

(2006) 10 MAD CK 0161

Madras High Court (Madurai Bench)

Case No: Writ Petition (MD) No"s. 8568, 8818 and 8945 of 2006 and M.P. (MD) No. 1 of 2006 in Writ Petition (MD) No. 8568 of 2006, M.P. (MD) No"s. 2 and 4 of 2006 in Writ Petition (MD) No. 8818 of 2006 and M.P. (MD) No. 2 of 2006 in Writ Petition (MD) No. 8945 of

M. Sankar

APPELLANT

Vs

Bharat Heavy Electricals Limited

Bharat Heavy Electricals
Limited Workers Union Vs The
Chairman cum Managing
Director, B.H.E.L. and Others

The Scheduled Castes Uplift
Union, The SC/ST Employees
Welfare Associations and The
SC/ST Employees Welfare
Council Vs Bharat Heavy
Electricals Limited and Others

RESPONDENT

Date of Decision: Oct. 27, 2006

Acts Referred:

- Constitution of India, 1950 - Article 12, 16(1), 16(4)

Hon'ble Judges: P.K. Misra, J; G. Rajasuria, J

Bench: Division Bench

Advocate: G.R. Swaminathan, in W.P. Nos. 8568 and 8945/2006 and S. Muthukrishnan, in W.P. No. 8818/2006, for the Appellant; A.L. Somayaji for Jeyaraman, for Respondents 1 in W.P. 8568 and 8945/2006 and Respondents 1 to 3 in W.P. 8818/2006, N. Sivakumar, in W.P. 8818/2006, T. Arul, in W.P. No. 8818/2006 and for R-20 in W.P. No. 8945/2006, R. Subramanian, for Respondents 6 and 7 in W.P. 8818/2006, Lakshmi Gopinathan, for Respondents 2 to 10 in W.P.8945/2006, Veera Kathiravan, for Respondents 11 to 19 in W.P. 8945/2006 and N. Shanmugha Selvan, for Respondent No. 21 in W.P. No. 8945/2006, for the Respondent

Final Decision: Allowed

P.K. Misra, J.

W.P. No. 8568 of 2006 has been filed by one M. Sankar, belonging to Scheduled Caste for issuing a writ of Mandamus or any other appropriate writ or order of direction directing the respondent, namely, Bharat Heavy Electricals Limited, to consider the petitioner for the appointment to the post of Skilled Artisan (Welder) in terms of Employment Notice No. 277.

1.1 W.P. No. 8818 of 2006 has been filed by Bharat Heavy Electricals Limited Worker's Union, for issuing a writ of Certiorarified Mandamus or any order or direction calling for the records of the Employment Notice No. 277 issued by the third respondent in such writ petition, namely, the General Manager, H.R.D., Bharat Heavy Electricals Limited and quash the same and direct the respondents to issue fresh employment notice in accordance with law.

1.2 W.P. No. 8945 of 2006 has been filed by the Scheduled Castes Uplift Union, the SC/ST Employees Welfare Associations and the SC/ST Employees Welfare Council against the Bharat Heavy Electricals Limited to issue a Writ of Mandamus or any other appropriate writ, order or direction directing the respondent to reconduct the selection process held pursuant to employment Notice No. 277.

2. W.P.No. 8568 of 2006 was initially admitted by a learned single Judge. Subsequently, W.P. No. 8818 of 2006, which was filed as a public interest litigation on behalf of Bharat Heavy Electricals Limited Worker's Union was admitted by a Division Bench on 25.9.2006 and notice was issued in the matter relating to stay/injunction. On 28.9.2006, an interim order was passed in W.P. Nos. 8818 and 8945 of 2006 to the effect that the selected candidates shall not be allowed to join till 12.10.2006. It was further directed that notice should be published in the newspaper indicating that the writ petitions should be taken up for further hearing on 12.10.2006 and further indicating that any interested candidate was free to file application for intervention on or before the said date so that such candidate could also be heard. It was further indicated that such order passed by the court in presence of the Counsel appearing for Bharat Heavy Electricals Limited should be brought to the notice of the selected candidates by Bharat Heavy Electricals Limited.

