
(2021) 02 SHI CK 0288
In the High Court Of Himachal Pradesh
Case No : CWPOA No.7692 Of 2020

Man Mohan Kapoor

APPELLANT

Vs

State Of Himachal Pradesh & Ors

RESPONDENT

Date of Decision : 26-02-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 15, 16, 38
Uttar Pradesh Public Services (Reservation For Scheduled Castes, Scheduled Tribes
And Other Backward Classes) Act, 1994 — Section 8, 8(2)

Citation : (2021) 02 SHI CK 0288

Hon'ble Judges : Tarlok Singh Chauhan, J; Jyotsna Rewal Dua, J

Bench : Division Bench

Advocate : Jiya Lal Bhardwaj, Ashok Sharma, Vinod Thakur, Vikas Rathore, Shiv Pal Manhans, Bhupinder Thakur, Yudhvir Singh Thakur, Sanjeev Bhushan, Rakesh Chauhan

Final Decision : Dismissed

Judgement

Jyotsna Rewal Dua, J

1. Petitioner claims that even though he has availed the benefit of age relaxation and fee concession available to the candidates belonging to Scheduled

Tribes category, yet having scored more marks than the last candidate in the General category, he is required to be moved to the General category.

Challenge has also been laid to the circular/instruction dated 12.12.2011 issued by the State Government, which provide for migration of only such

SC/ST/OBC candidates to the general category merit list who are selected on the same standard as applied to general category candidates.

2. Bare minimum factual position is that :-

2(i) A recruitment notice was issued by respondents No.1 to 5 on 5.3.2015 for filling-up various posts of Constables in different districts of the State.

60 posts of Constables (Male) were allotted to District Shimla.

2(ii) Age limit prescribed for recruitment to the post of Constable was 18-23 years for general category, whereas for candidates belonging to reserved

category of SC/ST/OBC, it was 18 to 25 years. Petitioner had admittedly crossed age limit of 23 years when he applied under the advertisement.

Petitioner belonged to Scheduled Tribes Category (UR) and, therefore, was eligible to apply only in view of the age concession admissible to ST

category. He had applied accordingly for the posts in District Shimla.

2(iii) Petitioner obtained 65 marks in the written examination and in view of his height was entitled to three marks. Petitioner thus scored 68 marks

(i.e. 65 marks for written+ 3 marks for height). He was not selected within his category as no post for ST (UR) was available. Petitioner's

candidature was not considered against general category posts as he did not fulfill the standards prescribed for general category (UR) candidates.

Accordingly he was not called for interview.

2(iv) Aggrieved, petitioner has preferred instant petition primarily on the ground that he having scored more marks than the last candidate called for

interview in general category (61 marks) was required to be moved from ST category to the general category. Additionally, State Government

instructions dated 12.12.2011 on the subject have also been assailed.

3. Contentions.

3(i) Learned Counsel for the petitioner contended that concession in age and fee availed by the petitioner as a Scheduled Tribe candidate would not

debar his migration to general category merit list, as on merit the petitioner had scored more marks than the minimum cut off in the general category.

In support of this contention, learned Counsel placed heavy reliance upon following paras of the judgment in (2010) 3 SCC 119, titled Jitendra Kumar

Singh and another versus State of Uttar Pradesh and others:-

¶49. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate

the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of

opportunity guaranteed under Article 16 (1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category

candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the

candidates at par with General Category candidates. It is only thereafter the merit of the candidates is to be determined without any further

concessions in favour of the reserved category candidates.

71. We are of the considered opinion that the concessions falling within Section 8 of the Act of 1994 cannot be said to be relaxations in the standard

prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concessions in respect of

fees in the competitive examination or interview and relaxation in upper age limit.

75. In our opinion, the relaxation in age does not in any manner upset the ""level playing field"". It is not possible to accept the submission of the learned

counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of

India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the

concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely,

qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee

concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit.

Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be

declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been

permitted to participate in the open competition.â??

It was also urged on behalf of the petitioner that the instructions dated 12.12.2011 providing that candidates availing relaxed standards cannot be

considered against unreserved vacancies, are unconstitutional.

3(ii) Per contra, learned Senior Counsel for private respondent No. 6 and learned Additional Advocate General relied upon(2019) 7 SCC 383, titled

Niravkumar Dilipbhai Makwana versus Gurarat Public Service Commission and others in support of their stand that once relaxation in age and fee has

been availed by a candidate belonging to reserve category, then he cannot be

shifted to general category even on the basis of his merit more

particularly in view of State Government instructions on the subject, issued on 12.12.2011.

