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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:- 02.08.2019
Date of Decision:- 28.08.2019

\+ W.P.(C) 747/2018, C.M. APPL.3130/2018 & 14752/2018

MANISH SHARMA ..... Petitioner
Through : Mr. Ravi Kant Chadha, Sr. Advocate with Mr. Sanjeev Sharma, Ms. Mansi Chadha, Mr. Sameer Rohtagi, Mr. Siddhant Chaudhary and Mr. Akshit Kumar, Advocates.
Petitioner in person.

versus

LT. GOVERNOR AND ORS. ..... Respondents
Through : Mr. N.K. Singh with Ms. Palak Rohmetra, Advocates, for respondent No.1.
Mr. Viraj. R. Datar, Mr. Nitish Chaudhary and Ms. Meenal Duggal, Advocates, for DHC.
Mr. Pradeep Kumar Bakshi, Mr. Hardik Luthra and Mr. Alok Shukla, Advocates, for respondent No.3.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE REKHA PALLI

JUDGMENT

REKHA PALLI, J

1. The present writ petition under Article 226 of the Constitution of India has been preferred by a General category candidate assailing his non-selection in the Delhi Higher Judicial Services. The petitioner was a candidate in the Delhi Higher Judicial Service Examination

2015 ('DHJSE 2015' for short) and having been placed at the third position in the merit list of General candidates, is aggrieved by his non-appointment to the Delhi Higher Judicial Service (`DHJS' for short) despite the availability of three vacancies for candidates in the General category, as per the advertisement.

2. The undisputed facts of the case are that on 23.12.2015, an advertisement was issued by the respondent no.2/Delhi High Court inviting applications from interested candidates to fill 9 vacancies in the Delhi Higher Judicial Services by participating in the DHJSE, 2015. As per the said advertisement, 3 out of these 9 vacancies were reserved for candidates belonging to the General category, 2 vacancies were reserved for the Scheduled Castes category and the remaining 4 vacancies were reserved for the Scheduled Tribes category. The advertisement also stated that out of the 9 vacancies, 01 vacancy was reserved for physically handicapped persons. The relevant extract of the advertisement, along with the relevant part of the Instructions annexed to the advertisement, is reproduced hereinbelow:-

"PUBLIC APPOINTMENT
HIGH COURT OF DELHI: NEW DELHI
(website : www.delhihighcourt.nic.in)
DELHI HIGHER JUDICIAL SERVICE EXAMINATION-2015

THE HIGH COURT OF DELHI invites online applications from eligible candidates for filling up 09 vacancies by way of direct recruitment in Delhi Higher Judicial Service by holding Delhi Higher Judicial Service Examination in two successive stages:-

(i) Delhi Higher Judicial Service Preliminary Examination (objective type with 25% negative marking) for selection to the main examination; and
(ii) Delhi Higher Judicial Service Main Examination (Descriptive) for selection of candidates for calling for Viva voce.

The Delhi Higher Judicial Service Preliminary Examination (Objective Type) referred to above, will be held on ***Sunday, the 3rd April, 2016.***

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The number of vacancies to be filled are as under:-

Category	***No. of vacancies***
General	*03*
SC	*02*
ST	*04*
Total	***09***

Note 1: Out of aforesaid 09 vacancies, 01 vacancy is reserved for Physically Handicapped (Ortho.) candidate.

Note 2: The above vacancies are subject to the outcome of CA No.1086/2013 pending in Supreme Court of India and W.P.(C)No.2828/2010, W.P.(C)No.9370/2015 and W.P.(C)No.10113/2015 pending in Delhi High Court.

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A candidate shall be eligible to appear in the viva voce only in case he secures 50% marks in the written examination i.e. the aggregate of both parts (Preliminary and Main(Descriptive)) in the case of General category and 45% marks in case of reserved category."

3. The petitioner, desirous of being appointed to the Delhi Higher Judicial Services, submitted his application as a General category

candidate for the DHJSE, 2015. The preliminary examination for the DHJSE, 2015 was held on 03.04.2016 and the results thereof were declared on 26.08.2016, wherein 18 candidates including the petitioner herein had qualified. Respondent no.3, who is a physically handicapped candidate, challenged some of the answers in the answer-key of the preliminary examination by filing *W.P.(C)No.7863/2016*, which was allowed. Thereafter, the revised result was declared on 20.10.20116, in which 16 more candidates including the respondent no.3 were declared as qualified to appear in the main examination. The main examination was conducted on 12&13.11.2016, which was followed by a *viva voce* held on 28.11.2017. For appearing in the viva voce, which was the final stage of the selection process, a General category candidate was required to secure at least 50% marks in the written examination while a reserved category candidate was required to secure 45% marks. The final result of the successful candidates was declared on 05.12.2017. As per the final result, only 5 vacancies could be filled; 3 belonged to the General category candidates, out of which 1 vacancy was allotted to the respondent no.3 as a Physically Handicapped (Ortho.) candidate, while the remaining 2 vacancies were filled by candidates belonging to the Scheduled Caste category. The 4 vacancies reserved for Scheduled Tribe candidates remain unfilled and, therefore, only 5 out of the 9 advertised vacancies could be filled. The relevant extract of the notice dated 05.12.2017, issued by the respondent no.2, declaring the final result is reproduced hereinbelow:-

"NOTICE

S. No.	*Roll No. (Descriptive)*	*Name*	*Category*	*Marks obtained in Preliminary (Objective) Max Marks-250*	*Marks obtained in Main (Descriptive) Max Marks-500*	*Total Marks obtained Max Marks 750*	*Marks obtained in viva voce (Max Marks 250)*	*Grand Total marks obtained out of 1000 marks*	*Result/Standing in order of merit.*
1	*003*	*Arun Shukhija*	*General*	*151.00*	*315*	*466.00*	*169.00*	*635.00*	*1*
2	*007*	*Hasan Anzar*	*General*	*166.50*	*267*	*433.50*	*185.00*	*618.50*	*2*
3	*005*	*Vineet Kumar*	*SC*	*151.00*	*253*	*404.00*	*162.00*	*566.00*	*3*
4	*014*	*Hargurvarinder S Jaggi*	*General PH (ORTHO)*	*146.00*	*223*	*369.00*	*191.00*	*560.00*	*4*
5	*028*	*Shivaji Anand*	*SC*	*146.50*	*235*	*381.50*	*156.00*	*537.50*	*5*

4. Aggrieved by his non-inclusion in the final select list, the petitioner submitted representations dated 08.12.2017 and 16.12.2017 to the respondent no.2/Delhi High Court, wherein he contended that the third General vacancy had been erroneously allotted to the respondent no.3, even though he had scored only 49.20% marks in the main examination, which was below the minimum requirement of 50% marks for a General category candidate. It was stated that the Rights of Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 (hereinafter referred to as "the PWD Act") merely provided for reservation for physically handicapped candidates, but did not provide for granting any

relaxation to them in terms of the minimum qualifying marks. It was further stated that keeping in view the fact that the selection process had taken almost 2 years for completion, it would be in public interest to convert one of the many unfilled vacancies from the Scheduled Tribe category to the General category for being filled by successful candidates of the General category, who though meritorious, could not be appointed for want of vacancies in the said category.

5. As the petitioner's representations remained unanswered, he approached this Court by filing W.P.(C) No.11620/2017, which was disposed of with directions to the respondent no.2 to decide his representations within a period of 3 weeks. Thereafter, on 12.01.2018, the petitioner's representations were duly considered by the Selection Committee of the High Court for the DHJSE, 2015 and were rejected. Vide communication dated 19.01.2018, the petitioner was informed about the rejection of his representations. Assailing his non-appointment to the DHJS on the same grounds as were taken by him in his representations, the petitioner has filed the present writ petition. The prayers made in the writ petition read as under:-

> "*(a) Issue a writ, order and/or direction in the nature of Mandamus directing the respondent nos.1 & 2 to publish select list of candidates successful in the DHJSE 2015 in the order of merit in accordance with the number of vacancies available as on date and make appointments in accordance therewith;*
>
> *(b) Issue a writ, order and/or direction in the nature of Mandamus declaring relaxation of minimum marks of 50% General category in case of Horizontal Reservation for general physically handicapped candidates to be invalid and directing the Respondent nos.1 & 2 to redraw the select*

and merit list by refraining from relaxing the requirement of minimum 50% for general category for candidate(s) eligible for horizontal reservation available for physically handicap candidates; and

(c) Issue a writ, order and/or direction in the nature of Mandamus directing the respondent nos.1 & 2 to de-reserve the accumulated/unfilled vacancies of ST category which have not been filled in accordance with law;

(d) Issue a writ, order and/or direction in the nature of Mandamus directing that the vacancies wrongly advertised for reserved category breaching the ceiling of 50% rule shall be given to candidates of General category or in alternate 01 vacancy of General category be increased/retained or in alternate the advertisement of Delhi Higher Judicial Service may be quashed/set aside as bad in law of 2015.

