

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8351 OF 2017
(ARISING OUT OF SLP(C) NO. 30603 OF 2014)

GAURAV PRADHAN & ORS. ... APPELLANTS

VERSUS

STATE OF RAJASTHAN & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO.7656 OF 2017
(ARISING OUT OF SLP(C) NO.34216 OF 2014)

SACHIN SHARMA AND ORS. ... APPELLANTS

VERSUS

STATE OF RAJASTHAN & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NO. 5305 OF 2015

IRFAN KHAN ... APPELLANT

VERSUS

STATE OF RAJASTHAN & ORS. ... RESPONDENTS

J U D G M E N T

ASHOK BHUSHAN, J.

In these appeals appellants challenge the common judgment dated 16.01.2014 of the Rajasthan

High Court deciding a batch of Special Appeals which arose out of judgment of learned Single Judge dated 27.04.2012 delivered in SB Civil Writ Petition No.15152 of 2011 and other connected matters and judgment dated 08.11.2013 in SB Civil Writ Petition No.4811 of 2013 and other connected matters. The judgment dated 27.04.2012 pertains to selection to various posts of constables whereas judgment dated 08.11.2013 pertains to selection on the post of Sub-Inspector of Police. The judgment dated 08.11.2013 was delivered following the earlier judgment dated 27th April, 2012. A large number of Special Appeals were filed against the aforesaid two judgments which were decided by the Division Bench by a common judgment dated 16.01.2004 which judgment is subject matter of these appeals.

2. Brief facts of the case which are necessary to be noted for deciding these appeals are:

The Rajasthan Police Subordinate Service Rules, 1989 has been framed by the State of Rajasthan for recruitment on various posts in the Police Establishment. Part III of the Rules provides for recruitment and Rule 7 provides reservation of vacancies for the Scheduled Casts and the Scheduled Tribes. The State Government had from time to time issued various orders/circulars providing for reservation as well as methodology for giving effect to the reservation. Circulars dated 17.06.1996, 04.03.2002 and 24.06.2008 were issued by the State Government providing for reservation.

3. The Rajasthan Public Service Commission issued an advertisement dated 14.10.2010 inviting applications for selection on various posts of constables. On 25.10.2010 another advertisement was issued by the Rajasthan Public Service Commission for selection on the post of Sub Inspector of Police. The selection process for the

posts of constables as well as post of Sub Inspector of Police comprised of the different stages. During process of selection, the State Government issued a circular dated 11.05.2011 providing that candidates of BC/SBC/SC/ST irrespective of whether they have availed of any concession including relaxation in age shall be migrated against open category vacancies if they have secured more marks than the last candidate of open category. Select list of constables was issued on 01.07.2011 whereas result of Sub Inspector of Police was issued on 25.02.2013. Various writ petitions were filed by the general category candidates where they have questioned the circular dated 11.05.2011 and preparation of select list accordingly. The case of the general category candidates was that those reserved category candidates who have taken concession of relaxation of age in competition for post of constable/SI of Police cannot be migrated to

general category vacancies. Learned Single Judge decided Special Writ Petitions *vide* judgment dated 27.12.2012 taking view that circular dated 11.05.2011 is not applicable since the recruitment process had began prior to circular 11.05.2011. It was held that migration of reserved category candidates to open/general category can be permitted as per earlier circular dated 24.06.2008. With regard to circular dated 11.05.2011, it was held that the said circular needs to be given proper interpretation. Learned Single Judge held that only those who have taken benefit of concession of fee and not the relaxation in age during the process of selection would be allowed to migrate to open/general category if obtained equal or more marks to the last candidate in open/general category. As noted above, other group of writ petitions was decided by the Single Judge *vide* judgment dated 08.11.2013 following the judgment dated 27.04.2012.

4. The Division Bench disposed of all the Special Appeals by modifying the judgment of learned Single Judge dated 27.04.2012 and 08.11.2013 to the extent that the relaxation in age having been availed by candidates of reserved category who find place in the select list on dint of merit of general/open category vacancies, deserve to be migrated against general/open category vacancies. However, candidates availing special relaxation/concessions while participating in competitive test/process of selection, if find place in select/merit list of general/open category vacancies, they are not eligible to be migrated against open/general category vacancies. Aggrieved by the aforesaid judgment all these appeals have been filed.

5. We have heard learned counsel for the appellants and learned counsel appearing for the State of Rajasthan as well as learned counsel appearing for private respondents.

6. Shri Sushil Kumar Jain, learned senior counsel for the appellants in support of the appeals contends that the reserved category candidates who had participated in the selection after obtaining the benefit of relaxation in age cannot be allowed to be treated in the open/general category and as per the Government circular dated 24.06.2008 such candidates have to be treated in the reserved category candidates. He submits that circular dated 11.05.2011 reversing the earlier provision for migration in the general/open category was not applicable in the present case since the advertisements were issued much before the aforesaid circular and the recruitment process had begun. It is submitted that the judgment relied on by the Division Bench in coming to the conclusion that relaxation in age does not prohibit the reserved category candidates from migrating the open/general category quota are not applicable in the facts of the present case. Shri Jain submits

that the issue raised in these appeals is fully covered by the judgment of this Court **dated 6th April, 2017 in C.A.No.3609 of 2017, Deepa E.V. vs. Union of India and ors.** It is submitted that in view of the judgment of this Court in **Deepa E.V.**, the appeals deserve to be allowed setting aside the judgment of the Division Bench and restoring that of learned Single Judge.