4. Observations.

It is not in dispute that the petitioner had availed concession in age and fee while applying as Scheduled Tribe candidate under the recruitment notice.

He had already crossed the maximum age bar fixed for general category candidates.

4(i) In support of petitioner's claim of migration from scheduled tribe category to general category on the basis of merit, reliance has been placed

upon Jitendra Kumar Singh's case (relevant portions already extracted). The judgment passed by Hon'ble Apex Court in Jitendra Kumar

Singh's case supra was considered in (2017) 12 SCC 680, titled Deepa E.V. versus Union of India and others. In Deepa E.V., the appellant

before the Apex Court was an OBC category candidate who had availed age relaxation and was claiming treatment as a general category candidate.

In support of the claim to be treated as a general category candidate, the appellant therein had relied upon the judgment in Jitendra Kumar Singh's

case. The Apex Court, however, distinguished Jitendra Kumar Singh's case in following manner:-

8. The learned counsel for the appellant mainly relied upon the judgment of this Court in Jitendra Kumar Singh v. State of U.P., which deals with

the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government order dated

25.3.1994. On a perusal of the above judgment, we find that there is no express bar in the said U.P. Act for the candidates of SC/ST/OBC being

considered for the posts under general category. In such facts and circumstances of the said case, this Court has taken the view that the relaxation

granted to the reserved category candidates will operate as a level playing field. In the light of the express bar provided under the proceedings dated

1.7.1998 the principle laid down in Jitendra Kumar Singh cannot be applied to the case in hand.

9. The learned Senior Counsel appearing for the respondents has also drawn our attention to paras 65 and 72 in Jitendra Kumar Singh to contend that

principle in Jitendra Kumar Singh is in the context of the interpretation of U.P. Act

1994 and in the particular factual situation of the said case. Paras

65 and 72, read as under:-

¶65. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as

noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the instruction dated 25.3.1994 and the G.O. dated

26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved

category candidate, thus becoming eligible to be considered against a reserved vacancy, can also be considered against an unreserved vacancy if

he/she secures more marks than the last candidate in the general category.

72. Soon after the enforcement of the 1994 Act the Government issued instruction dated 25.3.1994 on the subject of reservation for Scheduled Castes,

Scheduled Tribes and other backward groups in the Uttar Pradesh Public Services. These instruction, inter alia, provide as under:-

¶4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general category candidates, then

he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be

immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category.¶

From the above it becomes quite apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the

general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for

selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot

deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive

examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the

concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are

modified or revoked.¶

10. Having regard to the observations in paras 65 and 72, in our view, the

principles laid down in Jitendra Kumar Singh cannot be applied to the case in hand. As rightly pointed out by the High Court that judgment in Jitendra Kumar Singh was based on the statutory interpretation of the U.P. Act, 1994 and Government order dated 25.3.1994 which provides for entirely a different scheme.â??

4(ii) The issue again cropped-up in (2018) 11 SCC 352, titled Gaurav Pradhan and others versus State of Rajasthan and others .The Apex Court

observed that the ratio of judgment in Jitendra Kumar Singhâ??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. Statutory scheme and intention of State

Government indicated from the said scheme cannot be extended to a State where different circular indicating contrary intention was in vogue. In this

regard it will be apposite to extract para-32 from the judgment:-

â??32. We are of the view that judgment of this Court in Jitendra Kumar Singh which was based on statutory scheme and circular dated 25.03.1994

has to be confined to scheme which was under consideration, statutory scheme and intention of the State Government as indicated from the said

scheme cannot be extended to a State where the State circulars are to the contrary especially when there is no challenge before us to the converse

scheme as delineated by the circular dated 24.06.2008.â??

Following the judgment in Deepa E.V. and taking into consideration the circular dated 26.7.2017 issued by State of Rajasthan, it was held that the

candidates belonging to SC/ST/BC, who had taken relaxation of age were not entitled to be migrated to the unreserved vacancies. Relevant

paragraphs are as under:-

â??40. The circular dated 26.07.2017 is the reiteration of the earlier position as was provided by the circular dated 24.06.2008 quoted above. Thus,

the position is now well accepted even by the State of Rajasthan that those candidates belonging to SC/ST/BC who have obtained concession of age

are not eligible to be migrated to the unreserved vacancies. The circular dated 24.06.2008 being very much in existence, law laid down by this Court in

Deepa E.V. holds the field and the State of Rajasthan was obliged to not migrate those SC/ST/BC category candidates who are in unreserved

category, who have taken concession of age.

