
(2015) 04 AHC CK 0112

In the Allahabad High Court

Case No : Civil Misc. Writ Petition Nos. 67530 of 2014, 5173, 11771, 7726, 8110 and 5792 of 2015

Nitin Kumar and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 16-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2015) 4 ADJ 701 : (2015) 5 ALJ 573 : (2015) 3 AWC 2508 : (2015) 3 ESC 1480 : (2016) 1 UPLBEC 487

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : Ashok Khare and Siddharth Khare, for the Appellant; A.K. Saxena, H.R. Mishra and J.P. Pandey, Advocates for the Respondent

Final Decision : Allowed

Judgement

B. Amit Sthalekar, J.—It has been informed across the Bar that the controversy and issues involved in the above writ petitions are similar and common, therefore the above writ petitions are being decided by this common judgment. Writ petition No. 67530 of 2014 (Nitin Kumar and others v. State of U.P. and others) shall be treated as the leading case. Counter-affidavit and rejoinder-affidavit have been exchanged in this case which shall be read in all the cases, as agreed by all the learned counsel represented in the connected writ petitions.

2. The petitioners are seeking a direction to the respondents to permit them to appear in the interview for the post of Technician Grade II (Trainee) Electrical in pursuance of the advertisement No. 4/ESC/2014 and to declare them to be qualified on the basis of their having secured higher marks in the written examination than the last candidate called for interview from the unreserved category.

3. Briefly stated, the case of the petitioners is that an advertisement No. 4/ESC/2014 dated 6.9.2014 was issued by the Electricity Service Commission, U.P.

Power Corporation Ltd. Lucknow for recruitment to 2211 posts of Technician Grade-II (Trainee) Electrical. The advertisement mentioned that 587 posts were reserved for OBC category, 464 posts were reserved for the S.C. category and 44 posts were reserved for S.T. category and the rest were for unreserved category. The selection would comprise a written test followed by interview. The minimum qualifying marks for SC/ST candidate in the written test was 28% and for the remaining categories of candidates it was 33%. It is also stated in paragraph 7 of the writ petition that all the petitioners possess a certificate from the Industrial Training Institute in the electrician Trade and they also possess the DOAECC pass certificate. The petitioners have also passed their High School with Science and Maths as subjects. All the petitioners belong to OBC category. The written examination was held on 8.11.2014. The petitioners of W.P. No. 67530 of 2014 appeared in the written examination and as per internet information they have secured the following marks:

as stated in paragraph 12 of the writ petition.

4. The petitioners of Writ Petition No. 7726 of 2015 appeared in the written examination and as per internet information they have secured the following marks:

as stated in paragraph 12 of the writ petition.

5. The petitioners of W.P. No. 5792 of 2015 appeared in the written examination and as per internet information they have secured the following marks:

as stated in paragraph 12 of the writ petition.

6. The petitioners of other writ petitions are claiming that they have secured more than 100 marks.

7. It is submitted that the State Electricity Service Commission, Lucknow has released a list of candidates on 1.12.2014 declaring the candidates successful in the written examination on the basis of which the candidates are to be called in the interview. The names of the petitioners did not find place in the said result. It is also submitted that the last candidate belonging to the unreserved category who has secured 81 marks and is much lower than the marks secured by the petitioners has been called in the interview but the petitioners have not been called. The contention of the petitioners is that even though they belong to the OBC category but if they have secured higher marks in the written examination than an unreserved category candidate then they are entitled to be called for the interview to enable them to compete against the unreserved vacancies and cannot be ousted by a candidate of the general category having lower marks. The submission is that there is no reservation so far as the unreserved vacancies are concerned, therefore every candidate, even a candidate belonging to a reserved category can on the basis of his merit compete against an unreserved vacancy.

8. A counter-affidavit has been filed and in paragraph 12 thereof it has been

stated that the candidates were called for interview in the ratio of 3x (three times) the number of category wise vacancies which were advertised. This procedure was adopted in order to enable short listing of the candidates for being called for interview. The petitioners could not come within the range of 3x times formula of the number of candidates in their own category, therefore, they were not called for the interview.

9. I have heard Shri Siddharth Khare, learned counsel for the petitioners and Shri I.R. Mishra, learned senior counsel assisted by Shri J.P. Pandey for the respondents no 2 and 3 and the learned standing counsel for the respondent No. 1 and perused the documents on record. The learned counsel in the connected writ petitions have adopted the submissions advanced by Sri Siddharth Khare.

