

**WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

**HON'BLE JUSTICE SOUMITRA PAL,
CHAIRMAN**

-AND-

**HON'BLE SAYEED AHMED BABA,
MEMBER (A)**

J U D G M E N T

-of-

Case No O.A. 11 of 2021

SAHIM HOSSAIN AND 92 OTHERS Applicants

-Versus-

THE STATE OF WEST BENGAL AND OTHERS.....Respondents

For the Applicants :

Mr Subir Sanyal
Mr. Dibyendu Chatterjee
Ms. Jhuma Chakraborty
Mrs. Reshmi Ghosh
Mr. Sagnik Roy Chowdhury
Advocates

For the State Respondents :

Mr. Kalyan Kumar Bandyopadhyay
Senior Advocate.
Mr. Goutam Pathak Banerjee
Mr. Jyotosh Majumdar
Mr. Arjun Roy Chowdhury
Advocates

For the Public Service Commission,
West Bengal :

Mr. Pradip Kumar Roy
Mr. Sourav Bhattacharjee
Advocates

AND

Case No O.A. 105 of 2021

MD. SAKIUL BISWAS AND 55 OTHERS Applicants
-Versus-
THE STATE OF WEST BENGAL AND OTHERS.....Respondents

AND

Case No O.A. 150 of 2021

BIPUL ROY AND 5 OTHERS Applicants
-Versus-
THE STATE OF WEST BENGAL AND OTHERS.....Respondents

For the Applicants :

Mr. Dibyendu Chatterjee
Mrs. Reshmi Ghosh
Advocates

For the State Respondents :

Mr. Goutam Pathak Banerjee
Advocate

For the Public Service Commission,
West Bengal :

Mr. Sourav Bhattacharjee
Advocate

Judgment delivered on : 29th day of March, 2022.

Since the issues are similar in OA-11 of 2021, OA-105 of 2021 and OA-150 of 2021, the same are disposed of by a common judgement and order. However, for the sake of brevity and clarity, we refer to the facts in OA-11 of 2021.

1. In the Original application Sahim Hossain and others have prayed for certain reliefs, the relevant portion of which is as under :-

“....a) An order quashing the entire process of selection for recruitment to the post of Sub-Inspector in the Subordinate Food & Supplies Service, Grade-III, under Food and Supplies Department, Government of West Bengal, 2018 of the declared vacancies and directing the respondents to commence the process of recruitment afresh maintaining the lack of transparency by publishing cut off

marks of the Written Test and the result of the respective candidates with breakup of marks.

b) An order directing the respondents to publish the marks of the Written Test and marks of interview and also to publish and also to publish the OMR of the applicants....”.

2. The application, being OA-11 of 2021, came up for hearing before the single Bench of the Tribunal pursuant to the notification dated 24th December, 2020 issued in exercise of the powers conferred under sub section (6) of section 5 of the Administrative Tribunals Act, 1985 on 8th January, 2021 when after hearing the learned advocates for the parties it was held since the matter involves an important question of law and in view of the proviso 2 sub-section 5 (6) of the Act, the matter be placed before the Division Bench as and when it sits and the matter was directed to appear under the heading ‘Admission Hearing’ on 15th January, 2021. Thereafter, the original applicants moved the High Court by filing a writ petition, being WPST 17 of 2021. It appears the matter came up for hearing before the High Court on 23rd February, 2021. Thereafter, the writ petition was heard on 25th February, 2021 when the following order was passed :

“At the time of hearing Mr. Bandopadhyay, learned senior counsel appearing for the respondent Nos. 1 and 2 pointed out that before the statement was made by him on the last date of hearing, seventy candidates had been joined after their medical examination and verification of documents. However, even if any further appointment letters have been issued, no other candidate is being permitted to join service.

On the request of the learned counsel for the Commission, adjourned to March 3, 2021.”

3. The matter came up for hearing on 3rd March, 2021 when after hearing the learned advocates for the parties an order was passed which is as under :-

“Mr. Majumdar, learned Additional Advocate General appearing for the Public Service Commission fairly submitted that the Commission will upload the

result with the marks obtained by all the candidates in the written test and the interview on the website of the Commission within two days from today.

Adjourned to March 11, 2021.”

4. Thereafter, the matter came up for hearing on 23rd March, 2021 when, while disposing of the writ petition, an order was passed, the relevant portion of which is as under :

“Considering the aforesaid facts, while setting aside the impugned order dated February 18, 2021, declining interim relief to the petitioners, we deem it appropriate to remand back the matter to the Tribunal to consider all the arguments raised by the learned counsels for the parties afresh, in the light of the issues which have arisen after the merit list and select list have been uploaded on the website of the Commission.

The matter regarding interim relief be decided by the Tribunal on or before April 09, 2021.

