

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

WA.No. 827 of 2015 () IN WP(C).14500/2012

AGAINST THE ORDER/JUDGMENT IN WP(C) 14500/2012 of HIGH COURT OF
KERALA DATED 16-01-2015

APPELLANT(S)/PETITIONERS IN WPC:

DEEPA E.V. AGED 31 YEARS
W/O.SREEMON, RESIDING AT PULICKAL HOUSE
NADAKKAVU P.O., UDAYAMPEROOR, ERNAKULAM.

BY ADVS.SRI.P.G.JAYASHANKAR
SMT.V.VIJITHA

RESPONDENT(S)/RESPONDENTS IN WPC:

1. UNION OF INDIA
REPRESENTED BY ITS SECRETARY
MINISTRY OF COMMERCE AND INDUSTRY
CENTRAL SECRETARIAT, NEW DELHI-110001.

2. THE EXORT INSPECTION COUNCIL OF INDIA
(MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA)
3RD FLOOR, NDYMCA CULTURAL CENTRE BUILDING
1 JAI SINGH ROAD
NEW DELHI-110 001 REPRESENTED BY ITS DIRECTOR.

3. THE EXPORT INSPECTION AGENCY
KOCHI (MINISTRY OF COMMERCE AND INDUSTRY
GOVERNMENT OF INDIA), 27/1767A, SHIPYARD QUARTERS ROAD
PANAMPILLY NAGAR (SOUTH)
KOCHI-682036 REPRESENTED BY ITS JOINT DIRECTOR.

BY SRI.T.SANJAY, CGC

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

**ASHOK BHUSHAN, CJ
&
A.M.SHAFFIQUE, J**

W.A.No. 827 of 2015

Dated this the 20th July, 2015

JUDGMENT

Ashok Bhushan, CJ.

This Writ Appeal has been filed by the appellant against the judgment dated 16.1.2015 in W.P(C).No.14500 of 2012. Appellant is the writ petitioner. The Writ Petition has been dismissed by the learned Single Judge. Aggrieved by the said judgment, the appellant has come up in this appeal. Brief facts giving rise to the Writ Petition are:

The Export Inspection Council of India functioning under the Ministry of Commerce and Industry, Government of India invited applications for the post of Laboratory Assistant Grade II by Exhibit P1 advertisement. The advertisement mentioned three vacancies (OBC-1; General-2). The petitioner belongs to Dheevera

community, which is one of the Other Backward Classes. The petitioner was over aged and as per relaxation granted to OBC category candidates, the petitioner submitted application in response to the advertisement. Under the criteria fixed for the selection, 70% marks were fixed as cut off marks for final selection. Only four candidates belonging to OBC category could secure 70 out of 100 marks, hence rank list of four OBC candidates was published, in which the petitioner is serial No.3. The four OBC candidates, who were included in the rank list, were above the normal age limit, i.e., 18 to 25 and they participated in the selection on account of relaxation of age granted to OBC candidates. Out of the general category candidates, four candidates were qualified for interview, but none could achieve the minimum marks, hence no candidate from the general category could be selected. In the rank list the first candidate Serena Joseph (OBC) was issued appointment letter, there being only one vacancy for OBC. The petitioner filed the Writ Petition

claiming that she is entitled for appointment against the general vacancies, which remains unfilled. The following prayers were made in the Writ Petition:

- “i) To declare that the denial of appointment to the petitioner as Laboratory Assistant under the respondents is violative of her fundamental rights guaranteed under Articles 14, 16 and 21 of the Constitution of India;*
- i)(a) To declare that Exhibit P1 is not binding upon the petitioner and respondents in view of the declaration of law made by the Hon'ble Supreme Court in **Jitendra Kumar Singh and Another v. State of Uttar Pradesh and Others [(2010)3 SCC 119]**.*
- ii) To issue a writ of mandamus commanding the respondents to immediately issue an order of appointment to the petitioner as Laboratory Assistant under the respondents to which she has been selected pursuant to a test and an interview conducted thereafter and ranked No.3 and vacancies exist to make appointment.”*

