

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

WP.ST 34 of 2022
Sahim Hossain & Ors.
Vs.
The State of West Bengal & Ors.

With

WP.ST 35 of 2022
Amit Sikdar & Ors.
Vs.
The State of West Bengal & Ors.

With

WP.ST 42 of 2022
Tanmoy Dutta & Ors.
Vs.
State of West Bengal & Ors.

With

WP.ST 48 of 2022
The Public Service Commission & Ors.
Vs.
Sahim Hossain & Others.

For the Petitioners	: Mr. Bikash Ranjan Bhattacharyya, Sr. Adv.
in WP.ST 34 of 2022	Mr. Subir Sanyal, Adv.
WP.ST 35 of 2022	Mr. Dyutimoy Paul, Adv.
WP.ST 42 of 2022 & for	Mr. Akash Dutta, Adv.
the Respondent in	Mr. Dibyendu Chatterjee, Adv.
WP.ST 48 of 2022	

For the Petitioners in WP.ST 48 of 2022	: Mr. Abhratosh Majumder, Adv. Ms. Shraboni Sarkar, Adv.
For the PSC in WP.ST 34 of 2022 WP.ST 35 of 2022 WP.ST 42 of 2022	: Ms. Shraboni Sarkar, Adv.
For the State in WP.ST 34 of 2022	: Mr. S. N. Mookherjee, AG Mr. Tapan Kr. Mukherjee, Ld. A.G.P. Mr. Pinaki Dhole, Adv. Mr. Somnath Naskar, Adv.
For the State in WP.ST 42 of 2022 WP.ST 48 of 2022	: Mr. S. N. Mookherjee, AG Mr. Tapan Kr. Mukherjee, Ld. A.G.P. Ms. Sangeeta Roy, Adv.
For the Added Respondents	: Mr. Jayanta Kr. Mitra, Sr. Adv. Mr. Kamalesh Bhattacharya, Adv. Mr. Anindya Bhattacharya, Adv.
For the Respondent Nos. 14 to 103 in WP.ST 34 of 2022	: Mr. Pratik Dhar, Sr. Adv. Mr. Ritwik Pattanayak, Adv.
Hearing Concluded on	: August 28, 2023
Judgement on	: September 13, 2023

DEBANGSU BASAK, J.:-

Scope

1. Four writ petitions have been heard analogously as they emanate from the same order dated March 29, 2022 passed by the West Bengal Administrative Tribunal in OA 11 of 2021, OA 105 of 2021 and OA 150 of 2021.
2. By the impugned order, the Tribunal has refused to set aside the recruitment process conducted by the West Bengal Public Service Commission for the post of Sub- Inspector in the Subordinate Food and Supply Service, Grade III, under

Food and Supplies Department, Government of West Bengal, 2018. The Tribunal has however held that, persons belonging to a reserved category who took the benefit of age relaxation could not be placed in the unreserved category. The Tribunal has directed the preparation of fresh panels for the unreserved and the reserved categories in such context.

3. For the sake of convenience, the parties in the four writ petitions can be categorized as Public Service Commission, State, successful candidates who have been given appointment, successful candidates who are yet to be given the appointment, and unsuccessful candidates.

4. Writ petition at the behest of the Public Service Commission has been registered as WPST 48 of 2022 while those of the unsuccessful candidates have been registered as WPST 34 of 2022, WPST 35 of 2022, and WPST 42 of 2022.

Contentions of unsuccessful candidates

5. It has been contended on behalf of the unsuccessful candidates that, once reserved category candidates have taken the benefit of age relaxation given to such category of candidates, they cannot be treated as same as unreserved category candidates. It has been contended that, unreserved category candidates did not obtain any benefit of age

relaxation. Reserved category candidates have been granted age relaxation and those candidates belonging to the reserved category who had taken the age relaxation can no longer be treated at par with the unreserved category candidates.

6. It has been contended on behalf of the unsuccessful candidates that, question No. 87 was wrong and that all 4 options to such answer were wrong. The written examination process had provided for negative marking of 0.33 marks in case of a wrong answer. Question No. 87 had therefore affected the unsuccessful candidates along with others. It has also been contended that question No. 36 was also wrong. Therefore, according to the unsuccessful candidates, they are entitled to receive full marks in respect of question No. 36 and 87 in the written examination as they had attempted those answers. The unsuccessful candidates had not been provided with the key answers prior to the publication of the result of the written examination and no process for obtaining feedbacks from the candidates was exercised.