10. The submission of Shri Siddharth Khare is that the last unreserved category candidate belonging to the general category had secured 81 marks but while he was called for interview, the petitioners, all of whom had secured more marks than the last unreserved category candidate were not called for interview. He submitted that in service jurisprudence reservation is contemplated only for the S.C./S.T. and the OBC category so far as vertical reservation is concerned and the unreserved category does not mean that they are reserved for general category candidates inasmuch as that would amount to a reservation for the general category candidates. He submits that there is no reservation contemplated under the U.P. Public Services (Reservation for S.C, S.T. and OBC) Act-1994 (hereinafter referred to as the Act, 1994 only) providing for reservation for the unreserved category candidate. After the reserved category is excluded what remains are the vacancies or posts against which all candidates can compete including OBC, S.C and S.T. candidates and if a reserved category candidate competes against the unreserved vacancy and secures more marks than the general category candidate he is entitled to take precedence over the general category candidate who secures lesser marks than him. Shri Siddharth Khare referred to the provisions of sub-section (6) of Section 3 of the Act, 1994, which is also to the same effect. Sub-section (6) of Section 3 of the Act, 1994 reads 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)."

11. He further submits that even if the respondents wanted to shortlist the candidates for the purposes of calling them for interview the three times formula should have been applied on a broad spectrum basis, meaning thereby, applicable equally to all the candidates irrespective of the category from which they had qualified the selection. The submission is that applying the three times formula category wise has resulted in the ouster of the petitioners from being called for interview even though they have secured more marks from the last unreserved category candidate called for interview who has secured only 81

marks. In support of his contention he has relied upon the judgment of the Division Bench of this Court in Shiv Prakash Yadav, Ganesh Prasad Patel, Munnu Ram and Santosh Kumar Seth Vs. The State of U.P. and Others, (2008) 2 AWC 1391 : (2008) 1 UPLBEC 49 , wherein in paragraph 10 the Division Bench has relied upon an earlier Division Bench decision of this Court in the case of Sanjeev Kumar Singh Vs. State of U.P. and Deputy Inspector General of Police (Establishment) and Secretary Police, P.A.C. Selection Board and has quoted paragraph 52 of the said judgment. Paragraph 52 of the judgment in the case of Sanjeev Kumar Singh, as referred to in the case of Shiv Kumar Yadav reads as under:

"52. Learned counsel for the parties during the course of argument have conceded that concession in fee in order to enable a reserve category candidate to be able and eligible to participate in competitive examination would not cause any added advantage to him depriving his selection against unreserved seat. The entire gamut of arguments has confined to the possible advantage a reserve category candidate, who has availed the benefit of relaxation in upper age limit and it is contended that such a candidate start and compete with headstart and added advantage of extra qualification, extra experience etc. and therefore, it cannot be said that he is a candidate who is selected in open competition with general category candidate. To answer this question it would be appropriate to recapitulate some conditions of advertisement. A perusal thereof shows that though a general competition was notified but the eligibility qualifications for candidates were not identical even amongst the general category candidates with whom there is no dispute whatsoever. The age limit for general category candidates ranges from 21 to 25. Besides, for Scheduled Castes, Scheduled Tribes, O.B. Cs. And dependents of freedom fighters, five years relaxation in age is provided. For Ex-serviceman the age relaxation is to be the extent of service rendered in Army plus three years. Even the educational qualification for all is not equal. For others it is graduation, but for the candidates of Ex-serviceman category, it is Intermediate or equivalent thereto. It is an admitted position that the Ex-serviceman compete horizontally i.e. in their own category as well as alongwith the general and other category candidates and the petitioners have no grievance of any handicap or supposed headstart with such candidates. Similarly the dependents of freedom fighters also compete horizontally and occupy seats in general category also if secure more marks but there is no quarrel or dispute against their selection or any so called handicapness on account of age relaxation to such category of persons. Even amongst the general category candidates, age varies from 21 to 25 i.e. a person who is at the initial level of the prescribed age will have to participate with the person who is at the last level of age. If the arguments that merely on the account of difference in age any handicapped in the standard of selection or open competition would cause, such an argument can be raised when there is different level of age prescribed for eligibility since a candidate having 21 years of age can always say that he is not being equally treated with the candidates who are having the age of 22, 23, 24 or 25 years