In case the parties wish to supplement the pleadings already filed by them the same may be done immediately so that sufficient time is there for hearing and disposal of the prayer for interim relief.

Till the prayer for interim relief is decided by the Tribunal, the appointment of the selected candidates shall remain stayed.

The writ petition is disposed of accordingly.”

5. Thereafter on 13th April, 2021 supplementary affidavit was filed by the original applicants. The supplementary affidavit records the publication of the result and it is the allegation of the applicants that while preparing the result of the candidates that is the merit list and the final list, it has been found that the candidates belonging to reserved category have availed the benefit of age relaxation and inspite of availing such benefit of relaxation, they have been kept in the merit list under the general/Unreserved candidates and recommended against

Unreserved/ general vacancies which is arbitrary, malafide and illegal. It has been alleged that since reserved category candidates inspite of age relaxation, have been recommended against Unreserved/general vacancies, vacancies in the Unreserved/general category have been curtailed. It has been stated that it transpires from the list of candidates recommended against category wise vacancies and the result of all the candidates called for interview that the candidates, who are having the same/equal marks with that of the last recommended candidate in a particular category have not been recommended for appointment by the Commission. Referring to note of the Commission it has stated one who has been senior in age shall get precedence. Such act on the part of the Commission is illegal, unreasonable, arbitrary and unjust, since neither the West Bengal Public Service Commission Rules and Procedures nor the advertisement empowered the Commission to determine the basis of recommendation to be the seniority in age amongst the candidates having the same/equal marks in aggregate.

6. In support of this submission, the applicant has given two charts at pages 12,14 and 15 of the application. Challenge has also been made regarding allotment of marks in the interview and a chart containing the names of seven candidates have been given. Again allegation is that candidates having better marks in the written test were given minimum marks in the interview.

7. The original application along with the supplementary affidavit came up for hearing before the Tribunal on various dates. The State respondents and the Public Service Commission, West Bengal, had filed their respective replies. It may be noted that subsequently the matter was heard by the Division Bench. On 1st December, 2021 a miscellaneous application, being MA-111 of 2021 for addition of party was filed. The State respondents filed reply to the miscellaneous application. The said application for addition of party by judgement delivered on 18th January, 2022 was dismissed to which we shall advert later.

8. Mr. S. Sanyal, learned advocate appearing on behalf of the applicants relying on the original application and supplementary affidavit submitted after being successful in the written examination, the applicants were called for interview. Referring to the list of finally recommended candidates, it was submitted that since the reserved category candidates having availed of the

benefits were recommended for the Unreserved category, the entire list has become topsy-turvy and therefore the entire list be quashed.

9. Significantly, the applicants who got lesser marks in the written test secured more marks in the interview which speaks of manipulation and leading to favouritism. Again, candidates obtaining higher marks in the written test have been given lesser marks in the interview to keep them out of the zone of consideration. Since there was negative marking in the written test, as some of the key answers of questions for example question no. 87 was wrong, consequences in marking have been disastrous and as a result applicants have suffered. Submission of wrong key answers make the applicants entitled to marks for the questions and for grant of and/or restoration of marks and consequently reshuffling of the entire select/recommended lists. Since allegations of wrong key answers have been admitted, if the Commission decides to grant full marks irrespective of attempts, the applicants become entitled to get full marks. The disclosures of key answers on a later date do not disentitle the applicants from getting full marks. Though the advertisement speaks of cut off marks and qualifying marks, however, it is not reflected from the result of the examination. Since cut off marks and qualifying marks operate on different spheres, as qualifying marks do not find mention in the affidavit filed by the Commission, the entire procedure of selection has been changed. Mr. Sanyal has referred to the following judgements in support of his submissions :-

Ajay Hasia – vs- Khalid Mujib Sehravrdi, (1981)1SCC 722; Krishna Yadav – vs- State of Haryana, (1994) 4 SCC 615; Pravin Singh –vs- State of Punjab; (2000) 8 SCC 633; K. Manjusree – vs- State of Andhra Pradesh; (2008) 3 SCC 512; Rajesh Kumar – vs- State of Bihar; (2013) 4 SCC 690; Nirab Kumar Dilip Kumar Makuama – vs- Gujrat PSC, (2019)7 SCC 383; Civil Appeal No. 2103 of 2020 Ramjit Singh Kardam – vs- Sanjib Kumar.

10. Mr. P. Roy, learned advocate appearing on behalf of the Public Service Commission, West Bengal along with Mr. S. Bhattacharjee, learned advocate, relying on the reply filed on behalf of the Commission denying the allegations made in the original application submits as 3024 candidates were called for the personality test and merit list of 957 recommended candidates have

been published, the allegation of adopting hide and seek policy for recruitment by the Commission is incorrect. According to him, in order to maintain transparency, Commission does not disclose total written marks to any candidate prior to the personality test, as aggregate marks of written and personality test is one of the main criteria to decide the eligibility for merit list. Since the number of candidates eligible for personality test is based on the number of vacancies and cut off marks in each category is determined on the basis of marks obtained in the written examination, fixation of cut off marks before the written examination is not possible. Submission is the allegations made in paragraph 5(ff) and 5(gg) of the original application are false and have been negated as evident from the statements made in paragraph 27 of the reply.