7. It has been contended on behalf of the unsuccessful candidates that, the criteria for tiebreak in cases where equal aggregate marks were obtained by the candidates were not disclosed prior to the commencement of the selection process

or even before the holding of the written examination or the interview. The Public Service Commission had published a note with regard to the result dated March 4, 2021. Therefore, the prescription of tiebreak had been introduced subsequent to the Written and the Personality Test.

8. The unsuccessful candidates have questioned the maintainability of the writ petition at the behest of the Public Service Commission. It has been contended on their behalf that, being a recommending body, Public Service Commission has no right to file a writ petition. Reference has been made to another recruitment process involving the appointment to the post of Police Constable, West Bengal (Male), 2019 and the merit list for recommended candidates in respect thereto which was cancelled by the Tribunal on the ground of violation of the reservation policy. Tribunal had directed similar measures to be taken as done in the present case. State and Public Service Commission had accepted such direction. Having accepted such direction of the Tribunal, it was no longer open to the Public Service Commission to assail the impugned order of the Tribunal.

Contentions of the Public Service Commission

9. Learned senior advocate appearing for the Public Service Commission has contended that, his client issued an advertisement bearing No. 26/2018 dated August 25, 2018 for recruitment to the post of Sub- Inspector in the Food and Supplies Service, Grade III under Food and Supplies Department, Government of West Bengal. He has pointed out the salient features of the advertisement including the concessions that had been stipulated for the reserved category candidates. He has pointed out the manner of selection. He has contended that, a Written Test of the qualified candidates had been proposed to be held and was actually held. Subsequently, a interview had also been held.

10. Learned senior advocate appearing for the Public Service Commission has drawn the attention of the Court to the provisions of the West Bengal Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services and Post) Act, 1976 and particularly to sections 4 and 5 thereof. He has drawn the attention of the Court to the government memorandum bearing No. 378-F dated January 10, 1997, and the decision of the Full Commission dated August 21, 2018 on the subject of Preparation of Merit List for Relaxed Standard.

11. Learned senior advocate appearing for the Public Service Commission has relied upon ***All India Reporter 1964 Supreme Court 179 (Devadasan versus Union of India)*** and the dissenting judgement therein. He has relied upon ***1976 Volume 2 Supreme Court Cases 310 (State of Kerala versus N M Thomas), 1992 Supp (3) Supreme Court Cases 217 (Indra Sawhney and Others vs. Union of India and Others)*** and the amendment inserted to Article 335 of the Constitution. He has relied upon ***2007 volume 8 Supreme Court Cases 785 (Rajesh kumar Daria versus Rajasthan Public Service Commission and others), 2010 Volume 3 Supreme Court Cases 119 (Jitendra Kumar Singh and another versus State of Uttar Pradesh and others), 2019 Volume 16 Supreme Court Cases 129 (B. K. Pavitra and others versus Union of India and others)*** and ***2022 volume 4 Supreme Court Cases 1 (Neil Aurelio Nuns (OBC Reservation) and others versus Union of India)*** in support of his contention that, a candidate who obtained age relaxation but participated in the selection process with the unreserved category can be considered and placed in the unreserved category merit wise.

12. Learned senior advocate appearing for the Public Service Commission has contended that, the Tribunal misconstrued and misapplied the ratio of **2019 Volume 7 Supreme Court Cases 383 (Niravkumar Dilipbhai Makwana versus Gujrat Public Service Commission and others)**. He has contended that, the embargo placed by the State of Gujarat in the selection process under consideration in that case is not obtaining in the present case and as such the ratio is not attracted to the facts of the present case.

13. Learned senior advocate appearing for the Public Service Commission has contended that, his client took necessary measure for the typographical error in option D of Question No. 87 after the wrong was detected. Moreover, none of the writ petitioners had raised any objection with regard to the wrong answers key during the examination as well as after the examination and prior to the publication of the merit list. He has contended that, writ jurisdiction cannot be invoked to examine the correctness of the answer.

14. Learned senior advocate appearing for the Public Service Commission has contended that seniority amongst two or more candidates involved in a tie would be broken taking into account the seniority in age amongst them as well as

their performance at the Personality Test. In this regard, he has referred to the Full Commission Decision dated March 20, 2007.

