

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

+ **LPA 696/2015**

Judgment Reserved on: 10th August, 2016

% **Date of Decision: 7th October, 2016**

RAJYA SABHA RECRUITMENT CELL & ANRAppellants

Through Mr. J.P. Sengh, Sr. Advocate with
Ms.Zubeda Begum, Ms. Vanessa Singh,
Ms.Sana Ansari & Ms.Manisha Mehta,
Advocates.

versus

JITENDER YADAV & ORS. Respondents

Through Mr. Anil Singh, Advocate.
Mr. Ankur Chhibber & Mr. Prashant
Sivarajan, Advocates for respondent No. 3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

SANJIV KHANNA, J.

1. The Rajya Sabha Recruitment Cell and the Rajya Sabha Secretariat have filed the present intra-Court appeal under Clause X of the Letters Patent Act read with Rule 11 of the Delhi High Court Rules assailing the judgment and order dated 24th August, 2015, whereby Writ Petition (C) No.7500/2013 filed by the respondent No.1- Jitender Yadav has been allowed.

2. The question raised is whether an Other Backward Class candidate or a reserved category candidate, who has gained first door access on availing age relaxation applicable to the said class of

candidates, can be appointed against the unreserved or general vacancy, for he has secured better marks and a higher position in merit than the last selected candidate of the general category.

3. In order to appreciate the controversy before us, we would like to set out the facts and circumstances giving rise to the present Letters Patent Appeal. In December, 2011, the appellant had issued advertisement No.1/2011 inviting applications from eligible Indian citizens for different posts in the Rajya Sabha Secretariat, including the post of Staff Car Driver (Ordinary Grade). The number of posts, as advertised was 3, out of which one post was reserved for the Scheduled Caste, one for the Other Backward Classes category, and one post was for the unreserved or general category. The upper age limit prescribed to be reckoned as on the closing date of the receipt of the application i.e. 20th December, 2011, was 27 years. However, an age relaxation of up to 5 years was available in the case of Scheduled Castes and Scheduled Tribes candidates, and 3 years if the candidate was one from the category of Other Backward Classes, not belonging to the creamy layer. Relaxation of five years was also provided if a candidate was either in Government service or in the services of the Lok Sabha Secretariat, provided he or she had completed three years of regular service as on 20th December, 2011. Similarly, relaxation of three years plus the length of military service, subject to maximum age of 45 years was provided for ex-serviceman. For candidates in regular service of the Rajya Sabha Secretariat, no upper age limit was prescribed. Candidates belonging to Scheduled Castes, Scheduled Tribes or Other Backward Classes, who were covered by any of the

other classes, those working in Government or Lok Sabha Secretariat or ex-serviceman category were eligible for grant of cumulative age relaxation under both categories. Candidates applying against reserved vacancies for the grant of benefit of certain age relaxation were required to submit a certificate in support of his / her being Scheduled Castes, Scheduled Tribes, and Other Backward Classes or ex-serviceman or employee of Lok Sabha Secretariat, in the prescribed form, at the final stage of recruitment.

4. For the sake of clarity, the relevant Clause of advertisement No.1/2011 pertaining to grant of age relaxation is reproduced below:-

“C. AGE LIMITS:

- (i) **Age as on closing date:** For the posts of Junior Parliamentary Interpreter (English / Hindi), Junior Parliamentary Inspector (Telugu) and Translator, the age of applicant should not be less than 18 years and not more than 30 years. For the post of Junior Proof Reader, the age of applicant should not be less than 18 years and not more than 32 years. For the remaining posts, the age of an applicant should not be less than 18 years and not more than 27 years. The age of the applicant shall be reckoned as on the closing date of receipt of application.
- (ii) The upper age limit prescribed above will be relaxable up to:
 - (a) A maximum of five years, if the candidate belongs to a Scheduled Caste or a Scheduled Tribe;
 - (b) A maximum of three years, if the candidate belongs to Other Backward Classes but does not belong to creamy layer;