7. Shri Ajay Choudhary, learned counsel for the State of Rajasthan has supported the judgment of the Division Bench. He contends that relaxation of age does not debar the reserved category candidates in migrating to the general/open category quota, in the event, they have secured more marks to last general category candidate. It is submitted that circular dated 11.05.2011 is fully applicable in this recruitment. He further submits that judgment of this Court in **K. Manjusree vs. State of Andhra Pradesh, 2008(3) SCC 512**, has been referred to a larger bench of this

Court in ***Tej Prakash Pathak and others vs. Rajasthan High Court and others, 2013(4) SCC 540.***

Hence, the judgement of this Court in ***K. Manjusree*** need not be relied on.

8. Shri Choudhary further contends that relaxation in age being permissible in accordance with the Rajasthan Police Subordinate Service Rules, 1989 to the reserved category candidates, they are entitled to be counted in the general/open category, in the event, they have secured more marks to the last general category candidate. It is submitted that appointment letters have been issued to the reserved category candidates in accordance with the merit list as per circular dated 11.05.2011.

9. Learned counsel appearing for respondent Nos.6 to 9 supported the judgment of the Division Bench. He further submitted that all the private respondents have been appointed on the respective

posts and they are working for the last about four years. He further submits that even circular dated 24.06.2008 recognises that candidates belonging to reserved category shall be selected if they have obtained more than general category even if it leads to selection of more candidates than that provided by virtue of reservation. He has relied on latter part of paragraph 6.2 of circular dated 24.06.2008.

10. Learned counsel for the appellants has also brought on record circular dated 26.07.2017 issued by the Government of Rajasthan in the light of the judgment of this Court in **Deepa E.V. (supra)**. The State Government by circular dated 26.07.2017 has reiterated that if a candidate belonging to SC/ST/BC has not availed of any of the special concessions such as in age-limit, marks, physical fitness etc. in the recruitment process, which are available to the candidates belonging to these categories, except the concession of fees, and

secure more marks than the marks obtained by the last unreserved category candidate who is selected, such a candidate belong to the SC/ST/BC shall be counted against the unreserved category vacancies and not the vacancies reserved for the SC/ST/BC.

11. Learned counsel for the appellants has further submitted that there are large number of vacancies still lying vacant on which the appellants can be appointed. They submit that the appellants were denied the appointment illegally whereas they were fully entitled for appointment. Hence, this Court may direct the State to appoint the appellants on existing vacancies. Learned counsel for the State has, however, refuted the submission of the appellants regarding existence of vacancies.

12. We have considered the submissions of the parties and perused the records. From the submissions of the learned counsel for the parties

and materials on record the following issues arise for consideration in these appeals:

(1) Whether the reserved category candidates who had taken benefit of age relaxation in the selection in question and have obtained marks equal or more to last general category candidate would be treated in the general/open category candidates or ought to have been confined in the reserved category candidates.

(2) Whether the circular dated 11.05.2011 issued by the State Government changing the criteria for migrating reserved category candidates into general category candidates can be applied in respect to the selection which had already begun on issuance of advertisements dated 14.10.2010 and 25.10.2010.

13. The statutory Rules have been framed, namely, the Rajasthan Police Subordinate Service Rules,

1989. The Rules provide for composition and strength of the service, methods of recruitment, procedure for direct recruitment and other relevant matters. Rule 7 provides for reservation of vacancies for the Scheduled Castes and the Scheduled Tribes. Rule 7 which is relevant for this case is as follows:

"7. Reservation of vacancies for the Scheduled Castes and the Scheduled Tribes-
(1) Reservation of vacancies for the Scheduled Castes and the Scheduled Tribes shall be in accordance with the orders of the Government for such reservation in force at the time of recruitment i.e. by direct recruitment and by promotion.

... ..
"

14. As per Rule 7(1) orders were issued by the State of Rajasthan from time to time providing for reservations and matters connecting therewith. In the present case we are only concerned with the question of migration of reserved category candidate into general/open category candidate.

Hence, it is sufficient to note the relevant orders issued by the Government in the above context. The 1989 Rules do not contain any provision regarding migration of reserved category candidates into general/open category candidates, but the Government orders which were referable to Rule 7(1) do provide the criteria and basis for such migration. The circular dated 24.06.2008 was the last circular on the subject prior to initiation of recruitment process. Para 6.2 of the circular dated 24.06.2008 which has also been extracted by the Division Bench of the High Court is to the following effect:

"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."