since they are not equally situated. In our view the contention is *ex facie* erroneous and misleading. Concession in respect to age, fee etc. are the provisions pertaining to eligibility of a candidate to find out as to whether he can appear in the competitive test or not and by itself do not provide any indicia of open competition. The competition would start only at the stage when all the persons who fulfil the requisite eligibility conditions namely qualification, age etc. are short listed. The candidates in the zone of consideration entering the list on the basis of the aforesaid qualification would thereafter participate in competition and open competition would commence therefrom. In other words we can say that concession in fee or relaxation in upper age limit are the provision not concerned with the process of selection i.e. one competition itself but are the provisions pertaining to eligibility i.e. to bring in consideration, he is entitled to participate in the open competition irrespective of difference in the eligibility qualification. Further, if on account of his identity belonging to particular category, any procedural difference is observed in the selection itself in that case only, such an adjustment under Section 3(6) of the Act of 1994 would not be applicable and not otherwise. To elaborate our view in the case in hand, the identity of individual candidate whether General, Scheduled Caste, Scheduled Tribe or O.B.C. has no relevance in the entire process of selection and it is only when the final select list is prepared selection and it is only when the final select list is prepared, selection qua respective category of vacancies would be made. For example in the present case, all the candidates, securing 50% marks and more in the preliminary qualifying written test participated in the physical test irrespective of the number of candidates qualifying against individual category. The standard of selection is common to all. Similarly in the physical test also all the candidates irrespective of their category, securing at least 50% marks qualify and appear in the main written test. Again all the candidates who secured 40% and above in main written test were declared successful in written test and thereafter, all of them appeared in interview. It is only after interview a final merit list on the basis of marks secured in main written test and interview is prepared and thereafter the final select list is prepared applying reservation. At any stage prior thereto, the candidate's identity had no relation or relevance in the process of selection whatsoever. Thus in our view *ex facie* and undoubtedly, at the time of final select list, Section 3(6) of Act of Act or 1994 would be applicable and if a reserve category candidate has secured marks more than a last general category candidate, he is entitled to be selected against unreserved seat without being adjusted against a reserved seat."

12. In the same context he has also referred to another decision of a learned Single Judge of this Court in *Narendra Pratap Singh and Others Vs. Director General of Police, U.P. and Others*, (2002) 3 AWC 2176 : (2002) 3 UPLBEC 2304 . In both the cases the Court was interpreting Sub-section (6) of Section 3 of the Act, 1994. Reference has also been made to the judgment of the Supreme Court in *A.P. Public Service Commission Vs. Balaji Badhavath and Others*, (2009) 5 JT 563 : (2009) 5 SCC 1 : (2009) 1 SCC(L&S) 999 : (2009) 5 SCR 688 : (2009) 3

SLJ 476 : (2009) 4 SLR 635 : (2009) 4 UJ 1692 and has referred to paragraph 43 thereof.

13. The submission of the learned counsel for the petitioner is that if the three times formula was necessary to be applied it should have been applied universally to the list of the candidates selected in the written examination and not category wise. In the alternative it is submitted that the three times formula ought not to have been applied to the reserved category so much so that it has resulted in the ouster of the petitioners from being called for the interview even though the petitioners have secured higher marks than the last unreserved candidate who has been called for interview. Further submission is that by virtue of the provisions of sub-section (6) of Section 3 of the Act, 1994 the reserved category candidate higher in merit was entitled to compete against the unreserved seats but by applying the three times formula category wise, the petitioners have been ousted from the field of consideration for being called in the interview.

14. Shri H.R. Mishra, learned senior counsel, on the other hand, submitted that because of a very large number of candidates who had appeared in the selection it was not possible to call everyone for interview, therefore, the respondent authorities adopted the procedure of short listing by applying the three times formula and calling three times the number of candidates who had qualified the written examination and further that the candidates were called category wise. Shri Mishra submitted that the three times formula could not have been applied uniformly to all the candidates who had qualified the written examination and that in order to maintain equality between the candidates and the principle of short listing, the three times formula was applied category wise. He submits that it is for this reason that the last candidate in the unreserved category even though had secured 81 marks but still he had to be called for interview whereas in the OBC category of the petitioners the list of qualified candidates was extremely large so much that even after applying the three times formula the petitioners could not be called in the interview. The submission is that in the application of three times formula uniformity has to be maintained and the petitioners cannot be heard to submit that the three times formula should be applied to the unreserved category but not to the reserved category meaning thereby that the reserved category should be called for interview irrespective of the three times formula but where the unreserved category candidates are concerned the three times formula should be applied.

