

Niravkumar Dilipbhai Makwana vs Gujrat Public Service Commission And ... on 4 July, 2019

Equivalent citations: AIR 2019 SUPREME COURT 3149, AIRONLINE 2019 SC 388, 2019 LAB IC 3136, (2019) 128 CUT LT 527, (2019) 2 ORISSA LR 241, (2019) 2 SERVLJ 463, (2019) 3 ESC 686, (2019) 3 SCT 359, 2019 (4) KCCR SN 245 (SC), (2019) 4 PAT LJR 48, (2019) 4 RAJ LW 2908, (2019) 4 SERVLR 507, (2019) 5 ALL WC 4637, (2019) 5 SERVLR 198, 2019 (7) SCC 383, 2019 (9) ADJ 82 NOC, (2019) 9 SCALE 17, AIR 2019 SC (CIV) 2177

Author: S.Abdul Nazeer

Bench: Indira Banerjee, S. Abdul Nazeer

1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5185 OF 2019
(Arising out of S.L.P. (Civil) No.3938 of 2018)

NIRAVKUMAR DILIPBHAI MAKWANA

... APPELLANT

VERSUS

GUJARAT PUBLIC SERVICE
COMMISSION & ORS.

... RESPONDENTS

JUDGMENT

S.ABDUL NAZEER, J.

1. Leave granted.

2. The question for consideration in this appeal is whether a candidate who has availed of an age relaxation in a selection process as a result of belonging to a reserved category, can thereafter seek to be accommodated in/or migrated to the general category seat?

3. Brief facts of the case which are necessary for deciding this appeal are:□

4. Gujarat Public Service Commission (for short 'GPSC') had issued an advertisement dated 01.03.2010 and corrigendum thereafter for 47 posts of Assistant Conservator of Forests (for short 'ACF') (Class□II) and 120 posts of Range Forest Officer (for short 'RFO') (Class□II). As per the said advertisement and corrigendum, total 84 posts were to be filled in from unreserved (general category) candidates. Out of the said 84 posts, 26 posts were reserved for women candidates, 48 posts were to be filled in from socially and economically backward classes (for short 'SEBC') category candidates. Out of 48 posts for SEBC category candidates, 18 posts were reserved for women candidates, 9 posts were to be filled in from Scheduled Caste (for short 'SC') category candidates, out of which 2 posts were reserved for women candidates. Similarly, 26 posts were to be filled in from Scheduled Tribe (for short 'ST') category candidates, out of which 8 posts were reserved for women candidates. It was also stipulated in the advertisement that 25% of the vacancies shall, as far as practicable, be filled up by appointing candidates who possess BSc degree with Forestry as the principal subject. GPSC had stipulated in the advertisement that the candidates should submit their on□line applications from 01.03.2010 to 06.04.2010. The details about the educational qualifications, age, mode of examination as well as the steps to submit the application have been narrated in the advertisement.

5. GPSC conducted preliminary test on 30.05.2010 and main written examination was held from 27.05.2013 to 02.06.2013. The result of the main written examination was declared on 21.05.2014. 505 candidates who cleared the main written examination were called for physical measurement test. Personal interviews were conducted from 16.06.2014 to 31.07.2014.

6. The appellant submitted an application in the category of SEBC. He successfully passed the examination conducted by GPSC. In the list of selected candidates published on 25.09.2014, he was shown at serial no.138.

7. It is the case of the appellant that while preparing the merit list, GPSC has ignored the judgment of this Court in *Jitendra Kumar Singh and Anr. v. State of Uttar Pradesh and Ors.*, 2010 (3) SCC 119. Therefore, the appellant filed Special Civil Application No. 1100 of 1015 before the learned Single Judge of the High Court of Gujarat challenging correctness of the aforesaid select list.

8. The learned Single Judge by his order dated 11.06.2015 allowed the application in the following terms:

"The action of considering the meritorious reserved category candidates (who secured their position in general/open category on account of their performance) in their respective reserved category only because they availed benefit of "concession" which cannot be considered as "relaxation in merits" also set aside since it is found to

be contrary to the decision of Hon'ble Apex Court in the case of Jitendra Kumar Singh (supra)."