15. It is also relevant to notice that during the process of selection, the Government issued circular on 11.05.2011 in supersession of earlier circular dated 04.03.2002. Before we notice circular dated 11.05.2011, it is relevant to note circular dated 04.03.2002 which is to the following effect:

"Circular dated 04.03.2002

(a) *If a candidate belonging to OBC/SC/ST has not availed of any of the special concessions which are available to the candidates belonging to these categories except the concession of fees, and he secures more marks than the marks obtained by the last general category candidate who is selected, such a candidate belonging to OBC/SC/ST shall be counted against the general category vacancies and not the vacancies reserved for the OBC/SC/ST, as the case may be.*

(b) *If any SC/ST candidate gets selected against the general category vacancies on the basis of his merit without availing of any of the special concessions which are available to the candidates belonging to these categories, except the concession of fees, such a*

SC/ST candidate, as the case may be, for all further service matters including further promotions and all the benefits which are admissible to the other SC/ST persons under the various service rules/ Government instructions shall be admissible to them."

16. Now we come to circular dated 11.05.2011 by which the earlier methodology of treating the reserved category candidates into general category candidates has been fully changed. Circular dated 11.05.2011 provides:

"Circular dated 11.05.2011

In super-session of this department circular of even number dated 04.03.2002 on the above-mentioned subject, the matter has been examined in consultation with Law Department, the following clarifications are here by issued for the guidance of all Appointing Authorities:-

(a) If a candidate belonging to BC/SBC/SC/ST irrespective of whether he has availed of or not any of the special concessions which are available to the candidate belonging to these categories and he secures more marks than the marks obtained

by the last unreserved category candidate who is selected, such a candidate belonging to BC/SBC/SC/ST shall be counted against the unreserved category vacancies and not the vacancies reserved for the BC/SBC/SC/ST, as the case may be.

... ..
"

17. The Government orders were issued by the State of Rajasthan as contemplated by Rule 7(1) of 1989 Rules which were in operation at the time of initiation of process of recruitment by Government orders dated 14.10.2010 and 25.10.2010. The Government orders provided that reserved category candidate who have taken any concession like age relaxation was not entitled to be migrated into the general/open category and only those reserved category candidates who have not taken any concession apart from concession of fee was entitled to be migrated into general/open category. The Division Bench of the High Court has after noticing all the relevant circulars on the

subject has itself recorded a finding to the above effect. It is relevant to refer to the aforesaid finding which is to the following effect:

"Circulars issued by State Government from time to time, are nothing more than guidelines issued for being followed by recruiting agencies/competent authority while filling up the vacancies of direct recruitment/promotion in service of the Government.

In later circular of 2008, the State Government further made it clear that 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.) available to them other than that relating to payment of examination fee in case of direct recruitment.

This consistency was followed by State Government in its standing order No.5/2010 dated 07.10.2010 followed for recruitment to the post of Constable notified vide advertisement dated 25/11/2010.

The State Government through out from June, 1996 consistently in its later circulars issued in March, 2002. June, 2008, October, 2010 (Standing Order No.5/2010) as per its policy decision directed that

the candidates belonging to SC/ST/OBC can compete against non-reserved vacancies provided they have not availed special concessions (like age etc.) other than examination fees.

However, there was a deviation in its later circular dated 11/05/2011 issued in the form of clarification laying down guidelines for the recruiting agency/authorities in supersession of its earlier circulars/directions and the State Government was of the view that candidates belonging to reserved category (BC/SBC/SC/ST) irrespective of having availed any of the special concessions (including of age) etc. which are available to the candidates belonging to the reserved categories, secure bench mark prescribed for general/open category candidates if selected, such a reserved category SC/ST/SBC candidate shall be counted against unreserved/open category seats."

18. A perusal of impugned judgment of the Rajasthan High Court indicates that the Division Bench relying on following has formed its opinion:

"(a) Earlier judgments of Rajasthan High Court, namely,

Chandra Bhan Yadav vs. State of Rajasthan, (2009) 2 WLC (Raj.) 454 and judgment of Single Judge in Mangala Ram Bishnoi & others vs. State, 2011 (1) WLC 148;

(b) Judgment of this Court in Jitendra Kumar Singh vs. State of U.P., 2010 (3) SCC 119; and

(c) Circular dated 11.05.2011 of the State Government."

19. Judgment of learned Single Judge in **Chandra Bhan Yadav (supra)** was a judgment where circulars issued by the State Government which are referable to Rule 7(1) of 1989 Rules relevant in the context of selection in question, were neither referred to nor considered. The learned Single Judge only relied on the judgments laying down that reserved category candidates selected in open competition shall not be counted in reserved quota and they shall be treated as open category candidates. There cannot be any dispute with the general proposition which stands well settled as laid down by nine Judge Bench in **Indra Sawhney and others**

vs. Union of India and others, 1997 Suppl. SCC

217. This Court in paragraph 811 laid down the following:

"811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

20. The another judgment of learned Single Judge relied on in the impugned judgment in **Mangala Ram Bishnoi (supra)** was a judgment where the learned Single Judge has placed heavy reliance on the judgment of **Jitendra Kumar Singh (supra)**. The circular of the State Government dated 04.03.2002 as applicable was considered in paragraph 34. But learned Single Judge, held that in view of the law laid down by this Court in **Jitendra Kumar Singh (supra)** circular dated 4.3.2002 does not remain

operative. We thus need to look into the judgment of this Court in ***Jitendra Kumar Singh's case (supra)***. The Division Bench further held that since the judgment of ***Mangala Ram Bishnoi (supra)*** which was judge made law was holding field, the State Government was required to permit migration of the reserved category candidates having obtained age relaxation into general category candidates and no exception can be taken in following the circular dated 11.05.2011.