2. Counter affidavit dated 25.7.2012 and counter affidavit to the amended Writ Petition dated 28.1.2013 have been filed by the respondents. In the counter affidavit it was pleaded that the prescribed age limit for the general category is 18 to 25, while for the OBC candidates, there was relaxation of three years. The petitioner was over aged for general category and could appear in the selection availing the relaxation provided for OBC. 70 out of 100 marks was fixed as cut off mark for selection. Only four OBC category candidates could secure more than 70 marks, who were included in the rank list in which the petitioner was serial No.3. All the OBC candidates, who were included in the rank list were the candidates who availed the benefit of age relaxation. Although four general category candidates were qualified for interview, no one secured 70 marks. As per O.M.No.36011/1/98-Estt.(Res.) dated 1.7.1998, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age limit, experience,

qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies. Copy of the O.M dated 1.7.1998 was annexed along with the counter affidavit. The petitioner filed reply to the counter affidavit.

3. The learned Single Judge, referring to the O.M dated 1.7.1998, held that the petitioner having participated in the selection taking the benefit of relaxation in age limit, he could not be considered against the general vacancies and he could only compete against OBC vacancies. The OBC vacancy being one, which has been offered to the candidate at serial No.1 the petitioner was not entitled to any relief.

4. The judgment of the Supreme Court in ***Jitendra Kumar Singh v. State of U.P*** [(2010)3 SCC 119] relied

on by the petitioner was distinguished by the learned Single Judge holding that the said judgment was considering specific statutory provision and was based on the specific statutes and Government Order applicable in the State of Uttar Pradesh.

5. Learned counsel for the appellant, challenging the judgment of the learned Single Judge submits that the petitioner was also entitled to be considered for appointment against the general vacancies, which remained unfilled. It is submitted that age relaxation granted to the appellant being OBC category candidate, in no way, can be treated to be relaxation in the standard of merit. The appellant competed with the general category candidate and being meritorious enough to be included in the rank list, the appellant is clearly entitled for appointment. Learned counsel for the appellant submitted that the Supreme Court in ***Jitendra Kumar Singh's case*** (supra) has laid down that grant of relaxation in age limit or fee does not debar reserved candidates to be

considered in open vacancies. Denial of appointment to the appellant is violation of Articles 14 and 16 of the Constitution of India. The Office Memorandum dated 1.7.1998 cannot be relied for denying claim to the appellant. Learned counsel for the appellant placed reliance on some other judgments, which shall be discussed while considering the submissions in detail.

6. Learned counsel for the respondents, refuting the submissions of learned counsel for the appellant, contended that three vacancies being earmarked in the advertisement as one for OBC and two for general, the appellant was entitled to be considered only against OBC vacancies, she having taken relaxation in age limit while appearing in the selection. It is submitted that reserved candidates, who have not taken any relaxation can be considered against unreserved vacancies according to their merit. But candidates who have taken relaxation in selection cannot claim appointment against the unreserved vacancies. Learned counsel for the respondent

placed reliance on O.M dated 1.7.1998 and submitted that application of reservation in the selection has to be in accordance with the O.M issued by the Government of India and the appellant cannot claim any right of reservation contrary to the O.M dated 1.7.1998.

7. We have considered the submissions of learned counsel for the parties and perused the records.

8. The undisputed facts of the case are; that the advertisement was issued for three vacancies of Laboratory Assistant Grade II, one vacancy for OBC and two vacancies for general, the age mentioned in the advertisement was 18 to 25. Relaxation of age limit after 25 years was permissible for the OBC candidates, the appellant, who was aged 26 years, availing the benefit of age relaxation, applied in the selection. Against OBC category, rank list of four persons was prepared in which the appellant is serial No.3. The persons in the rank list are OBC category candidates who participated in selection after taking age relaxation. None could secure 70% marks

against two general vacancies and those vacancies remained unfilled.

9. Whether the appellant can claim appointment against two unfilled vacancies of general category is the question to be answered?

10. It is well settled under the general law of reservation that reserved category candidate is also entitled to compete against unreserved vacancies if the reserved candidate is selected on merit he/she need not be adjusted against the reserved vacancies. The Apex Court in ***Indra Sawhney v. Union of India*** [(1992) Suppl. 3 SCC 217] at paragraph 811 has laid down the following:

“811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.”

