the amendments brought in specific statutes of some municipal areas within the State of Maharashtra, noticing the ongoing process of delimitation carried out under the impugned amendments resulting in the breach of the constitutional provisions in the conduct of the elections immediately with the completion of five years, the Court in **Rahul Ramesh Wagh**⁵ by way of an interim order dated 04.05.2022 mandated the Election Commission to conduct the elections without providing for



reservation in the category of Backward Classes. The operative portion of the order reads as under:-

“Be that as it may, any election notified by the Madhya Pradesh Election Commission after 04.03.2021, ought to strictly comply with the triple test requirement predicated in the decision of the three-Judge Bench of this Court in *Vikas Kishanrao Gawali* (supra), in relation to reservation for OBC category seats.

In view of the above submission made on behalf of the State, this petition/application is disposed of as having become infructuous.”

(Emphasis supplied)

31. Finding the position to be similar in the State of Madhya Pradesh, where elections were underway, the Court in **Manmohan Nagar⁶** not only stayed the election process underway but directed elections to be conducted by notifying the seats reserved for OBC Category as General Category.

PROVISIONS OF THE BIHAR MUNICIPAL ACT, 2007 (MUNICIPAL ACT) AND CORRESPONDING AMENDMENTS PROVIDING RESERVATION.

I. The Bihar Municipal Act, 2007 [Bihar Act 11, 2007]

Enacted in conformity with the provisions of the Constitution of India as amended by the Constitution (Seventy-Fourth Amendment) Act, 1992.

II. The Bihar Municipal (Amendment) Act, 2009 [Bihar Act 8 of 2009]



1. Amended Section 12 of the Municipal Act, which deals with the constitution of a municipality and provides for reservation for Scheduled Castes (SC), Scheduled Tribes (ST) and Backward Classes (BC) not exceeding 50% of the total seats in each municipality, and for women belonging to SC, ST, and OBC.
 - a) Originally, the section provided that the number of seats for SC and ST would be as far as possible, proportionate to the population in that area and that the seats would be allotted by rotation to different constituencies in a municipality in the prescribed manner. This was amended to include the words after two consecutive general elections, i.e., the rotation would take place in the prescribed manner after two consecutive general elections.
 - b) Originally, the section also provided that after reservation of seats for SC and ST, seats to be reserved for the BC shall be as nearly as possible but not exceeding 20% of the seats and within the overall limit of 50%. It, once again, provided for reservation on rotation, which was amended to include such rotation after two consecutive general elections.
 - c) Similar amendment was made in clause (d) of sub-section 2 of Section 12 with the effect that seats reserved for women belonging to SC, ST, and BC would be on rotation after two consecutive general elections.
 - d) Through the amendment, an explanation was added that clarified that the principle of rotation would



commence from the first election held after the commencement of the Municipal Act.

2. Amended Section 29 of the Act, which provides for reservation of office of Chief Councillor for SC, ST and BC not exceeding 50% of the total seats of the post of Chairman in the State, and for women belonging to SC, ST, and OBC.
 - a) Similar to the amendment to Section 12, here too, the words "after two consecutive general elections" with the effect that the rotation for the seats reserved for would be in the manner prescribed after two consecutive general elections for the seats reserved for SC, ST, and OBC, and women belonging to such classes.
 - b) An explanation similar to that introduced in Section 12 was prescribed here, i.e., the principle of rotation would commence from the first election held after the commencement of the Municipal Act.

III. The Bihar Municipal (Amendment) Act, 2016 [Bihar Act 16 of 2016]

1. Amended Section 13 of the Municipal Act, which provides for the composition of a municipality, and categorization into a municipal corporation, municipal councils and Nagar panchayats based on population.
 - a) A proviso to Section 13 was inserted stating that notwithstanding anything contained in any other provision of the Act, until the relevant figures of the 2021 census are published, it would not be necessary for the state to re-determine the number of wards based



on the population of the municipal area ascertained at 2011 census.

**IV. The Bihar Municipal (Amendment) Act, 2022
[Bihar Act 6 of 2022]**

1. Amended Section 2(104) of the Municipal Act, which originally defined "Board of Councillors" as the elected body of the municipality consisting of councillors elected in a general election under Section 12 or in a by-election of the municipality. This was amended to include Chief Councillors and Deputy Chief Councillors in the ambit of the Board and as elected under Section 23.
2. Amended Section 11 of the Municipal Act, which originally provided that a municipality would consist of such a number of councillors as there are wards. Now, it has been substituted with the effect that there will be one elected Chief Councillor and Deputy Chief Councillor in each municipality.
3. Section 12, which provides for the Constitution of Municipality and reservation for SC, ST and BC not exceeding 50% of the total seats in each municipality, and for women belonging to SC, ST, and OBC, has also been amended.
 - a) In sub-section (1), the words "all the seats in the municipalities" have been substituted by the words "all the seats of Councillors in the municipalities".
 - b) In sub-section (2) (a), the words " total seats of the member" have been substituted by the words "total seats of Councillors".



- c) In sub-section (2) (a) and (b), the words "seats" have been substituted by the words "seats of Councillor".
- d) Sub-section (4) has been substituted by the following-
"Every member of the Municipality shall have the right to vote in the meeting".
- 4. Amended Section 29 of the Act, which provides for reservation of office of Chief Councillor for SC, ST and BC not exceeding 50% of the total seats of the post of Chairman in the state, and for women belonging to SC, ST, and OBC, to include, in addition to the post of Chief Councillor, the post of Deputy Chief Councillor as well.

Orders/Notifications Impugned in these petitions

32. (i) Based on the legal opinion, the Government vide communication bearing No. 850 dated 01.04.2022 directed the State Election Commission to proceed with the elections, for the empirical data could be collected in terms of Form- 7, 8 and 9. (Page- 66 of CWJC No. 12514 of 2022)

(ii) Notification bearing Communication No. 3732 dated 8.09.2022 issued by the State Election Commission reserving the post of Deputy Chief Councillor for the election of Municipal Corporation for



all categories, including OBC/EBC. (Page-55 of CWJC No. 14240 of 2022)

(iii) Communication bearing No. 3090 dated 7.09.2022 issued by the District Magistrate-cum- District Election Officer (Municipality) directing specific seats to be reserved for different categories in different Nagar Parishads (six in number). (Page- 19 of CWJC No. 14193 of 2022)

(iv) Communication No. 3237 dated 19.08.2022, issued by the State Election Commission calling upon all the Divisional Commissioners, District Magistrates-cum-District Election Officer (Municipality) to prepare the reservation proposal (ST/SC/BC/Women) in terms of the Bihar Municipal Election Rules, 2007 in each one of the municipalities for the post of Municipal Councillor, on a similar basis as was carried out for conducting the election to the Municipalities in the year 2017. (Page-92 of CWJC No. 12514 of 2022)

(v) Notification No. 3734 dated 08.09.2022 issued by the State Election Commission providing reservation of all categories for the post of Deputy Chief



Councillor for elections in different municipal areas of Bihar. (Page- 40 of CWJC No. 14249 of 2022)

(vi) Notification No. 3731 dated 08.09.2022 issued by the State Election Commission providing reservation of all categories for the post of Chief Councillor for elections in different municipal areas of Bihar. (page- 65 of CWJC No. 14245 of 2022)

(vii) Notification No. 3733 dated 08.09.2022 issued by the State Election Commission providing reservation of all categories for the post of Chief Councillor for elections in different municipal areas of Bihar. (Page-19 of CWJC No. 14242 of 2022)

(viii) Notification No. 2731 dated 09.09.2022 issued by the Urban Development and Housing Department, Government of Bihar, notifying the schedule for election to be held for all the posts in the Municipal Bodies of the State of Bihar. (Page-116 of CWJC No. 12514 of 2022)