9. Being aggrieved and dissatisfied with the order of the learned Single Judge, GPSC filed Letters Patent Appeal praying for setting aside of the order passed by the learned Single Judge. The Division Bench of the High Court by order dated 15.03.2017 has allowed the appeal and set aside the order of the learned Single Judge as under:

"Keeping in view the decisions rendered by the Hon'ble Supreme Court as well as this Court discussed hereinabove and in view of the discussion made by us in the aforesaid paragraphs, we are of the opinion that the State of Gujarat has framed the reservation policy by Government Resolution dated 11.2.1986 and circulars dated 29.1.2000 and 23.7.2004 as well as in view of the statutory provisions i.e. Recruitment Rules of 1967, Rules of 2007, 2008 and 2009, we hold that all those candidates belonging to a reserved category, if they avail the benefit of age relaxation, the same is to be considered as relaxation in the standard and therefore such candidates who got the benefit of age relaxation are not entitled to be considered in general category and their cases are required to be considered for reserved category cases only. Thus, the decision rendered by the Hon'ble Supreme Court in the case of Jitendra Kumar Singh (supra) would not be applicable to the facts of the present case and the relaxation of age in view of the policy of the State Government can be said to be relaxation in standard and the same cannot be considered to be concession. We answer the question posed for consideration accordingly."

10. In this appeal, the appellant has challenged the legality and correctness of the aforesaid order of the Division Bench of the High Court.

11. We have heard Mr. V.K. Garg, learned senior counsel for the appellant and Mr. Preetesh Kapur, learned senior counsel for the respondents.

12. Mr. Garg submits that the relaxation/concession in age granted to the candidates at the initial stage only to enable a candidate belonging to the reserved category without granting him/her any preferential advantage in the matter of selection cannot be treated as an incident of reservation under Article 16(4) of the Constitution of India. The Circulars dated 29.01.2000 and 23.07.2004 issued by the Government of Gujarat clearly show a concession in age in the matter of selection to a post which cannot be treated as an incident of reservation. Therefore, relaxation in age at the initial qualifying stage would not fall foul of these circulars. Rule 4 of the ACF/RFO Competitive Examination Rules, 2008 read with the schedule, clearly stipulates that preliminary test is merely to declare a candidate qualified for appearing in the written examination. Examination and interview performance alone would be the criteria for his/her selection for the appointment to the post. Therefore, relaxation at the stage of preliminary test would not amount to grant of benefit of reservation for selection. It is argued that Section 8 of the U.P. Public Services (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1994 is identically worded as circulars dated 29.01.2000 and 23.07.2004 in the State of Gujarat. Therefore, the ratio in Jitendra Kumar Singh

(supra) shall be squarely applicable to the facts of the present case too. He has also relied on the judgments of this Court in *Ajithkumar P. and Ors. v. Remin K.R. and Ors.*, 2015 (16) SCC 778 and *Vikas Sankhala and Ors. v. Vikas Kumar Agarwal and Ors.*, 2017 (1) SCC 350, in support of his submission.

13. On the other hand, Mr. Preetesh Kapur, learned senior counsel submits that a candidate who has availed of an age relaxation in the selection process as a result of belonging to a reserved category cannot, thereafter, seek to be accommodated in general category seats. In this connection he has drawn our attention to the Circulars dated 29.01.2000 and 23.07.2004. It is further submitted that judgment of this Court in *Jitendra Kumar Singh (supra)* has no application to the facts of this case. The decision was rendered in the context of policy adopted by the State of U.P. In support of his submissions, he has relied on the judgments of this Court in *Deepa E.V. v. Union of India and Ors.*, 2017 (12) SCC 680, and *Gaurav Pradhan and Ors. etc. etc. v. State of Rajasthan and Ors. etc. etc.*, 2018 (11) SCC 352. It is argued that the relaxation in age granted at the initial stage in the instant case, is necessarily an incident of reservation under Article 16(4) of the Constitution of India.

14. We have carefully considered the submissions of the learned senior counsel made at the Bar and perused the materials placed on record. For deciding the issue involved in this appeal, certain important aspects are required to be considered.

15. The State Government, in exercise of its powers conferred under Article 309 of the Constitution of India made Rules of 1967 vide notification dated 10.10.1967. As per sub-rule (2) of Rule 8, the appointing authority has been given powers to relax age limit in favour of the candidates belonging to SC/ST and SEBC and in favour of women candidates to the extent indicated therein. The Ministry of Personnel, Public Grievances and Pensions vide Office Memorandum dated 22.05.1989 formulated a policy in tune with Article 16(4) of the Constitution of India, which enables the State Government to provide for reservation for the category of persons belonging to backward classes. Thereafter, the Ministry of Personnel, Public Grievances and Pensions vide Office Memorandum dated 01.07.1998 clarified the earlier O.M dated 22.05.1989.