11. With regard to the marks given in the written test it is submitted that assuming the questions were wrong, since the mistake was not brought to the notice of the Commission at that relevant point of time and as the list of recommended successful candidates was published on 30th December, 2020, the belated submission on behalf of the applicants be not accepted.

12. Referring to the reply to the supplementary affidavit, it was stated that though candidates belonging to Scheduled Caste category have been recommended against Unreserved vacancy, as all of them secured the minimum cut off marks fixed for general candidates, as per usual practice availing of age relaxation by a reserved candidate is not considered a bar for recommending candidates against unreserved posts. Referring to WBPSC rules and procedures, 1982 Part-I, it was submitted since it has been stipulated that the Commission may “publish the results in such a manner as may be deemed suitable by the Commission”, the Commission, having jurisdiction to publish the result, has not violated any provision of law. For breaking of equal marks in aggregate, priority has been given to marks obtained by a candidate in the personality test. Thereafter even if there is a tie, priority is given to the candidate who is senior in age.

13. Referring to paragraphs 13, 14 and 15 of the supplementary affidavit, it was submitted that Abhijit Sardar, Sentu Sarkar, Bulet Rahaman, Hansmin Biswas and Siddhartha Ghose though failed to secure cut off marks fixed for

Unreserved categories, as they secured equal or above the cut off marks in their respective categories, they have been recommended in their respective categories.

14. Mr. Bhattacharjee has referred to the following judgements :-

Dalpat Abasaheb Salonke – vs- Mahajan; 1990 AIR (SC) 434, S.P.Chengal Varaya Naidu (Dead) by Lrs – vs- Jaggnath (dead) by Lrs. : 1994 AIR(SC) 853.

15. Mr. K. K. Bandyopadhyay, learned senior advocate appearing on behalf of the State respondents submitted that the application is not maintainable as different categories of persons have joined together to move the original application in violation of section 19 of the Act. Assuming injustice has been shown to a Scheduled caste candidate, he cannot espouse the case of an OBC candidate. Referring to the supplementary affidavit, submission was there is no averment that the applicants have been prejudiced. Since the respondents have published the marks of the written test, as accordingly prayer 'b' of the application has already been allowed, nothing remains to be decided in the application. The applicants after qualifying in the written test and only after being unsuccessful in the interview have filed this application which is illegal. Referring to the marks granted in the written test submission was no case has been made out that it is a malice in fact or malice in law. As distortion of fact and of law have not been stated, Tribunal cannot go into a roving enquiry. Moreover, allegations have been made against a few candidates who have not been made party respondents. Mr. Bandyopadhyay has referred to the following judgements in support of his submission :-

Bharat Singh, 1988(4) SCC 534, Ashok Kumar Yadav, 2003 (2) SCC 132; Khetrabasi Biswal, 2004(1) SCC 317 (Para 6), U.O.I.-vs- S. Vinod Kumar, 2007(8) SCC 100, Sadananda Halo, 2008(4)SCC 619, B. Ramakichenin, 2008(1)SCC 362, Amlan Jyoti Borooah, 2009(3) SCC227, Jitendra Kumar Singh, 2010 (3) SCC 119, Rajya Sabha Secretariat, 2013 (5) SCC 169, Ranjan Kumar, 2014(16) SCC 187, Sanjoy Kumar Shukla, 2014 (3)SCC 493, Baluram, 2015 (13) SCC 579, Poonam, 2016 (2) SCC 779, Ashok Kumar, 2017 (4) SCC 357, Ram Vijay Singh, 2018 (2) SCC 357, Anupal Singh, 2020 (2) SCC 173, Sourav Yadav – vs-State of U.P, 2021 (4)SCC542 and Ram Sharan Maurya, AIR 2021 SC 954.

16. During submission by the learned advocates for the parties several issues were raised which require consideration. So far as the issue regarding fixation of cut off marks, it was submitted on behalf of the applicants that though the advertisement speaks of cut off marks and qualifying marks it is not reflected from the result of the examination. Since in the recruitment process, the number of candidates participating was very high and since the number of candidates eligible for personally test is based on the number of vacancies and cut off marks in each category is determined on the basis of marks obtained in the written examination, in our view, the fixation of cut off marks before the written examination is not feasible as it would have resulted in anomalies. We accept the submission on behalf of the Commission that it would not have been feasible as, if cut off marks were fixed too high or too low then the Commission might have either faced a problem of excess candidates or lack of candidates and for that reason, the fixation of cut off marks after the availability of results is a sound proposition as it would not have caused prejudice to any of the applicants. The judgement in K. Manjusree (supra) dealing with the selection of candidates for the post of District and Sessions Judges (Grade ii) in the Andhra Pradesh State Higher Judicial services, is inapplicable as lakhs of candidates participated in the selection process.