- (c) A maximum of five years, if the candidate is either in Govt. Service or in service of the Lok Sabha Secretariat provided he/she has completed 3 years of regular and continuous service as on 20.12.2011 either in the Govt. or in the Lok Sabha Secretariat, or has completed combined regular and continuous service of three years in the Rajya Sabha Secretariat, the Lok Sabha Secretariat and the Govt. put together. The age relaxation is further subject to the condition that the employee continues to be in the regular employment till final selection; and
- (d) A maximum of three years plus length of Military Service, subject to a maximum of 45 years of age, if the candidate is an ex-serviceman.
- (iii) For, candidates in regular service of Rajya Sabha Secretariat, there is no upper age limit.
- (iv) Candidates belonging to the Scheduled Caste, the Scheduled Tribes and the Other Backwards Classes who are also covered under any other clauses of para 3 C (ii) (c) & (d) above viz. those working in Govt. or Lok Sabha Secretariat or belonging to Ex-servicemen category, will be eligible for grant of cumulative age-relaxation under both the categories.
- (v) A candidate will be eligible to get the benefit of community (SC/ ST/ OBC) reservation or age relaxation only in case the particular caste / tribe to which the candidate belongs to is included in the list of reserved communities issued by the Central Govt.

- (vi) The terms Ex-servicemen, will apply to the persons who are defined as ex-servicemen in the Ex-servicemen (Re-employment in Civil Services and Posts) Rules, 1979, as amended from time to time.
- (vii) Candidates applying against reserved vacancies or seeking age relaxation shall be required to submit, at the final stage of the recruitment process, a certificate in support of his / her being SC/ ST/ OBC/ Ex-serviceman/ Govt. Servant / Lok Sabha Secretariat Employee in the prescribed format. The formats of these certificates are available on the website of the Rajya Sabha Secretariat. Failure to produce such certificate would lead to summary rejection of the candidature.”

5. Examinations for appointments to the posts advertised by the appellant were held in June, 2013 and interviews were held in October, 2013. The final result was declared on 6th November, 2013. Tej Pal Singh, respondent No.2 before us, secured an overall first Rank in the merit list published on 6th November, 2013. However, he was not appointed against the unreserved vacancy and was appointed against the vacancy reserved for the Other Backward Classes (hereinafter referred to as OBC) category for the reason that he was given age relaxation envisaged and applicable to OBC candidates. This was in terms of the circulars dated 22.5.1989 and 1.7.1998 issued by the Department of Personnel and Training (DoPT) which had clarified that only such SC/ST/OBC candidates who are selected on the same standard as applied to those belonging to the unreserved category shall be adjusted against the unreserved vacancy. Thus, the

appointment of respondent No.2 was made against the vacancy reserved for the OBC category.

6. The controversy in the present case is whether the second respondent Tej Pal Singh, who had secured the first rank in the merit list, should be appointed against the unreserved vacancy or against the OBC vacancy on account of having availed the benefit of age relaxation of 3 years available to an OBC candidate for the purpose of eligibility. Depending upon the answer, either Bhim Singh, the third respondent, or Jitender Yadav, the first respondent, would be appointed to the post of Staff Car Driver. In other words, if Tej Pal Singh is appointed against the unreserved vacancy, the first respondent Jitender Yadav would be appointed against the OBC vacancy. On the other hand, if Tej Pal Singh is appointed against the OBC vacancy, the third respondent Bhim Singh would secure appointment against the unreserved vacancy.

7. In these circumstances, the first respondent had filed the aforesaid writ petition No.7500/2013 challenging the appointment of respondent No.2 against the OBC vacancy and praying for the quashing of the final result dated 6.11.2013 and an order or direction for the selection and appointment of Respondent No.1 to the post of Staff Car Driver (Ordinary Grade) against the OBC vacancy.