15. Shri H.R. Mishra further submits that so far as the right of the petitioners to compete against the unreserved vacancies are concerned and so far as the specific provisions of sub-section (6) of Section 3 of the Act, 1994 are concerned there is no quarrel so far as the settled legal position is concerned that a reserved category candidate who secures higher merit than an unreserved category candidate, would take the unreserved seat. However, for the applicability of sub-section (6) of Section 3 of the Act, 1994 the right of the

petitioners to compete against unreserved vacancies would only arise only after application of the three times formula category wise and if the three times formula is applied and the petitioners stand ousted in their category from being called in the interview it cannot be said that there is any illegality or discrimination in the same. He has referred to the Constitution Bench judgment of the Supreme Court in *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, AIR 1987 SC 454 : (1986) LabIC 1417 : (1985) 1 SCALE 1290 : (1985) 4 SCC 417 : (1985) 1 SCR 657 Supp . Paragraphs 19 and 20 of the said judgment read as under:

"19. There was also one other contention which found favour with the Division Bench in support of its conclusion that there was reasonable likelihood of bias vitiating the "whole gamut of the selection process". This contention was based on the fact that though only 61 vacant posts were advertised for being filled up, over 1300 candidates representing more than 20 times the number of available vacancies, were called for the viva voce examination. The Division Bench pointed out that in order to have a proper balance between the objective assessment of a written examination and the subjective assessment of personality by a viva voce test, the candidates to be called for interview at the viva voce test should not exceed twice or at the highest, thrice the number of available vacancies. This practice of confining the number of candidates to be called for interview to twice or at the highest, thrice the number of vacancies to be filled up, was being followed consistently by the Union Public Service Commission in case of Civil Services Examination, but in the present case, observed the Division Bench, a departure was made by the Haryana Public Service Commission and candidates numbering more than 20 times the available vacancies were called for interview. The result, according to the Division Bench, was that the area of arbitrariness in the viva voce test was considerably enlarged and even a student who had got poor marks in the written examination and who having regard to dismal performance at the written examination did not deserve to be called for interview, could get a chance of being called and he could then be pulled up within the range of selection by awarding unduly high marks at the viva voce examination. This conclusion was sought to be buttressed by the Division Bench by relying on a comparison of the marks obtained by some of the petitioners in the written examination and at the viva voce test. This comparison showed that eight of the petitioners secured "a percentage of around 60 per cent rising up to a highest of 68.5 per cent" in the written examination, but they were awarded "a disastrously low percentage of marks in the viva voce ranging from the rock bottom of 13 per cent to 21 per cent", making it impossible for them to bridge the difference so as to be able to come within the range of selection. How could such brilliant candidates who had done so well in the written examination fare so poorly in the viva voce test that they could not get more than 20 per cent marks, asked the Division Bench? The Division Bench also pointed out that some out of these eight petitioners had appeared in an earlier examination held in 1977-78 and at the viva voce test held at that time. They had secured more than 50 to 55

per cent marks and it was difficult to believe that during the next three succeeding years, they had deteriorated to such an extent that they slumped down to 20 per cent marks. The Division Bench also analysed the comparative marks obtained by the first 16 candidates who topped the list in the written examination and noted that on account of the poor marks obtained by them at the viva voce test, 10 out of these 16 candidates were "knocked out of the race" because their ranking, on the basis of the total marks obtained by them in them in the written examination and the viva voce test, went for below 61 and only 4 out of the remaining 6 could rank within the first 16 so as to be eligible for appointment in the Haryana Civil Service (Executive Branch) which is a superior service compared to other allied services. It was also pointed out by the Division Bench that out of 16 candidates who topped the list on the basis of combined marks obtained in the written and viva voce examinations and who consequently secured appointment to posts in the Haryana Civil Service (Executive Branch), 12 could make it only on account of the high marks obtained by them at the viva voce examination, though they were not high up in ranking in the written examination. On the basis of these facts and circumstances, the Division Bench concluded that the petitioners had discharged the burden of showing that there was reasonable likelihood of bias vitiating the entire selection process.