(e) Issue a writ, order and/or direction in the nature of Mandamus directing the respondent nos.1 & 2 to issue the appointment letter to the petitioner who successfully qualified and archived the 3rd rank in the merit list.

(f) Issue a writ, order and/or direction in the nature of Mandamus directing the respondent no.2 to produce the roster register prepared for the physically handicap persons as per the guidelines/instructions for physically handicap persons and fill their vacancy separately from the ones advertised in the general category.

(g) Pass such other and further orders which this Hon'ble Court may deem fit and proper.

6. It is noteworthy that during the pendency of the petition, the petitioner had moved an application for seeking amendment of the prayer clause to include a challenge to the communication dated 19.01.2018 issued by the respondent no.2 which was allowed and the

following additional prayer was permitted to be incorporated in the prayer clause:-

> *" (h) Issue a writ, order and/or direction in the nature of Certiorari or any other writ to set aside/quash the order dated 19.01.18 passed by the respondent no.2 disposing of representations dated 08.12.17 and 16.12.17 and grant all consequential benefits to the petitioner as per law"*

7. Respondent nos. 2 and 3 filed their respective counter affidavits opposing the petition on almost similar grounds. The common plea of the respondents in their respective counter affidavits is that even though the petitioner had been placed at Serial No. 3 in the merit list of the General candidates, but in view of the fact that the reservation available to a physically handicapped candidate is in the nature of a horizontal reservation, the third General category vacancy had to necessarily be given to the respondent no.3 as he was not only the most meritorious amongst the physically handicapped candidates, he also happened to be a General category candidate and had to, therefore, be adjusted against a General category vacancy only. It has been further averred in the counter affidavits that the Instructions issued by the respondent no.2 along with the advertisement inviting applications issued on 23.12.2015, had specified that for being eligible to appear in the *viva voce*, a candidate from the General category was required to secure a minimum of 50% qualifying marks in the written examination while the requirement stipulated for a candidate from the reserved category was only 45% marks and, therefore, if he was aggrieved by the relaxation provided to the physically handicapped candidates, he ought to have challenged the advertisement at that

stage itself. Having participated in the selection process without any demur and having failed to raise any objection to the provision for relaxation extended to the reserved category candidates, the petitioner was now estopped from challenging the said relaxation based whereon the respondent no.3 was held eligible for appearing in the *viva voce* and was consequently selected. It has been further stated in the counter affidavit that as the respondent no.3 is a physically handicapped candidate and fell under the reserved category, he was rightly treated as eligible for appearing in the *viva voce* though he had secured less than 50% marks in the written examination.

8. A rejoinder was filed by the petitioner reiterating the pleas taken in the writ petition and refuting all the submissions made by the respondent nos.2 and 3 in their counter affidavits.

9. Mr. Ravikant Chadha, learned Senior Counsel appearing for the petitioner raised two primary grounds to assail the order dated 19.01.2018 passed by the respondent no.2. Firstly, that the respondent no.2 could not have allotted any vacancy to the respondent no.3, a physically handicapped candidate, without first preparing a roster and without calculating the total number of vacancies required to be reserved for candidates under the said category. He submitted that in the case of ***Nishant S. Diwan v. High Court of Delhi Through Registrar General & Anr***. *[209 (2014) DLT 197 (DB)]*, while directing the respondent no.2/Delhi High Court to grant reservation to physically handicapped candidates in the DHJS, the Division Bench had specifically directed that the number of vacancies which could be reserved for the physically handicapped candidates, ought to be

calculated first and thereafter, a special drive be conducted for filling such vacancies. He submitted that the respondent no.2 has neither calculated the vacancies, nor conducted any special drive for the physically handicapped candidates but merely stated in the advertisement for the DHJSE, 2015 that one vacancy had been reserved for the physically handicapped candidate and that too without specifying as to from which category would such a candidate be allocated a seat. He contended that had the respondent no.2 taken the pains to comply with the directions issued in ***Nishant S. Diwan*** *(supra)* and conducted a special drive for the physically handicapped candidates after calculating the vacancies for the said category, the third General category vacancy would not have been given away to the respondent no.3, a physically handicapped candidate, while denying an opportunity to the petitioner of being appointed as a DHJS Officer, despite his merit position.

10. The second submission made by Mr. Chadha, Senior Advocate was that the respondent no.2 has diverted one vacancy from the General category in a most arbitrary manner to a physically handicapped candidate and that too, to a candidate who had failed to secure the minimum 50% qualifying marks prescribed for selection of General category candidates and in circumstances where, admittedly, he was placed at a lower merit position viz. the petitioner. He submitted that even if the respondent no.2 could consider the selection of the respondent no.3 for the vacancy in the General category by invoking the principle of horizontal reservation, at the very least they were bound to ensure that he fulfilled the minimum criteria prescribed

in the Recruitment Rules for the selection of General category candidates. It was further submitted that once the respondent no. 3 has been treated as a General category candidate for the purpose of allocation of a vacancy, he must necessarily fulfil the mandatory requirements prescribed for selection of candidates from the said category. To buttress the said submission, learned counsel drew our attention to the unamended Rule 22 of the Delhi Higher Judicial Service Rules, 1970(hereinafter referred to as the "DHJS Rules") as it stood on the date of the advertisement or for that matter, on the date of the selection and argued that since the Recruitment Rules did not contemplate any relaxation in the prescribed criteria for physically handicapped candidates, therefore, any relaxation granted to the respondent no. 3 was based on a misreading of the Rules and was a result of an erroneous assumption that he was entitled to be treated as a reserved category candidate under the Rules. It was his submission that the DHJS Rules, as they stood, did not include physically handicapped candidates within the ambit of reserved category.

11. By placing reliance on the decisions in the cases of ***Neetu Devi Singh v. High Court of Judicature at Allahabad and Ors.*** *(2008 (71) ALR 62),* ***Ashwani Kumar Kaushik and Another v. Haryana Public Service Commission and Others*** *(2011) ILR 2 Punjab and Haryana 132,* ***Rajender Pal Singh v. State of Punjab*** *CWP No. 5850/2012* and ***Sakthi Prasad Datta v. DM Spolia and Others*** *2013 (5) AD (Delhi) 101,* learned counsel argued that merely because statutory reservation has been provided for physically handicapped persons under the Rights of Persons with Disabilities Act, 2016, does not imply that they

should automatically be granted relaxation too. He submitted that once the Recruitment Rules as they stood, did not bring physically handicapped persons (also referred to as person with disabilities) within the ambit of reserved category candidates, the respondent no.2 could not have granted any automatic relaxation to such candidates insofar as the minimum standards prescribed for their selection were concerned. It was contended that this Court as also the Punjab and Haryana High Court have categorically held that relaxation in the prescribed educational standards cannot be granted to persons with physical disability as a matter of right, though after considering all the relevant factors, the employer can take a conscious decision to grant relaxation in the prescribed criteria.

12. Learned counsel for the petitioner had drawn our attention to the averments made in paragraphs 15 to 17 of the counter affidavit filed by the respondent no.2 wherein it has been categorically stated that the recommendation for amendment of the DHJS Rules to specifically provide for five per cent relaxation to physically handicapped candidates had been made after the selection process in the instant case was completed. It was, therefore, contended that in the light of the respondent no.2's own admission that the recommendation to incorporate a provision for grant of relaxation to physically handicapped persons had not materialised till the date of the selection, any relaxation in the qualifying marks in the written examination granted to the respondent no.3, was without jurisdiction and liable to be set aside. He urged that the subsequent amendment to Rule 22 on 03.05.2019 for including physically handicapped persons as reserved

category candidates thereby making them eligible for grant of the same relaxation as was being granted to the Scheduled Caste and Scheduled Tribe category candidates, cannot cure the patent illegality in the action of the respondent no.2 of granting relaxation to the respondent no.3, when none was due. It was pointed out that the Notification dated 03.05.2019 has clearly stated that the amendment to Rule 22 would come into force from the date of its publication in the official Gazette making it evident that prior to 03.05.2019, physically handicapped candidates had not been included in the reserved category under the DHJS Rules.