8. The impugned judgment holds that the decision of the Supreme Court in ***Jitendra Kumar Singh Vs. State of U.P. and Anr.*** (2010) 3 SCC 119, decided on 8th January, 2010, as held by the Division Bench of High Court of Delhi in ***Naveen Dahiya Vs. Govt. of Delhi and Ors.*** WP(C)No.2125/2014 decided on 11th February, 2015 would

hold the field. The decision of the Punjab and Haryana High Court in the case of ***Baljit Singh Vs. Central Administrative Tribunal, Chandigarh Bench, Chandigarh & Ors.*** in CWP No.9773/2011 decided on 17th August, 2011, was not followed by the Single Judge, who, in allowing the writ petition, has observed and held as under:-

"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 the 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 a Reserved category will compete only for the Reserved post would be a clear negation of rights of the 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 category 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)*...

19. The Punjab & Haryana High Court in *Baljit Singh's* case (supra) has, based its conclusions on the circulars issued by DOPT dated May 22, 1989 and July 1, 1989 which provided that if a Scheduled Caste Candidate has availed any relaxed standard like the relaxation in age, then he cannot be considered against a general category 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 the 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 paragraph 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 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."

9. Contesting the findings in the impugned judgment, it is submitted on behalf of the appellant that the decision in the case of ***Jitendra Kumar Singh (Supra)*** is inapplicable for in the said case, the Supreme Court was interpreting the U.P. Public Service (Reservation for Scheduled Castes, Scheduled Tribes, and Other Backward Classes) Act, 1994 and the Order dated 25th March, 1994 and the decision is predicated on the same. Section 8 of the above Act had, by way of an express provision, empowered the State Government to grant concession in respect of fee and upper age relaxation with the stipulation that the State Government may grant such concessions as it may consider necessary in favour of the categories of persons mentioned in sub-section (1) of Section 3. Furthermore, the instructions dated 25.03.1994 provided that if any person belonging to reserved categories is selected on the basis of merit 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. Per contra, the instructions issued by the DoPT, Government of India vide O.M. dated 01.07.1998

clearly states that only such SC/ST/OBC candidates who are selected on the same standard as applied to those belonging to the unreserved category shall be adjusted against the unreserved vacancy. The case of *Naveen Dahiya (Supra)* is sought to be distinguished on the ground that the issue involved in the said case was different. The appellant also relies upon the circular dated 12th March, 2015 issued by the DoPT, Government of India, which had clarified that the judgment in the case of *Jitendra Kumar Singh (Supra)* was only in respect of the State of U.P. and not applicable to the service under the Central Government. A copy of the circular dated 12th March, 2015 is not on record.

10. Learned counsel appearing for respondent no.1, on the other hand, submits that the decision in the case of *Jitendra Kumar Singh (Supra)* is squarely applicable and forecloses the questions raised.

11. We would first examine the ratio and decision in the case of *Jitendra Kumar Singh (Supra)*. The specific issue raised before the Supreme Court in *Jitendra Kumar Singh (Supra)* was relating to the reservation for the posts of backward classes, Scheduled Castes, Scheduled Tribes, women candidates and sports persons. In the said case, the advertisement was for the recruitment to the post of Sub-Inspectors in Civil Police and Platoon Commanders in PAC. There was a preliminary written test consisting of 300 marks and candidates were required to score at least 50% marks to participate in further tests. This was followed by physical test of 100 marks in which again the candidate was required to secure at least 50% or more marks. The candidates, who had qualified in the preliminary written test and