17. Therefore, the fixation of cut off marks by the Commission after the written examination on the basis of marks secured by the last qualifying candidate was just and proper. Since 1106359 candidates applied for the selection process and 783440 candidates appeared in the written test, fixation of cut off marks in our view is to be left to the discretion of the Commission. Since lakhs of candidates participated in the selection process we do not accept the submission on behalf of the applicants that fixation of cut off marks was unjust and arbitrary and is opposed to the principles of equality as stipulated under Article 14 of the Constitution of India as the power of the Commission to fix cut off marks is neither denied nor disputed.

18. The issue regarding allotment of lesser marks in the personality test/interview to the candidates, who secured higher marks in the written test or vice versa in a collective and systematic manner to keep them out of zone of consideration for appointment could not be substantiated either in the original

application or in the supplementary affidavit by giving specific instances. As allegations are bald, it cannot be accepted. Some names stated in paragraph 16 of the supplementary affidavit does not demonstrate the fact that the applicants have been prejudiced as they participated in the written examination.

19. We accept the submission on behalf of the Commission that question no. 87 had affected all the candidates and not just the applicants and the applicants should have shown they had suffered due to the wrong questions.

20. With regard to the submission of the applicants regarding entitlement to marks for wrong key answers and restoration of marks deducted for negative marks and consequently reshuffling of the entire recommended list cannot be accepted as the applicants had participated in the written examination and had not filed representation regarding wrong key answers soon after the written examination. Rather they had raised the issue after publication of the final merit list.

21. It is pertinent to refer to the law laid down in paragraph 24 in judgement in Rajyasabha Secretariat (Supra) wherein it was held as under :-

“.....This Court held that though the standard adopted by the Public Commission may be defective, the same standard was applied to all, and did not prejudice Respondents 1 and 2 or any of the candidates. This Court observed that : [SCC(L&S) p.1453, para 3]

“3.....When uniform process had been adopted in respect of all and selections had been made, it was highly inappropriate for the High Court to have examined the matter in further detail and to have allocated marks to the two candidates and thereafter directed the appellant Commission to select them...”.

22. It is also appropriate to refer to the law laid down in judgement in Jasvinder Singh (supra) wherein it has been held :-

“ The learned Single Judge also seems to have been very much carried away by few instances noticed by him as to the award of higher percentage of marks in viva voce to those who got lower marks in the written test as compared to

some who scored higher marks in the written examination but could not get as much higher marks in viva voce. Picking up a negligible few instances cannot provide the basis for either striking down the method of selection or the selections ultimately made. There is no guarantee that a person who fared well in the written test will or should be presumed to have fared well in the viva voce test also and the expert opinion about as well as experience in viva voce does not lend credence to any such general assumptions, in all circumstances and for all eventualities...”.

23. In view of the above, the question of quashing the entire selection process, as prayed for, does not arise as the applicants had participated in the process without any protest at any stage whatsoever.

24. An important issue - whether selection and recommendation of the candidates belonging to reserved categories - Scheduled Caste, Scheduled Tribe, Other Backward Classes - A and B against unreserved vacancies, in spite of availing benefits of age relaxation, is permissible or not in the light of the provisions contained in West Bengal Scheduled Castes and Scheduled Tribes (Reservation of vacancies in Services and Posts) Act, 1976 ('1976 Act' in short) has been raised. In this regard it is appropriate to refer to section 4(2) of the 1976 Act which is as under :

“(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 ay 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)” (Emphasis supplied)

25. Section 5(a) and (b) of the West Bengal Backward Classes (Other than Scheduled Castes and Scheduled Tribes) (Reservation of Vacancies in Services and Posts) Act, 2012 (for short '2012 Act') says as follows :-

“(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 B” category of the Other Backward Classes in the manner set out in Schedule III.

(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).”

26. While dealing with the issue, it is appropriate to refer to the eligibility criteria as set out in the advertisement, which is as follows :-

*“5. Age : Not below 18 years but not more than 40 years as on 01.01.2018 (i.e. born not earlier than 2nd January, 1978 and not later than 1st January, 2000).
Concession in age :*

The upper age limit is relaxable by 5 years for S.C. & S.T. candidates and by 3 years for B.C. (Non-creamy Layer) candidates. No relaxation is applicable to S.C./S.T./B.C. candidates of other States of other States as they shall be treated as general unreserved candidates.