13. It was next submitted that in contravention of the DHJS Rules, respondent no.3 was erroneously permitted to appear in the *viva voce* even though he had secured 49.2% marks in the written examination and did not meet the minimum standard prescribed for the General category candidates, the category to which he belongs, thereby wrongfully depriving the petitioner of the said vacancy. Drawing an analogy from Section 34 (3) of the PWD Act which contemplates that the appropriate Government is required to issue a specific notification for granting any relaxation in the prescribed upper age limit, it was contended that if the respondent no.2 was desirous of granting any relaxation in the minimum qualifying marks required to be secured by a candidate under the physically handicapped category, it was incumbent for it to have taken a reasoned and conscious decision in that regard prior to the date of conducting the DHJSE, 2015. But in the instant case, the question as to the necessity, if any, of granting relaxation to physically handicapped candidates was never considered

by the respondent no.2 at any point in time prior to commencing the selection process and since the permission granted to the respondent no.3 to participate in the *viva voce*, is *de hors* the extant Rules, his appointment is illegal and liable to be set aside. Referring to the decision in the case of ***Indira Sawhney Vs. Union of India,*** *1992 Supp (3) SCC 217*, where the Supreme Court has categorically held that though it would be permissible for the State to extend concessions and relaxation to members of the reserved categories, the same would have to be consistent with the efficiency of the administration and the nature of the duties attached to the office concerned, it was canvassed before us that no such exercise was undertaken by the respondent no.2 while granting relaxation to the respondent no.3 in respect of the minimum qualifying marks required to be secured by him while appearing for the *viva voce*.

14. Citing the decision in ***M. Nagaraj & Ors. Vs. Union of India & Ors.*** *2006 (10) SCALE 301*, Mr.Chadha, Senior Advocate contended that the Supreme Court has categorically held in the said case that no relaxation in the matter of qualifying marks or standards is warranted at the time of direct recruitment and the State is only empowered to relax qualifying marks or standards for reservation in matters of promotion and that too after ensuring that the overall efficiency of the system is not effected by granting such a relaxation. It was thus submitted that even if the respondent no.2 had wanted to grant any kind of relaxation to physically handicapped candidates, the same could only be extended in the matter of age but not in the case of the minimum prescribed marks set down as a pre-condition for

participating in the *viva voce;* that the respondent no.2 has failed to appreciate that the efficiency of a judicial service should not be compromised by lowering the prescribed standards; that if the respondent no.2 still wanted to lower the prescribed criteria, it had to take a conscious decision by considering all the relevant factors including the nature of the duties entrusted to a judicial officer, who once appointed, would be expected to deliberate upon and adjudicate matters having wide ramifications. It was argued on behalf of the petitioner that for the aforesaid reasons, the selection of the respondent no.3 is liable to be quashed and set aside and the respondent no.2 ought to be directed to appoint him to the DHJS with all the consequential benefits, as per his merit position in the DHJSE, 2015.

15. On the other hand, Mr. Viraj R. Datar, Advocate appearing on behalf of the respondent no.2/Delhi High Court, while opposing the writ petition, submitted that the petitioner is estopped from challenging the selection of the respondent no.3 which was made strictly in consonance with the instructions set out in the advertisement dated 23.12.2015. He submitted that the petitioner was well aware of the fact that as per the said advertisement, candidates belonging to all the reserved categories were required to secure only 45% marks in the written examination for being eligible to appear in the *viva voce*. To buttress the plea that once the petitioner was aware of these provisions and had still elected to participate in the DHJSE, 2015 without any protest or demur, he cannot be permitted to turn around and challenge the relaxation granted to reserved category candidates and that too upon being declared as unsuccessful in the selection process, reliance

was placed on the decision of the Supreme Court in ***Ranjan Kumar Vs. State of Bihar*** *(2014)16 SCC 187* and of the decision of this Court in ***Kunal Kishore Vs. Lt. Governor*** *2011 (176) DLT 518* and ***Babita Pathak &Ors. Vs. High Court of Delhi &Ors.*** *2013(135) DR 382 (DB)*.

16. Repelling the argument advanced on behalf of the petitioner that the advertisement did not specify as to from which category would the physically handicapped candidate be allocated the vacancy, learned counsel for the respondent no.2 submitted that there is a vital difference between vertical and horizontal reservation. While the reservation in favour of the Scheduled Caste and Scheduled Tribe candidates is treated as a vertical reservation, reservation in favour of physically handicapped candidates is a horizontal reservation that cuts across vertical reservation. Therefore, persons selected under the category of physically handicapped candidates by way of horizontal reservation, are required to be placed in the appropriate category to which they belong. He submitted that as a necessary corollary thereto, if a candidate selected under the physically handicapped category belongs to the Scheduled Caste category, he must be placed in the said category by making necessary adjustments. But if the candidate selected under the physically handicapped category happens to belong to the General category, as was the situation in the present case, he must be placed in the General category itself. It was thus contended that the advertisement could not be expected to pre-define or anticipate as to from which category would the selected physically handicapped candidate be allocated the vacancy. Once there is no denial to the fact

that the respondent no.3 is a physically handicapped candidate belonging to the general category, he had to be allocated a vacancy from the General category and, therefore, there is no infirmity in the allocation of a General category vacancy to him.

17. Mr.Datar, learned counsel further submitted that since it was clearly mentioned in the Examination Notification that all reserved category candidates would be eligible to appear in the *viva voce* if they secured 45% marks in the written examination and it had also been clarified that one vacancy was reserved for physically handicapped candidates, it was evident that the physically handicapped candidates being a part of the reserved category, would also be eligible to appear in the *viva voce* upon their obtaining 45% marks in the written examination. He argued that it is the prerogative of the employer-respondent no.2 to decide the nature of relaxation required to be granted to a particular category, as long as the same did not come in conflict with any of the Rules or guidelines. He thus contended that the decision of the respondent no.2 to grant 5% relaxation to the physically handicapped candidates for appearing in the *viva voce*, cannot be said to be arbitrary or illegal from any angle. The respondent no.2 has been consistently treating the candidates belonging not only to Scheduled Castes and Scheduled Tribes, but also those belonging to the physically handicapped category, as reserved category candidates. In support of the said submission, he cited the example of the Delhi Judicial Service Examination where the respondent no.2 had been consistently granting a similar relaxation to candidates belonging to the physically handicapped category. It was

urged that it was but natural to extend a similar relaxation to physically handicapped candidates in the DHJSE, 2015, as was being provided to all other reserved category candidates.

18. Learned counsel for the respondent no.2 further submitted that reliance placed by the counsel for the petitioner on the decisions in the cases of ***Ashwani Kumar Kaushik*** *(supra)*, ***Sakthi Prasad Datta*** *(supra)*, ***Rajender Pal Singh*** *(supra)* and ***Neetu Devi Singh*** *(supra)*, is wholly misplaced as the said decisions merely reiterate the settled legal position that it is for the employer to decide as to whether relaxation is warranted or not and no candidate belonging to the physically handicapped category can seek a mandamus for grant of relaxation. It was his stand that these decisions do not, in any manner, curtail the right of the employer to grant relaxation to the physically handicapped category candidates. Citing the judicial pronouncements in ***Anamol Bhandari (Minor) through his father/Natural Guardian Vs. Delhi Technological University*** *2012 (131) DRJ 583 (DB)*, ***Anmol Kumar Vs. Union of India & Anr.*** *(2015) 147 DRJ 491* and ***All India Confederation of Blind & Anr. Vs. Union of India & Anr.*** *(2017) 3 SCC 525*, he canvassed that grant of relaxation to physically handicapped candidates has been consistently upheld by courts across the country as it is in furtherance of the object for which the PWD Act has been enacted and such a relaxation goes to ensure that persons from this category actually reap the fruits of reservation meant for them.

19. Learned counsel finally referred to the decision of a Co-ordinate Bench of this Court in ***Nishant S Diwan*** *(supra)* and

submitted that the relaxation granted to a physically handicapped candidate not only seeks to fulfil the mandate of the PWD Act, but is also in consonance with the directions of this Court to extend 3% reservation prescribed under the PWD Act to the DHJS also. He submitted that the Division Bench in the aforesaid decision, noting that 14 vacancies including 10 vacancies for the General category candidates were being sought to be filled by the DHJS Examination 2013, had specifically directed that 01 out of those 10 vacancies be earmarked for disabled candidates. The respondent no.2 was further directed to carry out a review of the balance number of vacancies that could be appropriately earmarked for persons with disabilities, thereafter club the same with the aforesaid 01 vacancy and advertise all the available vacancies for persons with disabilities either in the next recruitment process, or by way of a special recruitment drive.