physical test, were required to appear in the main written test consisting of 600 marks having two papers i.e. general Hindi, general knowledge, and mental aptitude test. Those candidates, who would secure 40% or more marks could be declared successful. The marks obtained in the preliminary written test and physical test were not to be included for the determination of the final merit list. A reading of paragraph 11 of the said judgment would show that one of the propositions or issues framed by the High Court was in respect of a candidate of the reserved category who had availed of relaxation meant for the reserved category candidate in the form of fee and age but had secured more marks than the last selected general category candidate. In other words, whether the relaxation of age and fee would deprive him of the opportunity to compete for an unreserved seat in an open competition with the general candidate. The Division Bench of the High Court had held that after the formulation of the 1994 Act and the instructions dated 25th March, 1994, the State Government has not treated relaxation in age and fee as relaxation in the standard of selection. Therefore, it would not deny a reserved category candidate selection in the open competition with the general category candidates. Such concession could be granted under Section 8(1) of the 1994 Act. Further, relaxation of age and concession of fee pertain to the question of eligibility for competition, and did not by itself provide any indicia of an open competition. The competition would start only after the persons who had fulfilled the requisite qualification, age etc, were short-listed.

12. Section 8 of 1994 Act, reads :

“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 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 relative 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.”

Referring to the aforesaid provision, the Supreme Court in ***Jitendra Kumar Singh (Supra)*** had observed:

“71. We are of the considered opinion that the concessions falling within Section 8 of the Act of 1994 cannot be said to be relaxations in the standard prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concessions in respect of fees in the competitive examination or interview and relaxation in upper age limit.

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.

73. Learned counsel for the appellants had submitted that in the present appeals, the issue is only with regard to age relaxation and not to any other concessions. The vires of Section 3 (6) or Section 8 have not been challenged before us. It was only submitted by the learned Sr. Counsel for the petitioners/appellants that age relaxation gives an undue advantage to the candidate belonging to the reserved category. They are more experienced and, therefore, steal a march over General Category candidates whose ages range from 21 to 25 years.

74. It is not disputed before us that relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes, and OBCs but also the dependents of Freedom Fighters. Such age relaxation is also given to Ex-servicemen to the extent of service rendered in the Army, plus three years. In fact, the

educational qualifications in the case of Ex-servicemen is only intermediate or equivalent whereas for the General category candidates it is graduation. It is also accepted before us that Ex-servicemen compete not only in their own category, but also with the General category candidates. No grievance has been made by any of the appellants/petitioners with regard to the age relaxation granted to the Ex-servicemen. Similarly, the dependents of Freedom Fighters are also free to compete in the General category if they secure more marks than the last candidate in the General category. Therefore, we do not find much substance in the submission of the learned counsel for the appellants that relaxation in age "queers the pitch" in favour of the reserved category at the expense of the General category.

75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition.

76. Mr. Rao had suggested that Section 3 (6) ensures that there is a level playing field in open competition. However, Section 8 lowers the level playing field, by providing concessions in

respect of fees for any competitive examination or interview and relaxation in upper age limit. We are unable to accept the aforesaid submission. Section 3 (6) is clear and unambiguous. It clearly provides that a reserved category candidate who gets selected on the basis of merit in open competition with general category candidates shall not be adjusted against the reserved vacancies. Section 3(1), 3 (6) and Section 8 are interconnected. Expression "open competition" in Section 3 (6) clearly provides that all eligible candidates have to be assessed on the same criteria.

77. We have already noticed earlier that all the candidates irrespective of the category they belong to have been subjected to the uniform selection criteria. All of them have participated in the Preliminary Written Test and the Physical Test followed by the Main Written Test and the Interview. Such being the position, we are unable to accept the submissions of the learned counsel for the petitioners/appellants that the reserved category candidates having availed relaxation of age are disqualified to be adjusted against the Open Category seats. It was perhaps to avoid any further confusion that the State of UP issued directions on 25.3.1994 to ensure compliance of the various provisions of the Act. Non-compliance by any Officer was in fact made punishable with imprisonment which may extend to period of three months”

13. A reading of the aforesaid paragraphs would indicate that the observations and findings were made in the context of section 8 of 1994 Act and the instructions dated 25th March, 1994. It was also observed that vires of Section 3(6) and Section 8 of 1994 Act, had not been challenged.

