

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

Judgment reserved on: 26.04.2017

% **Judgment delivered on: 12.02.2018**

+ **W.P.(C) 606/2016 and C.M. Nos. 2483/2016 (stay) and 2486/2016 (seeking permission to file additional documents)**

**DELHI SUBORDINATE SERVICES
SELECTION BOARD**

..... Petitioner

Through: Mr. Gautam Narayan, ASC,
Mr. Shatrajit Banerji, Mr. Praveen
Sharma and Mr. Vivek Naresh,
Advocates.

versus

JITENDER MUNJAL

..... Respondent

Through: Mrs. Biji Rajesh for Mr. G. Kant,
Advocate for R-1
Mr. Naresh Kaushik and Ms. Kritika
Sharma, Advocates for UPSC.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE DEEPA SHARMA**

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner Delhi Subordinate Services Selection Board (DSSSB) has preferred the present writ petition to assail the order dated 17.12.2014 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (CAT/ Tribunal) in O.A. No. 3142/2014. The said Original Application,

preferred by the respondent has been allowed by the Tribunal with a direction to the petitioner to re-draw the short list of unreserved category candidates (for one post of Physiotherapist advertised vide Post Code No.04/2014), by including 9 unreserved category candidates and 1 candidate from SC category - who did not avail the benefit of reservation. The Tribunal directed that candidates who had claimed the benefit of reservation, and had applied as OBC category candidates, should be shortlisted for their consideration against the OBC vacancy only. The respondent, who ranked at 10th position with 70.25 marks in the unreserved category (after the screening test) was also directed to be interviewed for the post in question along with the other candidates.

2. Vide Advertisement No.01/2014, the Government of National Capital Territory of Delhi / DSSSB invited applications, inter alia, for the Post Code No.04/2014 (Physiotherapist). The said posts were in the MCD. The advertisement pertained to one unreserved vacancy, and one vacancy for the OBC category. It also provided for horizontal reservation on one post for the Physically Handicapped (PH).

3. The respondent participated in the screening test conducted on 25.05.2014 in respect of the advertised posts as an unreserved category candidate. The merit list declared by DSSSB contained the particulars of the candidates, the category under which they had applied (i.e. unreserved, OBC, SC, PH, etc.), and the marks obtained by them in the screening test. The most meritorious candidate in the list was one Pulkit Saxena, who belonged to the unreserved category (DC). He secured 82.75 marks in the screening test as opposed to the respondent's 70.25 marks. Above the

respondent, there were 15 candidates in the merit list, which included candidates belonging to the unreserved category, the OBC category and the SC category. The respondent was not called to participate in the interview when the notice dated 24.08.2014 was issued by the petitioner to the more meritorious candidates. Thus, the respondent raised his grievance, by approaching the Tribunal. He claimed that candidates with lesser marks, i.e. 68.75, 64, 62, etc. etc. - up to 56.75 were allowed to participate in the interview. He also raised a grievance that the petitioner had resorted to shortlisting of candidates, without making the shortlisting criteria public. He contended that the screening test held on 25.07.2014 was not in accordance with the syllabus indicated in Annexure-I of the advertisement dated 02.01.2014. The three submissions/ grounds urged by the respondent before the Tribunal have been culled out in the impugned order itself, which read as follows:

- “(i) Having secured 70.25 marks, the applicant was entitled to be called for interview;*
- (ii) The Screening Test was out of syllabus and was not in consonance with the syllabus mentioned in the advertisement;*
- (iii) The criteria of short listing was not made public.”*

4. The petitioner justified its decision to limit the number of candidates to be called for interview after the holding of the screening test. The petitioner disclosed that a decision had been taken by the Board of the petitioner in its meeting held on 26.02.2014, wherein it was decided that the number of candidates to be called for interview after screening would be limited to 10 times against 1-2 vacancies. Since, in the present case, there was 1 unreserved and 1 OBC category posts, 10 candidates were called for

interview against the unreserved post and 10 candidates were called for interview against the vacancy/ post reserved for the OBC category. The stand taken by the petitioner in paragraph 4.1 of its reply, which is extracted in the impugned order, reads as follows:

“4.10. That in reply to para 4.10, it is stated that as per the decision taken in the Board s meeting held on 26.02.2014 with the objective to restrict the number of candidates to be called for interview after the screening test, the candidates for interview is to be called in the following ratio after the screening test:

