

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No. 25174 of 2014 (O&M)
Reserved on October 28, 2022
Date of Pronouncement: 14.11.2022**

Harpreet Kaur and others

...Petitioners

Versus

State of Punjab and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Maninder Arora, Advocate
for petitioners No. 1 and 2.

Mr. D.S. Patwalia, Senior Advocate with
Mr. Adityajit Singh Chadha, Advocate,
for petitioner No.3.

Mr. Mohit Kapoor, Addl. AG, Punjab.

JAISHREE THAKUR, J.

1. The writ petitioners have approached this court invoking Articles 226/227 of the Constitution of India seeking issuance of an appropriate writ, order or direction, especially in a writ in the nature of Certiorari for quashing the selection of respondents No. 3 to 19, as the same is contrary to the terms and conditions of the advertisement (Annexure P/1), as the said respondents, who had applied for the post under the reserved categories, have been selected against the seats meant for general category.

2. The facts in brief are that respondents No. 1 and 2 had issued an advertisement for recruitment of 110 posts of Sub-Inspector (Female) in November, 2013 (P-1). In the said advertisement, it was clearly mentioned that against a particular category, there are particular number of posts and the

eligibility criteria is also different. Not only in physical efficiency test, but even in the written test, there was difference in eligibility conditions. The petitioners applied for the post of Sub-Inspector under the general category and cleared their physical efficiency test as well as written test and were called for interview (P-2). On 22.11.2014, a final list (P-3) of selected candidates was published and the petitioners, who were hopeful of getting appointment under general category, were surprised to see that the reserved category candidates, who have scored higher marks than them, have been selected against the post kept for general category candidates, as a result of which the petitioners who had scored 59, 57 and 54 marks respectively were not on the merit list. It is averred that, as per final merit list, there were 17 candidates who had applied under various reserved categories (impleaded as respondents No.3 to 19), and have been selected against the posts kept for general category. It is further averred that respondents No. 5, 8, 9, 13, 14 and 19, who were overage and had applied for the post of Sub-Inspector under the reserved category had availed the benefit of age relaxation, were selected against the post meant for general category. Since, their selection is against the very spirit of the terms and conditions of the eligibility criteria as laid down in the advertisement the same is liable to be set aside. Hence, the instant writ petition.

3. Mr. D.S. Patwalia, learned Senior Advocate, for the petitioners herein would contend that a candidate belonging to a reserved category, who has availed age relaxation in the selection process, cannot thereafter seek to be accommodated against general category seat. In fact, they have to satisfy all conditions as general category candidates in case they want to be selected against the seats meant for general category. Since the private respondents who

had applied after availing the benefit of age relaxation under the reserved category, cannot be accommodated or migrated to general category seats, hence their selection is *void ab initio* and deserves to be set aside.

4. Per contra, learned counsel appearing on behalf of the State would contend that respondents No. 3 to 19, who belonged to reserved category of SC and BC were selected in general category on their own merit as per State Government Instructions issued vide No. 3/28/2009-GS-1/1601 dated 9.11.2009 (R-1). It is clearly mentioned in these instructions that candidates belonging to SC and BC category who gain seniority cum merit in general category cannot be counted in reserved category. Therefore, there is no fault in the selection process or appointment of the private respondents and, therefore, no interference is called for in the instant writ petition.

5. I have heard learned counsel for the parties and have gone through the record of the case.

6. The sole question that falls for consideration in the writ petition is, whether a candidate who has applied under the reserved category, after seeking relaxation in age or otherwise, can be accommodated or migrated to general category seat?