20. Learned counsel for the respondent no.2 thus submitted that out of the 03 vacancies that were available for General category candidates in the DHJSE, 2015, one of the vacancies was in fact the vacancy which was initially carried forward to the DHJSE 2015, in the light of the directions issued in ***Nishant Dewan*** *(supra)* to reserve the same for physically handicapped candidates. It was thus contended that the petitioner cannot raise any grievance regarding one of the three General category vacancies being allocated to the respondent no.3 as the said vacancy was, in any event, a vacancy that had occurred in the year 2013 which came to be included in the DHJSE, 2015 only in terms of the directions issued in the aforesaid case for reserving 01 out of 10 General category vacancies for

physically handicapped candidates. With these pleas, dismissal of the writ petition was sought.

21. Mr.Pradeep Bakshi, learned counsel for the respondent no.3 adopted the arguments advanced by Mr.Datar and asserted that having participated in the selection process without laying any challenge to the provisions in the advertisement which clearly stated that reserved candidates obtaining 45% marks in the written examination would be eligible for participating in the *viva voce*, the petitioner is now estopped from challenging the said provision or arguing that the aforesaid provision entitling reserved candidates to appear in the *viva voce* even with 45% marks as against the prescribed requirement of 50% marks for General category candidates, cannot be applied to candidates belonging to the physically handicapped category. He submitted that even otherwise, the presumption of the petitioner that the said relaxation of 5% marks was applicable only to the reserved category of Scheduled Castes and Scheduled Tribes and not to candidates from the Physically Handicapped category, is based on a fallacious reading of Rule 7(C) and Rule 22 of DHJS Rules. He submitted that once Rule 7(C) categorically prescribes a requirement of only 45% qualifying marks in the written examination as a condition precedent for appearing in the *viva voce* for candidates from reserved categories, the mere fact that Rule 22 was subsequently amended on 03.05.2019, to include persons with disabilities in the reserved category, would not preclude the respondent no.2 from extending the said relaxation to the latter category despite the statute being silent on this aspect. He contended that the plea of the

petitioner that persons with disabilities could not be considered as reserved category candidates, runs contrary to the scheme of the PWD Act and is liable to be rejected. It was his submission that reservation has been granted to disabled persons by virtue of the statute and, on applying the principles of purposive interpretation, the respondent no.2 was wholly justified in extending the same relaxation to physically handicapped candidates, as was being granted to other reserved category candidates.

22. We have heard the learned counsel for the parties at length and with their assistance, carefully perused the record including the minutes of the meeting conducted by the Committee for the DHJSE, 2015, on 30.09.2015, wherein it was decided that out of the 9 available vacancies in the DHJS sought to be filled under 25% direct recruitment quota, 01 vacancy had been earmarked for disabled candidates as also the minutes of the subsequent meeting held on 12.01.2018, whereunder the petitioner's representations have been rejected.

23. Having given our thoughtful consideration to the submissions made by the parties, we are unable to accept the first limb of the argument advanced by learned counsel for the petitioner insofar as the respondent no.2 is sought to be blamed for allocation of a General category vacancy to the respondent no.3, without first preparing a roster point or without specifying in the advertisement as to from which category would a vacancy be allocated to a candidate who is physically handicapped. In the light of the admitted position that reservation for physically handicapped candidates is in the nature of a

horizontal reservation, which reservation cuts across vertical reservation, it is but obvious that at the time of issuing the advertisement, the respondent no.2 could not have anticipated, much less specified the category from which the vacancy for the physically handicapped candidates would have to be adjusted. Inherent in the nature of horizontal reservation is that on the selection of a physically handicapped candidate, he is required to be placed in the appropriate category to which he belongs, i.e., Scheduled Castes, Scheduled Tribes or General category, as the case may be, and appropriate adjustment would then have to be made in the vacancies available for the said category. In this context, we may profitably refer to ***Indira Sawhney*** *(supra)* where in paragraph 832, the Supreme Court had highlighted the difference between horizontal and vertical reservation in the following words:-

> *"832 We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations.* ***Horizontal reservations cut across the vertical reservations — what is called interlocking reservations.*** *To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16.* ***The***

> ***persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments.*** *Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains — and should remain — the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure."* *(emphasis added)*

24. In the present case, respondent no.3 is a physically handicapped candidate belonging to the General category and therefore upon his selection, one vacancy from the 03 vacancies in the General category had necessarily to be allotted to him, thereby leaving only 02 vacancies in the General category to be filled by candidates belonging to the unreserved category. The scheme of horizontal reservation can operate in no other manner. Though the petitioner was placed at merit position number 3 in the General category, he could not be selected for sheer lack of vacancies. The petitioner's grievance on this account is, therefore, found to be wholly meritless and stands rejected.

25. We are also not persuaded by the next submission made by Mr.Chadha, Senior Advocate that the respondent no.2 could not have filled the vacancy earmarked for physically handicapped candidates without first preparing a roster or that it was incumbent upon the respondent no.2 to carry out a separate special recruitment drive for the physically handicapped candidates. In fact, on a perusal of paragraph 21 of the decision in ***Nishant Dewan*** *(supra)*, it is evident that in DHJS Examination 2013, the sole vacancy reserved for

physically handicapped candidates was the vacancy that was initially proposed to be filled through General category candidates but was subsequently earmarked for physically handicapped candidates and carried forward to be filled in the DHJSE 2015, as per the directions of the Division Bench. It is considered apposite to refer to the view expressed in paragraph 21 of ***Nishant Dewan*** *(supra)* that reads as under:-

> *"21. The decision in National Federation of the Blind (supra) states that reservation under the Disabilities Act is to be vacancy-based – on a textual reading of Section 33. If one were to literally apply that authority to the facts of this case, it would not be possible to earmark any post under the 3% quota since the total number of advertised posts is only 14. Keeping in mind the circumstance that for the period 2007 onwards when the disabilities reservation was introduced in Judicial Services in Delhi for the first time, and also taking notice of the fact that this Court is called upon to decide the issue in the context of the direct recruitment quota for the DHJS which is 25% of the entire cadre strength of 224 posts or such other number as is determined, having regard to the increased number of posts, the most feasible approach under the circumstances would be to determine the total number of posts that are to be filled in this quota before actually taking steps to fill them. This Court is also mindful of the circumstance that the advertisement in this case was issued on 30.12.2013. The petitioner approached this Court on 03.02.2014. One of the alternatives that this Court could adopt would be to direct the consideration of the petitioner's case, based upon his claim as a disabled candidate and, therefore, entitled to be considered as against the 3% quota. Although this course is attractive, at the same time, the Court*

cannot be oblivious of the circumstance that other eligible and possibly equal, if not more meritorious candidates, are unaware of their right to be considered against this quota. Directing the petitioner's case alone to be processed on the basis of the documents and materials presented by him to back-up the claim of disability would in such a case result in keeping out those candidates. ***In these circumstances, this Court is of the opinion that the most appropriate method of proceeding with this exercise is to direct the respondents to earmark one of the advertised posts for disabled candidates in terms of the 3% quota under the Disabilities Act and not fill it up in the present recruitment process. Once the recruitment process is completed and the appointments are made, depending upon the further number of vacancies which may exist at the stage of declaration of results, the respondents should carry-out a review of the balance number of vacancies that can be appropriately earmarked for those with disabilities, club them with the post directed to be kept apart and proceed with the next recruitment process, clearly indicating the total number of vacancies earmarked under the 3% quota. In the event the respondents are not in a position to advertise all the vacancies, it shall endeavour to at least carry-out a special recruitment procedure in respect of only the earmarked vacancies falling to the share of those entitled to be considered under the 3% quota under the Disabilities Act, within one year of the date of declaration of results in the current recruitment process.*** *A direction is accordingly issued to the respondents to carry-out the exercise and complete the special recruitment drive after following the steps indicated above."*

(emphasis added)

26. No doubt, as per the mandate of the aforesaid decision, the respondent no.2 was expected to undertake a review of the total number of vacancies that could be appropriately earmarked for candidates with disabilities and thereafter, club the same with the 01 vacancy which, though initially proposed to be filled by General category candidates of the DHJS Examination 2013, had been earmarked for physically handicapped persons. Merely because the respondent no.2 chose to reserve only one vacancy for physically handicapped candidates, instead of determining the total number of vacancies available for being filled by physically handicapped persons, the same would not be a ground for the petitioner to raise any grievance on this count. On the contrary, a grievance, if any, on this count could be raised only by candidates from the physically handicapped category as they were the ones who suffered as a direct consequence of the failure on the part of the respondent no.2 to identify and earmark additional posts for candidates belonging to the physically handicapped category with a specific direction to reserve the said vacancy for disabled candidates, in terms of the decision in ***Nishant Dewan (supra)***.