21. As noted above, nine Judge Constitution Bench had laid down that if the members belonging to the reserved category get selected in the open competition field on the basis of their own merit, they will not be counted against the quota reserved for Scheduled Casts and they would be treated as open competition candidates. In ***Post Graduate Institute of Medical Education & Research, Chandigarh and others vs. K.L.***

Narasimhan and another, 1997(6) SCC 283, a three Judge Bench of this Court in paragraph 5 has laid down the following:

"5....It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

22. Article 16 sub-clause (4) of the Constitution of India is an enabling provision empowering the State for making any provision for the 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 services under the State. The orders issued by the State Government from time to time were the orders contemplated by Article 16 sub-clause (4). It is well settled by nine Judge Constitution Bench that

reservation in favour of backward classes can be provided by a State Government by an executive order also.

23. The reservation being the enabling provision the manner and extent to which reservation is provided has to be spelled from the orders issued by the Government from time to time. In the present case there is no issue pertaining to the extent of reservation provided by the State Government to the SC, ST and OBC candidates. The issue involved in the present case is as to whether the reserved category candidates can be allowed to be migrated into general category candidates. The reservation is wide enough to include exemption, concession etc. The exemption, concession etc. are allowable to the reserved category candidates to effectuate and to give effect to the object behind Article 16 sub-clause (4) of the Constitution of India. The State is

fully empowered to lay down the criteria for grant of exemption, concession and reservation and the manner and methodology to effectuate such reservation. The migration of reserved candidates into general category candidates is also part and parcel of larger concept of reservation and the Government orders issued on 17.06.1996, 04.03.2002 and 24.06.2008 were the Government orders providing for methodology for migration of reserved category candidates into general category candidates which was well within the power of State. Neither before us nor even before the High Court the aforesaid Government orders, last being 24.06.2008, were under challenge. As noted above, the High Court itself has returned a finding that earlier methodology of providing for migration of reserved category candidates into general category candidates was reversed by order dated 11.05.2011 by which despite taking any special concession

reserved category candidates could be migrated into general category candidates.

24. Now we come to the judgment of this Court in ***Jitendra Kumar Singh vs. State of U.P., 2010 (3) SCC 119***. In the above case also the question which had come up for consideration was as to whether reserved category candidates who have taken the age relaxation and secured more marks to the last candidate in the general category candidate should be treated to be in general category. In para 23 the issue which was involved in the case was noted in the following words:

"23. We have heard the learned counsel for the parties. Mr L.N. Rao, learned Senior Counsel appearing on behalf of the appellants submitted that the cardinal issue raised in these appeals is whether the reserved category candidates who had taken the benefit of age or fee relaxation, are entitled to be counted as general category candidates. According to the learned Senior Counsel, the Division Bench has erred in law in concluding that

relaxation in age and fee cannot be treated to be relaxation in standard of selection and shall not deny a reserved category candidate's selection in open competition with general category candidate."

25. This Court had considered the above issue in the context of U.P. Public Services (Reservation for Scheduled Casts, Scheduled Tribes and Other Backward Classes) Act, 1994. Section 3 of the Act provided for reservation in favour of ST, SC and other backward classes. Section 3 sub-Section (6) of 1994 Act provided as following :

"Section 3. Reservation in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes.-

(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentages of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -

<i>(a) in the case of Scheduled Castes</i>	<i>twenty-one per cent;</i>
<i>(b) In the case of Scheduled Tribes</i>	<i>two per cent;</i>
<i>(c) in the case of Other Backward</i>	<i>twenty-seven per cent;</i>

Classes of citizens

Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II.

... ..
... ..

(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).

... .."

26. The State of U.P. issued instructions dated 25.3.1994 which have been extracted in paragraph 72 of the judgment. Para 72 stated below:

"72. Soon after the enforcement of the 1994 Act the Government issued Instructions dated 25-3-1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and other

backward groups in the Uttar Pradesh Public Services. 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 category candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category."

From the above it becomes quite apparent that the relaxation in age-limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. main written test followed by interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that government orders in force on the

commencement of the Act in respect of the concessions and relaxations including relaxation in upper age-limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked."

27. The last line of the the Government instructions dated 25.03.1994 as quoted above provided "It shall be immaterial that he has availed any facility or relaxation (like relaxation in age-limit) available to reserved category".

28. The provisions of Section 3 sub-Section (6) of 1994 Act read with instructions dated 25.3.1994 clearly meant that grant of age relaxation to reserved category candidate does not militate against him being treated as general category candidate if he has obtained more marks than the last general category candidate. This Court in the above case has also made general observation

specially in para 75 which is to the following effect:

"75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfil the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the preliminary test as also in the physical test.

It is only thereafter that successful candidates have been permitted to participate in the open competition."

29. The ratio of the judgment in **Jitendra Kumar Singh** has to be read in the context of statutory provisions and the Government orders dated 25.3.1994 and the said observation cannot be applied in a case where the Government orders are to the converse effect. As noted above State of Rajasthan has issued circular dated 24.06.2008 where following is provided in para 6.2:

"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."