7. Article 16(4) of the Constitution of India specifies that “ *Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*” In a recent judgment rendered in **Bharat Sanchar Nigam Limited vs Sandeep Choudhary 2022 (2) S.C.T. 657**, the Supreme Court reiterated the principles as settled in the judgments rendered in **Indra**

Sawhney Vs. Union of India, 1992 Supp (3) SCC 217; R.K. Sabharwal Vs. State of Punjab, (2007) 8 SCC 785; Rajesh Kumar Daria Vs. Rajasthan Public Service Commission, (2007) 8 SCC 785 and Saurav Yadav Vs. State of U.P., (2021) 4 SCC 542 that candidates belonging to any of the vertical reservation categories are entitled to be selected in "open or general" category and it is further observed that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories that they belong to. It was also held that the reserved category candidates securing higher marks than the last of the general category candidates are entitled to get seat/post in unreserved categories. This is settled law now.

8. The question of allowing a reserved category candidate, who had availed age relaxation to be migrated and selected as a general category candidate, came up for the first time in **Jitendra Kumar Singh and another Versus State of UP and others 2010 (1) S.L.R. 526**, where there were instructions, which specified “*reserved category candidates having availed relaxation of age, are not disqualified to be adjusted against open category seats.*” Based on these instructions, the judgment was rendered in **Jitendra Kumar Singh's case (Supra)** holding as under:-

“xx xx xx

(i). *In implementing the reservation policy, the State has to strike a balance between the competing claims of individual under Article 16 (1) and reserved categories falling within Article 16 (4) of the Constitution.*

(ii). *50% maximum limit placed on reservation in any particular year must be maintained.*

(iii). *The open competing would start only at the stage when all*

person who fulfill the requisite eligibility conditions, as short listed.

*(iv). Plea that relaxation in fee or age would deprive the candidates belonging to reserved category of an opportunity to compete against General category candidates **is without any foundation** (Emphasise supplied).*

(v). All the candidates had to appear in the same written test and the same interview.

(vi). Reserved category candidates having availed relaxation of age, are not disqualified to be adjusted against open category seats.”

As per the reply filed, instructions were issued by the State based upon the decision as rendered in Jatinder Kumar’s case.

9. Learned counsel for the petitioners would rely on judgment rendered in **Deepa E.V. Versus Union of India and others 2017 (2) S.C.T. 833**, in support of their argument that a candidate who has taken benefit of age relaxation under the reserved category and obtained higher marks than a candidate in the general category will not be accommodated against the general category seat. In **Deepa's case (Supra)**, the Supreme Court was called upon to decide similar issue where the appellant, aged 26 years of age, had applied for the post of Laboratory Assistant Grade II in Export Inspection Council of India functioning under the Ministry of Commerce and Industry, Government of India, by seeking relaxation in age being OBC category candidate. The appellant secured 82 marks in the OBC category candidate, whereas in the general category, the last minimum cut off was 70 marks. Since the appellant did not have sufficient marks to find place in the merit of OBC category, as the cut off highest marks obtained in that category was 93, she sought appointment under the general category laying claim that in case a reserved category

candidate has higher marks than the last person in the unreserved category, such person shall be migrated to the general category. The writ petition was dismissed, which led to the filing of Special Leave to Appeal. The Supreme Court, while considering the Export Inspection Agency (Recruitment) Rules, 1980, took note of Rule 9 of the said Rules. Rule 9 clearly stipulated that *“nothing in these rules affect reservations, relaxation of age limit and other concessions required to be provided for the Scheduled Caste, Scheduled Tribes and other special categories of persons in accordance with the others issued by the Central Government from time to time”*. Whereas, one of the instructions issued by the Department of Personnel and Training had stipulated criteria to be followed by various Ministries/Department for recruitment to various posts under the Central Government and the reservations for SC/ST/OBC candidates. In the said instructions, it was clarified that 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, these candidates are to be counted against reserved vacancies, meaning thereby, such candidates would be deemed as unavailable for consideration against unreserved vacancies.

10. Taking into account these instructions, the Supreme Court came to hold that *“there is an express bar for the candidates belonging to SC/ST/OBC who have availed relaxation for being considered for general category candidates.”* Based on the said rules and instructions No. 36012/13/88-Estt (SCT) dated 22.5.1989 and 36011/1/98-Estt (Res.) dated 1.7.1998, as issued by the Department of Personnel and Training, the Supreme Court dismissed the appeal filed by the appellant, who belonged to the reserved

category and was claiming appointment under the general category on account of having obtained higher marks than the last selected candidate in the unreserved category.