“PROGRAMS RELATED TO THE VARIOUS STAGES OF THE ELECTION OF MUNICIPALITIES

Sl. No.	Details of Work	First Phase	Second Phase
1	Date of publication of information in Form 11 by the Returning Officer	10.09.2022	16.09.2022
2	Date of Receipt of	From 10.09.2022	From



	Nomination	to 19.09.2022	16.09.2022 to 24.09.2022
3	Date of scrutiny	From 20.09.2022 to 21.09.2022	From 25.09.2022 to 26.09.2022
4	Last date for withdrawal of candidature	From 22.09.2022 to 24.09.2022	From 27.09.2022 to 29.09.2022
5	Finalization after withdrawal of candidature, Publication of list of candidates and allotment of symbols	25.09.2022	30.09.2022
6	Date of Poll	10.10.2022	20.10.2022
7	Polling Time	7 am to 5 pm	7 am to 5 pm
8	Date of Counting	12.10.2022	22.10.2022

”

SUBMISSIONS OF COUNSEL

33. Submissions made on behalf of the petitioners’ counsel, more specifically, Senior Advocates Ms. Minakshi Arora, Shri Y.V.Giri, and Shri Mrigank Mauli, and Advocates, Shri S.B.K. Manglam, Sri Siddhartha Prasad, and Shri Vivek Ranjan, are summarized as under:-

(1) Constitution of an independent Commission for preparing empirical data for identifying the political backwardness is a *sine qua non* for reserving the post/seat in the OBC category.

(2) In utter disregard and breach of the first two tests (principles) laid down by Hon'ble the Supreme Court,



the Government and the Election Commission proceeded to conduct the elections.

(3). The Principle of reservation applied by the Government/Election Commission has resulted in an excessive reservation.

(4). Identification of political backwardness of the persons belonging to the OBC category was never undertaken by the State. In the absence of such an exercise, the criteria of adopting the total population of EBC cannot be the basis for reservation.

(5). Form 7, 8 and 9 only captures the detail of the population of Reserved Category of SC & ST. It does not account for the population of OBC/EBC much less political backwardness of EBC.

(6). Reserving the post of Deputy Chief Councillor is in excess of the 20% cap prescribed for the OBC category.

34. Here only, we may record that, save and except, for the challenge to Section 2(100) and providing reservation to the post of **Deputy Mayor/Councillor** or other similar posts, in terms of the Amendment Act, learned counsel for the petitioners did not press the prayers assailing other amendments brought into the Municipal Act.



35. Shri Vikash Singh, Senior Advocate, appeared on behalf of the State and Mr. Rajendra Narain, Senior Advocate for the Bihar State Election Commission.

36. Opposing the petitions, Shri Vikash Singh, Senior Advocate, has made the following submissions:

(1). The decision rendered in **K. Krishna Murthy** is based on a fact situation; different and distinct from Bihar, and as such, is not applicable for the State of Bihar; The triple test formula was laid only in the context of reservation of OBC.

(2). In Bihar, OBC cannot be considered politically backward due to their sheer numerical strength. Consequently, its sub-set, i.e. **Extremely Backward Class (EBC)**, was carved out and reservations provided thereto.

(3). **Vikas Kishanrao Gawali³; Suresh Mahajan⁴; Rahul Ramesh Wagh⁵; and Manmohan Nagar⁶** only deal with reservations exceeding the prescribed limit of 50%, which is not the case at hand.

(4). Alternatively, and in any event, Government is not only in full compliance but way ahead of what is mandated in the dictums;



(5). Post independence, by undertaking a novel exercise, pioneering the movement of reservation for not only the OBCs but a sub-set thereof, i.e. EBC, the Government brought in legislations for providing reservations; identifying caste by a statutory body- the State Commission for Backward Classes; and also constituted a separate Commission for identifying persons belonging to EBC Category. Based on their exercise, even as late as 2015, the Government issued a notification identifying persons belonging to both OBC and EBC Category for the purpose of conferring benefits.

(6). With the Constitution 73rd Amendment and Constitution 74th Amendment Act, 1992, suitable amendments were brought in the respective legislations providing adequate reservation to all categories of persons, including OBC and EBC categories, with the cap of 20%. This exercise has withstood the test of judicial scrutiny with the passing of the Full Bench judgment of this Court dated 19.05.2006, in **Vijay Kumar Singh Vs. State of Bihar & Ors,**⁷ wherein the action of the reservation to the extent of 20% for the EBC Category brought in the Bihar Panchayati Raj Act, 2006 was upheld with the Hon'ble the Supreme

⁷ 2006 (2) PLJR 606



Court putting its seal of approval vide order dated 06.03.2018 in **Saran Jila Mukhiya Sangh and another v. State of Bihar and others.**⁸ (Page 441).

(7). Arguing that the reservation in respect of Extremely Backward Classes is carved out of OBC, the State Legislature does not fall foul of the law, reliance is sought on the judgment dated 01.12.2016 rendered in **Sanjay Kumar Vs. The State of Bihar & Ors,**⁹ against which, even though an SLP is pending, the ratio is still binding.

37. Shri Amit Shrivastava, learned senior counsel, *Amicus Curiae*, in supporting the petitioner's submissions, has further added that bare reading of the communication dated 01.04.2022 (Page-66) indicates the State to have taken a contradictory stand. Whereas vide communication dated 13.10.2016, the Government had acknowledged the Election commission to be a constitutional and independent body, yet, contrary to the concern expressed by the Election Commission, by taking a summersault, issued direction to proceed with the elections.

⁸ Civil Appeal No. 1882 of 2008

⁹ Writ Petition No. 4222/2016



38. Certain other judicial pronouncements relied upon by the learned counsel shall be referred to and dealt with later in our opinion.

PLEADED CASE OF THE GOVERNMENT

39. Plead case of the Government is as follows:-

“3. That the judgments of the Hon'ble Supreme Court in the case of **K. Krishnamurthy & Ors. v Union of India & Ors. (2010) 7 SCC 202** as also **Vikas Kishanrao Gawali Vs. State of Maharashtra (2021) 6 SCC 73** do not apply at all in respect of the State of Bihar because Bihar has not provided reservation for OBC as a class in its local bodies. Krihnamurthy while considering a challenge to the constitutional validity of Part XI and XI-A of the Constitution of India amongst others, was also considering the vires of the enabling provision in the said Part which enabled various states to provide for reservation for OBCs in the Panchayats and Municipalities respectively. The judgment in Krihnamurthy is only an authority for the proposition that part XI and XI-A of the Constitution of India vide Articles 243D and 243T only provide for an enabling provision for the respective state legislatures to provide for reservation in Panchayats and municipal bodies respectively. While approving the spirit of the Constitution and justifying the enabling power to provide for reservation, the Constitution Bench of the



Hon'ble Supreme Court discussed the concept of 'political backwardness' on the premise that the OBCs, by their sheer numerical strength, cannot be said to be suffering the same disadvantages, which a Backward Class person would be suffering in the matter of employment where education and competing in an examination are the determining factors in selection. If any State was to further sub-divide the OBC category, like in Bihar by creating a sub-set of the OBCs as a class which is Extremely Backward, then firstly the advantage of numerical strength for the purpose of Political backwardness does not arise and secondly, the Extremely backward amongst the OBC are an identified lot whose historical sufferings in society are much greater than the other OBCs and hence they require affirmative action in the matter of reservation in local bodies. The extremely backward are a more disadvantaged lot of the OBCs, that too identified by the first time by the Kaka Kalekar Commission in its report on Backward classes 1955 and the said Most Backward Class were further specifically identified for the State of Bihar by the Mungeri Lal Commission in the year 1976. In other words, a dedicated commission identified this Extremely Backward Class (Most Backward Class) as early as in 1955 for the entire country and in the year 1976 for the State of Bihar and the updation of the persons falling in the said category is being done since 1993. In fact in the State of Bihar the updation of the Extremely Backward Class is first done by the Extremely Backward Class Commission (which is a statutory commission constituted by notification of the State Government) and the list so



prepared, is put up before the Backward Class Commission constituted under the Bihar State Commission for Backward Classes Act, 1993, which commission takes a holistic view of the matter and finalises the list of the Extremely Backward Class and OBC.