<i>S.No.</i>	<i>Number of vacancy</i>	<i>Number of candidates to be called for interview</i>
<i>1.</i>	<i>1 to 2</i>	<i>10 times</i>
<i>2.</i>	<i>3 to 4</i>	<i>08 times</i>
<i>3.</i>	<i>5 to 6</i>	<i>07 times</i>
<i>4.</i>	<i>7 onwards</i>	<i>06 times</i>

It has also been decided that the candidates should have obtained the minimum marks in the screening test as under:-

- 1. Unreserved 40%*
- 2. OBC 35%*
- 3. SC/ST 30%*
- 4. PH 30%*

Ex-servicemen will be given 5% relaxation in their respective categories subject to a minimum of 30%.

Therefore, as per the above decision, the numbers of candidates to be called for interview had been worked out from the result sheets indicating the marks obtained by the candidates in the screening test in the same position as has been provided by the secret cell.

While short-listing the candidates, we had taken candidates of all categories (UR/OBC/SC/ST) against UR category who have secured upto 40 marks. Thereafter, the OBC candidates securing upto 35 marks have been taken for the post meant for OBC categories and the SC/ST candidates securing upto 30 marks have been taken for the post meant for SC/ST/PH categories.

In this Post Code, 114 candidates have secured 40 or above 40 marks. Since 01 UR post is to be filled, 10 candidates securing 76.25 and above marks have come in to consideration which include 05-UR, 04-OBC candidates and 01 SC candidate. Further, for 01 OBC post, 10 candidates securing 56.75 marks from OBC category have come into consideration and accordingly, they have been called.”

5. The Tribunal rejected the respondent's submission that the criteria for shortlisting had not been made public. The Tribunal held that the DSSSB could have shortlisted the candidates in case of there being large number of candidates, and where the post was of technical or specialized nature, the selection could be made on the basis of the academic record, experience and interview, if the number of eligible candidates did not exceed 100. However, in case the number of eligible candidates were found to be more than 100 but lesser than 500, the Board could conduct the screening test to shortlist the candidates and final merit list could be drawn on the basis of the academic record, experience and interview of shortlisted candidates. The submission of the respondent that the selection process was changed midway, was rejected. At the same time, the Tribunal held that the petitioner should have included subject related questions in the screening test, and should not have restricted the questions posed in the screening test only to the aspect of 'General Awareness'. The Tribunal, inter alia, observed as follows in this regard:

“6. Nevertheless, the respondents ought to have included the subject related questions in the screen test, as indicated in the syllabus for one tier examination. When such questions are not included in the syllabus, they are expected to put such questions to the candidates in the interview.”

6. We may observe that on the aforesaid aspect, there is no real discussion to be found in the impugned order, and the aforesaid observation appears to have been made only as a passing observation. The same does not reflect due application of mind by the Tribunal to the issue: whether, in a screening test, it is essential that the entire syllabus should be covered, or the same could be based upon one of the aspects included in the syllabus – like in the present case, on the aspect of ‘General Awareness’. If this were to be regarded as a serious lacuna or a fatal flaw in the screening process, the direction that should have been issued, would have been to scrap the screening process and to re-conduct the same. But that is not the direction issued by the tribunal.

7. The real controversy in the present case, however, stems from the view taken by the Tribunal in the matter of excluding the meritorious OBC category candidates from being considered for the unreserved category post. In this regard, the reasoning given by the Tribunal needs to be reproduced. The same is contained in paragraph 7 of the impugned order, which reads as follows:

“7. According to the respondents themselves, they could invite the candidates for interview in the ratio mentioned in para 4.10 above. In such situation against one unreserved vacancy they were supposed to invite 10 candidates. Indubitably, the applicant had got 70.25 marks in the written examination (screening test). There were only 14 candidates who secured more marks than the applicant. He could not be