â?|â?|â?|â?|...

49. In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC, who had taken relaxation of age

were not entitled to be migrated to the unreserved vacancies; the State of Rajasthan has migrated such candidates who have taken concession of age

against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the

unreserved category vacancies. The candidates belonging to unreserved category who could not be appointed due to migration of candidates belonging

to SC/ ST/BC were clearly entitled for appointment which was denied to them on the basis of the above illegal interpretation put by the

State.â?|â?|..â??

4(iii) In *Niravkumar Dilipbhai Makwana versus Gujarat Public Service Commission*, reported in (2019) 7 SCC 38,3 the question for consideration

before the Honâ??ble Apex Court was whether a candidate who has availed of age relaxation in a selection process as a result of belonging to

reserved category can thereafter seek to be accommodated in/or migrated to the General Category seat. Reliance was placed upon *Jitendra Kumar*

Singhâ??s judgment in support of the claim. The Apex Court noticed that judgment in *Jitendra Kumar Singhâ??s* case was based upon specific

consideration of the provisions of U.P. Public Services (Reservation for Scheduled Casts, Scheduled Tribes and Other Backward Classes) Act, 1994

as well as the instructions dated 25.3.1994 issued by State of U.P. on the subject of reservation for scheduled casts/scheduled tribes/other back

groups in Uttar Pradesh Public Services, the portion of which, read as under:-

â??4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general category candidates,

then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be

immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category.â??

The statute and the instructions involved in *Jitendra Kumar Singhâ??s* case were held not applicable to *Nirav Kumarâ??s* case. After considering

applicable provisions it was held that reserve category candidate availing benefit of age relaxation in the selection process cannot be accommodated in

general category.

4(iv) Recently in Saurav Yadav & ors. versus State of Uttar Pradesh & ors., SLP(Civil) No. 23223 of 2018, decided on 18.12.2020, Honâ??ble

Apex Court while considering the claim of OBC female and SC female candidates against the posts of general category female candidates noted

various Apex Court decisions touching the issue vis-a-vis vertical reservations under Article 16(1) of Constitution of India that a candidate belonging to

any of the vertical reservation categories, on the basis of his own merit is entitled to be selected in open or general category and in such eventuality his

selection is not to be counted against the quota reserved for such vertical reservation category. While considering same claim vis-a-vis horizontal

reservation under Article 16(4), the views taken by the High Courts of Rajasthan, Bombay, Uttranchal and Gujarat were upheld with following rider:

â??35. We must also clarify at this stage that it is not disputed that the Applicant no.1 and other similarly situated candidates are otherwise entitled

and eligible to be appointed in â??Open/General Categoryâ?? and that they have not taken or availed of any special benefit which may disentitle them

from being considered against â??Open/General Categoryâ?? seat. The entire discussion and analysis in the present case is, therefore, from said

perspective.â??

4(v) The judgment delivered in Jitendra Kumar Singhâ??s case was based on its own facts governed by specific statutory provisions and State

Government circulars. In view of law laid down in Deepa E.V., Gaurav Pradhan and Nirav Kumarâ??s cases supra, this judgment on its own cannot

advance the claim of petitioner for migration from ST category to General category on the strength of securing more marks than the minimum cut off

marks in general category. The Honâ??ble Apex Court has already held that judgment in Jitendra Kumar Singhâ??s case was based on the

statutory interpretation of U.P. Government Act 1994 and the State Government instruction dated 25.3.1994 providing for a specific scheme of

migration. The statutory scheme and the intention of the state government as indicated from the said scheme cannot be extended to the respondent-

State where the instructions on the subject express intention different to the one expressed in Jitendra Kumarâ??s case. The said circular which

govern the recruitment in question was issued on 12.12.2011 and reads as

under:-

From

The principal Secretary (Personnel) to the
Government of Himachal Pradesh.

To

1. All Administrative Secretaries to thereafter Government of Himachal Pradesh.
2. All the Divisional Commissioners in H.P.
3. All the Deputy Commissioners in H.P.
4. All the Heads of the Departments in H.P.
5. All the Chairmen/ Managing Directors/ Secretaries & Registrars of all the Public Sector Undertakings/Corporations/Boards/ Universities etc. in H.P.