Contentions of State

15. Learned Advocate General appearing for the State has contended that, the action of the Public Service Commission is including candidates of the reserved category who had availed of age relaxation in the unreserved category cannot be faulted. He has contended that, a relaxation in age limit is merely to enable the reserved category candidates to compete with the general category candidate. At the time when the concession was availed of, the open competition had not commenced. According to him, competition on merit commences only after all the candidates who had fulfil the eligibility conditions including that of age are permitted to sit in the written examination. He has contended that, grant of age relaxation does not result in a relaxation in the standard for selection based on the merit of the candidate in the Written Test and the interview.

16. Learned Advocate General for the State has contended that, the view taken by the Public Service Commission is a plausible view and must not be interfered with. Moreover, the

unsuccessful candidates had participated in the recruitment process without objection. They had taken a chance to get themselves selected. Only after they had found themselves unsuccessful that they filed the petitions before the Tribunal.

17. Learned Advocate General appearing for the State has contended that, Public Service Commission is an independent constitutional body established under Article 315 of the Constitution of India. Public Service Commission is not subservient to the directions of the government unless such directions are impermissible by law. The unsuccessful candidates have cited an instance with regard to recruitment process conducted by the West Bengal Police Recruitment Board in support of their contention that, merit list should be reworked in the manner as directed by the Tribunal. He has contended that, there cannot be any estoppel against the law. Moreover, challenge to the order of the Tribunal in the recruitment conducted by the West Bengal Police Recruitment Board is pending before the High Court.

Contentions of the successful candidates who were appointed

18. Learned senior advocate appearing for the successful candidates who were appointed has contended that, age

relaxation is not a concession or lowering down the standard of the competition. The recruitment process had provided for age relaxation in order to enable the reserved category candidates to participate in the competition. Thereafter, the competition itself had been uniformly applied for everyone. The act of enabling a candidate to participate in the competition is not the same thing as granting concession by lowering down the standard of competition for reserved category candidates. He has relied upon ***Jitender Kumar Singh (supra)*** and ***2015 volume 16 Supreme Court Cases 778 (Ajitkumar P. And others versus Remin K. R and others)*** in this regard.

19. Learned senior advocate appearing for the successful candidates who were appointed has submitted that, when two plausible views are permitted, the recruiting authority can choose one of the same. In the facts of the present case, Public Service Commission had taken a view which it applied uniformly. Therefore, such a decision should not be upset by the Court.

20. Learned senior advocate appearing for the successful candidates who were appointed has submitted that the best candidate amongst the unsuccessful candidates who had filed

the writ petitions received less mark than all the answering respondents. None of the unsuccessful candidates had received higher than the successful candidates.

Contentions of successful candidates who are yet to join

21. Learned senior advocate appearing for the successful candidates but are yet to join, has referred to the West Bengal Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services and Post) Act, 1976. He has contended that, Public Service Commission did not commit any error in preparing the merit list of the unreserved category taking into consideration the merit of candidates irrespective of the category they belong to, in view of Section 4 (2) of the Act of 1976. He has contended that, the unsuccessful candidates had participated in the selection process throughout without any objection. According to him, more than 7 lakh candidates had appeared in the written examination. He has adopted the contentions of Public Service Commission as well as those advanced on behalf of the successful candidates who were given the appointment.

Findings

22. Public Service Commission had issued an advertisement bearing Advertisement No. 26/2018 dated August 25, 2018 for recruitment to the post of Sub- Inspector in the Subordinate Food and Supplies Service, Grade III under Food and Supplies Department, Government of West Bengal. The number of vacancies that had been declared to such post was 957 comprising of 454 in the unreserved category, 98 in the OBC-A, 69 in the OBC-B, 208 in the Scheduled Caste, 58 in Scheduled Tribe, 20 in MSP, 40 in Ex-Service Men and 40 in Ex-Service Men (SC).

23. The salient features of the selection process for the post as has been laid down by the advertisement dated August 25, 2018 can be summarized as follows: –

- (i) the recruitment would be made on the basis of a competitive examination
- (ii) the competitive examination would consist of Written Test (MCQ Type) followed by Personality Test
- (iii) Public Service Commission would in their discretion fix the qualifying marks in the Written Test, Personality Test also in the aggregate

(iv) age of the candidate must not be below 18 years and not more than 40 years as on January 1, 2018

(v) the upper age limit would be relaxable/relaxed by 5 years for SC and ST candidates and by 3 years for OBC “Non-Creamy Layer” candidates

(vi) the SC/ST candidates were not required to pay any fee for the purpose of participation in the examination

24. The records made available to Court suggest that, 11,06,359 candidates had applied in the selection process for participation out of which 7,83,440 appeared in the Written Test held on January 27, 2019.