called to participate in the interview only because the candidates who applied for the vacancies reserved for OBC and secured more marks than him were included in the short list prepared for unreserved vacancy. Though it is settled law that the reserved category candidate who find place in select list in general merit should be appointed against general (unreserved) vacancy and only such reserved category candidates who are selected with relaxed standard should be given benefit of reservation. Nevertheless, such principles need to be applied after finalization of the selection and at the time of preparation of the final select list and not for the purpose of short listing the candidates. If at the time of short listing, the reserved category candidates who stand high in the merit are allowed to be included in the short list prepared for unreserved category, then in final selection based on interview or otherwise they are made to compete with unreserved category candidates and in case they are not able to perform better than unreserved category candidates, there is all possibility of their non inclusion in the final select list, while the OBC category candidate with lesser merit and relaxed standard may get the reserved vacancies. In giving benefit of reservation in the middle of selection for the purpose of short listing there is always a possibility that the more meritorious candidates will have to compete with general category candidates and would stand the risk of not getting selected while a reserved category candidates with inferior performance in the screen test may get away with the reserved vacancy. The ramification of the application of the principle of shifting the reserved category candidates with high merit in general category would be that the meritorious candidates is made to compete with general category candidates and not that he is given unreserved vacancy. Not only this, when the candidates from reserved category who obtain higher marks in screening/written test conducted for short listing are included in short list and general category candidates are excluded on account of their inclusion, they are virtually deprived from participating the selection despite satisfying the short listing criteria, which cannot be permitted.

Thus, we are of the view that the principle of shifting the meritorious reserved category candidates to UR list should not be applied in the middle of the selection and need to be applied only for the purpose of making appointment after final selection. Thus, the 4 OBC category candidates who were short listed in general list ought to have been included in the short list prepared for unreserved category. As far as Scheduled Caste category candidate is concerned, since no vacancy was reserved for such category, the SC candidates cannot be considered in selection as reserved category candidates, but need to be assessed in UR category and his inclusion in the short list prepared for unreserved category is justified. The shifting of reserved category candidates to the list of unreserved candidates in the middle of selection leads only to a skewed situation. A candidate who fulfills short listing criteria should not be deprived from participating in the selection merely because he is from unreserved category.” (emphasis supplied)

8. The submission of learned counsel for the petitioner is that the impugned order passed by the Tribunal, with regard to exclusion of the more meritorious OBC category candidates from consideration against the unreserved post is erroneous, and the same is contrary not only to the O.M. dated 01.07.1998 issued by the DOP&T, Ministry of Personnel & Training, but also to the decisions of the Supreme Court relied upon by the petitioner which are taken note of herein after.

9. Learned counsel submits that the O.M. dated 01.07.1998 clarified the position 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 candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.” (emphasis supplied). Thus, OBC category candidates, and for that matter, candidates belonging to SC & ST categories, who qualify on their own merit to become eligible for staking their claim in respect of an unreserved category post, without seeking any relaxation of standards (for example, in the age limit, experience, qualification, permitted number of chances in the written examination, etc.), cannot be excluded from consideration for selection/ appointment against the unreserved posts.

10. Learned counsel points out that in the present case, the merit list prepared by the DSSSB contained the following names/ categories/ marks from serial numbers 1 to 32.

SNO	Roll_No	Name	Father's Name	D-O-B	Gender	Category Applied	Marks OBT.
1	12000579	PULKIT SAXENA	R D SAXENA	05/05/1987	M	UR DC	82.75
2	12000339	NITESH KUMAR	SURESH KUMAR	17/06/1989	M	UR	82.25
3	12000393	DEEPIKA CHAUDHARY	OM PRAKASH	09/11/1984	F	OBC	81.50
4	12000398	MANISH RANA	BALWAN SINGH RANA	25/11/1986	M	OBC	81.25
5	12000488	ANKUR	TRILOKI RAM	11/05/1988	M	UR	80.50
6	12000639	PREETI	SAT NARIAN	12/08/1987	F	UR	80.25
7	12000538	VERSA VERMA	RAJ KUMAR VERMA	16/01/1988	F	OBC	79.50
8	12000328	KAPIL	RAMPAL	13/04/1989	M	OBC	79.25
9	12000300	AKASH KOTIA	HARI RAM KOTIA	29/06/1989	M	SC	77.75