It is noteworthy that one of the mandates of the Bihar State Extremely Backward Commission is also to identify the caste which will remain in the Extremely Backward Class so as to enjoy the benefit of reservation in the local bodies of Bihar.

ANNEXURE

Accordingly in view of the above and in view of the events described herein below, it is clear that the Krihnamurthy judgment does not apply to the state of Bihar and accordingly Vikas Gawali judgement and subsequent orders passed therein would not apply to the State of Bihar. In view thereof the writ petition is not maintainable.”

“18. That on 11/05/2010, a Judgment was passed by the Constitution Bench of the Hon’ble Supreme Court in K.Krishnamurthy & Ors. v. Union of India & Ors. (2010) 7 SCC 202 dealing only with the reservation with regard to OBC. The said judgment did not in any manner deal with reservation as provided in the State of Bihar which had reserved seats in local bodies for Extremely Backward Classes and not for the entire OBC identified for the State. The said judgment would apply only to such states which had made reservation for OBC as a whole in the local bodies and the premise of the said judgment was that mostly in states OBC as a whole because of their numerical



strength cannot be considered to be backward in the matter of political representation.

It is noteworthy that while OBC as a whole constitute almost 50% of the population of Bihar out of the same Extremely Backward Classes would be almost 25%. Since there is no study on the subject, averment is being made on the basis of news report published by Indian Express.”

OUR OPINION

40. Having given thoughtful consideration to the material on record, we cannot persuade ourselves to agree with the first of the submissions made by Shri Vikash Singh, learned Senior Advocate.

41. We do not agree that the decision in **K. Krishna Murthy**² would apply to states which had provided reservations in the local bodies only for the OBC category “as a whole.”. There, primarily, the challenge dealt with was to the Constitution 73rd and 74th amendment, and the challenge to the Municipal Law (two States), left open to be dealt with separately. Significantly, the State of Bihar was a party to the said decision. Also, Hon'ble Supreme Court decided **Saran Jila Mukhiya Sangh**⁸ (Page 441) following **K. Krishna Murthy**², by extracting relevant portion thereof.



42. The concept of EBC, as carved out by Bihar, at best is only a “sub-set” and not an “off-set” of OBC. The primary reservation source, be it for OBC or EBC, flows through Article 243(6) alone, whereby for the “OBC” category, States are enabled to provide reservations through a statutory mechanism. This is unlike the category of SC and ST, for whom, as the Constitution provides, reservation necessarily has to be based on population, regardless of their political backwardness.

43. In so far as other decisions are concerned (referred to in the opening part of the opinion, Para-2) while dealing with the issue of reservation for OBC Category, the Court found the impugned action(s) to be violative on all counts- (1) reservation in excess of the Constitutional cap, (2) providing reservation without constituting a Commission (3) and/or conducting a study of contemporaneous empirical data, more so, with regard to the “political backwardness” vis-à-vis the territorial limits of the constituency.

44. Next, we proceed to examine whether the three test principles is complied with by the State of Bihar or not?



FIRST TEST

45. Coming to the first test principle, i.e. "Having a dedicated Commission to conduct an empirical inquiry into the nature and implication of backwardness in relation to local bodies", we find the Government to have placed certain material which we now proceed to deal with.

46. The Government states that with the enactment of the Constitution, the first Backward Class Commission, chaired by Kaka Saheb Kalelkar submitted its report in 1955; pan India, out of 2399 castes classified as Backward castes, 837 were in the Most Backward category. Concerning the State of Bihar, the Commission listed 128 castes as Backward.

47. In 1971, the Government of Bihar appointed its own Commission headed by Mr. Mungerilal, and the report submitted in 1976 revealed that out of these 128 castes, amongst all religions, i.e. Hindus, Muslims or Christians, 94 were Most Backward. The conclusions arrived at fully accounted for the parameters- (1). Socio-economic status; (2) Representation in Government Jobs; and (3) Share in industries and business.

48. Acting on this report, the then Chief Minister Shri Karpoori Thakur introduced a concept of reservation for



all categories, be it Other Backward Classes (OBC), Most Backward Class (MBC), Scheduled Caste (SC), Scheduled Tribe (ST), Women or Economically Backward Category (EBC). Consequently, amendments were brought into different statutes providing reservation, in the area of service, education or elected representatives at the grass root level.

49. The Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991[hereinafter referred to as Act No. 3 of 1992/Reservation Act] was updated to necessarily provide reservation to Economically Backward Class; Backward Class, Women of Backward Classes, including Women from Scheduled Castes; Scheduled Tribes and EBC.

50. Bihar Panchayat Raj Act, 1993 was amended, providing reservations to both the EBC and Backward Classes.

51. Further, under the Bihar State Commission for Backward Classes Act, 1993, the State constituted a specific Commission for Backward Classes other than Scheduled Castes and Scheduled Tribes.



52. Still further, by virtue of a resolution dated 15.09.2006 issued by the Personnel and Administrative Reforms Department, Government of Bihar, “State Commission for the Most Backward Class” was also constituted. (Page-454)

53. Inviting attention of notification dated 11th September, 2015 (Page 456), whereby the list contained in Bihar Act No. 3 of 1992 was amended, the existence of a mechanism complete in all respects, of identification of the OBC/EBC and the exercise carried out by such bodies, is pointed out. Thus, argued, meets the test of the establishment of a Commission to study empirical data.

54. It is argued that, by amending the Bihar Executive Rules, 1979 through a notification dated 20.03.2007 of the Cabinet Secretariat & Coordination Department, Backward Classes and Extremely Backward Classes Welfare Department has been made the Nodal Department to implement and monitor the following subjects:

- (1). To provide a stipend to the Extremely Backward Classes.
- (2). To provide grants for books and accessories to the Extremely Backward Class Students.
- (3). To provide loans to the members of the Extremely Backward Classes for their



development. (4). Establishing and managing hostels for the Extremely Backward Classes. (5). Formation of co-operative societies for the Extremely Backward Classes. (6). To provide subsidiary grants to educational and cultural institutions working to benefit the Extremely Backward Classes. (7). To provide a stipend to the Backward Classes. (8). To provide grants for books and accessories to the Backward Classes. (9). To provide loans to the members of the Backward Classes for their development. (10). Opening and managing hostels for the Backward Classes. (11). Formation of Cooperative Societies for the Backward Classes. (12). To provide subsidiary grants to educational and cultural institutions working for the benefit of the Backward Classes. (13). Bihar State Backward Classes Finance and Development Corporation (14). Special Home-Building Schemes for Backward Classes and Extremely Backward Classes.

55. Also, while OBC constitutes almost 50% of the Population in Bihar, 25% belong to Extremely Backward Classes and are provided with the benefit of reservation.



