

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on August 20, 2015
Judgment delivered on August 24, 2015

+ **W.P (C) No. 7500/2013**

JITENDER YADAV

..... Petitioner

Through: Mr. Anil Singal, Adv.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr.J.P.Sengh, Sr. Adv. with
Ms.Zubeda Begum, Ms.Sana
Ansari, Ms.Vanessa Singh,
Advs. for R1 and R2 (Rajya
Sabha Secretariat)
Ms.Madhumita Kothari, Adv.
for R4

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present writ petition has been filed by the petitioner challenging the notice dated September 19, 2013, whereby the respondents 1 and 2 had prescribed minimum qualifying marks for Interview for Unreserved, Other Backward Classes and Scheduled Castes/Scheduled Tribes category candidates as 50%, 45% and 40%

respectively and final result dated November 06, 2013, whereby the respondent Nos. 3 and 4 have been appointed as Staff Car Driver (Ordinary Grade) against 'OBC' vacancy and 'Unreserved' vacancy.

2. An advertisement was issued by the respondent Nos. 1 and 2 for making appointment to various posts including three posts of Staff Car Driver (Ordinary Grade) in pay band of Rs. 5200-20,200 (PB-I) + Grade Pay of Rs. 2400, the break up being SC-1, OBC-1 and UR-1.

3. Mr. Anil Singal, learned counsel appearing for the petitioner has challenged the impugned notice/order primarily on two grounds, the first one being, clause (6) of the advertisement, which relates to scheme of examination, contemplates that minimum qualifying marks for Written Examination/Personal Interview/Oration Test etc. shall be prescribed and made available on the website of Rajya Sabha before Written Examination is conducted. It is his submission that Written Examination for the Staff Car Driver (Ordinary Grade) was held in the month of June 2013, whereas the minimum qualifying marks for the Interview were fixed and notified on September 19, 2013, which is in violation of the advertisement. According to him, the Rules of selection could not have been prescribed after the process has been initiated/started.

4. His second submission was, Tej Pal- respondent No.3 even though an OBC candidate was the topper in the selection and necessarily had to

be appointed against an 'Unreserved' vacancy. In other words, it is his submission that if Tej Pal, respondent No.3 is appointed against an 'Unreserved' vacancy, the petitioner being as an OBC candidate and being at serial No. 2 in the merit and having secured 45% on the basis of relaxed standards, would be appointed against the OBC vacancy. This would result in the cancellation of the appointment of respondent No. 4 Bhim Singh, who has been appointed against one 'Unreserved' vacancy.

5. On the other hand, Mr. J.P.Sengh, learned Senior Counsel appearing for the respondent Nos. 1 and 2, justified the impugned action. According to him, the minimum prescribed marks for the interview were declared before the date of interview which is in terms of the advertisement. According to him, the petitioner having taken a chance by appearing in the interview, cannot challenge the criteria of minimum qualifying marks having been prescribed before the interview and not before the written examination. He states that the interview letters which were sent to each of the candidates did prescribe the minimum qualifying marks for the interview. He states that if the petitioner had any grievance against prescribing of minimum qualifying marks before the interview and not before the written examination, he should have challenged the same then by not participating in the Interview. In any case, it is his submission that there are no allegations of mala fide for prescribing the

minimum qualifying marks just before the Interview. According to him, the present petition is an afterthought by fence sitter who waited for the result of the selection process before challenging the same by way of this writ petition.

6. On the second submission of Mr. Singal, Mr. J.P. Sengh, learned Senior Counsel states that Tej Pal, the respondent No. 3 having availed the benefit of age relaxation so also the waiver of fee, even though, was topper in the selection, would still be appointed against an OBC vacancy and not 'Unreserved' vacancy. This according to him, is in terms of the judgment of the High Court of Punjab and Haryana in the case of ***Baljit Singh Vs. Central Administrative Tribunal, Chandigarh Bench, Chandigarh and Ors., in CWP 9773/2011 decided on August 17, 2011,*** wherein, the High Court upheld the judgment of the Central Administrative Tribunal, Chandigarh Bench, and held that a candidate belonging to 'Reserved' category, who has availed the concession of the age relaxation, cannot be permitted to consume the 'General' category seat. He would state, the said judgment of the Punjab and Haryana High Court in ***Baljit Singh's case (supra)*** has been upheld by the Supreme Court. He also states, the Department of Personnel and Training, Government of India has issued circular dated March 12, 2015, wherein it is clarified that the judgment of the Supreme Court in ***Jitendra Kumar***