30. It is relevant to note that in the case before us circular dated 24.06.2008 was not under

challenge. The State has come up with circular dated 11.05.2011 which was issued during process of recruitment. The Division Bench has already recorded a finding that recruitment process had begun prior to circular dated 11.05.2011. The State clearly provided that candidates belonging to reserved category irrespective of having availed any of the special concessions secure bench mark prescribed for general/open category candidates if selected, such a reserved category candidate shall be counted against unreserved/open category candidates.

31. We are of the view that judgment of this Court in **Jitendra Kumar Singh** which was based on statutory scheme and circular dated 25.03.1994 has to be confined to scheme which was under consideration, statutory scheme and intention of the State Government as indicated from the said scheme cannot be extended to a State where the

State circulars are to the contrary especially when there is no challenge before us to the converse scheme as delineated by circular dated 24.06.2008.

32. In a recent judgment this Court has occasion to consider the judgment of this Court in **Jitendra Kumar Singh** case. Learned counsel for the appellants has placed much reliance on the judgment of this Court dated 6th April, 2017 in C.A. No.3609 of 2017, **Deepa E.V. vs. Union of India**. It is necessary to notice the facts of the case and the issues decided by this Court in **Deepa E.V.** The appellants before this Court was an OBC category candidate who claimed that she should be treated as general category candidate. The appellant had availed the age relaxation as OBC category candidate. A writ petition was filed by the appellant claiming that she should be treated as candidate in general category. The learned

Single Judge dismissed the writ petition by judgment dated 16.01.2015 which judgment was affirmed by the Division Bench in the writ appeal. In paragraph 2 of the judgment facts were noted to the following effect:

"2. The appellant 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. The appellant belongs to Dheevara community which is one of the "Other Backward Class". Since the appellant was aged 26 years, she got age relaxation, as was granted to OBC category candidates. The appellant was one of the eleven candidates from OBC who were called for interview. The appellant secured 82 marks (in the list of candidates from OBC category). One Ms. Serena Joseph (OBC), who secured 93 marks was selected and appointed."

33. In paragraph 5 of the judgment this Court has noticed Rule 9 of the Export Inspection Agency (Recruitment) Rules, 1980 which governs the recruitment. The Department of Personnel and Training had issued circulars dated 22.05.1989 and

01.07.1998 for recruitment to various posts and in paragraph 6 of the judgment the entire circular has been extracted. Paragraph 6 of the judgment is extracted below:

"6. Department of Personnel and Training had issued proceedings O.M. No.36012/13/88-Estt. (SCT), dated 22.5.1989 and OM No.36011/1/98-Estt. (Res.), dated 1.7.1998 laying down stipulation to be followed by the various Ministries/Department for recruitment to various posts under the Central Government and the reservation for SC/ST/OBC candidates. The proceedings reads as under:-

"G.I. Dept. of Per. & Trg., O.M. No. 36012/13/88-Estt. (SCT), dated 22.5.1989 and OM No.36011/1/98-Estt. (Res.), dated 1.7.1998

"Subject:- Reserved vacancies to be filled up by candidates lower in merit or even by released standards-candidates selected on their own merits not to be adjusted against reserved quota."

As part of measure to increase the representation of SC/ST in the services under the Central Government, the Government have reviewed the procedure for implementation the policy of reservation while filling up reserved share of vacancies for Scheduled Castes and

Scheduled Tribes by direct recruitment. The practice presently 3 Page 4 being followed is to adjust SC/ST candidates selected for direct recruitment without relaxation of standards against the reserved share of vacancies. The position of such SC and ST candidates in the final select list, however, was determined by their relative merit as assigned to them in the selection process. When sufficient number of suitable Scheduled Caste and Scheduled Tribe candidates were not available to fill up all the reserved share of vacancies, SC/ST candidates were selected by relaxed standards.

2. It has now been decided that in cases of direct recruitment to vacancies in posts under the Central Government, the SC and ST candidates who are selected on their own merit, without relaxed standards along with candidates belonging to the other communities, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible SC and ST candidates which will thus comprise SC and ST candidates who are lower in merit than the last candidate on the merit list but otherwise found suitable for appointment even by relaxed standards, if necessary.

3. All Ministries/Departments will immediately review the various Recruitment Rules/Examination Rules to ensure that if any provision is contrary to the decision contained in previous paragraph exist in such rules, they are immediately suitably modified or deleted.

4. These instructions shall take immediate effect in respect of direct recruitment made hereafter. These will also apply to selections where though the recruitment process has started, the result have not yet been announced unless in the

Examination/Recruitment Rules or in the advertisement notified earlier there is a specific provision to the contrary and the manner in which the SC/ST vacancies could be filled has been indicated.

Clarification:- The instructions contained in the above OM apply in all types of direct recruitment whether by written test alone or written test followed by the interview alone.

2. The above OM and the O.M. No.36012/2/96-Estt.(Res.), dated 2.7.1997 provide that in cases of direct recruitment, the SC/ST/OBC candidates who are selected on their own merit will not be adjusted against reserved vacancies. 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. In other words, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

(Underlining added)"

34. After reading Rule 9 as well as circular dated 01.07.1998 this Court held that there is express bar for candidates belonging to SC, ST and OBC

having availed relaxation to be considered as general category candidates.