25. Public Service Commission had fixed ratio of the candidates to be called for the Personality Test as 1:3. Accordingly, Public Service Commission had fixed the cut-off marks in respect of the 8 categories of candidates. Public Service Commission in terms of the ratio so fixed had sent up the following number of candidates in respect of each categories: –

<u>Catgory</u>	<u>Cut-off Marks</u>	<u>Candidates to be Interviewed</u>
UR	79.6671	1369
SC	76.0006	732
ST	59.3339	175
OBC-A	74.6673	328

OBC-B	75.3339	210
PH	-	-
MSP	58.6671	60
Ex-Servicemen	53.0007	120
Ex-Servicemen (SC)	38.6672	30
Total		3024

26. A total number of 3,024 candidates had participated in the Personality Test. Reserved category candidates (SC, ST, OBC-A and OBC-B) who had failed to secure marks obtained by the last qualified candidate in the unreserved category but achieved sufficient marks in their respective categories in order to appear for the Personality Test, were granted the relaxation at the time of appearance at the Personality Test.

27. Reserved category candidates who had secured higher or equal marks when compared with the marks obtained by the last qualified candidate in the unreserved category in the Written Test were accommodated in the unreserved category.

28. Reserved category candidates who had secured higher or equal marks compared to the marks obtained by the last qualified candidate in the unreserved category in the Written Test but could not secure equal or higher marks in aggregate, compared to the last qualified candidate in the unreserved category in aggregate, were not accommodated under the

unreserved category but adjusted against the respective reserved categories.

29. In the selection process in question, Public Service Commission has placed candidates belonging to the reserved category in the unreserved category where the reserved category candidates had obtained higher or equal marks in aggregate in comparison to the unreserved category candidates. Therefore, in the ultimate merit list recommended for appointment, candidates belonging to the reserved category had found place in the unreserved category by dint of their marks obtained in the selection process.

30. Placement of reserved category candidates in the unreserved category has been set aside by the Tribunal in the impugned order on the strength of the ratio of ***Niravkumar Dilipbhai Makwana (supra)***. The Tribunal has held that, the principle of ***Jitender Kumar Singh (supra)*** was not attracted to the facts of the present case.

31. ***Niravkumar Dilipbhai Makwana (supra)*** has considered the issue of whether a candidate who availed of an age relaxation in a selection process as a result of belonging to a reserved category can thereafter seek to be accommodated in/or migrated to the general category or not. ***Jitender***

Kumar Singh (supra) as well as **Ajithkumar P. (supra)** has been considered therein. It has noticed the policies of the State of Gujarat appearing from circular dated January 29, 2000 and July 23, 2004. It has held that, the appointments in the reserved category were governed by the aforesaid policies of the State. It has held that, authorities affecting direct appointments are required to give effect to such policy decisions of the State at the time of the recruitment process. It has interpreted the 2 circulars of the State of Gujarat to mean that a candidate who availed of age relaxation in the selection process as a result of belonging to a reserved category cannot, thereafter, seek to be accommodated in or migrated to the general category seats. With regard to **Jitender Kumar Singh & Another (supra)** it has noticed that, the State of Uttar Pradesh instructions were different to those of the State of Gujarat on such aspect. Consequently, it has held that, the principles laid down in **Jitender Kumar Singh & Another (supra)** was not applicable.

32. It would be apposite to refer to paragraphs 22 to 26 of **Niravkumar Dilipbhai Makwana (supra)** in this regard, which are as follows: –

“22. Article 16(4) of the Constitution is an enabling provision empowering the State to make any provision or 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 service under the State. It is purely a matter of discretion of the State Government to formulate a policy for concession, exemption, preference or relaxation either conditionally or unconditionally in favour of the backward classes of citizens. The reservation being the enabling provision, the manner and the extent to which reservation is provided has to be spelled out from the orders issued by the Government from time to time.

23. In the instant case, the State Government has framed policy for the grant of reservation in favour of SC/ST and OBC by the Circulars dated 21-1-2000 and 23-7-2004. The State Government has clarified that when a relaxed standard is applied in selecting a candidate for SC/ST, SEBC category in the age-limit, experience, qualification, permitting number of chances in the written examination, etc., then candidate of such category selected in the said manner, shall have to be considered only against his/her reserved post. Such a candidate would be deemed as unavailable for consideration against unreserved post.