Singh (supra) dated January 08, 2010, is only with respect to State of Uttar Pradesh and is not applicable to the services under the Central Government. Further, it is his submission, even if it is conclusively held that Tej Pal, is not an OBC, still, the petitioner would not get any benefit as in terms of the extant instructions, if a vacancy belonging to 'Reserved' category is not filled, the same shall be carried forward for the next year.

7. The learned counsel appearing for the respondent No. 4 would submit the respondent No. 4 has been appointed against an 'Unreserved' vacancy and has been working for the last one year and Tej Pal even though topped the selection, has been appointed against on OBC vacancy. It is her submission, the appointment of the respondent No. 4 cannot be disturbed. It is also her submission that Tej Pal, even if being a 'Jat' is not an OBC, still, it would not have any bearing insofar as the appointment of the respondent No. 4 is concerned.

8. Mr. Anil Singal, learned counsel for the petitioner, in response to the submissions made by Mr. J.P. Sengh, would submit, the circular of DOPT dated March 12, 2015; the judgment of the Central Administrative Tribunal, Chandigarh Bench and the judgment of High Court of Punjab and Haryana in the case of *Baljit Singh Vs. Central Administrative Tribunal, Chandigarh Bench, Chandigarh and Ors.* are

concerned, the same have no applicability in view of the judgment of this Court in the case of *Naveen Dahiya Vs. Govt. of Delhi and Ors.*, *W.P.(C) 2125/2014, decided on February 11, 2015* wherein the Division Bench of this Court, relying upon the judgment of the Supreme Court in *Jitendra Kumar Singh Vs. State of U.P. and Ors.*, *Civil Appeal No. 74 of 2010, arising out of SLP(C) No. 1952 of 2008, decided on January 8, 2010* and *Indira Sawhney vs. UOI 1992(6) SLR 321*, has held that the relaxation in age and concession in fee are provisions pertaining to the eligibility of the candidate to find out whether he can appear in competitive test or not and the same by itself do not provide any indication of open competition. In other words, even if Tej Pal has taken the benefit as an OBC candidate for the purpose of age relaxation and fee concession, still being at serial No. 1 in the merit, he would be appointed against an 'Unreserved' vacancy, which would result in the appointment of the petitioner against an OBC vacancy.

9. Having heard the learned counsel for the parties, insofar as first submission for Mr. Singal is concerned, suffice to state, that the petitioner having appeared in the Interview process, after knowing that the minimum qualifying marks have been prescribed after the written examination, cannot now challenge the fixing of minimum qualifying marks for the purpose of Interview. This conclusion is in view of the

settled position of law of the Supreme Court in the case reported as **1995 (3) SCC 486 Madan Lal and Ors. Vs. State of Jammu and Kashmir and Ors.** The relevant para of the said judgment is reproduced as under:

“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being concerned respondents herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Upto this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the concerned Members of the Commission who interviewed the petitioners as well as the concerned contesting respondents. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, that they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors., (AIR 1986

SC 1043), it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner”.

10. It is clear from the facts noted above, that the petitioner is a fence sitter, who even after appearing in the interview waited for the results to be declared on November 6, 2013, and filed this writ petition on November 26, 2013. It is noted that the Interviews were held on August 13, 2013. Even thereafter, till the results were declared, he had not taken up the issue with the respondent Nos. 1 and 2.

11. It is also not his case that for certain extraneous reasons, the respondent Nos. 1 and 2 have prescribed the minimum qualifying marks just before the Interview. In the absence of such a case being set up by the petitioner, the first plea of Mr. Singal needs to be rejected.