20. We do not think we can agree with this conclusion reached by the Division Bench. But whilst disagreeing with the conclusion, we must admit that the Haryana Public Service Commission was not right in calling for interview all the 1300 and odd candidates who secure 45 per cent or more marks in the written examination. The respondents sought to justify the action of the Haryana Public Service Commission by relying on Regulation 3 of the Regulations contained in Appendix 1 of the Punjab Civil Service (Executive Branch) Rules 1930 which were applicable in the State of Haryana and contended that on a true interpretation of that Regulation, the Haryana Public Service Commission was bound to call for interview all the candidates who secured a minimum of 45 per cent marks in the aggregate at the written examination. We do not think this contention is well founded. A plain reading of Regulation 3 will show that it is wholly unjustified. We have already referred to Regulation 3 in an earlier part of the judgment and we need not reproduce it again. It is clear on a plain natural construction of Regulation 3 that what it prescribes is merely a minimum qualification for eligibility to appear at the viva voce test. Every candidate to be eligible for appearing at the viva voce test must obtain at least 45 per cent marks in the aggregate in the written examination. But obtaining of minimum 45 per cent marks does not by itself entitle a candidate to insist that he should be called for the viva voce test. There is no obligation on the Haryana Public Service Commission to call for the viva test all candidates who satisfy the minimum eligibility requirement. It is open to the Haryana Public Service Commission to say that out of the candidates who satisfy the eligibility criterion of minimum 45 per cent marks in the written examination, only a limited number of candidates at the top of the list shall be called for interview. And this has necessarily to be

done because otherwise the viva voce test would be reduced to a farce. It is indeed difficult to see how a viva voce test for properly and satisfactorily measuring the personality of a candidate can be carried out, if over 1300 candidates are to be interviewed for recruitment to a service. If a viva voce test is to be carried out in a thorough and scientific manner, as it must be in order to arrive at a fair and satisfactory evaluation of the personality of a candidates, the interview must take anything between 10 to 30 minutes. In fact, Herman Finer in his book on "Theory and Practice of Modern Government" points out that "the interview should last at least half an hour". The Union Public Service Commission making selections for the Indian Administrative Service also interviews a candidate for almost half an hour. Only 11 to 12 candidates are called for interview in a day of 5 1/2 hours. It is obvious that in the circumstances, it would be impossible to carry out a satisfactory viva voce test if such a large unmanageable number of over 1300 candidates are to be interviewer. The interviews would then tend to be casual, superficial and sloppy and the assessment made at such interviews would not correctly reflect the true measure of the personality of the candidate. Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the written examination, can, to borrow an expression used by the Division Bench, "gatecrash" into the range of selection, if he is awarded unduly high marks at the viva voce examination. It has therefore always been the practice of the Union Public Service Commission to call for interview, candidates representing not more than twice or thrice the number of available vacancies. Kothari Committee's Report on the "Recruitment Policy and Selection Methods for the Civil Services Examination" also points out, after an in-depth examination of the question as to what should be the number of candidates to be called for interview:

"The number of candidates to be called for interview, in order of the total marks in written papers, should not exceed, we think, twice the number of vacancies to be filled..."

Otherwise the written examination which is definitely more objective in its assessment than the viva voce test will lose all meaning and credibility and the viva voce test which is to some extent subjective and discretionary in its evaluation will become the decisive factor in the process of selection. We are therefore of the view that where there is a composite test consisting of a written examination followed by a viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination, should not exceed twice or at the highest, thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the minimum eligibility requirement by securing a minimum of 45 per cent marks in the written examination and this was certainly not right, but we may point out that in doing so the Haryana Public Service Commission could not be said to be actuated by any mala fide or oblique motive, because it was common ground between the

parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional. The only question is whether this had any invalidating effect on the selections made by the Haryana Public Service Commission."

16. Reference has also been made by Shri H.R. Misra to the paragraph 52 of the Division Bench judgment of this Court in the case of Sanjeev Kumar Singh (supra) already referred to by the petitioners. Reference has also been made to the judgment of the Supreme Court in Jitendra Kumar Singh and Another Vs. State of U.P. and Others, AIR 2010 SC 1851 : (2010) 1 JT 177 : (2010) 1 SCALE 358 : (2010) 3 SCC 119 : (2010) 1 SCC(L&S) 772 : (2010) 2 SLJ 108 : (2010) 1 SLR 526 .