10	12000305	NEHA	CHARAN JEET	03/05/1990	F	UR	76.25
11	12000288	PRATEEK YADAV	BHUP SINGH	29/03/1990	M	OBC	73.50
12	12000603	SHRESTHA SHARMA	ALOK SHARMA	12/04/1987	F	UR	73.25
13	12000250	LALIT YADAV	BALBIR SINGH	02/06/1987	M	OBC	71.25
14	12000466	ANJALI SINGH	RPSINGH	18/07/1987	F	OBC	71.25
15	12000411	DIPESH	DILBAG SINGH	25/04/1987	M	OBC	71.00
16	12000322	JITENDER MUNJAL	O P MUNJAL	08/03/1980	M	UR DC	70.25
17	12000419	AMIT KUMAR DINKER	N R DINKER	10/03/1984	M	SC	69.50
18	12000043	PREM KUMAR SINGH	BINDESHWARI MANDAL	03/01/1980	M	OBC PH	68.75
19	12000569	PALLAVI JAIN	S K JAIN	16/10/1987	F	UR	68.75
20	12000590	RUBY KHANAN LODHI	RASHIK KHAN LODHI	31/05/1989	F	UR	68.50
21	12000541	RAVINDRA KUMAR	SHIV KARAN KUMAR	13/03/1982	M	SC	68.25
22	12000403	AVINASH GAUTAM	RAMESH CHAND	13/11/1983	M	SC	68.00
23	12000577	AASHIM CHUGH	KRISHAN KUMAR CHUGH	03/05/1987	F	UR	67.50
24	12000491	PRASHANT VERMA	SURESH KUMAR VERMA	10/07/1988	M	UR	67.25
25	12000481	EKTA SHARMA	ANIL KUMAR SHARMA	26/01/1991	F	UR	65.25
26	12000546	RICHA MAHAJAN	VINAY MAHAJAN	14/12/1987	F	UR	64.75
27	12000269	YAGDUTT	JAIDUTT	03/05/1987	M	UR	64.50
28	12000310	PINKY KUMARI	RAJENDRA PRASAD	29/04/1989	F	OBC	64.00
29	12000040	RAKESH KUMAR	RAM SEWAK LOHANI	29/01/1982	M	UR PH	63.75
30	12000583	SHEENA ARORA	DEEPAK ARORA	20/03/1989	F	UR	63.00
31	12000638	ADITYA	KALIKA PRASAD	09/08/1991	M	SC	62.50
32	12000404	SHWETA SINGH	SURESH KUMAR	09/09/1988	F	UR	62.25

11. The aforesaid merit list would show that there were 15 more meritorious candidates than the respondent, some of whom belong to the unreserved category, while others belong to the OBC and SC category. Since there was only one unreserved post, the first 10 candidates in the merit list were shortlisted for interview, irrespective of the category to which they belonged, since the said candidates had not secured their merit position in the screening test on the basis of any relaxation available to the reserved category candidates.

12. Even though the tribunal has held in favour of the Board – that it was entitled to apply the short listing criteria by resort to a screening test, and the respondent has not assailed that finding of the tribunal, to buttress that submission learned counsel for the petitioner has placed reliance on ***B. Ramakichenin Alias Balagandhi Vs. Union of India & Others***, (2008) 1 SCC 362. In this decision, the Supreme Court held that the method of shortlisting can be validly adopted by the selection body. In this regard, reference was made to ***M.P. Public Service Commission Vs. Navnit Kumar Potdar***, (1994) 6 SCC 293; and ***Govt. of A.P. Vs. P. Dilip Kumar***, (1993) 2 SCC 310. The Supreme Court held in paragraphs 16 and 17 as follows:

“16. Even if there is no rule providing for shortlisting nor any mention of it in the advertisement calling for applications for the post, the selection body can resort to a shortlisting procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. For example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them. In this situation, the procedure of shortlisting can be resorted to by the selection body, even though there is no mention of shortlisting in the rules or in the advertisement.

17. However, for valid shortlisting there have to be two requirements — (i) it has to be on some rational and objective basis. For instance, if selection has to be done on some post for which the minimum essential requirement is a BSc degree, and if there are a large number of eligible applicants, the selection body can resort to shortlisting by prescribing certain minimum marks in BSc and only those who have got such marks may be called for the interview. This can be done even if the rule or advertisement does not mention that only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus the procedure of shortlisting is only a practical via media which has been followed by the courts in various decisions since otherwise there may be great difficulties for the selecting and appointing authorities as they may not be able to interview hundreds and thousands of eligible candidates; (ii) if a prescribed method of shortlisting has been mentioned in the rule or advertisement then that method alone has to be followed.” (emphasis supplied)

13. To assail the decision of the tribunal contained in para 7 of the impugned order, reliance is also placed by learned counsel on **Andhra Pradesh Public Service Commission Vs. Balaji Badhavath & Others**, (2009) 5 SCC 1. In paragraph 43 of this decision, the Supreme Court held that if category-wise segment is prepared, it may be detrimental to the interest of meritorious candidates belonging to the reserved categories. The reserved category candidates have two options. If they are meritorious enough to compete with the unreserved category, they are recruited in that category. The candidates below them would be considered for appointment in the reserved categories. This is a well-settled principle of law. The Supreme Court referred to its earlier decisions in **Union of India Vs. Satya Prakash**, (2006) 4 SCC 550; **Ritesh R. Shah Vs. Dr. Y.L. Yamul**, (1996) 3

SCC 253; and, *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission*, (2007) 8 SCC 785.