11. Recently, the Supreme Court in **Niravkumar Dilipbhai Makwana Versus Gujarat Public Service Commission and others 2019 (3) S.C.T. 359**, held that a reserved category candidate who availed age relaxation in the selection process cannot be migrated or accommodated in the general category seat. In this case, the Supreme Court, while going into the issue, took note of the State Government Circular No. PVS-1099-MVN-13-G-4 dated 29.1.2000, which clarified that a reserved category candidate if has not availed of any relaxation viz age limit, experience, qualification, number of chances to appear in the examination, the said candidate will be adjusted in the open category and in case the candidate has availed any of the aforesaid relaxation, he/she will have to be adjusted against the reserved seats. Learned counsel for the petitioners herein would argue that ratio of the two judgments i.e. **Deepa and Niravkumar Dilipbhai Makwana (Supra)**, is fully applicable to the present case since the petitioners herein are candidates of general category and the private respondents, who belonged to reserved category, had availed of age relaxation but they got appointment after migrating to general category on account of having obtained higher marks than the last candidate of general category. Thus, the petitioners were deprived of an opportunity of appointment.

12. In a judgment rendered in **Gaurav Pradhan and others versus State of Rajasthan and others (2018) 11 SCC 352**, the Supreme Court observed that the ratio of judgment in **Jitendra Kumar Singh's case** has to be

read in context of the statutory provision and the government orders/circulars involved therein as it was confined to the scheme under consideration in that case. The Rajasthan Public Service Commission issued an advertisement dated 14.10.2010 inviting applications for selection on various posts of Constables. On 25.10.2010, another advertisement was issued by the Commission for selection of Sub Inspector of Police. During process of selection, the State Government issued a Circular dated 11.05.2011 stating that candidates of BC/SC/ST/ categories irrespective of whether they have had availed of any concession including relaxation in age, shall be migrated against open category vacancies if they have secured more marks than the last candidate of open category. This circular was contrary to the earlier circular dated 24.06.2008 which did not permit reserved category candidates to migrate to general category on the basis of higher merit, if they had availed age relaxation. The general category candidates were aggrieved by the said circular and challenged the selection process stating that reserved category candidates who have taken concession of relaxation of age in competition for post of Constable/SI of Police cannot be migrated to general category vacancies. Learned Single Judge allowed the petitions and held that only those who have taken benefit of concession of fee and not relaxation in age during the process of selection would be allowed to migrate to general category, if obtained equal or more marks to the last candidate in general category. The Division Bench modified the order to the extent that since relaxation in age had been availed by candidates of reserved category, those who find place in the select list by virtue of merit

deserve to be migrated against general vacancies. Other candidates availing special relaxations could not be migrated. The Supreme Court was then seized of the matter and framed following two questions:-

(1) Whether the reserved category candidates who had taken benefit of age relaxation in the selection in question and have obtained marks equal or more to last general category candidate would be treated in the general/open category candidates or ought to have been confined in the reserved category candidates.

(2) Whether the circular dated 11.05.2011 issued by the State Government changing the criteria for migrating reserved category candidates into general category candidates can be applied in respect to the selection which had already began on issuance of advertisements dated 14.10.2010 and 25.10.2010.

It was held that subsequent circular cannot be applied in respect of advertisement issued in 2010, and those candidates who had availed age relaxation cannot migrate to the general category.

13. On the other hand, learned counsel for the State lays emphasis upon the judgment of the Supreme Court in **Jitendra Kumar Singh** (supra) and the instructions issued Annexure R/1.