17. On the question of validity of application of the principle of shortlisting of candidates, the respondents have placed reliance upon a Constitution Bench decision of the Supreme Court in the case of Ashok Kumar Yadav (supra). From the facts as emerging from paragraph 19 of the said judgment (already quoted hereinabove), it is noticed that in that case a 20x times formula was applied to the available vacancies for calling the candidates for viva voce examination. The Division Bench of the High Court had held that in order to have a proper balance between the objective assessment of the written examination and subjective assessment of personality by viva voce test the candidates to be called in the interview the viva voce test should not exceed twice or at the highest thrice the number of available vacancies. The Supreme Court held that where there is a composite test consisting of a written examination followed by a viva voce test the number of candidates to be called for interview in order of the marks obtained in the written examination should not exceed twice or at the highest thrice the number of vacancies to be filled. In paragraph 21 of the Constitution Bench judgment, the Supreme Court on the facts of the case held that the selection held by the Haryana Public Service Commission could not be said to be vitiated merely on the ground that as many as 1300 and more candidates representing more than 20 times number of available vacancies were called for interview although not more than twice or at the highest thrice the number of candidates should have been called.

18. Short listing of the candidates for calling them for interview is a measure adopted by the examining bodies in order to facilitate holding of such examination. The same has been upheld by the Supreme Court in the case in B. Ramakichenin @ Balagandhi Vs. Union of India (UOI) and Others, (2008) 1 CLT 884 : (2007) 13 JT 91 : (2007) 13 SCALE 175 : (2008) 1 SCC 362 : (2008) 1 SCC(L&S) 177 : (2007) 12 SCR 120 : (2008) 2 SLJ 387 , wherein it has been held that even if there is no Rule providing for short listing nor any mention of it made in the advertisement calling for application for the post, the selection body can resort to a short listing procedure if there are large number of eligible candidates who have applied and it is not possible for the authorities to interview

all of them. Paragraphs 15, 16 and 17 of the said judgment read as under:

"15. It is well-settled that the method of short-listing can be validly adopted by the Selection Body vide *Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another*, AIR 1995 SC 77 : (1994) 6 JT 302 : (1995) 1 LLJ 180 : (1994) 4 SCALE 251 : (1994) 6 SCC 293 : (1994) 3 SCR 665 Supp : (1995) 1 SLJ 134 : (1995) 1 UJ 115 , *Government of Andhra Pradesh v. P. Dilip Kumar and another*.

16. Even if there is no rule providing for short-listing nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a short-listing 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 short-listing 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 B.Sc. degree, and if there are a large number of eligible applicants, the Selection Body can resort to short-listing by prescribing certain minimum marks in B.Sc. 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 only those who have the aforementioned minimum marks, will be considered or appointed on the post. Thus the procedure of short-listing 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 short-listing has been mentioned in the rule or advertisement then that method alone has to be followed."

19. The very purpose of short listing the candidates for interview is that if a large number of candidates are called for interview then such an interview would be casual and superficial because of time constraint and the time given to each candidate and in order that the interview may be effective and the selection of the candidate purposeful short listing is resorted to.

20. In the present case the grievance of the petitioners is that there is no Rule or provision in the advertisement providing for short listing as stated in the written argument and therefore short listing was not permissible. This question has already been answered by the Supreme Court in the case of *Ramakichenin* (supra) that even if there are no Rules or mention in the advertisement regarding short listing, short listing can nevertheless be resorted to. In the written arguments the petitioners have themselves disclosed that even after

applying the 3x times formula the total number of candidates that would be called for the interview would be about 6636 candidates. The submission that the Constitution Bench judgment in the case of Ashok Kumar Yadav did not provide for calling candidates in the 3x times formula is not correct inasmuch as the Supreme Court has held that the candidates should be called in the range of two times or thrice the number of vacancies but in paragraph 21 of the said judgment it has upheld the action of the Haryana Public Service Commission for calling 20x times the number of the candidates.

21. In the present case the respondents have applied the 3x formula which is in complete consonance with the law laid down by the Supreme Court in the case of Ashok Kumar Yadav (*supra*).