27. We may now proceed to deal with the argument advanced on behalf of the petitioner that even if it is assumed that a General category vacancy could be allocated by the respondent no.2 to the respondent no.3 in preference to the petitioner only because he was a physically handicapped candidate, despite the petitioner being at a higher merit position than the respondent no.3, it was still incumbent for the said respondent to have secured 50% qualifying marks in the

written examination for being eligible to appear in the *viva voce*. Since it has been canvassed on behalf of the petitioner that as per the extant Rules, all General category candidates including those belonging to the physically handicapped category were required to obtain 50% qualifying marks in the written examination and that the respondent no.3 who had secured lesser marks, was erroneously permitted to appear in the *viva voce* by treating him as a reserved category candidate, when he was not a reserved category candidate as contemplated in the DHJS Rules, it is deemed appropriate to refer to Rule 7(C) and to Rule 22, as it stood on the date of the selection:

> *"**Rule 7(C).** Selection for appointment by direct recruitment:- The High Court shall before making recommendations to the Administrator invite applications by advertisement and may require the applicants to give such particulars as it may prescribe and may further hold written examination and viva voce test in the following manner:-*
>
> *(i) Written Test – 750 marks.*
> *(ii) Viva Voce-250 marks*
>
> *Provided that a candidate shall be eligible to appear in viva voce only in case he secures 50% marks in the Written Examination in the case of candidate of general category and 45% in the case of candidates of reserved categories:*
>
> *Provided further that a candidate of general category must secure a minimum of 50% marks and a candidate of reserved categories must secure a minimum of 45% marks in viva voce to be eligible for being recommended for appointment to the service.*

> ***Rule 22.*** *The reservation of posts for the Schedule Castes and Scheduled Tribes shall be in accordance with the orders issued by the Central Government from time to time.*

28. We may also refer to Rule 22, as it stands consequent to the amendment carried out therein, pursuant to the notification issued by the Government of NCT of Delhi on 03.05.2019 in exercise of its power conferred under the proviso to Article 309 of the Constitution of India. The amended Rule 22 reads as under:

> *"**Rule 22.*** *Recruitment made to the service by direct recruitment shall be subject to provisions regarding reservation and other concession (except age relaxation) for the Scheduled Castes, Scheduled Tribes and Persons with Disability candidates (suffering from any of the disabilities mentioned in sub section (1) of section 34 of the Rights of Persons with Disabilities Act, 2016) as provided by law or orders issued by the Central Government from time to time:*
>
> *Provided that the Persons with Disability candidates should be capable of efficiently discharging their duties as Judicial Officer as per the satisfaction of the Medical Board that may be constituted before or after their names are recommended for appointment."*

29. What emerges from a conjunctive reading of the aforesaid two provisions is that insofar as Rule 7(c) is concerned, it merely provides that a candidate from the General category must secure a minimum of 50% marks in the written examination for being eligible to appear in the *viva voce* whereas a candidate from the reserved category would be eligible for the *viva voce* even if he/she were to obtain 45% marks

in the written examination. None of the Rules define as to which category of candidates would be included in the 'reserved category'. The Rule that throws light on the said aspect is Rule 22, which as was applicable at the time of the selection in question, refers to reservation of posts only for Scheduled Caste and Scheduled Tribe categories. The said Rule was conspicuously silent about any reservation for physically handicapped candidates. Though reservation for physically handicapped candidates was statutorily introduced by the PWD Act on insertion of Section 33 which mandates that every appropriate Government was obliged to appoint disabled persons in every establishment on not less than 3% of the vacancies, the fact remains that the respondent no.2 did not extend the said reservation to physically handicapped candidates in the DHJS till as late as in the year 2013, only after appropriate directions to that end were issued in the case of ***Nishant S. Dewan*** *(supra)*.

30. Given the above position, there is no legal basis for drawing an inference that physically handicapped candidates were always treated as reserved category candidates, as was sought to be canvassed by learned counsel for the respondents. Even though both, Mr.Datar and Mr.Bakshi, Advocates have vehemently argued on behalf of the respondent nos.2 and 3 that the term 'reserved category' used in the advertisement and the accompanying Instructions, would take in its fold physically handicapped candidates, we are afraid that we are unable to agree with the said submission. Once the DHJS Rules, as they stood on the date of issuance of the advertisement for the DHJSE 2015, did not include the category of physically handicapped

candidates for reservation of posts, it cannot be said that merely because one vacancy had been reserved for physically handicapped candidates, the said vacancy would automatically be picked up from the total vacancies allocated to General category candidates and be treated as a reserved category post, thereby making them eligible to appear in the *viva voce* even upon securing only 45% marks in the written examination as against 50% minimum qualifying marks prescribed for General category candidates. There is no manner of doubt that at the stage of initiating the selection process, no decision was taken by the respondent no.2 to treat physically handicapped candidates as reserved category candidates under the DHJS Rules. In fact, as noted hereinabove, the newly re-cast Rule 22 incorporates reservation for physically handicapped candidates. The said amendment was notified only on 03.05.2019, with a specific rider that the same would come into force with effect from the date on which it is published in the Official Gazette.

31. In the above facts and circumstances, the respondents cannot be heard to state that as on the date of issuance of the advertisement, there was any provision, either explicit or implicit, for granting automatic relaxation to physically handicapped candidates or that it was made known to all the candidates that such a relaxation would be extended to a set of candidates over and above those belonging to the Scheduled Castes and Scheduled Tribes categories. In fact, the understanding at that stage was that a candidate seeking a vacancy from the General category, would necessarily be required to fulfil the

minimum requirement of securing 50% marks in the written examination.

32. In our opinion, the petitioner cannot be faulted for not challenging the advertisement or the Instructions annexed thereto at the initial stage nor can it be urged that despite being aware that relaxation would be granted to physically handicapped candidates even though they belong to the General category, the petitioner had failed to challenge the same at that stage and would, therefore, be estopped from challenging the said relaxation at a later stage. In the given facts, when we are of the view that there was nothing to show that any relaxation would be given to candidates from the physically handicapped category, there is no question of any estoppel being applied to the petitioner and, therefore, the decisions in ***Ranjan Kumar*** *(supra)*, ***Kunal Kishore*** *(supra)* and ***Babita Pathak*** *(supra)*, on which heavy reliance has been placed by the learned counsel for respondents would, in our opinion, not be applicable to the facts of the case in hand.

33. Now that we have arrived at the conclusion that no automatic relaxation to physically handicapped candidates was contemplated either under the Rules or in terms of the Instructions annexed with the advertisement, we shall now proceed to deal with the submission made by learned counsel for the respondents that once the respondent no.2/employer had taken a decision to grant relaxation to physically handicapped candidates, the same cannot be a subject matter of challenge in writ proceedings, least of all at the instance of an unsuccessful candidate like the petitioner herein, as the said relaxation

is in consonance with the object of the PWD Act. There can be no quarrel with the proposition that the employer/State may, after taking into account the relevant factors, relax any of the eligibility criteria including qualifying marks as prescribed in the Rules, for the benefit of physically handicapped candidates. But, regrettably, the records produced for our perusal by learned counsel for the respondent no.2 do not demonstrate that a conscious decision in this regard was ever taken prior to the issuance of the advertisement. We cannot lose sight of the fact that there is a clear-cut distinction between grant of reservation viz. grant of relaxation; both these aspects lie in separate domains. While reservation for physically handicapped candidates is statutorily mandated under the PWD Act, grant of any relaxation to such candidates would be for the employer to examine after taking into consideration the nature of duties required to be discharged on the post as also the number of candidates from the said category who may be found to be eligible for the said post.