24. Now, let us consider the judgment in Jitendra Kumar Singh [Jitendra Kumar Singh v. State of U.P., (2010) 3 SCC 119 : (2010) 1 SCC (L&S) 772] . In this case, this Court was considering the interpretation of sub-section (6) of Section 3 of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short “the 1994 Act”) and the Government Instructions dated 25-3-1994. Sub-section (6) of Section 3 of this Act provided for reservation in favour

of Scheduled Castes, Scheduled Tribes and Other Backward Classes which is as under:

“3. (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).”

25. The State of U.P. issued Instructions dated 25-3-1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and Other Backward Groups in the Uttar Pradesh Public Services. Last line of these instructions is as under:

“It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category.”

26. On consideration of sub-section (3) of Section 6 of the 1994 Act and the Instructions dated 25-3-1994, this Court held that grant of age relaxation to a reserved category candidate does not militate against him as general category candidate if he has obtained more marks than any general category candidates. This judgment was based on the statutory interpretation of the 1994 Act and the Instructions dated 25-3-1994 which is entirely different from the statutory scheme under consideration in the instant appeal. Hence, the principle laid down in Jitendra Kumar Singh [Jitendra Kumar Singh v. State of U.P., (2010) 3 SCC 119 : (2010) 1 SCC (L&S) 772] has no application to the facts of the present case.”

33. Jitender Kumar Singh and Another (supra) has considered the issue as to whether the relaxation in fee and upper age limit of 5 years in the category of OBC candidates

would fall within the definition of reservation to exclude candidates for open competition on the seats meant for the General Category candidates. It has considered such issue in the light of the policy decision of the State of Uttar Pradesh. It has considered UP Public Service (Reservation for Schedule Caste Schedule, Tribe and Other Backward Class) Act, 1994 in particular Section 3 and Section 8 thereof. It has observed in paragraph 71 of the report that, concession falling within Section 8 of the Act of 1994 cannot be said to be relaxation in the standard prescribed for qualifying in the written examination. It has observed that, Section 8 clearly provides that that State Government may provide for concession in respect of the fees in the competitive examination or interview and relaxation in upper age limit.

34. *Jitender Kumar Singh and Another (supra)* is prior in point of time than that of ***Niravkumar Dilipbhai Makwana (supra)*** and both have proceeded after holding that, Article 16 (4) of the Constitution is an enabling provision empowering the State to make provision or reservation for appointments to post in favour of any backward class of citizen which in the opinion of the State is not adequately represented in the service under the State. It has proceeded to

adjudge the policy decision of the State governing the reservation and apply the same in the selection process impugned therein.

35. In *Jitender Kumar Singh and Another (supra)*, policy decision of the State of Uttar Pradesh as embodied in the Act of 1994 and the instructions issued by the State of Uttar Pradesh have been considered to return a finding that relaxation in age and exemption from payment of fees to reserve category candidates would not affect the right of such candidates to be considered in the unreserved category in the order of merit. *Niravkumar Dilipbhai Makwana (supra)* has however, on consideration of the policy of the State of Gujarat held that, reserve category candidates cannot be permitted to contest in the unreserved category seats when they obtain concessions with regard to age or fees.

36. Therefore, we have to consider the issue as to whether, reserve category candidates in the State of West Bengal can compete in the unreserved category seats after obtaining concessions with regard to age and fees in the light of the policy decision of the State of West Bengal.

37. Provisions of Section 4 of the Act of 1976 and Section 5 of the Act of 2012 have therefore assumed significance in the facts of the present case and they are as follows :-

Section 4 of the Act of 1976

“4. (1) After the commencement of this Act all appointments to services and posts in an establishment which are to be filled up by direct recruitment shall be regulated in the following manner, namely, —

(a) subject to the other provisions of this Act twenty-two per cent of the vacancies shall be reserved for candidates belonging to Scheduled Castes and six per cent for candidates belonging to Scheduled Tribes, in the manner set out in Schedule I.

Provided that the State Government may, from time to time, by notification in the Official Gazette, increase the percentage so, however, that the reservation shall not exceed twenty-five per cent, in the case of Scheduled Castes and ten per cent in the case of Scheduled Tribes.

Provided further that different percentages may be fixed by the State Government for different districts in accordance with the percentages of population of Scheduled Castes and Scheduled Tribes in such districts.