14. The aforesaid decision of the Supreme Court has been distinguished by a Division Bench of Kerala High Court in *Deepa*

E.V. Vs. Union of India and Ors. reported as 2015 (4) KHC 17, in the following words:

“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 centers 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.-

XX XX XX

(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 (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."

Referring to the decision of the Supreme Court in the case of ***Jitendra Kumar Singh (Supra)*** and the 1994 Act, it was held that the decision in the said case was based upon a statutory interpretation of the Act in question i.e. the 1994 Act, and the instructions issued thereunder which had governed the field. In the case before the Kerala High Court, the Government Order dated 1st July, 1998 had governed the field and had provided for an entirely different scheme. As per the Government order dated 1st July, 1998, the OBC candidates who had availed the benefit of age relaxation for the purpose of eligibility were to be counted against the reserved vacancy only and would be deemed to be unavailable for consideration against the unreserved vacancies. Therefore, the decision in the case of ***Jitendra Kumar Singh (Supra)*** would not be applicable. Reference was also made to the decision of the Supreme Court in the case of ***Indira Sawhney Vs. Union of India & Ors.***, 1992 Suppl.3 SCC 217.

15. Similarly, the Punjab and Haryana High Court in Writ Petition ***Baljit Singh (Supra)*** had distinguished the decision in ***Jitendra Kumar Singh (Supra)*** on the ground that in that case, the 1994 Act and the instructions were applicable whereas in the said case, the instructions issued by the DoPT, Government of India, would apply.

16. An identical view has also been taken by the High Court of Gujarat in LPA No.1480/2013 titled ***Gujrat Public Service Commission Vs. Parmar Nilesh Rajendra Kumar*** decided on 11th

September, 2015. Referring to the decision in *Jitendra Kumar Singh (Supra)*, it was held that in the light of the 1994 Act and the instructions dated 25th March, 1994, the State had not treated the relaxation in age and fee as relaxation in the standards for selection based upon merit of the candidate in the selection test followed by the interview. However, in the State of Gujarat, the policy was different.

17. Learned counsel appearing for the respondent No.1 has drawn our attention to the fact that in the present case, the advertisement had granted age relaxation in the case of an Ex-serviceman, existing Government employees and those working in Lok Sabha Secretariat. For the candidates in the Rajya Sabha Secretariat, there was no upper age limit. In the case of the Ex-serviceman, existing Government employees and those belonging to Lok Sabha and Rajya Sabha Secretariat, age relaxation was granted, though there was no specific reservation for them. Accordingly, it is submitted that the age relaxation granted to Tej Pal Singh should not be treated as a relaxation in the standard. Age relaxation granted, therefore, need not be confined to the reservation made in exercise of power under Article 16(4) of the Constitution.

18. The aforesaid contention of respondent No.1, though meritorious at first instance, on a deeper examination, cannot be accepted on account of the counter view taken in the above mentioned cases by the High Courts of Kerala, Punjab and Haryana and Gujarat. Reservations can be horizontal as in favour of physically handicap, women etc. In such cases also age relaxation etc. can be granted. Horizontal reservations are distinct from the vertical reservations for

the Scheduled Castes, Scheduled Tribes, and Other Backward Classes. Horizontal reservation cuts into vertical reservation in what is called interlocking reservation. Appointments are first made in the order of merit and in case there is a shortfall in meeting the required number of posts reserved and vacancies are pending, the same are filled by appointing candidates entitled to horizontal reservation. Persons entitled to the horizontal reservation are placed in the appropriate category i.e. Scheduled Castes, Scheduled Tribes, and Other Backward Classes or general category, depending upon category to which they belong. The Supreme Court in ***Public Service Commission Uttaranchal. Vs. Mamta Bisht and Ors.*** (2010) 12 SCC 204 has observed that the reservations in favour of the physically handicap and woman etc. under Article 16(1) and 15(3) are horizontal reservations, whereas reservations in the cases of socially backward classes are vertical reservations. Reversing the judgment of the High Court, which had decided the case solely on the ground that the last selected candidate receiving the benefit of horizontal reservation had secured more marks than the last selected general category candidate, it was held :