“No claim for being a member of S.C./S.T./B.C.(Non-Creamy Layer), Ex-servicemen or a meritorious sportsman will be entertained after the closing date of submission of the application.

Upper age limit is also relaxable for Ex-servicemen who have put is not less than six month’s continuous service in any rank (whether as a Combatant or as a Non-Combatant) in the armed forces of the Union. For such Ex-servicemen the upper age limit is relaxable by three years more than the period of his service in the Armed Forces. SC/ST/BC candidates not belonging to the State of West Bengal shall be treated as General candidates...”.

27. Perusing the statutory provisions as noted hereinbefore, it is evident that the members of the Backward classes qualifying on merit in an open competition on the “*same standard*” as of unreserved candidates for appointment

to any unreserved service or post in an establishment shall not be adjusted against the quota in such service or post.

28. It is to be noted that though in the 1976 Act the words “*same standard*” are missing, the scheme for reservation and migration of the reserved categories in 1976 Act and 2012 Act are similar. There is no doubt that both under the 1976 Act and under the 2012 Act, candidates belonging to Scheduled Caste, Scheduled Tribe, Other Backward Classes - A and B cannot be placed under the unreserved category, if they availed the benefit of age and other relaxations. To put it in another way, if a candidate avails himself of age relaxation, he violates the parameter of “*same standard*” as of the unreserved candidate.

29. During hearing no specific provision under the 1976 Act has been shown on behalf of the Commission / State respondents which allows the SC, ST candidates, despite having availed the benefits of relaxation of age, can be placed under the unreserved category.

30. In the case of Jitendra Kumar Singh –versus- State of Uttar Pradesh : (2010)3 SCC 119, the Supreme Court of India has, inter alia, decided the issue as to whether relaxation in age and fee would deprive and outsource him from competing against an unreserved seat in an open competition with general candidates in the context of recruitment process in the posts of Sub Inspectors in Civil Police and Platoon Commanders in Uttar Pradesh in the light of U.P. Public Services (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1994.

31. In Jitendra Kumar Singh (supra), the Supreme Court has emphasized on various constitutional provisions including Article 16 (4) of the Constitution of India. The relevant part of the said judgement is set out hereinbelow for adjudication of the present case:-

“Section 8 of the Act of 1994 reads as under:-

“8. Concession and relaxation- (1) The State Government may, in favour of the categories of persons mentioned in sub-section (1) of Section 3, by order, grant

such concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit, as it may consider necessary.

(2)The Government orders in force on the date of commencement of this Act, in respect of concessions and relaxations, including concession in fees for any competitive examination or interview and relaxation in upper age limit and those relative to reservation in direct recruitment and promotion, in favour of categories of persons referred to in Sub-section (1), which are not inconsistent with the provisions of this Act, shall continue to be applicable till they are modified or revoked, as the case may be."

51. Schedule II gives a list of category of persons to whom reservation under Section 3 (1) would not be available, as they fall within the category of persons commonly known as "creamy layer". A perusal of Section 3 (1) would show that it provides for reservation in favour of the categories mentioned therein at the stage of direct recruitment. The controversy between the parties in these appeals is limited to sub-section (6) of Section 3 and Section 8 of the 1994 Act. It was strenuously argued by Mr.Rao and Dr. Rajeev Dhawan that Section 3 (6) of the Act of 1994 does not permit the reserved category candidates to be adjusted against general category vacancies who had applied as reserved category candidate. In the alternative, learned counsel had submitted that at least such reserved category candidate who had appeared availing relaxation of age available to reserved category candidates cannot be said to have competed at par in Open Competition with General category candidates, and therefore, cannot be adjusted against the vacancies meant for General Category Candidates. 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. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. These instructions, 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 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."

52. 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."

32. In the case of Niravkumar Dilipbhai Makwana (supra) the Supreme Court has held as follows:

"26. Now, let us consider the judgment in Jitendra Kumar Singh (supra). In this case, this Court was considering the interpretation of Subsection (6) of Section 3 of U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "1994 Act") and the Government Instructions dated 25.03.1994. 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:

"(6) If a person belonging to any categories mentioned in subsection (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 subsection (1)."

7. *The State of U.P. issued Instructions dated 25.03.1994 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."*

28. *On consideration of subsection (3) of Section 6 of the 1994 Act and the Instructions dated 25.03.1994, 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 1994 Act and the Instructions dated 25.03.1994 which is entirely different from the statutory scheme under consideration in the instant appeal. Hence, the principle laid down in Jitendra Kumar Singh (supra) has no application to the facts of the present case."*

33. From the facts in the judgement of Jitendra Kumar Singh (supra), it is evident that the State of U.P had issued instructions on 25th March, 1994 on the subject of reservation of SC, ST and OBCs in the UP public services. The last line of the 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."* In the backdrop of such policy decision of the State of UP, the Supreme Court held that the grant of age relaxation is within exclusive domain of the State.