12. Insofar as the second submission of Mr. Singal based on the judgment of this Court in the case of *Naveen Dahiya (supra)* is concerned, this Court in para 16 and 17 has held as under:

“16. In Jitendra Kumar Singh (Supra), where the matter related to the appointment on the posts of

Sub-Inspector in Civil Police and Platoon Commandant in PAC through direct recruitment, the chief issue which came up for consideration before the Apex Court pertained to the extent of selection of a reserved category candidate against unreserved seat and in what circumstances a reserved category candidate can be considered against unreserved vacancies besides reserved seat and also where a candidate of reserved category has availed relaxation meant for reserved category candidate namely fee and age, whether he will be deprived and outsourced from competing against an unreserved seat in open competition with general candidates. Upholding the view taken by the Division Bench of the High Court in the said case, the Supreme Court observed that relaxation in age and concession in fee are provisions pertaining to the eligibility of a candidate to find out as to whether he can appear in competitive test or not and the same by itself do not provide any indicia of open competition. After referring to the legal principles settled in Indra Sawhney (Supra), the Court held that the reservations are a mode to achieve equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concession and relaxation in fee and age provided to the reserved category candidates are with a view to enable them to

compete and seek the benefit of reservation and thus the same is merely an aid to reservation. It was further held that these concession and relaxations place a candidate at par with the general category candidate and it is only thereafter that the merit of the candidate is to be determined without any further concession in favour of the reserved category candidate. The Court went on to add that such relaxation cannot deprive a reserved category candidate of his right to be considered as a general category candidate on the basis of own merit in the competitive examination.

17. The ratio of the said judgment of the Apex Court in Jitendra Kumar Singh (supra) fully attracts the facts of the present case, in fact the case of petitioner in the present case stands on a higher pedestal as he never availed any kind of relaxation either in age or in the fee. We are at a total loss to understand how the learned Tribunal took a view that the said judgment of the Apex Court would not attract to the facts of the present case.

13. In the case of **Baljit Singh (supra)**, the Punjab & Haryana High Court has in para Nos.2 & 3 held as under:-

2. The order dated 22.03.2011 rendered by the Chandigarh Bench of the Central Administrative

Tribunal (for brevity “the Tribunal”) is the subject matter of challenge in the instant petition. The Tribunal has taken a categorical view that the judgment of the Supreme Court in Jitendra Kumar Singh's case specifically deals with U.P. Police Services (Reservation for SC and ST) Act, 1994 (for brevity “the Act”) and the instructions issued thereunder. The view of Hon'ble the Supreme Court is based on the statutory provisions and the instructions issued therein. It was laid down that in case a person belonging to Scheduled Caste/Scheduled Tribe/Other Backward Classes secure marks equivalent to the candidate belonging to general category then merely because he has been given relaxation in age by treating him eligible for the purposes of selection would not be a bar for considering such a candidate belonging to reserved category in general category. In other words, a candidate belonging to reserved category is permitted to consume a general category seat despite the fact that he has been given relaxation in age on the basis that he belonged to reserved category. However, in the present case, the instructions issued by the Government of India, Department of Personnel and Training on 22.5.1989 and 1.7.1998 (P-15) would provide otherwise. In paragraphs 2 and 3 of the aforesaid instructions, it has been made clear that if a Scheduled Caste candidate has availed of any relaxed standard like the relaxation in age, then he cannot be

considered against a general category seat even if he secures marks equivalent to the general category candidate. The paragraph, which was added on 1.7.1998 clarified the aforesaid situation in unmistakable terms, which is set out below:- “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.”

3. Once the aforesaid instructions are clear with regard to the application of law, then no doubt is left that the judgment in Jatinder Kumar Sing's case (Supra) would not govern the issue in the present case because it instructions issued by the Government of India, Department of Personnel and Training which is a subordinate piece of legislation that would apply. Therefore, a candidate belonging to reserved category, who has availed of the concession of age relaxation

cannot be permitted to consume the general category seat.

It is also a matter of record that the SLP No.2394/2014 filed against judgment of Punjab and Haryana High Court in ***Baljit Singh*** case was dismissed by the Supreme Court on March 28, 2014 by the following order:-

“The Special Leave Petition is dismissed”.