14. Reliance is also placed on *Ms. Jyoti Yadav & Another Vs. GNCTD & Another*, W.P.(C.) No. 7093/2010 decided by a Division Bench of this Court on 01.02.2012. The Division Bench in paragraph 11 of this decision observed as follows:

“11. As far as the legal position is concerned, neither has any contest been raised by the respondents nor is there any scope for ambiguity. The candidates selected in General (unreserved) category on their own merit, even if belonging to the reserved category cannot be counted in the reserved category so as to reduce the number of seats prescribed for the reserved category. Reserved category candidates can compete for unreserved category seats. An unreserved seat is available to all the candidates but a reserved seat is confined for candidates of that particular category. In an open competition, while the general category candidates are entitled to compete only against unreserved seats but a reserved category candidate in addition to his right to be considered against the reserved seat is also entitled to be considered against unreserved seats. His option in the application, for consideration of his candidature for a reserved seat is only a declaration of his intention to be considered against reserved seats without depriving himself of the right to be considered against an unreserved seat. Articles 15 and 16 of the Constitution of India confer certain benefits on the persons belonging to these categories but which benefits are not in substitution of any other right which may otherwise be available to them as citizens of the country. Members belonging to the reserved category cannot be asked to occupy only the reserved seats; they are free to occupy any seat including unreserved seats; however the requirement of law is that while claiming selection against unreserved seats, they should prove their merit like any other citizen who is not entitled to the benefit of reservation.” (emphasis supplied)

15. The petitioner also places reliance on *Naveen Dahiya Vs. GNCT of Delhi & Others*, W.P.(C.) No. 2125/2014 decided on 11.02.2015. The Division Bench in this decision, inter alia, observed:

“14. It is thus a well settled law that every candidate will first compete on their own merit from the candidates of general category, irrespective of their own categories, however if a candidate in the reserved category is not able to make his grade in the general category then he may contest with the reserved category. Thus, the candidates of the reserved category, who are able to get selected in the general category on their own merit, shall not be counted against the quota reserved for reserved category candidates. In this context we may refer with profit to the authoritative pronouncement of the Apex Court in the land mark judgment of Indra Sawhney Etc. v. Union of India & Ors. (Supra) wherein it was held as under:

“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.”

x x x x x x x x x

22. As has been discussed above, once the qualifying stage is over, the criteria of own merit has to be followed at every stage and not just at the final stage.... ..” (emphasis supplied)

16. Learned counsel for the petitioner submits that the OBC/ SC category candidates shown in the merit list prepared after screening test have not gained entry into the said list on account of any relaxation/ concession

available to the candidates of the said categories, and that they have found their position in the merit list entirely on the basis of their merit alone.

17. On the other hand, learned counsel for the respondent points out that the petitioner Board provided in “Note: 10” of the advertisement that “*The Board may shortlist the candidates for written examination on the basis of marks in qualifying exam in case there is large number of candidates. In cases of post of technical and specialized nature, the selection may be made on the basis of academic record & experience and interview if the number of eligible candidates does not exceed 100. If the number of eligible candidates is more than 100 but does not exceed 500 the Board shall conduct a screening test to shortlist the candidates and final selection shall be made on the basis of academic records, experience & interview of shortlisted candidates.*”.

18. Learned counsel for the respondent places reliance on a decision of the Andhra Pradesh High Court in ***S. Jaffer Saheb Vs. The State of Andhra Pradesh Rep By Chief Secretary To Government Secretariate, Hyderabad***, 1984 LawSuit (AP) 392 : 1985 (2) APLJ (HC) 380 : 1985 (2) AndhWR 283. In this case, under the relevant scheme, after the preliminary examination/ screening test, for the main examination candidates numbering 15 times the number of vacancies had to be called. The State, while calling the candidates for undertaking the main examination in respect of the unreserved category seats, did not adhere to the merit list and called less meritorious candidates belonging to the reserved classes. It is this action that the Court found to be violative of Articles 14 and 16 of the Constitution of India.