56. Continuous study and updation have resulted into amendments brought out in the Act No. 3 of 1992/Reservation Act in the following manner:-

“The Bihar Act 3, 1992

(a)	Schedule Castes	14%
(b)	Schedule Tribes	10%
(c)	Extremely Backward Class	12%
(d)	Backward Class	8%
(e)	Economically Backward women	3%
(f)	Economically Backward	3%
	Total	50%

”

“The Bihar Act 11, 1993

(a)	Schedule Castes	14%
(b)	Schedule Tribes	10%
(c)	Extremely Backward Class	14%
(d)	Backward Class	10%
(e)	Women of Backward Classes (Women of SC/ST,EBC and BC)	2%
	Total	50%

”

“The Bihar Act 17, 2002 (After Division of Bihar in year 2000)

(a)	Schedule Castes	16%
(b)	Schedule Tribes	1%
(c)	Extremely Backward Class	18%
(d)	Backward Class	12%
(e)	Women of Backward Class	3%
	Total	50%

”

57. Examination of the provisions of Act No. 3 of 1992/Reservation Act, in our considered view, carries the object and purpose of only providing reservation in services.

58. That apart, the criteria for delineating backwardness is “economic backwardness” and not “political backwardness”, as is evident from the Other Backward



Classes defined therein. For ready reference, relevant provisions of the statute are extracted hereunder:-

“2(i)"Other backward Classes" shall have reference to extremely backward and backward class economically backward and economically back ward women”;

“(j) Extremely Backward and Backward Classes" mean and includes those castes which have been mentioned and circulated vide Department of Personnel and Administrative Reforms, Government of Bihar. Resolution No. 11/A1-501/78-756/Ka dated the 10th November, 1978 as amended from time to time and specified in Schedule I and II of this Act and whose annual family income from all sources is less than the income tax limit;

“(k) Economically Backward” mean and include those candidates whose annual family income from all sources is less than the income-tax limit.

(l) "Economically Backward Women" mean and include those candidates whose annual family income from all sources is less than the income-tax limit.”

“(m) Merit list" means the list of candidates arranged in order of merit prepared according to the rules and orders issued by the State Government and adopted by competent authority for making appointments in respect of initial recruitment or promotion;”

“(n) "State" includes the Government, the Legislature and the Judiciary of the State of Bihar and



all local or other authorities within the State or under the control of the State Government.”

(Emphasis supplied)

59. The said Act was amended vide Bihar Act 11 of 1993 (Page 403). Substituting the definition of “other backward class” as under:

“2(ii) For clause (i), the following shall be substituted, namely:-

“(i) ‘Other Backward Classes’ shall have reference to Extremely Backward, Backward Classes and Women of Backward Classes”.

(iii) For clause (g) the following shall be substituted, namely:

“(j) Extremely Backward and Backward Classes' mean and include those classes which have been specified in Schedules I and II of the Act.”

(Emphasis supplied)

60. Bihar Act 6, 1996 amended Act No.3 of 1992 and the following was inserted:-

“14A. Power to add or remove Castes/Classes in Schedules I and II of the Act- The State Government may on the recommendation of the Bihar State Commission for Backward Classes, add or remove, as the case may be, any Caste/Class from Schedule I or Schedule II appended to the Act by notification in the Official Gazette.”



61. A conjoint reading of the definition clause 2(i),(j), (k) and (l) results in an unequivocal conclusion that even with the amendment in the definition of OBC and EBC, neither political backwardness nor representation to the local bodies is the criteria for determining backwardness. The position remains the same.

62. We examine the issue from the point of Municipal Act.

63. Here only we extract the definition of Backward Class contained therein.

“2(100) “**Backward Classes**” means and includes the list of Backward Classes of Citizens Specified in Annexure 1 of the Bihar Reservation of Vacancies in Post and Services (for SC, ST and other Backward Classes) Act 1991 (Bihar Act, 3/92).”

64. The import of backward class is restricted to Annexure-1 of the Bihar Act 3 of 1992, which actually is Schedule I and the list provided therein, pertaining to the EBC category.

65. When viewed with the definition of Backward Class in the Municipal Act, the Other Backward Classes, as defined in Section 2(i) of the Reservation Act, restricted in



nature, confines the scope of the Act only to the EBC and not OBC category.

66. Examining the provisions of the Bihar State Commission for Backward Classes Act, 1993(referred to as the Commission Act), (Page-406) we notice the scope of inquiry by the Backward Classes Commission to be restrictive in nature, i.e. examining the “request or complaints with regard to the inclusion of the Backward Classes in the list” as also “tender advice to the State Government as it deems appropriate. Here also, a Backward Class, is defined as the one specified in the Schedule appended to Act 3 of 1992, which is the Reservation Act. Certainly, the Reservation Act does not deal with the nature or implication of Political Backwardness concerning local bodies. For ready reference, the relevant provisions of the Commission Act are extracted as under:-

“2 (a). “Backward Classes” means, such Backward Classes other than the Scheduled Castes and the Scheduled Tribes specified or to be specified in the Schedule appended to Bihar Act 3 of 1992;

(b) “Commission” means the State Commission for Backward Classes constituted under Section 3;

(c) “Lists” means lists prepared by the State Government from time to time for purpose of making proviso for the reservation of appointments or posts in



favour of Backward Classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the State Government and any local or other authority within the State or under the control of the State Government;

9 Functions of the Commission. - (1) (a) The Commission shall examine the request for inclusion of any class of citizens as a Backward Class in the list and hear complaints of over inclusion or under inclusion of any Backward Class in such lists and tender such advice to the State Government as it deems appropriate;

(2) The advice of the Commission shall ordinarily be binding upon the State Government.”

(Emphasis supplied)

67. Thus, the definition clause itself clarifies the object of preparation of the list by the Commission, i.e., providing reservations for appointments in Government Service and/or any local or other authority within the State or under its control for the EBC.

68. The Commission Act was amended vide the Bihar Act No. 5 of 2008, titled the State Commission for Backward Classes (Amendment) Act, 2007, (Page-453) with the substitution of Section 9, which reads as under:-

“2. Amendment of Section 9 of the Bihar Act 12, 1993
- Sub-section (1) of Section-9 of the said Act shall be substituted by the following:-



(1) (a) The Commission shall examine, request for inclusion of any class of citizen as a backward class in the list and hear complaints of over inclusion or under-inclusion of any backward class in the list of Backward Classes (Schedule-2) and tender such advice to the State Government as it deems appropriate;

(b) The Commission shall examine the complaints under any other law, Rules or instructions, for the time being in force, under the Constitution and by the State Government debarring from rights and protection and reservation admissible for Backward Classes for the entrance in public services and educational institutions and tender appropriate advice so that the State Government may take necessary action in this regard.

(C) Execution of other works referred by the Government to the Commission also from time to time shall be made by the Commission.”

(Emphasis supplied)

69. It is thus seen that under this amendment, the power to deal with the list of Backward Classes is confined to Schedule-II, which deals only with OBC category and not EBC category, for which there is a separate Schedule-I. The scope of inquiry by the Commission was not expanded even by this Amendment.

70. We add that, by adopting the legislative principle of “reference”, and not “incorporation”, reference to the Schedule/List/Annexure, be it by whatever name, in the



statutes, is only what is provided under the Reservation Act. The legislative action, incoherent in nature, by the delegatee has resulted into this anomalous situation.

71. Thus, the scope of inquiry under the Commission Act or Act No. 9/1992 is definitely not to ascertain the political backwardness of persons belonging to the reserved category of OBC, including the EBC for the purpose of representation to the Municipal Bodies.

72. Coming to the State resolution constituting the State Commission for Most Backward Class (Page 454), we find one of the functions of the Commission is to provide suggestions for enabling representation of the “Most Backward Class” in the three-tier levels of the Panchayats and the problems arising out of it, vis-à-vis inclusion and removal of such castes and other matters connected therewith.