34. In this regard, it is noteworthy that the Supreme Court, in no uncertain terms has upheld the discretion of the State Government to lay down a policy of concession, exemption, preference for suitable accommodation of the reserved quota candidates in the direct recruitment of the public service as evident from the judgement in Niravkumar Dilipbhai Makwana (supra) wherein it has been held:-

" 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”.

35. Therefore, the prerogative of the State to make any provision for reservation for appointment or posts in favour of backward classes is not in dispute. However in course of hearing the Commission or the State respondents did not show any such circular, notification, instruction reflecting the State policy akin to the instruction of the State of Uttar Pradesh which empowers the candidates belonging to Scheduled Caste, Scheduled Tribe, Other Backward Classes-A and B categories, who can secure his position on merit under the unreserved category in spite of availing the benefit of age relaxation. In the absence of such policy, it is impermissible to allow under the 1976 Act SC and ST candidates, having availed the benefits of age relaxation to secure their positions in the merit list under the unreserved categories.

36. In Sourav Yadav (supra) the Supreme Court has dealt with the methodology in placing the candidates entitled to vertical reservation within the horizontal reservation in the recruitment to the post of Constables in Uttar Pradesh. Therein the Supreme Court has approved the methodology applied by the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat whereas the view of the High Courts of Allahabad and Madhya Pradesh has been rejected. In the said judgement the Supreme Court also upheld the principles as laid down in the cases of Jitendra Kumar Singh (supra) and Deepa E.V. (supra) keeping in mind the state policies of the concerned states in terms of Article 16 (4) of the Constitution of India.

37. In the present case the dispute relates to placement of the candidates belonging to reserved categories having availed relaxation of age in the unreserved category i.e. the dispute of the placement within vertical or social reservation. Therefore, the ultimate principle of law laid down in Sourav Yadav (supra) is in no manner applicable in the present case.

38. It is pertinent to mention that even if the words “*same standard*” have not been mentioned in Section 4 (2) of the 1976 Act and it does not make any difference or to grant concession in allowing the reserved candidates, having availed the benefit of age relaxation, to be placed under the unreserved category. There cannot be any discrimination between the candidates belonging to the reserved categories under the 1976 Act and 2012 Act within the sphere of vertical or social reservation. The words “*same standard*” demonstrate equality among the candidates similarly situated who are to be placed only and only on merit under all categories. Therefore, we find non-compliance of the Act and principle of law in placing some reserved category candidates, having availed age relaxation in the UR category, is impermissible in law.

39. In this regard it is appropriate to refer to the statements made in the original application and in the supplementary affidavit.

40. In paragraph 5(r) of the original application it has been stated that “*there has been a clear violation of the Reservation Policy in as much as candidate applied for OBC-B Category has been selected in the Unreserved category without disclosing the particulars and details in regard to the merit of the candidate. This act also points out to the lack of maintenance of transparency or in the process of public recruitment...*”.

41. In paragraph 5(ff) it has been alleged that the merit list published was “*in violation of the reservation policy as guaranteed under Article 16(4) of the Constitution of India...*” and some examples have been given regarding the grant of marks to the last empanelled candidate in the general category and it has been stated that “*...in the instant merit list, the Public Service Commission, West Bengal has not prepared the merit list in terms of the merit of candidates in different category having resulting to that the candidates, who got highest marks from the different reserved category could not be placed in the unreserved category due to the in-action on the part of the Public Service Commission, West Bengal*”.

42. In paragraph 5(gg) it has been stated that “*...the same violation is cropped up in the category of Scheduled Caste where a candidate being Roll No.*

0320484 got 97.0004 marks as total marks (written-interview) which is more higher than the last empanelled candidate under general category. In the instant case the candidate being Roll NO. 0320484 under S.C. category is entitled to get a chance to compete the selection process with the advantage of unreserved category candidate...”.

43. These statements have been countered and/or disputed in paragraph 17 of the reply filed by the Public Service Commission, West Bengal, which is as follows :-

“.....Allegations contained in paragraph 5(r) of the said application are baseless, frivolous. I deny and dispute the same and state that the Commission did not violate the reservation policy. According to the policy, candidates having any category other than general category can also be considered in UR category list according to their merit....”.

44. Further in paragraph 27 of the reply filed, the Commission disputed the statements made in paragraph 5(ff) and 5(gg) of the original application, the relevant portion of which is as under :-

“....According to the verdict of Hon’ble Supreme Court in a case between Nirav Kumar Dilipbhai Makwana vs Gujrat Public Service Commission & Ors in S.L.P. (Civil) No. 3938 of 2018 and paragraph 6.2 of the Circular dated 24.06.2006 by the Government of Gujrat mentioning “In the state, members of SC/ST/OBC can compete against non-reserved vacancies and be counted against them, in case they have not taken any concession (like that of age, etc.) payment of examination fee in case of direct recruitment” is justified.