14. Admittedly, neither the counsel for the petitioners nor learned counsel for the respondents—State are in a position to show any such circular/instructions wherein it has been specified that a person of reserved category who has availed relaxation, viz age limit, experience, qualification, number of chances to appear in the examination, would be treated as reserved candidate only, as was the situation in the judgments cited above. An oblique reference has been made to Annexure R/1 to support the argument that a person of reserved category who had obtained higher marks than the last

person in the general category will be migrated or accommodated to the general category. However, the said instructions as relied upon by the respondents—State is not relevant to the present case, as it does not pertain to any age relaxation availed of by a reserved category candidate. The instruction of the year 2010 is based on the general principal of vertical reservation.

15. In **Gaurav Pradhan and others versus State of Rajasthan and others (2018) 11 SCC 352** it has been held :-

“ 22. Article 16 clause (4) of the Constitution is an enabling provision empowering the State for making 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. The orders issued by the State Government from time to time were the orders contemplated by Article 16 clause (4). It is well settled by the nine-Judge Constitution Bench [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] that reservation in favour of backward classes can be provided by a State Government by an executive order also.”

23. The reservation being the enabling provision, the manner and extent to which reservation is provided has to be spelled from the orders issued by the Government from time to time. In the present case, there is no issue pertaining to the extent of reservation provided by the State Government to the SC, ST and OBC candidates. The issue involved in the present case is as to whether the reserved category candidates can be allowed to be migrated into general category candidates. The reservation is wide enough to include exemption, concession, etc. The exemption, concession, etc. are allowable to the reserved category candidates to effectuate and to give effect to the object behind Article 16 clause (4) of the Constitution. The State is fully empowered to lay down the criteria for grant of exemption, concession and reservation and the manner and methodology to effectuate such reservation.

The migration of reserved candidates into general category candidates is also part and parcel of larger concept of reservation.....”

16. Learned counsel for the petitioners has relied upon clarification dated 25.9.2017 (Annexure P/4) which was issued in light of the judgment of **Deepa E.V. (Supra)**, wherein it was specifically clarified as under:-

“i) If a candidate belonging to Scheduled Caste/Backward Classes has not availed of any of the special concessions such as in age-limit, marks physical fitness, etc. in the recruitment process, which are available to the candidates belonging to these categories, except the concession of fees, and he secures more marks than the marks obtained by the last unreserved category candidate who is selected, such a candidate belonging to the Scheduled Caste/Backward Classes shall be counted against the unreserved category vacancies and not the vacancies reserved for the Scheduled Caste/Backward Classes, as the case may be.”

17. Reliance on these instructions cannot be placed in the instant case since the Circular was issued in the year 2017 and the recruitment process in the instant case was initiated in the year 2013. This Circular as issued in 2017 has not been made applicable retrospective. The State while offering the appointment to the candidates of the reserved category having higher merit than a candidate of an unreserved category and migrating them to the general category, was guided by the principles as laid down in **Jitendra Kumar Singh's case (Supra)** and its Instructions dated 9.11.2009. In the case in hand, like noticed above, there are no instructions, whereby the persons of reserved category who have availed relaxation, namely age limit, experience, qualification, number of chances to appear in the examination and have higher marks than the last person in the unreserved category, will continue to be

treated as unreserved candidates. Since the judgment in **Jitendra Kumar Singh's case (Supra)** was prevalent at that time, the State in its wisdom followed the ratio as settled.

18. The petitioners though may have some merit in their case to the effect, that a candidate of the reserved category who has availed benefit of relaxation in age limit, experience, qualification etc. has to be treated as reserved category candidate based on the instructions issued in the year 2017, but this Court is of the opinion that these instructions cannot be made applicable retrospectively. The private respondents who were appointed from the reserved category by migrating them into the general category cannot be faulted as the migration was not of their own accord nor any misrepresentation made by them. The action of the respondents—State in migrating the private respondents to the general category was based upon the law as applicable at the relevant time.

19. Consequently, finding no merit in this writ petition, the same is dismissed.

November 14, 2022
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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned :	Yes
Whether Reportable :	No