The dismissal of the SLP by an order simplicitor will not have the effect of merger of the judgment of the Punjab & Haryana High Court in ***Baljit Singh’s case*** (supra).

14. It is noted from the judgment of the Punjab and Haryana High Court in the case of ***Baljit Singh’s case (supra)*** is concerned, there, the High Court has referred to an earlier instruction of DOPT dated July 1, 1998, wherein, it has been clarified that when the relaxed standards are applied in selecting ST/SC/OBC candidate, 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 the General Category candidates etc., SC/ST/OBC candidates are to be counted against ‘Reserved’ vacancy. Such candidate would be deemed to be unavailable for consideration against the ‘Unreserved’ vacancy.

15. In a subsequent OM dated March 12, 2015 as well, the DOPT has opined that the Punjab and Haryana High Court as well as the Supreme Court has held that the judgment dated January 8, 2010 is only with respect to the State of Uttar Pradesh and is not applicable to the services under the Central Government.

16. Where as this Court in ***Naveen Dahiya's case (supra)***, was considering a case, wherein, the petitioner's grievance was that even though, he has secured highest marks, was not adjusted against a vacancy meant for Unreserved candidate. The Division Bench has also noted the judgment of this Court in ***Tej Pal Yadav Vs. Union of India, LPA 611/2010, decided on November 29, 2010***, wherein this Court, in para 19, has held as under:

“19. Coming to the case at hand, a student may appear in the preliminary examination declaring that he belongs to OBC category and may qualify or may not qualify. If he does not qualify, that is the end of the road. If he qualifies, he appears in the main examination. If he does not qualify in the said examination, his right to get admission becomes totally extinct. If he qualifies within the OBC category, he may put forth his claim in that category but if he gets more marks than the general candidates, he would be justified to say that he can be considered in the general category. As has been held in the case of Dr. Preeti

Shrivastava (supra), the public interest cannot be undermined and public good cannot be sacrificed. The necessity of maintaining efficiency is also paramount. If the whole concept of reservation is understood in a holistic manner, it becomes amply clear that a candidate's appearing in the OBC category in the preliminary examination is basically at the entry level. We are inclined to think that though both the preliminary and main examinations, at a first glance, may look to be totally interconnected, yet on a deeper scrutiny, one is disposed to think that despite being apparent interconnectivity there is a subtle distinctive separation. This being the position, we are of the considered opinion that if an OBC candidate appears in the preliminary examination as an OBC category candidate and performs extremely well in the main examination, his claims should not be scuttled or smothered solely on the ground that he had taken the initial examination as an OBC category candidate. In case it is allowed to be so done, a general category candidate who really could not compete with the OBC candidate in the main examination would steal a march over him. That would not be in the public interest and also not in accord with the law laid down in the cases of Indra Sawhney (supra), Ritesh R. Sah (supra), R.K. Sabharwal (supra) and Dr. Preeti Shrivastava (supra). Further, if we allow ourselves to say so, the constitutional philosophy as well as the law laid down by the Apex

Court from time to time in relation to the conceptual essentiality of reservation in medical admission, a test of trinity, namely, due regard for merit when a reserved category candidate is able to compete with a general category candidate, interest of public efficiency and public good in certain courses, and bestowing of special care to the said category so that they would come up in educational sphere are to be kept in view. Therefore, we conclude and hold that the analysis made by the learned Single Judge in this regard is not defensible”.

17. Suffice to state, that in view of the judgment of this Court in **Naveen Dahiya** (supra) and being bound by the same, I respectfully follow.