35. In **Deepa E.V.** reliance was also placed on **Jitendra Kumar Singh**. This Court considered the case of **Jitendra Kumar Singh** and the circular dated 25.03.1994 issued by the State of U.P. which come up for consideration in **Jitendra Kumar Singh**. This Court in **Deepa E.V.** has distinguished **Jitendra Kumar Singh** in paragraphs 8, 9 and 10 which is to the following effect:

"8. Learned counsel for the appellant mainly relied upon the judgment of this Court in Jitendra Kumar Singh and Another v. State of Uttar Pradesh and Others, reported in (2010) 3 SCC 119, which deals with the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and Government order dated 25.3.1994. On a perusal of the above judgment, we find that there is no express bar in the said U.P. Act for the candidates of SC/ST/OBC being considered for the posts under General Category. In such facts and circumstances of the said case, this Court has taken the

view that the relaxation granted to the reserved category candidates will operate a a level playing field. In the light of the express bar provided under the proceedings dated 1.7.1998 the principle laid down in *Jitendra Kumar Singh (supra)* cannot be applied to the case in hand.

9. Learned senior counsel appearing for the respondents has also drawn our attention to paragraph Nos.65 and 72 in *Jitendra Kumar Singh (supra)* to contend that principle in *Jitendra Kumar Singh (supra)* are in the context of interpretation of U.P. Act 1994 and in the particular factual situation of the said case. Paragraphs 65 and 72, read as under:-

"65. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the Instructions dated 25.3.1994 and the G.O. dated 26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus becoming eligible to be considered against a reserved

vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category.

72. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.3.1994 on the subject of reservation for Scheduled Castes, Scheduled Tribes and other backward groups in the Uttar Pradesh Public Services. 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 category candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."

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

to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked."

10. Having regard to the observations in paragraphs 65 and 72, in our view, the principles laid down in *Jitendra Kumar Singh (supra)* cannot be applied to the case in hand. As rightly pointed out by the High Court that judgment in *Jitendra Kumar Singh (supra)* was based on the statutory interpretation of the U.P. Act, 1994 and Government order dated 25.3.1994 which provides for entirely a different scheme."

36. The judgment of this Court in **Deepa E.V.** fully supports the case of the appellants. In **Deepa E.V.** case also circular of the Central Government dated 01.07.1998/02.7.1997 provided the relevant provision which is to the following effect:

"6....In other words, when a relaxed standard is applied in selecting an SC/ST/OBC candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for general category candidates, etc., the SC/ST/OBC candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies."

37. The contents of the above circular which speaks age relaxation and makes reserved category candidates ineligible to be treated into general category candidates is same as in para 6.2 of circular dated 24.06.2008 as noted above which is

applicable in the present case. Case of **Jitendra Kumar Singh is** distinguishable with the present case as has been distinguished by this Court in **Deepa E.V. case.**

38. After the judgment of this Court in **Deepa E.V. (supra)**, the State of Rajasthan has issued circular dated 26.07.2017 in the light of the judgment passed by this Court in **Deepa E.V.** By circular dated 26.07.2017 directions have been issued to all the Appointing Authorities. It is useful to refer to the circular dated 26.07.2017 which is to the following effect:

"CIRULAR

Subject: *Treatment to be given to the candidates belonging to the SC/ST/BC who are selected against reserved category vacancies on the basis of their merit.*

In supersession of this departments circular even number dated 04.03.2014 on the above-mentioned subject, the matter has been examined in consultation with the Law Department in the light of judgment passed by the Hon'ble Supreme Court in Civil Appeal

No.3609 of 2012-Deepa E.V. V/s Union of India and Ors. Dated 06.04.2017, following instructions are hereby issued for the guidance of all Appointing Authorities:-

- (a) Of a candidate belonging to SC/ST/BC has not availed of any of the special concessions such as in age-limit, marks, physical fitness etc. in the recruitment process, which are available to the candidates belonging to these categories, except the concession of fees, and he secures more marks than the marks obtained by the last UR category candidate who is selected, such a candidate belonging to the SC/ST/BC shall be counted against the UR category vacancies and not the vacancies reserved for the SC/ST/BC, as the case may be.
- (b) If any SC/ST candidate gets selected against the UR category vacancies on the basis of his merit without availing of any of the special concessions which are available to the candidates belonging to these categories, except the concession of fees, such a SC/ST candidate will be treated as a SC/ST candidate, as the case may be, for all further services matters, including further promotions, and all the benefits which are admissible to the other SC/ST persons under

*the various service rules/
government instructions shall
be admissible to them.*

*(c) The SC/ST/BC category candidates
who get selected against UR
category vacancies on the basis
of their merit without availing
of any of the special concessions
which are available to the
candidates belonging to those
categories, except the
concession of fees, will not be
counted against the posts
reserved for these categories
when it comes to the question of
determining the total number of
posts occupied by the
candidates of these categories
in the particular post/cadre."*

39. Circular dated 26.07.2017 is the reiteration of earlier position as was provided by circular dated 24.06.2008 quoted above. Thus, the position is now well accepted even by State of Rajasthan that those candidates belonging to SC/ST/BC who have obtained concession of age are not eligible to be migrated to the unreserved vacancies. Circular dated 24.06.2008 being very much in existence, law laid down by this Court in **Deepa**