11. But, as noted above, in the present case the issue is as to whether OBC category candidates, who obtained relaxation can be considered against general vacancies or consideration is to be confined to reserved vacancies. Article 16(4) of the Constitution of India is an enabling provision for the State to make provision for upliftment of Other Backward Class categories, so that they may come in the main stream. Article 16(4) is a facet of equality. It is well settled that the percentage of reservation the mode and manner of implementing the reservation depend on statutory provisions/ administrative instructions issued by the State. In the present case on the subject "Reserved vacancies to be filled up by candidates lower in merit or evenly relaxed standards - candidates selected on their own merit not to be adjusted against reserved quota", the Government of India issued O.M dated 1.7.1998. O.M dated 1.7.1998 contained a clarification. Paragraphs 2 and 3 of the O.M is as follows:

“2. The above OM and the O.M.No.36012/2/96-Estt. (Res.), dated 2.7.1997 provide that in cases of direct recruitment, the SC/ST/OBC candidates who are selected on their own merit will not be adjusted against reserved vacancies.

3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standard as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidate are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.”

12. The above provision clearly provides that when a relaxed standard is applied in selecting an SC/ST/OBC candidate, for example in the age limit, experience, qualification, permitted number of chances in written examination,..... SC/ST/OBC candidates are to be counted

against reserved vacancies. Such candidates should be deemed as unavailable for consideration against unreserved vacancies. The above O.M clearly cover the issue raised in the Writ Petition. The appellant having appeared for selection after taking the age relaxation benefit, she could be deemed to be unavailable for consideration against unreserved vacancies as per the above O.M. To overcome the above position, learned counsel for the appellant has relied on the judgment of the Supreme Court in ***Jitendra Kumar Singh's case*** (supra). In the said case advertisements were issued by the State of U.P for appointment of Sub Inspectors of Civil Police and Platoon Commanders. Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates was governed in the State of U.P by an Act, namely, U.P. Public Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government order dated 25.3.1994. Under Section 8 of the above Act, 1994, the

State Government was empowered to grant concession in respect of fee for any competitive examination and interview and relaxation in upper age. The State Government exercising power under Section 8 of the Act, 1994 had granted relaxation in upper age for the Scheduled Castes and Other Backward Classes candidates. In the advertisement some posts were earmarked for Other Backward Classes, Scheduled Castes, Scheduled Tribes and general category. Large number of reserved candidates, who had taken age relaxation, appeared in the preliminary test and written test and were ultimately found selected. Large number of reserved candidates were adjusted against general category on account of their merit. A Writ Petition was filed by the general category candidates challenging the inclusion of reserved category candidates against the vacancies of general category on the ground that they having appeared after taking relaxation cannot be adjusted against general category candidates. The High Court

repelled the contention of the writ petitioners relying on the provisions of Section 3(6) and Section 8 of the Act, 1994 and Government order dated 25.3.1994. The matter was taken up to the Apex Court. The Apex Court confirmed the judgment of the High Court on the above interpretation. It is useful to refer to paragraph 65 of the judgment, where the Apex Court has clearly observed that the issue in the appeal need not be decided on the general principles of law laid down in various judgments, since the field is covered by the Act, 1994 and G.O dated 25.3.1994. Paragraph 65 of the judgment in ***Jitendra Kumar Singh's case*** (supra) reads as under:

“65. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the Instructions dated 25.3.1994 and the G.O dated 26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus becoming eligible to be considered

against a reserved vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category.”

Section 3 of the Act, 1994 provided for reservation against Scheduled Castes, Scheduled Tribes and Other Backward Classes. In sub-section (6) of Section 3 of the Act, 1994 it is provided as under:

“3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.-

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(6) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).”

The Apex Court in **Jitendra Kumar Singh's case** (supra) has quoted Section 8 of the Act, 1994 in paragraph 68 of the judgment, which is extracted as under:

'68. Section 8 of the Act of 1994 reads as under:

“8. Concession and relaxation.- (1) *The State Government may, in favour of the categories of persons mentioned in sub-section (1) of Section 3, by order, grant such concessions in respect of fees for any competitive examination or interview and relaxation in upper age-limit, as it may consider necessary.’*

(2) *The government orders in force on the date of the commencement of this Act, in respect of concessions and relaxations, including concession in fees for any competitive examination or interview and relaxation in upper age-limit and those relating to reservation in direct recruitment and promotion, in favour of categories of persons referred to in sub-section (1), which are not inconsistent with the provisions of this Act, shall continue to be applicable till they are modified or revoked, as the case may be.”*

The Apex Court, after noticing the aforesaid provision, has taken note of the Government order dated 25.3.1994 and has made the following observation in paragraph 72:

“72. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. These instructions, inter alia, provide as under:-

"4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."