For that reason mentioned above and due to the decision of the Full Commission meeting dated 21.08.2018 and its extended meeting held on 30.08.2018 mentioning “7(b) 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 examination(s)/Interview etc. Will be considered only for the merit list for that particular category”.

Here, in this case the candidates in question failed to secure the cut-off marks/Marks obtained by the last qualified candidate in written test for UR category but achieved sufficient marks in their respective category in order to appear in interview. Since they availed the benefits of reservation at time of appearing at the Personality Test, their names cannot be considered against UR vacancies. I state further that I repeat and reiterate paragraph 7 of the instant reply...”.

45. As noted hereinbefore, the applicants had filed supplementary affidavit and the statements made in paragraph 11(a), 13 to 16 are noteworthy. Paragraph 11(a) highlights the fact that

“...Candidates belonging to Reserved category as Scheduled caste candidate availed of the benefit of age relaxation and inspite of availing such benefit of relaxation they have been kept in the Merit List of General/Unreserved category candidate and recommended against unreserved/General vacancies illegally, arbitrarily and in a malafide way...”.

46. In paragraph 13 it has been stated as under :-

“.....it also transpires from the list of candidates recommended against category-wise vacancies that the candidates though belonging to Reserved category but qualifying on merit in the open competition on the same standard as of the Unreserved candidates have not been recommended against the Unreserved vacancies inspite of securing the cut off marks of 91.1671 for recommendation against General category vacancies....”.

47. In paragraph 14 it has been stated as under :-

“.....Similarly, it transpires from the list of the candidates recommended against category-wise vacancies that the candidates though belonging to the Reserved category but qualifying on merit in the open competition on the same standard as of the Unreserved candidates have not been recommended against the

Unreserved vacancies inspite of securing the cut off marks of 91.1761 for recommendation against General category vacancies...”.

48. Again in paragraph 15 it has been stated that

“.....it again transpires from the list of the candidates recommended against category-wise vacancies that the candidates though belonging to OBC-B Reserved category but qualifying on merit in the open competition on the same standard as of the Unreserved candidates have not been recommended against the Unreserved vacancies inspite of securing the cut off marks of 91.1761 for recommendation against General/Unreserved category vacancies...”.

49. In paragraph 11(a), 13, 14 and 15 names of few candidates, who are not party respondents, have been given who allegedly have benefitted in violation of the reservation policy of the State.

50. Paragraphs 11(a), 13, 14 and 15 of the supplementary affidavit has been dealt with by the Commission in its reply. In paragraph 8 of the reply it has been stated that :-

“Statements made in paragraph 11(a) of the said affidavit are matters of record. I do not admit anything save and except what would appear from the record. I state that candidates belonging to Reserved Category(OBC/SC/ST etc) may be recommended in the Merit List of General Category if he or she has obtained required cut-off marks fixed for General Category candidates. Though, the candidates mentioned in this paragraph belonged to SC category and they have been recommended against Unreserved vacancies as all of them secured at least the cut-off marks fixed for General candidates. As per usual practice, availing the benefit of age relaxation is not considered as bar for recommending against unreserved vacancies....”

(Emphasis supplied).

51. In paragraph 10 of the reply to the supplementary affidavit it has been stated that :-

“ Statements made in paragraph 13,14 and 15 of the said affidavit are matters of record. I do not admit anything save and except what would appear from the record. I state that Abhijit Sardar, Sentu Sarkar, Bulet Rahaman, Hansmin Biswas and Siddhartha Ghosh have failed to secure the cut-off marks fixed for UR categories but secured marks equal to or above the cut-off marks for their respective categories. As such they have been recommended in their respective categories.

Statements/Allegations made in paragraph 16 of the said affidavit I deny and dispute the same. I state that such is the applicants own perception. I state that Mithin Mandal secured the cut-off marks fixed for UR category.

Arpan Sardar, Bablu Sardar and Prabhat Sardar have not been recommended as they have failed in Test of Knowledge of Bengali”.

52. During hearing the learned advocate for the Commission had filed the minutes of the Full Commission meeting held on 21st August, 2018 and its extended meeting held on 30th August, 2018 relating to the “*Preparation of Merit List for Relaxed Standard*” as disclosed in paragraph 27 of the reply to the original application, which is as follows :-

“.....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 examination(s) /interview etc they will be considered only for the merit list for that particular category.....”.