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

40. At this stage, one of the submissions raised by the learned counsel for respondent Nos.6 to 9 needs to be considered. Learned counsel for respondent Nos.6 to 9 referring to paragraph 6.2 of circular dated 24.06.2008 has emphasised on following part of circular dated 24.06.2008:

"6.2.....On the other hand, women, persons with disabilities, sports persons, in-servicemen or non-gazetted employees and ex-servicemen are counted against their respective category, even if they are suitable for selection against non-reserved or open competition vacancy/post. But it may be noted that if any remaining candidate of these categories after providing the vacancies/posts reserved for them are more meritorious than the last person of the open competition category, such candidate will be selected even if it leads to selection of more

candidates than that provided by virtue of reservation....."

His submission is that if members of the SC/ST/OBC are more meritorious than the last person of the open competition category, such candidate will be selected even if it leads to selection of more candidates than that provided by virtue of reservation. The above submission of the learned counsel for respondent Nos.6 to 9 is not based on correct reading of paragraph 6.2. The opening part of paragraph 6.2 clearly states following:

"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.) available to them other than that relating to payment of examination fee in case of direct recruitment...."

41. In the event, the submission of learned counsel for respondent Nos.6 to 9 is accepted the

above two parts of paragraph 6.2 shall become clearly contradictory. Since, in the beginning it is clearly stated that candidates of *SC/ST/OBC* shall be counted against unreserved vacancies whereas if second part read as contended by the learned counsel for the private respondents, the first part of paragraph becomes redundant and unnecessary. The scheme of circular dated 24.06.2008 is not so as contended by the learned counsel for the private respondents. The part on which reliance has been placed by the learned counsel for respondent Nos.6 to 9 is a part which deals with the case of women, persons with disabilities, sports persons, in-servicemen or non-gazetted employees and ex-servicemen, for those categories it is provided that if they have obtained marks more than the last person of the open competition category, they will be adjusted against unreserved candidates. Thus, the above

submission of learned counsel for the private respondents cannot be accepted.

42. One more judgment of this Court which needs to be referred to is **Vikas Sankhala and others vs. Vikas Kumar Agarwal and others, (2017) 1 SCC 350.**

Somewhat similar issues were raised in above case with regard to migration of reserved category candidates into general category which was objected by the candidates belonging to general category on the ground that they have been selected after obtaining relaxation of marks permissible to reserved category candidates. They are not entitled to be included into general category. The issue is mentioned in paragraph 24 which is to the following effect:

"24. It so happened that many candidates who belonged to reserved category got higher marks than the last candidates from the general category who was selected for the appointment in the said recruitment process. In terms of its various circulars, which we shall refer to

at the appropriate stage, such reserved category candidates who emerged more meritorious than the general category candidates were allowed to migrate in general category. Effect thereof was that these candidates though belonging to reserved category occupied the post meant for general category. According to the writ petitioners (the respondents herein), it was impermissible as these reserved category candidates got selected after availing certain concessions and, therefore, there was no reason to allow them to shift to general category. The High Court has accepted this plea treating the relaxation in pass marks in TET as concession availed by the reserved category candidates in the selection process."

43. Under the orders of the State Government dated 23.3.2011 relaxation in marks of the TET ranging from 10% to 20% was allowed to different reserved categories. After availing such relaxation the reserved category candidates were selected as having obtained more marks than the last general category candidate and were included in the general category candidates. Different circulars

issued by the State of Rajasthan including circulars dated 17.06.1996, 04.03.2002 and 11.05.2011 were noticed by this Court. The general category candidates contended that since relaxation was obtained prior to issuance of circular dated 11.05.2011, circular dated 11.05.2011 is not applicable and as per earlier circulars reserved category candidates having obtained relaxation in marks were not eligible to be included into general category candidates. This Court after noticing the above arguments, ultimately held that the relaxation given in the marks in TET examination is not part of recruitment process. In paragraph 80 of the judgment this Court reached on following conclusion:

"80.....Thus, in recruitment process no weightage or concession is given and allocation of 20% of TET marks is applied across the board. Therefore, the High Court is not correct in observing that concession was given in the

recruitment process on the basis of relaxation in TET."

44. This Court having come to the conclusion that relaxation given in TET was not part of recruitment process, the Circulars issued by the State of Rajasthan as noted above were held not to be applicable. Thus, in the above case although somewhat similar issues were raised but this Court has held that relaxation in TET marks was not part of recruitment process. The said judgment does not help either of the parties.

45. The Division Bench as well as learned counsel appearing for the State of Rajasthan has relied on circular dated 11.05.2011. The Division Bench has observed that circular dated 11.05.2011 did not change the rules of game. Following observation has been made with regard to circular dated 11.05.2011:

"In the instant case, State Government in supersession of its earlier policy decision regarding treatment to be given to the

candidates belonging to reserved category who are selected against unreserved category vacancies, issued directives for guidance to the appointing authorities vide Circular dated 11/5/2011 that neither changed the eligibility criteria seeking employment nor manner & method of selection of suitable candidates and in our considered view, circular dated 11/05/2011 did not change Rules of the game after the game is played or process of selection is initiated as observed by the learned Single Judge but such policy decisions are always within realm of judicial review and this what the Court considered & examined policy decision of the Government impugned."