Provided also that in respect of the West Bengal Civil Service (Judicial), the percentage shall be ten for Scheduled Castes and five for Scheduled Tribes;

(b) fees, if any, prescribed for any examination for selection to any service or post shall not be charged in the case of candidates belonging to the Scheduled Castes or the Scheduled Tribes;

(c) the members of the Scheduled Castes and the Scheduled Tribes shall be entitled to a concession of five years over the prescribed maximum age limit for appointment to any service or post.

(2) The member of any Scheduled Caste or Scheduled Tribe candidate qualifying on merit for appointment to any unreserved vacancy in a service or post in any establishment to be filled up by direct recruitment shall not be deducted from the quota reserved in such service or post for such candidate under sub-section (1)."

Section 5 of the Act of 2012

"5. After the commencement of this Act, all appointments to services and posts in establishments which are to be filled up by direct recruitment shall be regulated in the following manner, namely,—

(a) subject to the other provisions of this Act, ten per cent of the vacancies shall be reserved for candidates belonging to the Other Backward Classes denoted as "Other Backward Classes Category A" category and seven per cent of the vacancies shall be reserved for candidates belonging to the "Other Backward Classes Category B" category of the Other Backward Classes in the manner set out in Schedule III

Provided that the State Government may, from time to time, by notification in the Official Gazette,

increase the percentage in the manner that the overall reservation for the Scheduled Castes, the Scheduled Tribes and Other Backward Classes shall not exceed fifty per cent

(b) the members of the Other Backward Classes qualifying on merit in an open competition on the same standard as of the unreserved candidates for appointment to any unreserved post in a service or post in an establishment to be filled up by direct recruitment shall not be adjusted against the quota reserved in such service or post for such candidate under sub-section (a).

Explanation.—For the purpose of this Act, Other Backward Classes Category A shall mean the "More Backward Classes" and the Other Backward Classes Category B shall mean the "Backward Classes".

38. With regard to relaxation of age for candidates belonging to the Backward Classes, State has issued a memorandum bearing No. 378-F dated January 10, 1997 which is as follows: –

“The question of granting relaxation of upper age limit to the candidates belonging to Backward Classes for recruitment to all post and services under the Government or in Semi Government Organisations has been under consideration of the Government for some time past.

2. After careful consideration of the matter in all its aspects, the Governor is pleased to decide that the candidates belonging to the Backward Classes as

specified for the purpose of the West Bengal Commission for Backward Classes Act, 1993 by issuing notification in that behalf shall be entitled to relaxation of three years over the prescribed upper age-limit for direct recruitment to any service or post under the government of West Bengal, the Local and Statutory Authorities constituted under any State Act, Corporations in which not less than 51 % of the paid up share capital is held by the State Government, Universities, Colleges affiliated to the Universities, Primary, Secondary and Higher Secondary Schools and other educational institutions which are owned or aided by the State Government and in the establishments in Public Sector.

3. This order will take immediate effect.”

39. Public Service Commission in its Full Commission meeting held on August 21, 2018 and extended meeting on August 30, 2018 has taken the following decision with respect to “Preparation of Merit List for Relaxed Standard”: –

“It has been further decided by the Commission that the candidates who will avail relaxed standard of any reserved category at any stage i.e. in written examinations/interview etc. they will be considered only for the merit list for that particular category.”

40. Sub-Section (1) of Section 4 has prescribed the quantum of reservation for SC and ST in vacancies to be filled up by direct recruitment. Section 4 (1) (b) and (c) of the Act of 1976 has provided that, no fees shall be charged from any

candidate belonging to the SC/ST, participating in a selection process to any service or post and they shall be entitled to concession of 5 years over the prescribed maximum age limit. Section 4 (2) of the Act of 1976 has prescribed that, a member of any SC/ST candidate qualifying on merit for appointment to any unreserved vacancy in a service or post in any establishment which has to be filled up by direct recruitment shall not be deducted from the quota reserved in such service or post for such candidate under Sub-section (1) of Section 4.

41. Section 5 (a) of the Act of 2012 has prescribed the quantum of reservation for OBC classes in vacancy to be filled up by direct recruitment. Clause (b) of Section 5 of the Act of 2012 has prescribed that any member of OBC qualifying on merit in an open competition on the same standard as of the unreserved candidates for appointment to any unreserved post in a service or post in an establishment to be filled up by direct recruitment shall not be adjusted against the quota reserved in such service or post for such candidate under Clause (a).