34. In the present case where we are dealing with appointment of judicial officers, it was incumbent for the respondent no.2 to have weighed in all the relevant factors and then taken a calibrated decision as to whether, keeping in view the nature of the duties attached to the post under the DHJS and the role expected to be performed by the appointee, any such relaxation would be warranted. Nothing has been placed on record to demonstrate that respondent no.2 engaged itself in such deliberations at any stage. To the contrary, it appears that relaxed standards were applied to the respondent no.3 without real application of mind and in a most mechanical manner, by overlooking

the fact that unlike candidates from the Scheduled Caste and Scheduled Tribe category for whom vacancies were separately reserved, no such exercise was undertaken by the respondent no.2 at the time of allocating a vacancy to the respondent no.3 from the General category vacancies.

35. In this context, we may refer to the observations made by the Punjab & Haryana High Court in the case of ***Ashwani Kumar Kaushik & Anr.*** *(supra)* where while dealing with a similar question, it was observed as under:-

> *"1* ***The primary question raised in these appeals is "whether the expression 'reserved categories' used in the advertisement date 3rd June, 2009 would include, other categories like Ex-servicemen or Physically Handicapped belonging to the State of Haryana apart from Scheduled Castes and the Scheduled Tribes".*** *The learned Single Judge has taken the view that it would not include any of the aforesaid classes except Scheduled Castes/Scheduled Tribes.*
>
> *xxx xxx xxx*
>
> *7. Mr. Narender Hooda, learned counsel for the DHBVNL, HPGCL and HVPNL has pointed out that the expression 'reservation' has to be interpreted by referring to the provisions of Article 335 of the Constitution especially in terms of providing relaxed standards for the 'reserved category'. In order to buttress his stand, learned counsel has pointed out that Article 16(4) of the Constitution deals with 'reservation' in matters of appointment whereas Article 335 deals with matter concerning relaxation in qualifying marks in any examination or lowering the standard of evaluation. Mr. Hooda has drawn our attention to the Statement of Objects and Reasons for*

which 82nd Amendment was made in the Constitution incorporating proviso to Article 335. A perusal of the State of Objects and Reasons shows that the proviso to Article 335 was added on account of the judgment delivered in by Hon'ble the Supreme Court in the case of ***S. Vinod Kumar v. Union of India***[2]*. The reason which necessitated the amendment in the Constitution was that there was no relaxed standard provided by Article 335 even for the members of the Scheduled Castes/Schedule Tribes and the judgment in* ***S. Vinod Kumar's case*** *(supra) interpreted Article 335 of the Constitution to mean that the State was not competent to provide any relaxed standard for any members of the Scheduled Caste/Scheduled Tribe. By the Constitution (Eighty-second Amendment) Act, 2000, proviso was added to Article 335 enabling the States or the Union of India to provide for relaxation in qualifying marks in any examination or lowering the standard of evaluation for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State. Mr. Hooda has also clarified that he was relying on the proviso for the purposes of showing which categories of candidates could be regarded as 'reserved category' candidate although the provision talks of relaxation in matters of promotion. According to learned counsel it would include only members of Scheduled Castes/Scheduled Tribes and it would not include Ex-servicemen. Therefore, he has argued that the expression 'reserved categories' would not in any case include the appellants. The proviso reads thus:*

> *"Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in*

matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

(8) The submission made by Mr. Hooda appears to be that there is no possibility to include the Ex-servicemen in the reserve category of Scheduled Caste for the purpose of providing relaxation in qualifying marks in any examination or lowering the standard of evaluation except as provided in proviso to Article 335 of the Constitiution. He has submitted that the proviso if applied to the advertisement as well as the notifications issued by various Nigams/Corporations for the purpose of reservations have to be read to mean that no category other than the members of the Scheduled Caste/Scheduled Tribe would be covered by the expression 'reserved category'.

(9) Mr. H.N. Mehtani, learned counsel for the Commission has supported the view adopted by the learned Single Judge in para 14 of the judgment. Learned counsel has argued that a candidate cannot claim relaxation of educational qualification or percentage of marks as a matter of right unless he is covered by a piece of legislation or by process of interpretation such a conclusion is reached by the Court.

xxx xxx xxx

(11) Having heard learned counsel and after persual of the impugned judgment rendered by the learned Single Judge ***we are of the considered view that in the absence of specific provision made in the statute, no candidate belonging to any category could be extended the benefit of relaxed standards in public appointments.*** *Hon'ble the Supreme Court in* ***S. Vinod Kumar's case*** *(supra) has quoted the judgment of a Constitution Bench of Hon'ble the Supreme Court rendered in* ***Indira Sawhney v. Union of India****, to hold that it was permissible to prescribe*

lesser qualifying marks or evaluation for Other Backward Classes, Scheduled Castes and Scheduled Tribes, if it is consistent with the efficiency of administration and the nature of duties attaching to the office concerned in the matter of direct recruitment. But such a course was not permissible in the matter of promotion because there was no enabling provision in Article 335 of the Constitution etc. Those judgments rendered in ***S. Vinod Kumar's*** *(supra) and in* ***Indira Sawhney'scase*** *(supra) have dealt with reserved categories of Scheduled Castes and Scheduled Tribes only but there is no scope for extending the same benefit for the members of Ex-servicemen like the appellants before us, either in direct recruitment or in matters concerning promotion.* ***The argument of Mr. Narender Hooda is meritorious and it could be accepted only to this extent that the members of any other categories (except OBC/SC/ST) could not be extended the benefit of relaxed standards because Article 16(4), 16(4A) and 335 after 82nd Amendment only talks of granting such concession to the members of Scheduled Castes/Scheduled Tribes in matters of direct recruitment and promotions. It is doubtful if the legislature could extend any such benefit to any other class like Ex-servicemen or Physically Handicapped candidates. However, in the present case there is no express provision in regard thereto. Even the provisions in Article 16(4) and 16(4A) read with Article 335 are merely enabling provisions which expressly clothed the State to provide for such reservation or relaxation in favour of specified class alone. If the State has not made a provision for reservation then no mandamus could be issued compelling the State to enact any such law. In the absence of any express provision the question to include Ex-serviceman in the reserved category would not even***

> ***arise. Therefore, the argument of Mr. Malik that the expression 'reserve category' used in the advertisement should be interpreted to include Ex-servicemen or Physically Handicapped, cannot be accepted.***" *(emphasis added)*

36. It is also considered appropriate to refer to the decision of a Single Judge of this Court in ***Sakti Prosad Datta*** *(supra)*, which reads as under:-

> *"4. Reply to this contempt has been filed. The Department has reiterated its stand that no relaxation was provided for physically handicapped candidates. In the reply affidavit filed it has been stated that in the final result declared no relaxed standard had been followed by the respondent while dealing with cases of physically handicapped candidates. Copies of the results for the year 1995-96 have been annexed along with the reply. The result shows that Shri Vinod Kumar and Shri Kirori Lal Sharma whose names have been quoted have been declared as passed whereas the result shows that the petitioner has failed. In support of the plea that the relaxed standards were applied only to the SC/ST candidates and no other category, reliance is placed on the format of the result to show that there is a claim for SC/ST but no separate column for candidates belonging to General category, Physically Handicapped candidate or any other category. Reliance is also placed on the counter affidavit filed by the respondent way back in the year 2002 wherein a stand was taken that there is no relaxation in the qualifying marks for physically handicapped candidates.*
>
> *xxx xxx xxx*
>
> *7.* ***It is further clarified that there is a distinction between applying relaxed standards for declaring a candidate successful in examination and reserving***

posts for the purpose of promotion. Relaxation in qualifying marks and reservation of posts for the purpose of promotion are two different aspects. *It may be possible that Delhi Government might have given Shri Vinod Kumar and Shri Kirori Lal Sharma benefit of reservation in promotion even though they did not get any benefit of relaxation in qualifying marks. Ms.Avnish Ahlawat submits that it is for Delhi Government to explain in what context they mentioned Shri Vinod Kumar and Shri Kirori Lal Sharma as physically handicapped candidates.*

8. I have heard the petitioner in person and counsel for the respondent. The facts of the case as noticed by the Division Bench are that the petitioner had appeared in the Combined JAO/SAS Examination in January 1995. Candidates were required to obtain minimum 40% marks in each paper to qualify the examination. Out of the three papers the petitioner obtained more marks than the marks required in two papers, however, he obtained 12 marks less in the PWD paper than the required marks. ***The petitioner who is a physically handicapped person claimed that he was entitled to 30 marks under relaxed standard of marking in accordance with the Government of India OM 14016/88/Estt./SCT dated 4.9.1995 as well as letter dated 13.9.1993 issued by the Comptroller and Auditor General of India. Representations made in this regard were rejected as according to the respondent OM dated 4.9.1985 and communication dated 13.9.1993 only related to SC/ST candidates and did not cover physically handicapped persons.*** *Petitioner challenged the rejection by filing OA No.493/1996 before the Central Administrative Tribunal. The OA filed by the petitioner was dismissed on 22.7.1997. It was inter-alia observed as under:-*

"6. In this connection, the Hon'ble Supreme Court in their judgment dated 1.10.96 in Civil Appeal No.12676/96 S. Vinod Kumar and another Vs. UOI & Ors. has held that the provision for lower qualifying marks or lesser level or evaluation in the matter of promotion is not permissible under Article 16(4), in view of the command contained in Article 335 of the Constitution. 7. In view of the above, the OA is dismissed. No costs."