73. The scope of the Commission is defined in Clause 3(b), which is extracted as under:-

“3. The work to be done by the Commission:-

- i. To submit a detailed report every year to the State Government on the reasons for the backwardness and the social and educational status of the most backward class and the measures to remove them.



- ii. On the basis of complaints received regarding deprivation of rights of the most backward class, vesting in Law, Government orders, policies, ordinance order, after inquiry would give suggestions to the State Government for taking appropriate action.
- iii. The Commission may suggest for inclusion and exclusion of any caste out of the list of the most backward castes.
- iv. The Commission may give suggestions with regard to the issues of the representation of the most backward class in the three-tier Panchayats and the problem arising out of it vis-a vis inclusion and removal of such castes in the most backward classes and other matters connected therewith.
- v. To study the problems of modernization of traditional jobs associated with extremely backward classes and to give appropriate suggestions to the Government.
- vi. Any other matter which the State Government may entrust to the Commission.”

(Emphasis supplied)

74. However, it is not the pleaded case of the State that the Government had ever entrusted any work to this Commission, undertaking the task of conducting an empirical inquiry into the nature and implication of political backwardness of the EBC, much less of OBC category for the purpose of the reservation to the election of municipalities, as mandated by **K. Krishna Murthy**² or **Vikas Kishanrao Gawali**³.



75. Before us, it is also not the pleaded case that this Commission has ever given any suggestions vis-à-vis an inquiry or ever undertaken any task in terms of the scope of Clause (iv), reproduced supra. The scope of Commission is specific and confined to EBC and not OBC as a whole, for the former is only a subset of the latter. Also, the Commission's primary objective is to prepare a report after examining the reasons for social, educational and economic backwardness.

76. We find the impugned actions to suffer from the vice of lack of jurisdictional error since imperativeness of the need to establish a dedicated Commission or empowering the existing bodies to undertake the task of empirical data collection and study thereof not to have been carried out.

77. In the backdrop mentioned above, we cannot persuade ourselves to opine the Government to comply with the first prong of the three-fold test.

SECOND TEST

78. We shall now deal with the second test principle, i.e. “specification of the proportion of reservation



required in the light of the recommendations of the Commission”.

79. As per **K. Krishna Murthy**², the onus is on the executive to conduct a rigorous investigation into the patterns of backwardness that act as barriers to political participation [Para 82 (iii)] and the onus challenging the errors in undertaking such exercise is on the person challenge the same. (Para 62)

80. It is not the case, pleaded or stated, of the Government that post **K. Krishna Murthy**² an exercise was carried out wherein the parameters adopted for determining the backwardness in other aspects, socio-economic or educational, were consciously adopted for the purpose of representation to the elected bodies.

81. On record, we find that save and except for the list notified on 11th September 2015 (Page 456), whereby amendment in the list of Act No. 3 of 1992/Reservation Act about EBC and OBC was brought about, there is no other latest list. We notice that there have been certain deletions in the said List-1 dealing with the Extremely Backward Class. But then the list clarifies the object of its preparation, i.e. to enable the authorities to issue Caste Certificates (Page 457)



and provide reservations in Government employment (Page 460).

82. Further, the notification does not specify the list to have been amended based on the recommendations made either by the Backward Classes Commission or the Extremely Backward Classes Commission. Thus, in our considered view, there is total non-compliance of the mandate of the Constitution Bench Judgment in **K. Krishna Murthy**² and subsequent judgments in **Sunil Kumar**¹; **Vikas Kishanrao Gawali**³; **Suresh Mahajan**⁴; **Rahul Ramesh Wagh**⁵; and **Manmohan Nagar**⁶.

83. The maize of incoherent statutes has perhaps led to this anomalous situation which requires clarification by a comprehensive legislation covering all aspects in the light of **K. Krishna Murthy**² and other subsequent judgments.

84. This fact alone has not weighed with us in arriving at such a conclusion, for we examine the issue differently.

85. In **Indrasawhney and others v. Union of India and others**,¹⁰ and **Pattali Makkal Katchi v. A. Mayilerumperumal and others**,¹¹ the concept of sub-

¹⁰ 1992 Supp (3) SCC 217

¹¹ 2022 SCC OnLine SC 386



classification within socially and educationally backward classes, though in the context of Article 16(4), was accepted.

86. In **State of Punjab and others v. Davinder Singh and others**,¹² [Five Judge Bench], the Hon'ble Supreme Court has held as follows:-

“48. The State's obligation is to undertake the emancipation of the deprived section of the community and eradicate inequalities. When the reservation creates inequalities within the reserved castes itself, it is required to be taken care of by the State making sub-classification and adopting a distributive justice method so that State largesse does not concentrate in few hands and equal justice to all is provided. It involves redistribution and reallocation of resources and opportunities and equitable access to all public and social goods to fulfil the very purpose of the constitutional mandate of equal justice to all.”

“49. Providing a percentage of the reservation within permissible limit is within the powers of the State Legislatures. It cannot be deprived of its concomitant power to make reasonable classification within the particular classes of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes without depriving others in the list. To achieve the real purpose of reservation, within constitutional dynamics, needy can always be given benefit; otherwise, it would mean that inequality is being perpetuated within the

¹² (2020) 8 SCC 1



class if preferential classification is not made ensuring benefit to all.”

(Emphasis supplied)

87. The concept of carving out a subset out of a set is also accepted in **Vijay Kumar Singh**⁷.

88. In the impugned communication dated 01.04.2022 (Page No. 66), it is the Government’s dictate to the Election Commission to obtain data from the District Magistrates through Forms 7, 8 and 9 to carry out an empirical study.

89. This takes us to the relevant enabling provisions providing for such an exercise to be undertaken.

90. The Municipal Act defines the backwardness to mean that:-

“2(100) “**Backward Classes**” means and includes the list of Backward Classes of Citizens Specified in Annexure 1 of the Bihar Reservation of Vacancies in Post and Services (for SC,ST and other Backward Classes) Act 1991 (Bihar Act, 3/92)”

91. The Constitution of a Municipality is defined under Section 12. Sub-section (2) of the said Section provides for reservations not exceeding 50% of the total seats of the member of the Municipalities to be reserved for (i) Scheduled



Castes, (ii) Scheduled Tribes and (iii) Backward Classes. As far as the SC and ST Category is concerned, the reservation is based on their respective total population of the area. The extent of the total number of seats to be reserved for all categories is 50%. After providing for reservation for the SC and ST Category, the remainder, not exceeding 20% of the total seats, are to be reserved for all other specified categories.

92. Bihar Municipal Election Rules, 2007 (referred to as the Rules) were notified on 21.04.2007. Rules 29 and 30 prescribe Forms 7, 8 and 9. Since both are similar, for ready reference, Rule 29 is extracted as under:-

“29. Constitution and numbering of wards of a Municipality. - (1) Subject to the provisions of Section 7 & Section 13 of the Act, wards shall be constituted and numbered in accordance with the procedures laid down by the State Election Commission. The list of ward of every Municipality shall be published in **Form -6** in the manner prescribed by the State Election Commission.

(2) Determination of seats for reservation in the wards.

-

- (i) For election to the post of Councillors in each Municipality, reservation and allotment of wards for the Scheduled Castes/Scheduled Tribes/ Backward Classes and Women of these categories in admissible number



under Section 12(2)(a) of the Act shall be made by the District Magistrate under the direction, controls and supervision of the State Election Commission.

- (ii) First of all the number of wards to be reserved under Section 12(2) of the Act for each category shall be calculated in **Form - 7** in the manner laid down by the State Election Commission.
- (iii) Wards having the highest population of Scheduled Castes and Scheduled Tribes in descending order of population shall be reserved for and allotted to Scheduled Castes or Scheduled Tribes, as the case may be, in admissible number.