18. In the present case, it is noted from the merit list prepared by the respondent Nos. 1 and 2, which is annexed at page 34, every candidate was tested on equal parameters in the written test, skill test and interview. It is not the case of the respondents that lower benchmark or marks were prescribed for the candidates of the Reserved category. It was an open competition amongst all the candidates belonging to all categories i.e. the Reserved/Unreserved. To say that in an open competition, the candidate of Reserved category, will compete only for the Reserved post, would be a clear negation of rights of Reserved

category candidate guaranteed under Article 16(4) of the Constitution of India. The criterion followed was of merit. Thus, Tej Pal, respondent No. 3, who has topped the selection necessarily be adjusted against an Unreserved category. The justification given by the respondent Nos. 1 and 2 in their additional affidavit, is that since the selection pertains to the Rajya Sabha, it is the instructions issued by the DOPT, which would be applicable and the ratio of the judgment of the Supreme Court in ***Jitendra Kumar Singh's case (supra)*** would not be applicable as in the said case, the Supreme Court was dealing with the service and appointment under the State of Uttar Pradesh and the provisions of the statute enacted by the Government of Uttar Pradesh, which itself provided that candidate of Reserved category availing age relaxation, but, qualifying on its own merit, would be appointed against Unreserved vacancy is not convincing. Both the submissions need to be rejected in view of the conclusion of the Supreme Court, in the case of ***Jitendra Kumar Singh (supra)*** wherein reference is made to ***Indira Sawhney etc. Vs. Union of India and Ors., 1992 Suppl. 3 SCC 217***, which has been noted by the Supreme Court in para 39 of the ***Jitendra Kumar Singh (supra)***, which I reproduced as under:

“39. In view of the aforesaid facts, we are of the considered opinion that the submissions of the

appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the General Category Candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16 (1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with General Category candidates. It is only

thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates. It has been recognized by this Court in the case of Indra Sawhney (supra) that larger concept of reservation would include incidental and ancillary provisions with a view to make the main provision of reservation effective. In the case of Indra Sawhney (supra), it has been observed as under:-

"743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question, it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs.

The relevant words are "any provision for the reservation of appointments or posts". The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The constitutional scheme and context of Article 16 (4) induces us to take the view that larger concept of reservations takes within

its sweep all supplemental and ancillary provisions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration--the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in Karamchari Sangh are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour....."

19. The Punjab & Haryana High Court in **Baljit Singh's** case (supra) has, based its conclusion on the circulars issued by DOPT dated May 22, 1989 and July 1, 1998 which provided that if a Schedule Caste Candidate has availed any relaxed standard like the relaxation in age, then he cannot be considered against a general category seat even if he secures marks equivalent to the general category candidate. No doubt in **Jitendra Kumar Singh & another**, the Supreme Court was concerned with sub-section 6 of Section 3 of 1994 Act, which specifies, if a person belonging to any of the category mentioned in sub-section 1 i.e SC/ST/OBC can be selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancy

reserved for such category under sub-section 1. I note that the Supreme Court, on a principle of law, which is clear from para 37 of the judgment in ***Jitendra Kumar Singh (supra)***, had examined the issue whether the relaxation in fee and upper age limit of five years in the category of OBC candidates would fall within the definition of “reservation” to exclude the candidates from open competition on the seats meant for general candidates. To say that the judgment of the Supreme Court in ***Jitendra Kumar Singh (supra)***, is only in respect of State of U.P and not applicable for services of the Central Government may not be correct, more particularly in view of para 39 of the judgment, which I have reproduced above. The circulars, so relied upon by Punjab & Haryana High Court, even though not challenged, cannot be at variance with the law laid down by the Supreme Court in ***Jitendra Kumar Singh (supra)***.

20. Accordingly, I hold that if the respondent No. 3 being a Reserved category candidate and top on the merit, should have been adjusted against the Unreserved vacancy and not against the Reserved vacancy of OBC and if adjusted against the Unreserved vacancy, the resultant Reserved vacancy of OBC shall be filled by the petitioner being the next available OBC candidate. Thus, the final result dated November 6, 2013 is liable to be set aside to the extent of appointment of Tej Pal, respondent No. 3 and Bhim Singh, respondent No. 4 herein.

Accordingly, the consequential orders including the order appointing the petitioner, need to be issued by the respondent Nos. 1 and 2.

21. The writ petition is disposed of in terms of the above.

22. No costs.

(V.KAMESWAR RAO)
JUDGE

AUGUST 24, 2015

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