42. Both the Act of 1976 and the Act of 2012 have prohibited deduction of the quota fixed for reservation in respect of SC, ST and OBC candidates, in the event reserved

category candidates succeed on merit in the unreserved category. In other words, both the Act of 1976 and the Act of 2012 contemplate and have provided for a situation where reserved category candidates, participating in the selection process can be placed in the merit list in the unreserved category and their placement in the unreserved category will not hamper the quota fixed for the reserved category.

43. The Full Commission decision of the Public Service Commission with regard to preparation of merit list for relaxed standard, has to be construed and understood in the light of the provisions of the Act of 1976 and Act of 2012 prevailing in the State of West Bengal relating to reservation for SC, ST and OBC candidates. When so done, until and unless a reserved category candidate obtains any relaxation of standard in the process for ascertainment of merit in the selection process such candidate can and should be placed in the unreserved category in the order of merit, if he so qualifies, in the State of West Bengal without hampering the quota for the resumed category.

44. Relaxation in age and fees cannot be construed to be obtaining a benefit in the course for ascertainment of merit of a candidate. It is merely an enabling provision to enable

designated section of the society, an opportunity to complete. Facilitating a designated section of the society to partake in a selection process cannot be equated to grant of privilege during ascertainment of merit in the selection process such relaxation given at the preliminary stage has no relevance for the determination of merit of candidate. **Ajithkumar P. (supra)** has held that, relaxation of concession given at the preliminary stage cannot have any relevance in determining the merit of a candidate.

45. State of West Bengal has not issued definite circulars as that of the State of Uttar Pradesh as noted in **Jitender Kumar Singh (supra)** permitting unreserved category candidates to be placed in the reserved category after reserved category candidates obtained age and fee relaxation. Nor has the State of West Bengal issued any circular akin to that of the State of Gujarat as noted in **Niravkumar Dilipbhai Makwana (supra)**. However, the Act of 1976 and the Act of 2012 in respect of the State of West Bengal has granted age relaxation to the reserved category candidates. The Full Commission has understood the two Acts of the State Legislature with regard to grant of relaxation on account of age and fees and the memorandum dated January 10, 1997 in

a particular way and such understanding appears from the minutes of the meeting held on August 21, 2018 extended on August 30, 2018. Such minutes of the Full Commission has been understood by the Public Service Commission to mean that, reserved category candidates can be placed in the unreserved category in accordance with merit. They had applied such understanding uniformly across all selection processes conducted by them as will appear from the affidavit filed by them before the Tribunal.

46. Relaxation in age and fees for reserved category candidates does not mean that any advantage has been granted to the reserved category candidates so as to dis-entitle them to be considered in unreserved category in accordance with merit, particularly when this State did not prohibit the same. The Public Service Commission has followed the procedure as has been noted in paragraphs 27, 28 and 29 of judgement. No material has been placed before us to suggest that the procedure adopted by the Public Service Commission or its understanding of the provisions of statute governing the field, the memorandum of the State dated January 10, 1997 and the Full Commission decision, prohibits the Public Service Commission to undertake such an exercise or to treat

the candidates participating in the selection process in the manner it did.

47. The view that the Public Service Commission has taken in conducting the selection process is a plausible view. This plausible view had been applied in all selection processes undertaken by them. The view taken by the Tribunal in the impugned order has upset the long standing view of the Public Service Commission. In the event, the authorities have taken a view which is plausible then, Courts are slow to interfere therewith.

48. In the facts and circumstances of the present case, relaxation with regard to age and fees had been granted in view of the provisions of the two statutes governing the field the memorandum dated January 10, 1997 and the decision of the Full Commission. No other benefit had been extended to any of the reserved category candidates such as relaxation in the qualifying marks or otherwise. After grant of concessions as are statutorily required, to the reserved category candidates, they have not been extended any further facility when they were being considered for the purpose of placement in the unreserved category, merit wise. Reserved category candidates have been placed in the unreserved category if they

had succeeded, on merits, after they had competed with the unreserved category candidates in the same Written Test and after appearing in the Personality Test.

49. In such circumstances, we are of the view that, since the reserved category candidates should have been placed in the unreserved category having taken no benefit in the selection process excepting those which have been extended to them under the statute and since, there being no prohibition for the reserved category candidates being considered merit wise in the unreserved category, after they take the statutory relaxation that they are entitled to, the Tribunal erred in upsetting the plausible view taken by the Public Service Commission. Tribunal had read a prohibition akin to one obtaining in the State of Gujarat when for this State no such prohibition exists.