From the above it becomes quite apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked."

13. The Apex Court in the said case has held that the State has not treated the relaxation in age and fee as relaxation in the standard for selection, hence, those candidates were held to be entitled to be adjusted against general vacancies on account of their own merit. The above judgment of the Apex Court was based on the statutory interpretation of the Act, 1994 and Government order dated 25.3.1994 which governed the field. But, in the present case the Government order dated 1.7.1998, which governed the field, provides for entirely a different scheme. Government order dated 1.7.1998 clearly states that the OBC candidates, who have taken relaxation in age limit are to be counted against the reserved vacancies only and they would be deemed to be unavailable for consideration against unreserved vacancies. Thus, the judgment of the Apex Court has no application to the facts of the present case and clearly distinguishable.

14. Learned counsel for the appellant has placed reliance on a judgment of the Apex Court in **Relesh R.Sah v. Dr.Yamul** (1996 KHC 196), where the following was laid down in paragraphs 13 and 14:

“13. There cannot be any dispute with the proposition that if a candidate is entitled to be admitted on the basis of his own merit then such admission should not be counted against the quota reserved for Scheduled Caste or scheduled Tribe or any other reserved category since that will be against the Constitutional mandate enshrined in Art.16(4).

14. In a case Indra Sawheny v. Union of India (1992) 6 Suppl (3) SCC 217: (1992 AIR SCW 3682), commonly known as Mandal case (1992 Supp.(3) SCC 217: 1992 SCC (L&S) Supp 1: 1992 (22) ATC 385), this Court in Para.811 held thus:-

“In this connection it is well to remember that the reservations under Art.16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition filed on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.”

15. There cannot be any dispute about the above proposition. The general law as noted above is already settled in **Indra Sawhney's case** (supra). But the present case is to be decided in accordance with O.M dated 1.7.1998, which governed the selection. To the similar effect another judgment was relied on by the learned counsel for the appellant in **Yoganand Vishwasrao Patil and Others v. State of Maharashtra and Others** (2005 KHC 2163), where the following was laid down in paragraph 8 of the judgment:

"8. The legal position has been clarified in Ritesh R.Sah (1996(3) SCC 253) that a student, who is entitled to be admitted on the basis of merit, though belonging to reserved category, cannot be considered to be admitted in seats reserved for reserved category but, at the same time, provision should be made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the less meritorious reserved category candidate. It was further held that while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been

kept reserved for reserved category but while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate. In fairness to the respondent State, it is not being contended before us that because the rule has not been framed, the state Government is not required to implement the judgment in Ritesh R.Sah (1996(3) SCC 253) in letter and spirit. In fact, in purported implementation of the decision of this Court, the director of Medical Education and Research, Mumbai, by communication dated 31.3.2005 sent to its learned advocate i.e. Standing Counsel, has stated that the directions of this Court are being complied with in letter and spirit by the competent authority while making admission to the postgraduate courses. The said letter briefly sets out the procedure adopted for admission of a reserved category candidate getting admission in open category by virtue of his merit position for Health Science courses. However, the procedure stated in the said letter is not very clear.....”

16. Another judgment relied on by learned counsel for the appellant is **Pradip Kumar Maity v. Chinmoy Kumar Bhunja and Others** (2013 KHC 3920). In the above case the Apex Court was considering the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In

that context the Apex Court has observed that age relaxation enables disabled persons, otherwise outside the orbit of employment to general posts, an additional opportunity of being considered for such post. The said observations are not applicable in the present case, which deals with social reservation.

In view of the foregoing discussions, we are of the view that no error has been committed by the learned Single Judge in dismissing the Writ Petition filed by the appellant. The appellant was clearly not entitled to be considered against the general vacancy, she having appeared in selection after taking relaxation in upper age limit. We do not find any substance in the submissions made by learned counsel for the appellant. The Writ Appeal is dismissed.

**ASHOK BHUSHAN
CHIEF JUSTICE**

**A.M.SHAFFIQUE
JUDGE**

vgs