16. In the meantime, the State Government in its General Administration Department vide Government Resolution dated 11.12.1986 formulated a policy to the effect that the members belonging to the SC and ST categories who are selected for appointment by direct selection to any service or post included in the State Services or in the Subordinate Services on the basis of their merits, shall be considered for appointment on unreserved posts, which are filled in on merit along with other general category members. As per the said Government Resolution dated 11.12.1986, such appointments on merit of the members belonging to such castes and tribes shall in no way affect claims of the members of such castes and tribes for appointment in the services or on the post reserved for them under the Government orders issued from time to time. The State Government vide Circular No.PVS-1099-MVN-3-G-4 dated 29.01.2000 clarified that a reserved category candidate, if has not availed of any relaxation viz. age limit, experience, qualification, number of chances to appear in the examination, the said candidate will be adjusted in the open category and in case the candidate has availed any of the aforesaid relaxation, he/she will have to be adjusted against the reserved seats. This circular reads as under:

"....After careful and mature consideration in this regard, it is clarified that only those Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes candidates who are selected on the same standards as applied to the general category candidates, shall be counted/adjusted against unreserved posts and not against the reserved posts. When relaxed standard have been applied in selection of candidates belonging to Scheduled Castes, Scheduled Tribes and Socially and educationally Backward Classes in terms of the age limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category, etc., then the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes candidates selected under such arrangement shall be counted against the reserved posts. Such candidates would be deemed as unavailable for consideration against unreserved posts."

17. The State Government came out with a further clarification vide Circular No.PVS□02003□900□ G□4 dated 23.07.2004. In this circular, it was clarified as under:

"....After careful consideration of Government in this regard, it is clarified that candidates belonging to Scheduled Caste/ Scheduled Tribe/ Socially and Educationally backward classes, who got selected on merit through competitive examination without availing any relaxation in prescribed standards for eligibility shall not be adjusted against the reserved posts but candidate belonging to the Scheduled Case/ Scheduled Tribe/ Socially and Educationally backward classes who got selected by availing relaxation in qualifying marks in competitive written examination and personal interview shall be counted against the reserved posts. However, reserved class candidates who have been granted exemption from paying examination fee shall not be barred from competing for an unreserved vacant post."

18. Thus, the appointments in the category of SC/ST and other backward classes to the post of class I and class III in the State Services are being governed by the aforesaid policies and the State Government and/or any Authorities effecting direct appointments are required to give effect to the aforesaid policy decision at the time of recruitment process viz. preparing the select list etc.

19. It is evident from the above two circulars that a candidate who has availed of age relaxation in the selection process as a result of belonging to a reserved category cannot, thereafter, seek to be accommodated in or migrated to the general category seats.

20. The State of Gujarat framed the rules for regulating the recruitment to the post of ACF in Gujarat Forest Services Class II recruitment Rules 2007.

"(i) The Assistant Conservator of Forests in the Gujarat Forest Service, Class□I Recruitment Rules, 2007

(ii) The Assistant Conservator of Forests in the Gujarat Forest Service Class II Recruitment (Amendment) Rules, 2008.

(iii) The Assistant Conservator of Forests in the Gujarat Forest Service, Class II Recruitment (Amendment) Rules, 2009."

21. Similarly, the State of Gujarat has made the following rules for regulating recruitment to the post of RFO Class II:

"(i) The Range Forest Officer, Class II Recruitment Rules, 2008.

(ii) The Range Forest Officer, Class II Recruitment (Amendment) Rules, 2008.

(iii) The Range Forest Officer, Class II Recruitment (Amendment) Rules, 2009."

22. The State Government vide Notification dated 18.09.2008 framed the Examination Rules of 2008.

23. In the advertisement published by the GPSC inviting applications from the eligible candidates for the post of ACF (Class II) and RFO (Class II) dated 01.03.2010, upper age limit relaxation was granted to the candidates belonging to SC/ST and SEBC category. It was also specifically stated in the advertisement that if any candidate belonging to reserved category who applies in the open category, such candidate would not get the benefit of age relaxation. Such age relaxation was granted in pursuance to Rule 8 of Rules of 1967.

"8. Condition as to prescribed qualifications:

- 1) xxxx
- 2) Where the prescribed qualification

include a qualification as to age limit the appointing authority may relax the age limit in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Class and in favour of candidate who are women to the following extent, that is to say:

(a) in the case of a service or post in a subordinate service or of a State Service in respect of which the prescribed age limit does not exceed forty years, the age limit may be relaxed to the extent of five years.