22. So far as the provisions of sub-section (6) of Section 3 of the Act, 1994 and the right of the reserved category candidate to compete against the unreserved seats on their own merit is concerned there is absolutely no quarrel with the legal proposition already settled by the Supreme Court that a reserved category candidate who is higher in merit would take precedence over an unreserved category candidate who is lower in merit so far as the unreserved seat is concerned. This legal proposition is not controverted by Shri H.R. Mishra, learned senior counsel for the respondents either. However, the submission of the learned counsel for the petitioner that the three times formula should have been applied only to the unreserved category candidates and not to the reserved category candidate is absolutely fallacious inasmuch as any such proposition if applied would promptly result in violation of Articles 14 and 16 of the Constitution of India. If the 3x times formula has to be applied it has to be applied to all the categories. The petitioners have been left out of the field of consideration for being called in the interview only because there were a large number of candidates in the OBC category who had secured higher marks than the petitioners and by applying the three times formula it has resulted in the ouster of the petitioners from the field of consideration for being called for interview. On the contrary the petitioners having secured higher marks in the written test than the last unreserved category candidate, were entitled to compete against the unreserved vacancies/posts solely by virtue of their higher merit and they cannot be relegated to take the seats reserved for the OBC category to which they belong. OBC candidates having lower marks than the petitioners would have to be adjusted against the seats reserved for OBC. Paragraph 43 of Balaji Badhabat (*supra*) reads as under:

"43. One other aspect of the matter must be kept in mind. If category wise statement is prepared, as has been directed by the High Court, it may be detrimental to the interest of the meritorious candidates belonging to the reserved categories. The reserved category candidates have two options. If they are meritorious enough to compete with the open category candidates, they are recruited in that category. The candidates below them would be considered for appointment in the reserved categories. This is now a well-settled principle of law

as has been laid down by this Court in several decisions. [See for example, Union of India (UOI) and Another Vs. Satya Prakash and Others, AIR 2006 SC 3409 : (2006) 4 JT 524 : (2006) 4 SCALE 60 : (2006) 4 SCC 550 : (2006) 3 SLJ 371 : (2006) 3 SLR 56 : (2006) 1 UJ 532 : (2006) AIRSCW 1815 : (2006) 3 Supreme 453 , Ritesh R. Sah Vs. Dr. Y.L. Yamul and others, (1996) 2 AD 224 : AIR 1996 SC 1378 : (1996) 2 JT 495 : (1996) 2 SCALE 341 : (1996) 3 SCC 253 : (1996) 2 SCR 695 : (1996) 1 UJ 735 , Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and Others, AIR 2007 SC 3127 : (2007) 115 FLR 10 : (2007) 10 JT 154 : (2007) 10 SCALE 50 : (2007) 8 SCC 785 : (2007) 8 SCR 972 : (2007) AIRSCW 5650]"

23. In my opinion the observations made by the Supreme Court in Baloji Badhabat (supra) squarely apply to the facts of the present case inasmuch as in the present case the right of meritorious candidate to take precedence over unreserved category candidate against unreserved seats/vacancies has been marred by a misconceived application of the 3x times formula to categories individually instead of universally on a broad spectrum basis.

24. The respondents have further placed reliance on the Supreme Court judgment in Jitendra Kumar Singh and Another Vs. State of U.P. and Others, AIR 2010 SC 1851 : (2010) 1 JT 177 : (2010) 1 SCALE 358 : (2010) 3 SCC 119 : (2010) 1 SCC(L&S) 772 : (2010) 2 SLJ 108 : (2010) 1 SLR 526 , particularly paragraph 52 thereof. Paragraph 52 of the said judgment reads as under:

"52. In the present case, the concessions availed of by the reserved category candidates in age relaxation and fee concession had no relevance to the determination of the inter se merit on the basis of the final written test and interview. The ratio of the aforesaid judgment in fact permits reserved category candidates to be included in the general category candidates on the basis of merit."

25. I am of the view that the observations made by the Supreme Court in paragraph 52 of Jitendra Kumar Singh (supra) do not help the respondents at all, rather they support the case of the petitioners. The same logic stands extended to candidates successful in the written test also. After applying the three times formula if there is any candidate who has secured higher marks than unreserved category candidate he would definitely take precedence over an unreserved category candidate so far as the unreserved seats/vacancies are concerned.

26. Thus in the totality of the facts and circumstances of the case and the law laid down by the Supreme Court the writ petitions deserve to be allowed and are accordingly allowed. A direction is issued to the respondents to apply the 3x times formula uniformly to all the categories, reserved as well as the unreserved, who have qualified the written test and call the candidates for appearing in the interview strictly in the order of their merit. There shall be no order as to cost.