53. Further in paragraph 27 page 8 of the reply filed by the Commission to the original application is set out herein before, the Commission has adopted the principle of law laid down by the Supreme Court in Nirav Kumar DilipBhai Makwana (supra) which is consistent with the stand taken by the Full Commission as referred to hereinbefore and it negates the statement in paragraph 8 of the reply that “*As per usual practice, availing the benefit of age relaxation is not considered a bar for recommending against unreserved vacancies...*”.

54. The stand as shown in the supplementary affidavit highlighting the result of the Commission goes against the statement made in paragraph 8 of the reply filed by the Commission.

55. It is very interesting to note that the Commission while filing its reply to the original application as well as to the supplementary affidavit have not controverted the facts mentioned hereinbefore; rather its stand is contradictory. The stand of the Commission as already noted is reflected from the resolution of the Full Commission. Since the statements of the applicants have gone uncontroverted, those have to be accepted.

56. Hence, the stand taken by the Commission in paragraph 8 of the reply is contradictory to the minutes contained in the resolution taken by the Full Commission regarding preparation of merit list.

57. Though the State respondents vehemently prayed for dismissal of the original application for non-joinder of necessary parties and thereafter the application for addition of party in MA 111 of 2021 was dismissed by judgement and order dated 18th January, 2022, however, the issue of non compliance of the State policy in terms of Article 16(4) of the Constitution of India cannot be diluted and the Tribunal cannot be oblivious to the said fact.

58. Moreover, violation of the State policy, which is reflected from the resolution of the Commission, amounts to infringement of Article 16(4) of the Constitution of India. Once policy has been framed, as reflected from the resolution of the Full Commission, the Commission is estopped from changing its stand.

59. The observations in paragraph 26 in Saurav Yadav (supra), cited on behalf of the state respondents to the effect that *“the principle that candidates belonging to any of the vertical reservation categories are entitled to be selected in “Open or General Category” is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong”* are very

much applicable to the present case and the stand taken by the Public Service Commission, West Bengal in preparing merit list by placing the reserved candidates availing age relaxation under the open category is contrary to the said principles of law.

60. Keeping the principles of law in mind as discussed hereinbefore and the stand taken by the Commission in view of its resolution regarding preparation of merit list on relaxed standard, since we find from paragraphs 11(a), 13, 14 and 15 of the supplementary affidavit that a few candidates under the reserved category availing relaxations have been placed in the unreserved category which has not been disputed by the Commission in its reply to the original application and to the supplementary affidavit and as it also appears from paragraph 13 thereof that candidates recommended against category wise vacancies, though belonging to the reserved category but qualified on merit in open competition on the same standard as of the unreserved candidates, have not been recommended against unreserved vacancies, which has not been disputed categorically by the Commission in its reply, the merit list published on 4th March, 2021 is liable to be set aside and quashed.

61. A question may arise as the application for addition of parties was dismissed, whether quashing of the merit list without hearing the affected parties would be in violation of the principles of natural justice. Since Constitution has its paramountcy and is supreme and it is the touchstone of judging an action of an authority be it constitutional or executive, as the Full Commission resolution reflects the State policy under Article 16 (4) of the Constitution which has been evidently breached by the Commission, the answer in this judgement could not have been different even in the absence of hearing to the candidates who have been appointed.

62. Hence, the application, being OA-11 of 2021, is allowed in part. The panel is set aside and quashed. However, we make it clear that as the applicants had appeared in every stage of the selection process without any protest and as we do not find any illegality in the recruitment process save and except as indicated above, we refrain from quashing the entire selection process.

63. Accordingly, the Public Service Commission, West Bengal (the respondent nos. 3, 4 and 5) is directed to prepare a panel afresh for recommendation to the post of Sub-Inspector in the Sub-ordinate Food & Supplies Service, Grade-III, under Food & Supplies Department, Government of West Bengal within four (4) weeks from the date of presentation of a copy of this judgment in respect of :

- (i) The Unreserved category, that is open category, on merit excluding the candidates who have availed age relaxation, and
- (ii) The Reserved (Scheduled Caste, Scheduled Tribe, Other Backward Classes-A and Other Backward Classes-B) categories in accordance with the prevailing laws in force as well as the Resolution of the Full Commission in this regard.

The revised panel indicating name, date of birth, caste, whether availed any relaxation or not, written and oral marks and aggregate of each candidate be published on the website of the Public Service Commission, West Bengal (Respondent No.3, 4 and 5) as directed above.

In view of the above no further order be passed on the miscellaneous application, being MA - 116 of 2021 and is disposed of accordingly.

In the light of the aforesaid judgement and order, both OA-105 of 2021 and OA-150 of 2021 are also allowed in part to the effect as indicated above.

Accordingly, all the applications (OA-11 of 2021, OA-105 of 2021 and OA-150 of 2021) are disposed of.

No order as to costs.

(SAYEED AHMED BABA)
MEMBER(A)

(SOUMITRA PAL)
CHAIRMAN