9. The order passed by the Central Administrative Tribunal (CAT) was not challenged. Meanwhile, a Three Members Bench of the Supreme Court delivered a judgment on 19.11.1999 in the case of Haridas Parsedia Vs. Urmila Shakya reported as 1999 (7) SCALE 152. According to the petitioner as per this judgment he was entitled to relaxation which was given to SC/ST candidates. Another representation was made and thereafter OA No.1222/2000 was filed praying for the same relief as prayed earlier in OA No.493/1996. Reliance was placed by the petitioner on the decision of the Supreme Court in ***Haridas Parsedia case*** *(supra). The OA was dismissed on 6.7.2000 holding it to be barred by res judicata or principles analogous to res judicata. The order of the CAT was challenged by filing writ petition being WP(C) No.6272/2000 which was decided on 30th September 2011. The order of the CAT was not interfered by the High Court. The High Court not only came to the conclusion that the Tribunal had rightly stated that the second OA would be impermissible as it was hit by res judicata or principles analogous to res judicata but also that the judgment in the case of* ***Haridas Parsedia case*** *(supra) would not come to the aid of the petitioner at all as the Supreme Court was not dealing with promotions in that case. It also decided against the*

> *petitioner that the OM relied upon by him was not applicable. The Division Bench referred to the judgment of the Constitution Bench in the case of Indira Sahni & Ors. v. Union of India reported as AIR 1993 SC 447 wherein it was categorically held that relaxation given to SC/ST candidates would not apply to other categories.* ***The case of the petitioner before the CAT in both the OAs filed was that he was entitled to relaxed standards in qualifying examination held in 1995. This plea of the petitioner has not been accepted either by the CAT or by the High Court. While disposing of the writ petition the Division Bench was of the opinion that if relaxed standard is extended to other handicapped persons by the Government then the same treatment should be accorded to the petitioner as well****. In view of the categorical affidavit filed by the respondent, the stand taken by the respondent as far back as in the year 2002 in their counter affidavit which has been reproduced above and also taking into consideration the result which has been produced including the result of Vinod Kumar and Kirori Lal Sharma which show that both these candidates had cleared the examination whereas the petitioner had failed. I find no grounds to initiate contempt proceedings against the respondents."*

37. We may also refer to the decision of the Punjab & Haryana High Court in ***Rajender Pal Singh*** *(supra)*, which reads as under***:-***

> *"14. Learned counsel for the petitioner has relied upon a Division Bench's decision of the Delhi High Court in W.P.(C) No.4853 of 2012 decided on 12.9.2012 (titled Anamol Bhandari (Minor) through His Father/Natural Guardian v. Delhi Technological University) in which the issue of grant of benefit/concession was considered in the context of admissions to B. Tech. courses where 5% concession*

in marks was accorded to persons with disabilities as opposed to 10% grant provided to SC/ST candidates and that parity should be maintained on the ground that vertical reservation to persons with disabilities who belong to SC/ST candidates would end disparity irrespective of their vertical categories. The Division Bench of Delhi High Court relied on a judgment rendered by the Supreme Court in W.P. (C) No.116/1998 titled A.L. Confederation of Blind and another v. U.O.I. and another (decided on 19.3.2002) and concluded as follows:

> *"21. Reference to the aforesaid judgment is made by us to highlight the decision taken by the Government, and accepted by the Supreme Court that reservation for disabled is called horizontal reservation which cuts across all vertical categories such as SC, ST, OBC & General. Therefore, what was recognized was that since PWDs belonging to SC/ST categories, i.e., vertical categories enjoyed the relaxation which is provided to SC/ST categories, there is no reason not to give the same benefit/concession to those disabled who are in General Category or Other Backward Class Category as that process only would being parity among all persons' disparity irrespective of their vertical categories. This itself provides for justification to accord same concession, viz., 10% concession to PWDs as well, in all categories which is extended to those PWDs who fall in the category of SC/ST.*
>
> *22. All the aforesaid clinchingly demonstrates that the people suffering from disabilities are equally socially backward, if not more, as those belonging to SC/ST categories and therefore, as per the Constitutional mandates, they are entitled to at*

> *least the same benefit of relaxation as given to SC/ST candidates.*
> *23. We, therefore, hold that the provision giving only 5% concession in marks to PWD candidates as opposed to 10% relaxation provided to SC/ST candidates is discriminatory and PWD candidates are also entitled to same treatment. The mandate is, accordingly, issued direction the DTU to provide 10% relaxation. Thus, the minimum eligibility requirement for persons belonging to PWD becomes 50% in PCM. Since the petitioner becomes eligible to be considered for admission in B.Tech. course of DTU, his case may accordingly be considered for admission and found eligible for admission on that basis, the same be granted to him forthwith."*
>
> *15.* ***We are, however, unable to apply the salutary principle laid down in this judgment to the case in hand keeping in view the distinction between admissions to educational institutions and appointments to judicial office****."*

38. Finally, we would place reliance on paragraphs 9, 10 and 12 of the judgment of a Division Bench of the Allahabad High Court headed by Justice B.S. Chauhan (as his Lordship then was), in the case of ***Neetu Devi Singh*** *(supra),* wherein it was held as under***:-***

> *"9. A Constitution Bench of the Hon'ble Supreme Court in E. Chinnaiah Vs. State of Andhra Pradesh and Ors., held as under:-*
>
> > *Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when claims of Scheduled Castes and Scheduled*

Tribes to employment in the services of the Union are to be considered.

A Constitution Bench of the Apex Court in M. Nagraj and Ors. v. Union of India and Ors., examined the validity of the Constitution (Seventy Seventh Amendment) Act, 1995; thse Constitution (Eighty First Amendment) Act 2000; the Constitution (Eighty Second Amendment) Act 2000; and the Constitution (Eighty Fifth Amendment) Act 2001, providing for reservation to Scheduled Castes in promotions, which also provided for relaxation of qualifying marks etc. and held that constitutional limitation of efficiency under Article 335 if the appropriate government enacting a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside the strike down such legislation... ***It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables could be accommodated****."*

10. ***Thus, only in exceptional cases, for compelling interest of the reserved category candidates, the State may relax the qualifying marks after identification by weighing the comparable data, without affecting general efficiency of service as mandated under Article 335 of the Constitution.***

> *12.* ***In view thereof, as the reservation is provided for physically handicapped persons, though horizontal in nature, he/she must secure minimum qualifying marks as fixed by the authority concerned. The appellant-petitioner who has failed to achieve the said benchmark as she secured 36 percent marks while qualifying marks had been fixed as 55 percent, would be denied further consideration in view of the provisions of Article 335 of the Constitution of India.*** *It is not the case of the appellant-petitioner that any other physically handicapped person securing lesser marks than her, is being permitted consideration any further.*
>
> *The Special Appeal lacks merit and is accordingly dismissed."*

39. In the light of the aforesaid authoritative judicial pronouncements, we have no hesitation in accepting the submission made by Mr.Chadha, Senior Advocate appearing for the petitioner that in the present case, relaxation in the minimum qualifying marks for the written examination was granted to the respondent no.3 without any application of mind and without the respondent no.2 conducting any deliberations prior to the issuance of the advertisement. Therefore, there was no occasion for the respondent no.2 to extend relaxation to physically handicapped candidates belonging to the General category, that too when the scope of the unamended Rule 22, did not encompass physically handicapped candidates under reserved category.

40. In the light of the aforesaid discussion, we are constrained to hold that in the absence of a provision for granting any relaxation to

physically handicapped candidates, as on the date of issuance of the advertisement, the respondent no.2 was not empowered to permit respondent no.3 to appear in the *viva voce*, by treating him at par with those candidates belonging to the Scheduled Castes and Scheduled Tribes categories who were granted relaxation in the minimum qualifying marks for the written examination. To our mind, this goes to the root of the matter. Respondent no.3, having failed to fulfil the mandatory requirement of securing 50% minimum qualifying marks in the written examination as prescribed by the respondent no.2 for candidates belonging to the General Category, to which category he belongs, his appointment to the DHJS stands vitiated.