50. In such circumstances, we set aside the impugned order of the Tribunal directing re-working of the merit list by deleting the reserved category candidates from the unreserved category. We allow the writ petition of the Public Service Commission being WP.ST 48 of 2022, without any order as to costs.

51. So far as the other three writ petitions are concerned, we have not found any merit with regard to the contentions raised by the unsuccessful candidates. The Tribunal has considered the issue with regard to incorrect answer and correctly accepted the contention of the Public Service Commission that, the same affects all the candidates and not just the unsuccessful candidates. The unsuccessful candidates had participated in the selection process without any protest and took their chance with regard thereto. The unsuccessful candidates had qualified in the written examination and became unsuccessful only after the interview. They should therefore not be allowed to turn around to challenge the written examination.

52. The Tribunal has correctly negated the contention of the unsuccessful candidates with regard to the cut off marks being fixed subsequent to the commencement of the selection process. In the facts of the present case, fixing a cut off mark prior to the commencement of the written examination would have affected the selection process itself. The total number of applicants in the selection process vying for the total vacancy of 957 posts were 11,06,359. Total number candidates who had appeared in the written examination was 7,83,440.

Therefore, Public Service Commission had correctly taken the stand that, fixing a prior cut off mark for the Written Test may have been either too high or too low and in either of the two eventualities, the Public Service Commission might have faced a problem of excess candidates or lack of candidates. Going by the ratio of 1:3, Public Service Commission had fixed the cut off mark in respect of each of the categories of the candidates participating in the selection process so that for every vacant post in each category at least three candidates were available for the Personality Test. Subsequent to the written examination, such cut off mark had been uniformly applied against the respective categories. We have not found any illegality with regard thereto. The process had been undertaken in a transparent manner and no candidate had suffered any prejudice with regard thereto. Significantly, the unsuccessful candidates had qualified in the written examination and were called for the interview and participated therein. Therefore, their complaint that cut off marks for the written examination had not been fixed prior to the commencement of the selection process is of no substance.

53. The Tribunal has correctly negated the contentions with regard to the procedure for tiebreak adopted by the

Public Service Commission in the selection process. Public Service Commission had adopted a procedure of granting preference to candidates obtaining higher marks in one of the examinations in preference to the other and also taking into consideration the age of the respective candidates involved in the tiebreak. This procedure had been uniformly applied across all candidates.

54. Ordinarily, an issue of maintainability should have been decided first but in the facts and circumstances of the present case, the issue of maintainability raised at the behest of the unsuccessful candidates is not founded purely on law but is a mixed question of fact and law. According to the unsuccessful candidates, State had accepted the prescription of the Tribunal with regard to preparation of the merit list in other selection process and therefore, Public Service Commission cannot take a stand contrary to that of the State. In support of such contention, instance of the State accepting such prescription in another selection process has been cited.

55. Learned Advocate General has clarified that, such prescription of the Tribunal spoken of on behalf of the unsuccessful candidates is under challenge before a coordinate bench. Therefore, it cannot be said that, State or

Public Service Commission has accepted the prescription of the Tribunal in a different selection process and is seeking to take a different stand herein.

56. Before the Tribunal, in addition to all other contentions, Public Service Commission had taken the stand that, the preparation of the merit list, as done in the instant selection process, was in tune of the usual procedure adopted by the Public Service Commission in respect of other selection processes also. The Tribunal has held by the impugned order that, such a procedure adopted by the Public Service Commission did not have the sanction of law and in fact contrary to the law as understood by the Tribunal. Public Service Commission has a different view of the law as enunciated by the Tribunal in the impugned order. Therefore, it cannot be said that, Public Service Commission cannot assail the order of the Tribunal before this Court.

57. No law has been placed before us to suggest that, Public Service Commission suffers from any legal prohibition from filing a petition under article 226 of the Constitution assailing an order of the Tribunal.

58. In such circumstances, the contention of the unsuccessful candidates with regard to the maintainability of

the writ petition at the behest of the Public Service Commission has no merit.

59. In view of the discussions above, WP.ST No. 34 of 2022, WP.ST No. 35 of 2022 and WP.ST 42 of 2022 are dismissed without any order as to costs. WP.ST 48 of 2022 is allowed again without any order as to costs. All connected applications are disposed of accordingly.

[DEBANGSU BASAK, J.]

60. I agree.

[MD. SHABBAR RASHIDI, J]