Out of the seats so reserved for Scheduled Castes or Scheduled Tribes, as nearly as fifty per cent of these seats but not exceeding it, shall be reserved for women of the Scheduled Castes or Scheduled Tribes, as the case may be. Wards which come first in descending order of the Population of Scheduled Castes or Scheduled Tribes shall be allotted to the women of these categories.

- (iv) Subject to the limit of fifty per cent total reservation including Scheduled Castes/Scheduled Tribes and Backward Classes, a maximum of twenty per cent of total seats of wards shall be reserved for Backward Classes in each Municipality. For this the following procedure shall be followed:-

- (i) All the wards in the concerned municipality shall be arranged



- (a) showing category wise (Scheduled Castes, Scheduled Tribes, other and total) Population in **Form - 8**
- (b) descending order of the population showing Scheduled Castes population, Scheduled Tribes population, other classes population and total population (including Scheduled Castes/ Scheduled Tribes and other classes) in **Form - 9**
- (ii) Those wards which have been reserved and allotted to Scheduled Castes/Scheduled Tribes (including their women) shall not be reserved for the Backward Classes. Seat for Backward Classes shall be reserved and allotted from the remaining wards.
- (iii) Those wards which have the highest total population in descending order, shall be reserved for Backward Classes in admissible number. Out of the wards so reserved for Backward classes, those wards shall be reserved for Backward Class women in admissible number, which come first in descending order of total population.
- (iv) Details of such reserved/unreserved wards shall be prepared in **Form -10.”**

93. One such filled form is placed on record (Page No. 481 – 484) and sample of the forms is extracted as under:-

“**FORM 7**
[See Rule 29(2)]
Category wise reserved post

State
Name of Sub-Division
Name of Municipality

Municipality's Population				Total Number of	Category wise total reserved post			
Scheduled	Scheduled	Others	Total		Schedule	Schedule	Backward	Others



Caste	Tribe			Wards	Caste	Tribe	Class	
1	2	3	4	5	6	7	8	9

District Magistrate-cum-District Election Officer
(Municipality)

- (1)Counting of Reserved posts for Schedule Caste:-
(Population of Schedule Caste/Municipality's total Population) x Total Number of wards=.....Post
(2)Counting of Reserved posts for Schedule Tribe:-
(Population of Schedule Tribe/Municipality's total Population) x Total Number of wards=.....Post
(3)Counting for Reserved seats for Backward Class:-
a. Total Seats:-
b. 50% of Total Seats:-
c. 20% of Total Seats (1/5 of Total Seats):-
d. Number of Reserved Seats for SC/ST
e. Number of Reserved Seats for Backward Classes.....Seat
(4) Number of Unreserved Seats = Total Posts (d + e) =.....Seat”

“FORM- 8

[See Rule 29(2)(iv)]

Category wise population of Municipality’s ward

State:-
Name of District:-
Name of Sub-Division:-
Name of Municipality:-

Serial	Ward’s number/name	Population of Ward area			
		Schedule Tribe	Other	Schedule Caste	Total

District Magistrate”

“FORM-9

[See Rule 29(2)(iv)(i)(b)]

Municipality’s population in descending order

State:-
Name of District:-
Name of Sub-Division:-
Name of Municipality:-

Serial No.	ST's population in descending order	Ward No.	Other's population in descending order	Ward No.	ST's population in descending order	Ward No.	Total population in descending order	Ward No.

Ward number reserved for backward class.

District Magistrate”



94. Form 7, 8 and 9 only indicate total population of the ward and population of SC/ST in the ward. They do not indicate data of population for providing reservation, be it for SC, ST or OBC Category, which is definitely not in consonance with the directions issued in **Vikas Kishanrao Gawali³; Suresh Mahajan⁴ and Rahul Ramesh Wagh⁵**, for there being no study of political backwardness even amongst the EBC category. Also, whether data of the population furnished is in respect to the entire population of general category, OBC category or only EBC category, is not clear. At least, the Form does not create any distinction. So if the seats are reserved for OBC category as a whole, then obviously the stand of the State is incorrect, if not false. Even if it is confined only to EBC category, then also it falls foul of the mandate of the law.

95. We may further add that the procedure and pattern adopted by the Government/Election Commission in reserving the seats for the OBC category in all the Municipalities, be it Municipal Corporation, Municipality or Nagar Parishad, is identical. In other words, reservation across the board is provided without evaluating any



parameters, except population and also judging its overbreadth.

96. Vide communication No. 2327 dated 09.08.2022, the Election Commission issued guidelines for effecting reservation in favour of Backward Class category in various local bodies across the State based on population alone, uniformly at the rate of 20% across all the local bodies without enquiring into the nature and implications of at least political backwardness. Also it does not clarify the distinction between OBC and EBC category.

97. No point of reference to the Backward Class Commission or Extremely Backward Class Commission for ascertaining political backwardness is placed on record. It is also not the pleaded case that the list notified in the year 2015 was prepared with such an intent and endeavour. In fact, it could not have been, given the Government's own stand. Identification is an ongoing process. It cannot be static. Between the preparation of the last list, one full term of an elected body is over. The exercise undertaken by Kalekar and Mungerilal Commissions was not from the point of political backwardness but instead identifying socially and economic backwards castes.



98. Further, with the Amending Act, 2007, i.e. Bihar Act 5 of 2007, the Bihar State Commission of Backward Class Act, 1993 Act No. 12 of 1993 stood amended.

99. A plain reading of the amended provision implies the scope of the Bihar State Backward Class Commission to be narrowed down and limited to deal only with the issues of the castes identified in the list contained in Schedule-II, which is of the OBC Category and not the list of caste contained in Schedule-1 pertaining to the EBC Category.

100. If that were so, the corollary thereof is that there is no authority to examine the complaints and issues arising from the inclusion and exclusion of castes in the list contained under Schedule-1, i.e. in respect of the EBC Category.

101. Reservation in elections at different levels is a concept not alien to the Indian polity. The Morley Minto Reforms, 1909; the Indian Council Act, 1909; the Constitution of India, 1950 (Part- XVI) are evidently clear on the issue. Reservation at the grass root level, rural and urban,



stands constitutionally acknowledged with the enactment of the 73rd and 74th Amendment.

102. Notwithstanding the laudable object and tremendous exercise carried out by the Government, in ameliorating the sufferings of the deprived and the downtrodden in providing assistance and reservation in the field of education or employment, to our mind, still, the position would remain unchanged. For, as we notice, such an endeavour is based only on the point of social and economic backwardness and no more, unlike the mandate of **K. Krishna Murthy**² set out particularly in the following para.

“56. The objectives of democratic decentralisation are not only to bring governance closer to the people, but also to make it more participatory, inclusive and accountable to the weaker sections of society. In this sense, reservations in local self-government are intended to directly benefit the community as a whole, rather than just the elected representatives. It is for this very reason that there cannot be an exclusion of the “creamy layer” in the context of political representation. There are bound to be disparities in the socio-economic status of persons within the groups that are the intended beneficiaries of reservation policies. While the exclusion of the “creamy layer” may be feasible as well as desirable in the context of reservations for education and employment, the same principle cannot be extended to the context of local self-government.”



(Emphasis supplied)

103. Equal status and opportunity, be it in social, economic or political fields, and to make unequal equal, is a facet of equality. All the stakeholders have to ensure that the citizens are rendered justice for achieving the goals set out in the preamble. Providing reservations without setting out the essential parameters or ensuring compliance only perpetuates inequality. Having acquired benefits of reservation in service, a person of means may still be backward in the political field.