41. Having arrived at the above conclusion, a natural corollary thereto would be to allow the present petition and strike down the appointment of the respondent no.3. But if we adopt that course, then in our opinion, we would be failing in our duty of dispensing substantial and complete justice to the parties before us. Here is a case where pursuant to his selection in the DHJSE 2015, the respondent no.3, a physically handicapped candidate, has been sincerely and efficiently discharging his duties on the post of an Additional District Judge for the past almost two years. Respondent no.2, the employer, has no complaint against him and is satisfied with his work performance. In these circumstances, would it be appropriate to quash his appointment? We have given our thoughtful consideration to this knotty problem and are of the view that it will be a travesty of justice if the appointment of the respondent no.3 is quashed at this belated stage.

42. We are confronted with the conflicting claims of two candidates, both belonging to the General category, one of whom is a more meritorious candidate and has qualified for selection in terms of the DHJS Rules vis-a-vis a physically handicapped candidate who cannot be blamed for having been granted relaxation by the respondent no.2 and for being permitted to appear in the *viva voce* though he had failed to secure 50% qualifying marks, as required in the written examination. In our view, the exigencies of the instant case demand that the powers vested in this Court under Article 226 of the Constitution of India be invoked and the relief be moulded in such a manner as to balance the equities between the two contestants without doing injustice to either side. The predicament in which the respondent no.3 finds himself is not of his making. It is wholly attributable to the erroneous interpretation and application of the DHJS Rules by the respondent no.2 who granted him relaxation by placing him in the reserved category, contrary to the extant Rules. We are also mindful of the fact that not just the courts, even the Society as a whole must go that extra mile to integrate persons with disabilities in the mainstream. Another persuasive factor that has weighed with us is that a large number of vacancies, especially those belonging to the Scheduled Tribe category, have remained unfilled in the DHJS for several years together, thereby adversely impacting the justice delivery system due to induction of an inadequate number of judicial officers. Moreover, the records reveal that the respondent no.3, a physically handicapped candidate, was granted relaxation only to the extent of 0.8% marks, as he had obtained 49.2% marks as

against the minimum requirement of 50% marks. We can also not be oblivious to the fact that the newly re-cast Rule, as it stands today, has extended relaxation of 5% marks to candidates belonging to the physically handicapped category.

43. Therefore, in the interest of doing complete and substantial justice while granting relief to the petitioner, we are of the view that the appointment of the respondent no.3 should remain undisturbed. In other words, the respondent no.3 shall be continued in service. For this purpose, we would have directed creation of a supernumerary vacancy but since we have been informed that the vacancies reserved for Scheduled Tribes candidates have remained unfilled for the last many years, we direct that, as a purely temporary measure, instead of creating a supernumerary vacancy for him at this stage, the respondent no. 3 be adjusted against a vacancy by diverting one unfilled vacancy reserved for Scheduled Tribes candidates. The said diverted vacancy can be adjusted appropriately by creation of a supernumerary post in the future in case adequate Scheduled Tribe candidates are available. By adopting this course, there would be no occasion of creating an additional post.

44. For adopting the above course of action, we may profitably refer to some of the decisions of the Supreme Court on the scope of the powers of the High Court while exercising writ jurisdiction under Article 226 of the Constitution of India. In ***Gujarat Steel Tubes Ltd. & Ors. Vs. Gujarat Steel Tubes Mazdoor Sabha & Ors.*** *(1980)2 SCC 593*, while discussing the sweep of Article 226 of the Constitution of India, the Supreme Court observed as under:-

> *"73. While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs to the court's province and the remedy is appropriate to the judicial process. There is a native hue about Article 226, without being anglophilic or anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in. Moreover, we sit here in appeal over the High Court's judgment. And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine."*

45. The power of the High Court to mould the reliefs in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, has been reiterated by the Supreme Court in ***State of Rajasthan Vs. Hindustan Sugar Mills Ltd.*** *(1988) 3 SCC 449.* Reference may be made to the relevant observations made in paragraph 4 thereof which reads as under:-

> *"4. xxx The High Court was exercising high prerogative jurisdiction under Article 226 and could have moulded the relief in a just and fair manner as required by the demands of the situation. The High*

> *Court could well have proceeded on the premise that the enhancement made pursuant to the Notification dated 29-1-1970 was unenforceable for the four months preceding 1-6-1970 on which date the enhancement could have been lawfully enforced pursuant to the notification. Till then the notification would have remained unenforceable for that limited period of four months during which the embargo would have been in operation."*

46. Reference may also be made to the guiding principles enunciated by Hansaria, J, who, while concurring with the majority view in ***B.C. Chaturvedi Vs. Union of India*** reported as 1995 SCC (6) 749**,** made the following observations:-

> *"21. I am in respectful agreement with all the conclusions reached by learned brother Ramaswamy, J. This concurring note is to express my view on two facets of the case. The first of these relates to the power of the High Court to do "complete justice", which power has been invoked in some cases by this Court to alter the punishment/penalty where the one awarded has been regarded as disproportionate, but denied to the High Courts. No doubt, Article 142 of the Constitution has specifically conferred the power of doing complete justice on this Court, to achieve which result it may pass such decree or order as deemed necessary; it would be wrong to think that other courts are not to do complete justice between the parties. If the power of modification of punishment/penalty were to be available to this Court only under Article 142, a very large percentage of litigants would be denied this small relief merely because they are not in a position to approach this Court, which may, inter alia, be because of the poverty of the person concerned. It*

may be remembered that the framers of the Constitution permitted the High Courts to even strike down a parliamentary enactment, on such a case being made out, and we have hesitated to concede the power of even substituting a punishment/penalty, on such a case being made out. What a difference! May it be pointed out that Service Tribunals too, set up with the aid of Article 323-A have the power of striking down a legislative act.

23 ***It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if molding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh's case, AIR 1963 SC 1909, that the High Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court.*** *Of course, this power is not as wide as which this Court has under Article 142. That, however, is a different matter."*

47. Further, the jurisdiction of the High Court to pass appropriate orders in order to do complete and substantial justice has also been considered by the Supreme Court in ***Shangrila Food Products Ltd. &***

Anr., Vs. Life Insurance Corporation of India & Anr. *(1996) 5 SCC 54*, by holding as under:-

> *"11.* ***It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play.*** *If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge, is clear from the above emphasised words which may be reread with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the findings were to go in favour of the appellant Company and it is proved to be a lawful sub-tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub-tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendence under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that*

> *when the occupation of the premises in question was a factor in continuation of the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed interdependently. For those who seek equity must bow to equity."*
>
> *(Emphasis added)*

48. Reliance is also placed on paragraph 19 of the judgment passed in ***Food Corporation of India Vs. S.N. Nagarkar*** *(2002) 2 SCC 475*, wherein the Supreme Court observed as under:-

> *"19. Having regard to the facts and circumstances of the case, the Court was satisfied that the respondent was not only to be considered for promotion to the promotional posts, but was also entitled to arrears of pay and allowances since he had been deprived of those benefits not on account of any fault of his but on account of the fault of the authorities concerned.* ***It is well settled that in exercise of writ jurisdiction, the court may mould the relief having regard to the facts of the case and interest of justice****."*
>
> *(Emphasis added)*

49. The principles as laid down in the aforesaid decisions leave no manner of doubt that this is a fit case where, in exercise of the extraordinary powers vested in this Court under Article 226 of the Constitution of India, appropriate directions must be issued towards the end of dispensing complete and substantial justice. We, therefore, deem it appropriate to quash and set aside the impugned order dated 19.01.2018 and issue a writ of mandamus to the respondent no.2,

directing that the petitioner be appointed against the third General category vacancy of the DHJS as advertised on 2015, with all consequential benefits, except back wages. At the same time, appointment of the respondent no.3 as a member of the DHJS, 2015 batch shall not be disturbed.

50. The writ petition is allowed in the above terms while leaving the parties to bear their own costs.

C.M. APPL.3130/2018 (for stay) & 14752/2018 (for striking off the defence of the respondents

51. In view of the orders passed in the writ petition, these applications do not survive for adjudication. The same are rendered infructuous and are dismissed as such.

(REKHA PALLI)
JUDGE

(HIMA KOHLI)
JUDGE

AUGUST 28, 2019
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