Dated: Shimla-171002, the 12th December, 2011.

Subject: Relaxation of standard/concessions to the SCs/STs/OBCs against unreserved posts-classification regarding.

I am directed to refer to this department's instructions issued vide letter No. PER (AP)-C-B(12)-1/98, dated 20.08.1998 and 19.02.2000

followed by letter No. PER (AP)-C-F(1)-1/95, dated 04.01.2000 and No. PER (AP)-C-F(11)-3/98, dated 18.01.2004 regarding

implementation of post based reservation rosters, determination of seniorities and treatment of reserved category candidates appointed on their own merit.

2. The above mentioned instructions provide that the reserved category candidates who are appointed on their own merit and not owing to

reservation will not be adjusted against reserved points and they will be adjusted against unreserved points. These instructions further

provide that the SC/ST candidates appointed on their own merit by direct recruitment or promotion and adjusted against unreserved points

will retain their status of SC/ ST and will be eligible to get benefit of reservation in future/further promotions, if any.

3. The cases are being referred to the Department of Personnel for clarification whether the reserved category candidates who apply for

the post advertised for unreserved category candidates will be entitled for

relaxation in standard/concession as provided to them against reserved posts or not?

4. In this context, it is clarified that only such SC/ST/OBC candidates who are selected on the same standard as applied to general

candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBC

candidates, for example, in the Age limit, Experience, Qualification, permitted number of chances in written examination, Extended zone of

consideration larger than what is provided for general category candidates etc. The SC/ST/OBC candidates are to be counted against

reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

5. These instructions may be followed strictly and also brought in the notice of all concerned for compliance.

Yours faithfully,

Sd/-

Under Secretary (Personnel) to the Government of Himachal Pradesh.â??

The above extracted instruction though have also been assailed in the instant writ petition, however, the only ground pleaded for assailing the same is

that these are violative of Articles 14 and 16 of Constitution of India. Simply by averring that the instruction are violative of Articles 14 and 16 of the

Constitution of India will not make them unconstitutional. Scoring more marks than a general category candidate in the merit list, will not ipso facto

entitle a candidate belonging to SC/ST/OBC category to be accommodated against a general vacancy. Reservation is an enabling provision. The State

is fully empowered to lay down the criteria for grant of exemption, concession, reservation, the manner and methodology to effectuate such

reservation. The manner and extent for providing the reservation has to be spelled from the orders issued by the Government from time to time.

Migration of reserved candidates into general category is also part and parcel of larger concept of reservation. Below observation from Gaurav

Pradhanâ??s case are relevant in this regard:

â??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 and the Government orders issued on 17.06.1996, 04.03.2002 and 24.06.2008 were the Government orders providing for methodology for migration of reserved category candidates into general category candidates which was well within the power of State.

The circular/instruction dated 12.12.2011, clearly provide that only such SC/ST/OBC candidates who are selected on the same standard as applied to general category candidates shall not be adjusted against reserved vacancies or in other words when a relaxed standard is applied in selecting SC/ST/OBC candidates for example in age limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration then the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates will be deemed as unavailable for consideration against unreserved vacancies. The inclusion of reserved category candidate in the general category would only be in accordance with law of reservation. Instruction dated 12.12.2011 providing for reasonable classification for treating unequals as equals cannot be said to be unconstitutional. The petitioner has not been able to demonstrate before us as to how the instructions (already extracted above) are violative of Articles 14 and 16 of the Constitution of India. It is next contended that these instructions were not part and parcel of the recruitment notice dated 5.3.2015 inviting applications for posts of Constables, therefore, could not have been applied to the recruitment process in question. We are afraid that

the contention has been raised only to be rejected. The recruitment process initiated on 5.3.2015 was certainly to be governed by the instructions dated

12.12.2011 regulating the subject. There was no necessity of incorporating these instructions governing the mode and manner of migration of reserve

category candidates to general category, in the recruitment notice. Instructions of such nature having uniform application through out the State do not

lose their finding force merely because of their non incorporation in the recruitment notice.

For all the aforesaid reasons, the writ petition lacks merit and the same is accordingly dismissed. Pending application(s), if any, stand disposed of. All

interim orders stand vacated.