104. There is no statistical data on the Population of EBC(s) within the Local Bodies, nor is there any data relating to proportional representation of EBC in Local Self Government, particularly in the Municipalities, meeting the requirement of the triple test. The Government, without collecting empirical data or conducting a study, also about the political backwardness, carried out the exercise of reserving seats purely based on population, and that too, perhaps for EBC category. The same cannot be the solitary basis for providing reservations.

105. In **Sanjay Kumar**⁹, disposed of on 01.12.2016, the petitioner was seeking inclusion of the list contained in Schedule II of Act 3, 1992 into the Panchayati



Raj Act, 2006. It is against this backdrop that the Court while applying the principle of *casus omissus*, dismissed the petition.

106. In the considered opinion of this Court, the issue in hand was neither raised nor dealt with therein. Here, the issue is as to whether, for the reservation to the OBC Category, any study based on empirical data, more so about political backwardness, was ever conducted by any Commission, much less an independent Commission. Thus, when the Court was not dealing with the issue with which we are concerned, reliance upon the judgment is misconceived.

107. Hence, in our considered view, the Government has failed to establish compliance of the Second Test Principle of “Specification of the proportion of reservation required in light of the recommendations of the Commission”.

THIRD TEST

108. On the third test principle, i.e. statutory limit of reservation of 20% for the OBC category, we do not find, save, and except for one or two solitary instances that too unsubstantiated to have been breached. As such, we need not labour on the issue any further. In any event, no material indicates the impugned action of providing reservation



through various notifications/circulars/orders to be in excess of the combined upper limit of 50 per cent for all categories/classes/persons.

DELAY IN ASSAILING THE IMPUGNED ACTION

109. It is argued that since in the last three elections of the Municipalities, none raised any objection and that petitioners have failed to discharge the onus of the impugned action to be arbitrary, much less manifestly arbitrary, all petitions should be dismissed.

110. In our considered view, the contention needs to be repelled, for the petitions, even though filed belatedly, just before the commencement of the process of elections, had pointed out illegality, which is *ex facie* glaring and, as such, delay in approaching the Court cannot be a ground for their dismissal more so when **K. Krishna Murthy²** was required to be complied with in the year 2010 itself. Illegality cannot be allowed to be perpetuated any further. Article 141 of the Constitution of India mandates all, even us, to ensure compliance of dicta of Hon'ble the Supreme Court.

111. Here only we may add that the five-year term of the preceding bodies stood expired in June 2022, and



under sub-section 9 of Section 12, in the interregnum, the State Government appointed Administrator(s) to administer the offices of the Municipalities, with the term ending December 2022.

112. Well, the Government and the Election Commission were aware of their duties. They failed, but the opportunity to take remedial measures is yet not extinguished.

Role of Election Commission

113. There cannot be any disagreement on the suggestion made by the learned Amicus Curiae that the Election Commission is an autonomous and independent body duly empowered and authorized to take decisions under the Constitution.

114. A conjoint reading of Articles **243-K, 243-Z, 324 and Part-XV** of the Constitution of India mandates the superintendence, direction and control of the preparation of electoral rolls and the conduct of all elections to the Municipalities to be that of the State Election Commission.

115. The Hon'ble Apex Court in **Kishansingh Tomar vs Municipal Corporation Ahmedabad**;¹³ observed

¹³ (2006) 8 SCC 352



that:- 1. there should not be any delay in the Constitution of the new Municipality every five years. 2. the State Governments must acknowledge and recognise the significance of the State Election Commission, being a constitutional body. 3. The directions of the Commission bind the Government. 4. In the domain of elections to the panchayats and the municipal bodies under Part IX and Part IX-A for the conduct of the elections to these bodies, they enjoy the same status as the Election Commission of India. 5. Further, the words "superintendence, direction and control" and "conduct of elections" have to be held in the "broadest of terms". [Special Reference No. 1 of 2002, In re [Special Reference No. 1 of 2002, In re, (2002) 8 SCC 237] and Mohinder Singh Gill case [Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405]. 6. The powers of the State Election Commission in respect of the conduct of elections are akin to that of the Election Commission of India. 7. The State Election Commissions are to function independent of the State Governments concerned in their powers of superintendence, direction and control of all elections and preparation of electoral rolls for, and the conduct of, all elections to the panchayats and municipalities.



116. It further added that “8. Also, for the independent and effective functioning of the State Election Commission, where it feels that it is not receiving the cooperation of the State Government concerned in discharging its constitutional obligation of holding the elections to the panchayats or municipalities within the time mandated in the Constitution, it will be open to the State Election Commission to approach the High Courts, in the first instance, and thereafter the Supreme Court for a writ of mandamus or such other appropriate writ directing the State Government concerned to provide all necessary cooperation and assistance to the State Election Commission to enable the latter to fulfil the constitutional mandate.”

(Emphasis supplied)

117. The position stands reiterated in **State of Goa and another v. Fouziya Imtiaz Shaikh and another**.¹⁴

118. The Election Commission was fully aware of the directions issued by the Hon’ble Apex Court in **Rahul Ramesh Wagh**⁵. In fact, vide communications dated 04.01.2022, 24.01.2022 (Page 280,281), while annexing a copy of the judgment/order, had informed the Government of

¹⁴ (20021) 8 SCC 401



its necessity to comply with the same. A reminder to a similar effect is dated 28.01.2022 (Page 292)

119. Still, further, we find from the communication dated 28.03.2022 (Page 303) that while quoting relevant paragraphs of the judgment in **Rahul Ramesh Wagh⁵**, **Manmohan Nagar⁶**, **Vikas Kishanrao Gawali³** and **K. Krishnamurthy**, the Election Commission had asked the Government to make suitable mechanism, administrative as also legislative for complying with the directions.

120. Even after receipt of the Government's communication dated 01.04.2022 (Page 66), Election Commission vide communication dated 11.05.2022 (Page 307) and 16.06.2022 (Page 323) annexing the judgments/orders passed by the Apex Court in **Suresh Mahajan⁴**, suggested a suitable action.

121. Hence, no plausible explanation is forthcoming from the Election Commission for initiating the election process by providing reservation to the OBC category.

122. The only explanation that the Election Commission has furnished is its affidavit dated 20.09.2022 (Page-279), is extracted as under:-



“13. That the statements made in paragraph-9 of the writ petition under reply are matter of records and in this respect, it is stated and submitted that upon query made by the State Election Commission, the Urban Development and Housing Department has informed the Commission that on the basis of opinion of Law Department, there is no hurdle in conducting the election of the Municipality and on the basis of the aforesaid letter the Commission has taken further steps for conducting the Municipal Election accordingly.”

123. The Election Commission is definitely not subservient to the Government. It did not revise its opinion. It did not seek any legal opinion before acting on the government's dictas. Also, it did not seek recourse to any legal remedy. The Hon'ble Apex Court had subjected the State Election Commission to be bound by its order. Despite all this, the Election Commission proceeded to conduct the election. In this backdrop, we may observe that despite our suggestions vide order dated 29.09.2022, reproduced hereinunder, when the judgment was reserved, even till the date of pronouncement, as we understand, the Election Commission, by not taking any action of rescheduling the elections qua OBC/EBC Category, has failed to discharge its constitutional obligation and duties.

“**29.09.2022** We have heard all the learned counsel appearing for the parties.

Judgment reserved.

Petitioners have been insisting on passing an order on their applications seeking interim relief. We are of the considered view that since the hearing is complete



and we propose to pronounce the judgment in immediate future, perhaps even during the period of vacation, we deem it appropriate not to pass any order staying the process of elections.

However, we clarify that the such process shall be undertaken subject to the outcome of the present petitions, which fact shall be notified to all concerned.