14. The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria v. Rajasthan Public Service Commission* [(2007) 8 SCC 785 : (2009) 1 SCC (L&S) 1055 : AIR 2007 SC 3127] , wherein dealing with a similar issue this Court held as under: (SCC pp. 790-91, para 9)

“9. The second relates to the difference between the nature of vertical reservation and horizontal

reservation. Social reservations in favour of SCs, STs and OBCs under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women, etc. under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477] , *R.K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] , *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and *Ritesh R. Sah v. Dr. Y.L. Yamul* [(1996) 3 SCC 253] .) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Caste women'. If the number of women in such list is

equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.”

(emphasis added)

19. The Supreme Court had the occasion to examine the question of horizontal reservation in ***Anil Kumar Gupta & Ors. Vs. State of U.P. & Ors.*** (1995) 5 SCC 173 and observed that there could be either overall reservation or compartmentalized reservations. Horizontal reservation would normally be compartmentalized in nature, otherwise it would lead to difficulty and complications in implementation. Referring to the decision in the case of ***Indira Sawhney (Supra)***, it was observed:

“19. In this connection, we must reiterate what this Court has said in *Indra Sawhney*[1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . While holding that what may be called “horizontal reservation” can be provided under clause (1) of Article 16, the majority judgment administered the following caution in para 744:

“(B)ut at the same time, one thing is clear. It is in very exceptional situation — and not for all and sundry reasons — that any further reservations of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a

provision was necessary (in public interest) to redress the specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be correspondingly whittled down and that is not a reasonable thing to do.”

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

20. At this stage, we may refer to two decisions of Division Bench of the High Court of Delhi. In the case of ***Tej Pal Yadav Vs. Union of India & Ors.*** [LPA NO.611/2010 decided on 29.11.2010], the appellant had appeared in the All India Pre Medical / Pre Dental Examination held by the Central Board of Secondary Education for admission under the 15% All India seat quota of the Medical Colleges. The appellant having secured 49.2% marks in the said examination, had accordingly qualified to appear in the final examination where he had secured 72.3% marks and an All India rank

of 3017 with a Counseling Category Rank of 2965 (OBC rank of 1179). When the appellant appeared for counseling on 10th August, 2010, the seats reserved for OBC candidates were filled, whereas, for some unexplained reason, general seats were available. The Division Bench referred to the heading “reservation” in the prospectus and observed that the OBC candidates having secured a rank in the unreserved category as well as in OBC category, would have the right to claim over unreserved or OBC seats at any of the said ranks as per their choice. Further, if OBC seats remained unfilled after exhausting the unreserved merit list, these seats will be filled by the concerned State Quota candidates as per their existing rules and regulations. It was held that there was stipulation when a candidate secures an unreserved category rank and also has an OBC rank, he/she could opt for either the seat which was unreserved category or the seats exclusively reserved for OBC. If he opts for the unreserved category, he or she would not be counted in the reserved category. We would like to record the aforesaid clauses relating to reservation in the prospectus for clarity:

“OBC candidates have Rank in the Unreserved category and as well as in OBC category. Therefore, they have the right to claim over UR or OBC seats at any of the said ranks as per their choice. However, if OBC seats remain unfilled after exhausting the UR merit list, these seats will be filled by the concerned State Quota candidates as per their existing rules and regulations.

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As and when a candidate comes at his/her Unreserved Rank and having the OBC Rank also, he/she can choose/opt either the

seat which is not reserved for OBC or the seats exclusively reserved for OBC. If he/she opts the seat for unreserved category he/she will not be counted in the reserve category. This type of candidate will be counted in the category in which he/she gets the seat allotted. If an OBC candidate qualified under OBC Quota only will have claim over the seat which is reserved for OBC only. In the event of exhausting of OBC seats under All India Quota no OBC candidates can claim OBC seats. The seat if not filled for want candidate, they can be treated as with UR as in the case of SC/ST.”