(b) in the case of service or post in the State Service in respect of which prescribed age limit exceeds forty years, the age limit may be relaxed to the extent of maximum five years, so as to provide that upper age limit for entry in the service does not exceed forty five years."

24. 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.

25. In the instant case, State Government has framed policy for the grant of reservation in favour of SC/ST and OBC by the Circulars dated 21.01.2000 and 23.07.2004. The State Government has clarified that when a relaxed standard is applied in selecting a candidate for SC/ST, SEBC category in the age limit, experience, qualification, permitting number of chances in the written examination etc., then candidate of such category selected in the said manner, shall have to be considered only against his/her reserved post. Such a candidate would be deemed as unavailable for consideration against unreserved post.

26. Now, let us consider the judgment in Jitendra Kumar Singh (supra). In this case, this Court was considering the interpretation of Sub-section (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 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)."

27. 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 sub-section (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.

29. In Deepa (supra), the appellant had applied for the post of Laboratory Assistant Grade II in Export Inspection Council of India functioning under the Ministry of Commerce and Industry,

Government of India under OBC category by availing age relaxation. The Department of Personnel and Training had issued proceedings O.M. dated 22.05.1989 laying down the stipulation to be followed by various Ministries/Departments for recruitment to various posts under the Central Government and the reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates. Paragraph 3 of the said O.M. is as under:

"3. In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standards as applied to general candidates shall not be adjusted against reserved vacancies."

30. The judgment in Jitendra Kumar Singh (supra), was pressed into service in support of the contention that when a relaxed standard is applied in selecting Scheduled Castes, Scheduled Tribes and Other Backward Classes candidates, the same cannot be treated as a bar on such candidates for being considered for general category vacancies. This Court did not agree with the said proposition. It was held that Jitendra Kumar Singh (supra) was based on the statutory interpretation of the U.P. Act, 1994, and the GO dated 25.03.1994 which provides for an entirely different scheme. Therefore, the principles laid down in Jitendra Kumar Singh (supra) cannot be applied to the said case.

31. Similar question arose in Gaurav Pradhan (supra). In this case the Government had issued Circular dated 24.06.2008 which is as under:

"Circular dated 24.06.2008 6.2. In the State, members of the 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."

32. Taking into consideration the above circular, this Court held that the ratio of the judgment in Jitendra Kumar Singh (supra) has to be read in the context of statutory provisions and the GO dated 25.03.1994 and the said observation cannot be applied in a case where the Government Orders are to the converse effect. It was held as under:

"32. We are of the view that the judgment of this Court in Jitendra Kumar Singh which was based on statutory scheme and the 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."

33. The judgments in Deepa (supra) and Gaurav Pradhan (supra) fully support the case of the respondents.

34. The judgment in Ajithkumar (supra) relied on by the learned senior counsel for the appellant has no application to the facts of the instant appeal. In that case, this Court was not examining the effect of a statutory provision/circular granting age relaxation to the candidates belonging to the reserved category.

35. Similarly, in Vikas Sankhala (supra), relaxation of marks of TET was allowed to different categories (under the orders of the State Government dated 23.03.2011). After such relaxation, the reserved category candidates were selected as having obtained more marks than the last general candidate and were included as general category candidates. The general category candidates contended that since relaxation was obtained prior to the circular dated 11.05.2011, reserved category candidates were not eligible to be included as general category candidates. This Court, after noticing the circulars issued from time to time, held that relaxation given in the marks in the TET examination was not part of the recruitment process. This judgment also does not assist the appellant in any manner.

36. There is also no merit in the submission of the learned counsel for the appellant that relaxation in age at the initial qualifying stage would not fall foul of the circulars dated 29.01.2000 and 23.07.2004. The distinction sought to be drawn between the preliminary and final examination is totally misconceived. It is evident from the advertisement that a person who avails of an age relaxation at the initial stage will necessarily avail of the same relaxation even at the final stage. We are of the view that the age relaxation granted to the candidates belonging to SC/ST and SEBC category in the instant case is an incident of reservation under Article 16(4) of the Constitution of India.

37. There is no merit in this appeal. It is accordingly dismissed. However, the parties are directed to bear their own costs.

.....J. (S. ABDUL NAZEER)J. (INDIRA BANERJEE) New Delhi;

July 4, 2019.