19. Having heard learned counsel, considered their respective submissions and perused the record, we find that the impugned order passed by the Tribunal is laconic and cannot be sustained.

20. Pertinently, the two posts in question, namely that of Physiotherapist (One in unreserved category and one reserved for the OBC category), also carry another limitation. One of these two posts is reserved for a Physically Handicapped candidate. Therefore, while calling the candidates for interview on the basis of the screening test, it was essential for the petitioner to ensure that sufficient number of candidates, who belong to the Physically Handicapped category were also called so that, at least, one of the two seats of Physiotherapist is filled by a qualified Physically Handicapped candidate.

21. Even though the respondent had contended before the Tribunal that candidates with lower marks, i.e. 68.75, 64, 62, 59.5, 58.5 and 56.75 had been allowed to participate in the interview, that aspect has actually not been addressed by the Tribunal. However, the screening test result, which has been reproduced hereinabove, shows that in the said list of 32 candidates, two candidates are Physically Handicapped, namely Sh. Prem Kumar Singh (at serial No.18, who belongs to the OBC category and is Physically Handicapped), and Sh. Rakesh Kumar (who belongs to the unreserved category and is Physically Handicapped and is positioned at serial number 29 of the merit list). Whereas Sh. Prem Kumar Singh (OBC PH) secured 68.75 marks in the screening test, Sh. Rakesh Kumar (UR PH) secured 63.75 marks.

22. There is no dispute about the fact that the number of candidates for one unreserved post in question was in excess of 500. As aforesaid, the

Tribunal has found in favour of the petitioner that the petitioner was entitled to adopt a process of screening/ shortlisting, not only by virtue of the terms & conditions contained in the public notice in question, but also, in view of the law laid down by the Supreme Court in **B. Ramakichenin Alias Balagandhi** (supra), **Baloji Badhavath**(supra) and **Ms. Jyoti Yadav** (supra). Thus, the Board was entitled to resort to a process of screening, which was fair and transparent, keeping in view the very large number of candidates who had applied for the two posts in question. Pertinently, it was not the respondents case that the screening test was not uniformly applied, or that the same went contrary to the declared procedure for short listing of candidates. The respondent has not assailed the decision of the tribunal on the said aspect.

23. The reasoning adopted by the Tribunal in paragraph 7 of the impugned order, in our view, is patently laconic. It is not that the Tribunal has found, as a matter of fact, that the OBC/ SC category candidates – who emerged more meritorious than the respondent, had availed of the benefit of reservation in any manner whatsoever. It was not the respondent's case that they had appeared in the screening test by virtue of grant of age relaxation, or relaxation of experience, or qualification. That being the position, the candidates belonging to the OBC/ SC category were entitled to compete for the unreserved category post, like any other candidate. By restricting the competition in respect of the unreserved category post of Physiotherapist only to the candidates belonging to the unreserved category, and by excluding the OBC candidates, the Tribunal has not only gone contrary to the O.M. dated 01.07.1998, but also contrary to the decision of the Supreme

Court in *R.K. Sabharwal Vs. State of Punjab*, (1995) 2 SCC 745 and the aforesaid decisions relied upon by the petitioner in the case of *Andhra Pradesh Public Service Commission* (supra), *Jyoti Yadav* (supra) and *Navin Dahiya* (supra).

24. In *R.K. Sabharwal* (supra), the Constitution Bench of the Supreme Court, inter alia, observed as follows:

“4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/ promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member

of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same". (emphasis supplied)

25. The aforesaid interpretation of the rule of reservation has been consistently followed and applied by the Supreme Court as well as by this Court in the decisions taken note of herein above. The reasoning adopted by the tribunal in para 7 of the impugned order clearly runs contrary to the manner in which reservation for different categories has to be applied. Pertinently, the tribunal was conscious of the law laid down by the Supreme Court, when it observed that "*it is settled law that the reserved category candidate who find place in select list in general merit should be appointed against general (unreserved) vacancy and only such reserved category candidates who are selected with relaxed standard should be given benefit of reservation*". Yet it has gone contrary to the said legal position on a specious ground. There was no basis for the tribunal to conclude that the said principle could be applied for finalization of the selection and at the time of preparation of the final select list and not for the purpose of short listing the candidates. There would be no occasion to apply to rule of

reservation at the time of preparation of the final select list, if the reserved category candidates are excluded at the stage of screening, even though, they may have emerged higher on merit without availing any concession/ benefit of reservation. The justification offered by the tribunal for holding so does not impress us. There is no basis to conclude that the more meritorious reserved category candidates may not be accommodated, either against the unreserved posts, or even against the reserved posts for the category to which they belong. Whenever a situation like the present arises, the recruiting/ selecting agency would have to adopt a procedure which ensures that the more meritorious candidates – to whichever category they belong, gets selected.