We may also clarify that, should the State Election Commission find it prudent to defer the 1st phase of the elections, which is scheduled to be held on 10th of October, 2022, it shall be open for them to do so, more so considering their view expressed vide various communications dated 24th of January, 2022 (page-281), 28th January, 2022 (page-292), 28th of March, 2022 (Page-303), 20th of April, 2022 (page-306) and 11th of May, 2022 (page-307) addressed to the State of Bihar.”

Relevance of Full Bench Decision of this Court

124. Whether the issue in hand is covered with the decisions rendered by a Full Bench of this Court in **Vijay Kumar Singh**⁷ or not, as is so canvassed heavily by the State, is what we now proceed to examine. Special Leave Petition assailing the judgment was disposed of in **Saran Jila Mukhiya Sangh**⁸ [vide order dated 06.03.2018 (page 441)] in terms of the order passed in **K. Krishna Murthy**².

125. Our opinion cannot be and does not conflict with the opinion rendered by the Full Bench. There, the Court examined the constitutional validity of the Statute, inter alia, providing reservation and its extent to the OBC category. In the instant case, none has challenged the extent of reservation, similar in nature, as was provided under the



Panchayati Raj Act, 2006. Post rendering of such decision, the local self Government institutions under part-IX and IX-A of the Constitution are fully covered vide dicta of **K. Krishna Murthy**².

126. Significantly, the Full Bench itself noticed the earlier view expressed by this Court of the necessity of providing reservation to those, even amongst the backward caste, who lacked power in the political field. (Para-8 and 12). This is exactly what the authorities are now required to do.

Deputy Chief Councillor/Deputy Mayor

127. In the case of **Shri Ram Krishna Dalmia & Ors. Vs. Shri Justice S.R. Tendolkar and Others**,¹⁵ Hon'ble the Supreme Court has culled out the following principles to be applied in examining the Constitutional validity of a statute:-

“11. (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon

¹⁵ AIR 1958 SC 538



him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations large based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every State of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the Court when it is called upon, to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”



128. With effect from 2nd of April, 2022, Section 29 of the Bihar Municipal Act was amended so as to introduce the office of Deputy Chief Councillor and Deputy Mayor. The Deputy Chief Councillor and the Deputy Mayor have a limited role to play. Only if the main post falls vacant or the incumbent is unable to exercise the powers, be it for whatever reason and period, the next in line would take over. Till such time, the regular incumbent to the main post joins or is elected.

129. Challenge to the same, in our considered view needs to be repelled in view of the three-Judge Bench judgment of this Court in the case of **Vijay Kumar Singh**⁷ which has attained finality in **Saran Jila Mukhiya Sangh**⁸ (Page 441), wherein the Apex Court observed as under:-

“82 (v) The reservation of chairperson posts in the manner contemplated by Article 243-D(4) and 243-T(4) is constitutionally valid. These chairperson posts cannot be equated with solitary posts in the context of public employment.”

130. Equally, the observations of the Constitution Bench in **K. Krishna Murthy**² would be of significance, relevant part thereof is quoted hereunder:-

“74. The offices of chairpersons in panchayats and municipalities are reserved as a measure of protective discrimination, so as to enable the weaker sections to assert their voice against entrenched interests at the local level.



The patterns of disadvantage and discrimination faced by persons belonging to the weaker sections are more pervasive at the local level...”

“80. ... The position has been eloquently explained in the respondents’ submissions, wherein it has been stated that “the asymmetries of power require that the chairperson should belong to the disadvantaged community so that the agenda of such panchayats is not hijacked for majoritarian reasons.”

(Emphasis supplied)

131. Hence, the challenge to the reservation of posts of Deputy Mayor/Deputy Councillor/ other similar posts is not illegal and/or unsustainable. Equally, Section 2(100) of the Bihar Municipal Act, 2007 cannot be said to be *ultra vires*, clarifying that the entries in the Schedule cannot be the basis for reservation to the category of OBC for the purpose of Section-12/13 of the Municipal Act.

132. No other points urged.

CONCLUSION

133. In the light of the arguments advanced, cases and reports referred to and, the discussion that followed, the following are the conclusions: -

(i) The commissions formed under the Backward Classes Act and the Commission for Extremely Backward Classes both were formed for purposes independent and distinct from ascertaining political backwardness as required



by **K. Krishna Murthy²; Vikas Kishanrao Gawali³; Suresh Mahajan⁴; Rahul Ramesh Wagh⁵; Manmohan Nagar⁶**. The same were for the purposes of evaluating and computing socially and economically backward castes of any character.

(ii) The Lists/Annexures/Schedule/Entries in the Schedule to the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991, be it by whatever name, are prepared for the purposes of conferring benefit under Article 15(4) and 16(4) and not Article 243-T of the Constitution of India.

(iii) The anomalous situation presented by the instant case may be as a result of a number of overlapping statutes, muddying the waters as opposed to facilitating smooth functioning of providing reservations under socio-economic/ educational/ services/ elections, as the case may be.

(iv) The State of Bihar has not undertaken any exercise by which the criteria adopted for providing reservations under socio-economic/ educational/ services have been adopted for the purposes of ensuring electoral



representation of Other Backward Classes, including Extremely Backward Classes.

134. As such, we hold that –

(i) Action of the Government as also the Election Commission in reserving the seats for the OBC/EBC category for election to all the municipal bodies in the State of Bihar, governed under the Bihar Municipal Act, 2007 (Act No. 11 of 2007), sans compliance of the dictum laid down by Hon'ble the Supreme Court in **Sunil Kumar¹; K. Krishna Murthy²; Vikas Kishanrao Gawali³; Suresh Mahajan⁴; Rahul Ramesh Wagh⁵; Manmohan Nagar⁶** to be illegal.

(ii) Statutory reservation of seats for the post of Deputy Mayor/Deputy Councillor or similar posts is permissible in law.

135. We direct-

(i) Respondent No.4, namely The Secretary, State Election Commission, to carry out the elections only by immediately re-notifying the seats reserved for the OBC Category treating them as general category seats. Our direction, similar in nature, is based on the dictum of Hon'ble the Supreme Court.



(ii) The impugned notifications/circulars referred to in paragraph 32 shall stand modified to the aforesaid extent.

(iii) The Election Commission shall review its functioning as an autonomous and independent body, not bound by the dictates of the Government of Bihar.

(iv) The State of Bihar may consider enacting a comprehensive legislation pertaining to reservations in elections to local bodies, urban or rural, to bring the State seamlessly in line with the directions issued by Hon'ble the Apex Court in **K. Krishna Murthy²; Sunil Kumar¹; Vikas Kishanrao Gawali³; Suresh Mahajan⁴; Rahul Ramesh Wagh⁵; Manmohan Nagar⁶**.

(v) Let a copy of this judgment be communicated to the Chief Secretary, Government of Bihar and the State Election Commissioner for taking all consequential action.

136. We place on record our appreciation for the assistance rendered to the Court by all the learned senior advocate(s)/advocate(s) appearing on behalf of the parties, Shri Amit Shrivastava, learned Senior Advocate, *Amicus*



Curiae, and with special reference to Ms. Shristhi, Advocate and Mr. Ravi Ranjan, Advocate, who are young at the Bar.

137. The petitions are allowed and disposed of in the aforesaid terms.

138. Interlocutory Application(s), if any, shall stand disposed of.

139. Shri Girish Pandey, learned counsel appearing for the State Election Commission, undertakes to communicate this judgment to the authority concerned immediately.

(Sanjay Karol, CJ)

S. Kumar, J. I agree.

(S. Kumar, J)

KCJha/PKP/Sujit

AFR/NAFR	AFR
CAV DATE	29.09.2022
Uploading Date	04.10.2022
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