After referring to several case laws dealing with the question whether the candidate who has secured a meritorious position should be adjusted against the reserved seat for which reservations were made, it was held that the appellant therein was entitled to succeed. The said decision we would note was with reference to the conditions of reservation in the prospectus. On interpretation of the prospectus it was held that the marks secured in the final examination would determine the rank of the candidate in the general category as well as the OBC category. The candidate then had the option to choose between an unreserved or reserved seat, depending upon the rank secured. In terms of the said prospectus, the marks secured in the first qualifying examination were not determinative and decisive for the merit list. OBC candidates who had qualified to appear for the final exam in view of the relaxation available would still be allotted a rank in the unreserved as well as the OBC category. The final rank would be counted and determine the position on the merit list.

21. Reference to the decision of the Division Bench of this court in *Naveen Dahiya (Supra)* is not apposite. The petitioner in the said

case had applied for the post of Head Constable, Ministerial under the OBC category. He had not sought any relaxation or concession available to the candidates under the OBC category. The petitioner having been qualified in the physical measurement had appeared in the medical examination, but was not selected and called for typing and computer formatting test. The petitioner, on the basis of information uploaded on the website, had learnt that he had secured higher marks than the last selected candidate under the unreserved category. The petitioner had accordingly raised his grievance before the Central Administrative Tribunal. In the said case, the last selected candidate in the OBC category had secured 73 marks whereas the last selected candidate in the general category had 71 marks and the petitioner had secured 72 marks. Another contention of the petitioner was that the candidates belonging to the reserved category, selected without relaxation of standard could not have been adjusted and counted against the reserved share of vacancies. The issue raised in the said case related to the application of the own merit criteria and whether it should be applied at the end or the final stage of the selection process. Referring to Article 16(4) of the Constitution it was held that the reserved category candidates, who had been selected in the general category on their own merit should not be counted against the quota for reserved category candidates. Pertinently, while referring to the case of *Jitendra Kumar Singh (Supra)* the court observed that the petitioner had never availed any relaxation in either age or fee.

22. We would like to refer to the decision of the Constitutional Bench of the Supreme Court in the case of *Union of India Vs.*

Ramesh Ram and Anr. (2010) 7 SCC 234. The Supreme Court, in this case, was dealing with reserved category candidates, who had secured a meritorious position in the Civil Service Examination without availing any concession or relaxation, so as to qualify for selection in the general list as well as the reserved category list. Challenge to the constitutional validity of sub-rule (2) to (5) to Rule 16 of the Civil Service Examination Rules was made on the ground that reserved backward classes candidates, who had qualified as a part of the general list, but availed the benefit given to reserved category candidates to get a service of their choice, would continue to hold their general status and not occupy or reduce the reserved category post. Rejecting the said challenge, it was held that when meritorious candidates are adjusted against reserved category vacancy in view of their preference, the seats vacated by them in the general category would be allotted to those competing in the general category. If this principle is not followed, then possibly aggregate reservation would exceed 50%

23. The underlying principle behind this judgment is that referring to the applicable Rules, when a reserved category candidate takes benefit of a concession because he belongs to the said category, then his appointment has to be counted as a part of the reserved pool for the purpose of computing the aggregate reservation quota, if the Rules so require and stipulate. The reservation quota pool and the general unreserved pools are two separate categories as such, with the rider that other backward classes are also part of the general pool when they do not take benefit of any concession or relaxation as they belong to a

backward class. If such relaxation or benefit is claimed, unless the Rules or stipulation are to the contrary, the candidate would not belong to the general pool and would be covered under the reserved pool. The decision in *Ramesh Ram and Others* (supra) is also relevant for it repeatedly refers to, and draws a distinction between meritorious candidates who have not availed of any concession or relaxation in the eligibility criteria at any stage of the examination and have secured enough marks to place them in the general pool or the general qualifying standard. The Supreme Court has emphasized and referred to the requirement that such candidates should not have availed any concession or relaxation in the eligibility criteria. Therefore, it follows that where a candidate has obtained the post by virtue of relaxation or concession on account of the fact that he belongs to a backward class, then he would be treated as belonging to a reserved category unless there is a stipulation to the contrary by way of a specific enactment, rule, or instruction.