26. In the present case, since horizontal reservation is provided for the Physically Handicapped category, they would necessarily have to be called for interview even if they are low on merit. One of them (the more meritorious one) would have to be selected. If the selected Physically Handicapped category candidate belongs to the unreserved category, the most meritorious reserved category candidate (in this case the OBC category candidate) would be entitled to stake his claim to the reserved category seat. On the other hand, if the Physically Handicapped category candidate – who gets selected, belong to the reserved category (which in this case is the OBC category), the most meritorious candidate – irrespective of whichever category he may belong to, would be entitled to stake his claim against the unreserved post. The reasoning adopted by the tribunal tantamounts to excluding the OBC category candidates from competing for the unreserved

category seat. This clearly goes contrary to the well established legal position taken note of herein above.

27. Pertinently, even the Division Bench of the Andhra Pradesh High Court in *S. Jaffer Saheb* (supra) recognized and acknowledged the correct legal position when it observed:

“6. In the counter-affidavit filed by the Secretary, Andhra Pradesh Public Service Commission, it is admitted and it can no longer be disputed that a candidate belonging to the reserved communities is entitled to compete for a post in the open competition on the basis of merit besides the reserved posts, and where such candidates are selected on the basis of merit, the number of posts reserved for reserved communities will not in any way be affected” (emphasis supplied)

28. The Division Bench further observed:

“9. in the case of S.C./S.T. candidates, relaxation of minimum qualifying mark for selection shall have to be considered after the main examination. No preferential treatment is permitted under the scheme for admission to the main examination. It is so because the question of reservation of posts does not arise at that stage. Every candidate, whether he is a SC or S.T. or B.C. is equally competing with all others for all posts in open competition. All are equals at that stage and should be treated alike” (emphasis supplied)

In our view, this decision is not attracted in the facts and circumstances of the present case.

29. The UPSC vide its communication dated 01.04.2016 addressed to the counsel for the petitioner Mr. Naresh Kaushik has communicated the practice followed by the Commission while shortlisting the candidates at the written test stage. This communication, inter alia, states that:

“2. The minimum suitability of marks for each category viz. General/OBC/SC/ST/PH are dependent on the number of posts available/reserved for them and number of candidates available.

*3. The Union Public Service Commission while shortlisting the candidates to be called for interview considers candidates of reserved categories, who have secured the minimum suitability of marks prescribed for the general candidates and are within the age limit prescribed for general candidates against unreserved posts. **Otherwise, if only general category candidates are considered against unreserved posts, in most of the recruitment tests, it may end up with a situation that minimum suitability of marks proposed for general category candidates may be less than that proposed for other reserved categories particularly OBC category.**” (emphasis supplied)*

30. What is said in the aforesaid communication (which we have highlighted) has, in fact, come true in the present case. There are several OBC category candidates, and even an SC category candidate, who have fared better than the unreserved category candidates in the screening test. To exclude them from consideration at the stage of interview, for recruitment against the unreserved category post, would result in reverse discrimination, which would be clearly hit by the decision of the Supreme Court in ***R.K. Sabharwal*** (supra) and the other decision taken note of herein above.

31. So far as the respondent is concerned, in our view, he, in any event, was not entitled to be called for interview. This is for the reason that he secured only 70.25 marks in the screening test, as opposed to 15 others above him, which included unreserved category candidates, the OBC candidates and a SC candidate. Since there was only one unreserved post,

up to 10 candidates could be called for interview in terms of the decision taken by the petitioner Board.

32. For the aforesaid reasons, we are of the view that the impugned order passed by the Tribunal cannot be sustained. Consequently, the same is set aside and the Original Application preferred by the respondent is dismissed, leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(DEEPA SHARMA)
JUDGE

FEBRUARY 12, 2018

B.S. Rohella

न्यायमेव जयते