46. As noticed above Rule 7(1) of 1989 Rules expressly provides that "reservation of vacancies for the Scheduled Castes and the Scheduled Tribes shall be in accordance with the orders of the Government for such reservation in force at the time of recruitment i.e. by direct recruitment and by promotion".(underlined by us). The circular of the Government shall be treated to be in force for the purpose of reservation which is in force

at the time of recruitment. Recruitment commenced by the advertisement dated 7.10.2010 and 25.10.2010 at that time only circular dated 24.06.2008 was in force, hence, subsequent circular dated 11.05.2011 cannot be applied in the present recruitment. There cannot be any dispute that the policy of reservation can always be changed by the State Government and the State Government can change the manner and methodology of implementing the reservation and criteria of reservation of the reserved category candidates and general category candidates. It is also relevant to note that both learned Single Judge and Division Bench have not approved circular dated 11.05.2011 in toto. Both the Courts have held that apart from age relaxation, if the candidate has taken any other relaxation circular dated 11.05.2011 cannot help him in migrating into general category candidate.

47. We are thus of the opinion that Division Bench erred in modifying the judgment of the learned Single Judge and holding that candidates availing relaxation of age belonging to reserved category candidates who find place in merit list of the general/open category has to be treated to be included in the general/open category. The above conclusion of the Division Bench is unsustainable for the reason as indicated above.

48. In view of the foregoing discussion, we are of the considered opinion that the candidates belonging to SC/ST/BC who had taken relaxation of age were not entitled to be migrated to the unreserved vacancies, the State of Rajasthan has migrated such candidates who have taken concession of age against the unreserved vacancies which resulted displacement of a large number of candidates who were entitled to be selected against the unreserved category vacancies. The

candidates belonging to unreserved category who could not be appointed due to migration of candidates belonging to *SC/ST/BC* were clearly entitled for appointment which was denied to them on the basis of the above illegal interpretation put by the State. We, however, also take notice of the fact that the reserved category candidates who had taken benefit of age relaxation and were migrated on the unreserved category candidates and are working for more than last five years. The reserved category candidates who were appointed on migration against unreserved vacancies are not at fault in any manner. Hence, we are of the opinion that *SC/ST/BC* candidates who have been so migrated in reserved vacancies and appointed should not be displaced and allowed to continue in respective posts. On the other hand, the unreserved candidates who could not be appointed due to the above illegal migration are also entitled for

appointment as per their merit. The equities have to be adjusted by this Court.

49. On the question of existence of vacancies, although learned counsel for the appellant submitted that vacancies are still lying there, which submission however has been refuted by the learned counsel for the State of Rajasthan. However, neither appellants had produced any details of number of vacancies nor the State has been able to inform the Court about the correct position of the vacancies. We thus for adjusting the equity between the parties issue following directions:

(1) The writ petitioners/appellants who as per their merit were entitled to be appointed against unreserved vacancies which vacancies were filled up by migration of *SC/ST/BC* candidates who had taken relaxation of age should be given appointment on the posts. The State is directed to work out and issue appropriate orders for

appointment of such candidates who were as per their merit belonging to general category candidates entitled for appointment which exercise shall be completed within three months from the date copy of this order is produced.

(2) The State shall make appointments against the existing vacancies, if available, and in the event there are no vacancies available for the above candidates, the supernumerary posts may be created for adjustment of the appellants which supernumerary posts may be terminated as and when vacancies come into existence.

50. All the appeals are allowed accordingly.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI,

AUGUST 18, 2017.

ITEM NO.1501
(For judgment)

COURT NO.7

SECTION XV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No. 8351/2017

GAURAV PRADHAN AND ORS.

Appellant(s)

VERSUS

STATE OF RAJASTHAN AND ORS.

Respondent(s)

WITH

C.A. No. 7656/2017

C.A. No. 5305/2015

Date : 18-08-2017

These matters were called on for pronouncement of judgment today.

For parties

Mr. Rishabh Sancheti, Adv.
Mr. G. M. Padma Priya, Adv.
Mr. Parijata Bhardwaj, Adv.
Mr. Dhruv Sharma, Adv.
Mr. Jaywant Patankar, Adv.
Mr. T. Mahipal, AOR

Ms. Pratibha Jain, AOR

Mr. K. L. Janjani, Adv.
Mr. Pankaj Kumar Singh, Adv.
Mr. Manindra Dubey, Adv.
Ms. Ruchi Kohli, AOR

Mr. Umang Shankar, AOR

Mr. Ajay Choudhary, AOR

Mr. Jasmeet Singh, AOR

Mr. Milind Kumar, AOR

Hon'ble Mr. Justice Ashok Bhushan pronounced the judgment of the Bench comprising Hon'ble Mr. Justice A.K.Sikri and His Lordship.

The appeals are allowed in terms of the signed reportable judgment.

(NIDHI AHUJA)
COURT MASTER

(MALA KUMARI SHARMA)
COURT MASTER

[Signed reportable judgment is placed on the file.]