24. The difference between vertical and horizontal reservation has been highlighted to meet and reject the contention of the third respondent that age relaxation having been granted to general category candidates in specific cases, the benefit of age relaxation to OBC candidates etc. was not in the nature of an exemption for reserved category candidates alone. Relaxation of age in the general cases, where applicable, would not be covered under Article 16(4) of the Constitution, but would be relaxation granted to these general category candidates for specific reasons. Such relaxations would have to meet the test of equality under Article 14 of the constitution, and

should not be discriminatory. The candidates who were to take advantage or concession of the aforesaid relaxation would qualify in the same category, i.e., unreserved or general candidates. In a given case, where there is horizontal reservation, candidates belonging to the categories so classified would possibly be entitled to the benefit in the manner and mode elucidated in the aforesaid decisions.

25. Reservation legislations under Article 16(4) of the Constitution are enacted in order to protect and promote the interests of backward or socially disadvantaged groups, these being the OBCs, SCs and STs. These measures do not offend the equality clause since Article 16(4) safeguards the concern of certain classes and shields their legitimate claims in the domain of public employment. In case of legislation for affirmative action, the general principle governing reservation is that when any relaxation or concession is granted to the backward classes relating to eligibility qualifications whether in nature of marks, age, etc., the selection of the said candidate would be in the reserved category even if the said candidate had secured a meritorious position or rank, thus enabling him to qualify as a general category candidate. This principle would, however, be subject to a stipulation or a provision to the contrary in the recruitment rules, the applicable enactment, or in the advertisement/brochure pursuant to which applications were invited. This is an exception to the general principle and in the absence of an express provision enabling such exception, the general principle as stated above, would be applicable by default. There is sound and good reason for the same, for when a

candidate meets the minimum eligibility criteria only in view of the relaxation or concession granted to him for belonging to a backward class, he would not then qualify as a general or unreserved category candidate. This migration would be impermissible even if the said backward class candidate secures a higher meritorious position. In such cases, the exemption or benefit granted to the reserved category candidate would not be unwritten and negated because of the marks or gradations subsequently secured. There is a connecting chain between the candidate concerned, and the concession or relaxation granted by virtue of his belonging to a backward class, which chain when linked, is not broken or destroyed because of subsequent gradation of marks, which are higher or better than the unreserved or general candidate. The first door access matters. The aforesaid ratio takes care of the argument that a relaxation or concession in fee granted to backward classes, which is the norm and a general practice, would not bar the reserved category candidate from qualifying in the general category, for the reason that fee prescribed is not an eligibility qualification but a condition to enable a person to participate in the selection process, if he is otherwise eligible. A relaxation in age or marks secured, on the other hand, would directly relate to the prescribed eligibility qualification, which can be different for general candidates and backward classes etc. Relaxation or concession of fee is, therefore, not regarded as "relaxation" or "concession" which would affect a candidate's selection in the open competition.

26. In view of the above, we uphold the final result dated 6th November, 2013 and hold that Tej Pal Singh, the second respondent herein, who was eligible on account of availing age relaxation, was rightly appointed to the post of Staff Car Driver against the OBC vacancy and not the unreserved vacancy. Consequently, we uphold the appointment of Bhim Singh the third respondent to the post against the vacancy in the general category. The present Letters Patent Appeal is allowed and the impugned judgment dated 24th August, 2015 is set aside. The Writ Petition (C) No.7500/2013 will be treated as dismissed. There will be no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

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(SUNITA GUPTA)
JUDGE

OCTOBER 7, 2016

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