2.1 Pursuant to such order, notice was published in Tamil newspaper "Dina Malar" and English newspaper "Indian Express". On 12.10.2006, when the matter was listed for further hearing on stay, the interim order dated 28.9.2006 was modified by permitting the selected candidates to join after giving an undertaking that such selection and appointments are subject to the result of the writ petitions and if ultimately the writ petitions are allowed, such appointments shall not confer any legal right and the selected candidates can claim only the salary for the period they worked pursuant to the direction. It was further directed that the selected candidates at the time of joining should give an undertaking that the decision in the writ petitions would be binding on them without any further notice. Such undertaking was directed to be taken by the management at the time of allowing

the selected candidates to join against the selected posts. It was also directed that the writ petitions shall be taken up for hearing on 19.10.2006.

2.2 On or before 12.10.2006, several petitions for intervention had been filed and all those applications were ordered and the interveners were impleaded as parties. Subsequently also several other intervening applications have been filed, which have also been allowed. In W.P. No. 8568 of 2006 notice had been issued to Bharat Heavy Electricals Limited, the sole respondent, to appear on 15.11.2006. However, since the basic contentions raised in such writ petition are also same as in the other two writ petitions, such matter was also taken up along with two other writ petitions, which have been posted before the Division Bench, on the consent of the counsels appearing for the petitioners and the sole respondent, namely, Bharat Heavy Electricals Limited.

3. At the time of hearing, submissions have been made on behalf of Bharat Heavy Electricals Limited by the learned Senior Counsel Mr. A.L. Somayaji. Three of the interveners have also submitted by more or less supporting the stand taken by the Bharat Heavy Electricals Limited. Other Counsels appearing for the interveners have adopted the stand taken by the Bharat Heavy Electricals Limited.

4. With the above introductory note, it is now necessary to notice the basic contentions raised in the various writ petitions and the stand of the Bharat Heavy Electricals Limited.

5. The allegations in W.P. No. 8818 of 2006, which has been filed by the Bharat Heavy Electricals Limited Worker's Union, are noticed in detail. The main allegations made in the two other writ petitions to the extent they are supplemental would be noticed in due course.

5.1 Undisputedly the Bharat Heavy Electricals Limited, hereinafter referred to as "BHEL" is a Public Sector Undertaking of the Government of India. Employment Notice No. 277 was issued by and on behalf of the BHEL calling for the applications for the post of Skilled Artisans numbering about 250 in various trades. About 14,000 and odd candidates have submitted applications for the said posts. However, the respondent BHEL has rejected 6367 applications and 7695 candidates were found eligible as per the norms mentioned in the Employment Notice No. 277 17.9.2006 has been fixed as the date for the written examination. From the stand taken by the respondent, it is now apparent that selection is based on the result of the marks obtained in the written examination, qualifying examination and at the interview in the ratio of 50:30:20 respectively. Call letters were sent to 4132 candidates to appear at the written examination and for ignoring rest of the eligible candidates no reason has been stated as to why the call letters have not been sent to them. When many candidates were thus ignored, W.P.No. 8818 of 2006 was filed on 18.9.2006 for calling the records of the Employment Notice No. 277 and quash the same and to direct the respondent to issue fresh employment notice in accordance with law. One

of the specific ground taken in such writ petition is that as per the norms fixed by the respondent, a candidate belonging to general category having 53.71 marks was found eligible to appear at the examination, whereas a candidate belonging to Scheduled Caste having 72 marks had not been found eligible to appear at the written examination in the welder trade. It has been further indicated that the methodology adopted by the respondents in selecting the candidates is illegal. It is further stated that a representation had been made to the respondents 2 and 3, namely, the Executive Director, BHEL and the General Manager, H.R.D., BHEL to cancel the methodology adopted in the selection of skilled artisans, but nothing has been done.

5.2 In W.P. No. 8945/06, which has been filed by the Scheduled Castes Uplift Union, the SC/ST Employees Welfare Associations and the SC/ST Employees Welfare Council on 18.9.2006, the prayer is for directing the respondent to reconduct the selection process. In such writ petition, it has been contended that BHEL has introduced arbitrary short-listing criteria. It has been stated as follows:

6. We respectfully submit that the respondent management in the instant case has introduced arbitrary short listing criteria. Instead of considering reserved candidates first under the general category in open competition, the respondent management has segregated the candidates at the very threshold itself, that is it has classified the candidates under four categories i.e., SC, ST, OBC and General. When the application has been received from a SC candidate, instead of first considering him under the open category, the case of the candidate has been confined to the reserve category alone. In view of the large number of applications received from the candidates, short listing criteria had been introduced. In this case, it has turned out that the minimum cut off mark has been prescribed at high level for the reserved candidates compared to the general candidates. As a result of which, those reserved candidates who have secured marks lower than the cut off marks prescribed in the short listing process have been excluded from the selection process itself. This is a most perverse and illegal application of the reservation policy. When the petitioners Associations were informed about the same, they took up the matter with the Human Resource Management, the officials of the Human Resource Management informed the Associations that they are only following the guidelines laid down by the Corporate Department. The petitioners Associations immediately printed handbills and lodged their protest. Apart from the petitioners Associations, the Trade Union also promptly placed their protest by writing bills, pasting on the notice board. Since what is at stake is the very application of the reservation policy, the petitioners Associations took up the matter with the National Commission, for SC. But the respondent management has bluntly told us orally that they would go ahead with the recruitment process. The respondent has even already conducted the written test today i.e. on 17.9.2006. The personal interview is to be held on 18.9.2006. The petitioners Associations are not guilty of laches. They came to know about these developments only on 14.9.2006. Immediately they took

up the matter with the authorities concerned. Even though the authorities are fully conscious that they have committed error, they are not willing to rectify their mistake.

5.3 In the grounds filed in support of the petition, it has been stated that the recruitment process is unconstitutional and in violation of the reservation policy and it has been emphasized that a candidate should be first considered under the general, category and he should be considered against the reserved category if he does not qualify initially against the general category. It has been further indicated that the candidates in General Category, who have secured lower marks, have been called for the written test. In such affidavit, final cut-off percentage of the short-listed skilled artisans, who have been called for the written examination, has been appended as part of the typed-set, which generally indicates that the candidates belonging to Other Backward Class, Scheduled Caste and Scheduled Tribe have not been short-listed and called for appearing at the written examination even though they have secured higher percentage of mark at the qualifying examination as compared to the candidates belonging to General category.

5.4 In W.P. No. 8568 of 2006, which is filed by an individual candidate, it has been stated that such petitioner belongs to Scheduled Caste community, he had secured 72.14 marks and he was applicant for the post of skilled artisans in Welder trade and yet he had not been called for the written examination, even though the candidates belonging to open category securing less marks have been called. The grounds taken by such petitioner are more or less similar to the grounds highlighted in W.P.No. 8945 of 2006.

6. A counter affidavit has been filed by BHEL and the Executive Director and General Manager in W.P.No. 8818 of 2006. Similar, but separate counter affidavits, have been filed in WP.Nos. 8945 and 8568 of 2006. Subsequently, an additional common counter affidavit has been filed by BHEL and other officials in WP.Nos. 8818, 8945 and 8568 of 2006. A counter affidavit has been filed by a successful candidate, who has been impleaded as 4th respondent in W.P.No. 8818 of 2006. The other interveners have not filed any counter, obviously because the stand taken by BHEL reflects their stand and because there is hardly any factual dispute.

7. Mr. T. Arul, appearing for one of the interveners, (Intervener in M.P. No. 5 of 2006 in W.P. No. 8818 of 2006) has submitted that such intervener has been selected as the person belonging to Physically Challenged category and, therefore, irrespective of the result of the writ petitions, his selection should not be interfered with as no candidate belonging to Physically Challenged category has made any grievance.

8. Learned Counsel appearing for an intervener, who is a candidate belonging to reserved category, has submitted that selection of the candidates against reserved category need not be set aside.

9. In the original counter affidavit filed in W.P.No. 8818 of 2006, the locus standi of various Associations including the BHEL Workers' Union, to maintain the writ petitions has been challenged. It is also stated that a writ of mandamus is not maintainable as there is no violation of any legal right of the members of the Association. It is further stated that the writ petitions cannot be entertained as public interest litigation as the petitioners do not purport to represent any underprivileged class of persons unable to access the court. Apart from the above technical pleas, it has been further stated as follows:

The employment notice had clearly indicated that there were 250 posts out of which 48 were reserved for candidates from Scheduled Castes, 2 for Scheduled Tribes and 68 for Other Backward Classes. It has been specified in the notice that if comparatively large number of applications are received, short-listing of the candidates for the purpose of written test would be in the ratio of 1:15 for general candidates and 1:18 for OBC, ST and ST candidates. It has been further indicated in the counter that in the present case the number of the applications to the posts advertised was extremely disproportionate and therefore it was decided to short-list the candidates to call for the written test based on their merit in their ranking in terms of the marks secured in the qualifying examination. It was decided to call the first 15 persons in the general category and 18 persons in the reserved category so that there will be greater participation of persons in the reserved category and such methodology is fair and reasonable and in the larger interest of all concerned, including SCs and STs. It has been specifically stated:

b. It may be added that the employment notice was issued setting out the category wise vacancies as required by the Presidential Directives. These Directives also require that in any direct recruitment, through examination and interview, separate interviews ought to be conducted for SC/ST candidates and that they are not to be judged in comparison with the general candidates but by relaxed standards. If the petitioner's case were to be countenanced, it will lead to an anomalous situation where the categorisation and the resultant cut off marks for each category would become unimplementable and the consideration of SC/ST candidates alternately under general and reserved category at different stages of the selection process. I am advised to submit that this is clearly unjustified and impermissible in law and that the methodology adopted does not offend any constitutional standard. Indeed, the consideration of candidates without reference to the category may also result in the Respondent facing possible challenge at the instance of candidates belonging to other categories.

It has been further stated that at the time of final selection, the candidates belonging to reserved category wherever found meritorious enough have been selected in the general category. In the counter it is further indicated that the candidates had applied indicating separately the category under which they are applying and the candidates belonging to Scheduled Castes and Scheduled Tribes

have submitted their applications are conscious of their position as they were aware of number of reserved vacancies and the ratio prescribed for short-listing the candidates for written test. It has also been indicated that the candidates belonging to SC/ST submitted their applications for consideration under reserved category and they also did not enclose the demand draft for Rs. 50/- which otherwise they would have enclosed had they wanted to apply against the general quota. About 337 candidates who have participated in the examination have availed of the relaxation of age provided in the employment notice for SC/ST candidates and, therefore, they had availed of the benefits of the reserved category. The SC/ST candidates have submitted their applications for consideration against the reserved quota, cannot be allowed to take the benefit of the hind-sight. About 5000 applications have been rejected for want of proof by way of community certificate as required under the employment notice as the candidates were to apply against a specific category. The advertisement had categorically stipulated that the candidates applied under one category shall not be allowed to change the category at any later stage. "Therefore, the SC/ST candidates had applied under the reserved category fully conscious of the fact that they would not be entitled to be considered under the general category and had done so with intent to avail of the benefits/relaxations exclusively available to candidates applying under the reserved category. In the circumstances, it cannot now be contended that there was arbitrariness by reason of lower cut off marks in the general category on the score that SC/ST candidates with higher cut off marks were not considered in the general category."

It is further submitted as follows:

9... the respondent could not have foreseen that the cut off percentage for general candidates would go below that of the SC/ST candidates. This situation came about only on receipt of the applications and the subsequent screening. The cut off marks are written based entirely on the marks secured by the individual candidates wherein the candidates are ranked in the descending order of merit as per the marks secured in the National Apprenticeship Certificate exam and are shortlisted strictly as per the ratio mentioned earlier, where the marks of the candidate whose name finds place at the end of the shortlisted candidates is taken as the cut off for a particular category. It may be added that the situation as encountered in the case on hand, where the cut off marks were found to be higher for the reserved category candidates as against the general category is contrary to the position usually seen and this cannot vitiate the validity of the policy adopted by the Respondent, which is legal, transparent and reasonable.

10. In the common additional counter affidavit, it has been further stated:

(B) The cut off marks which are the basis for calling candidates for the written test (in the specified ratios) are based solely on the marks scored in the NAC. However, that by itself constitutes only less than 1/3 of the total marks to be considered for finally selecting a candidate. The contention of the petitioners that the meritorious

candidates have been permitted to take written test is by itself not a correct statement and does not reflect the correct factual position

No.	TRADE	Gen	OBC	SC	ST
1.	Blacksmith	72.14	73.29	76.57	81.57
2.	Carpenter	60.14	76.00	82.29	N.A.
3.	Fitter	54.14	70.43	72.43	73.57
4.	Machinist	73.57	78.86	78.71	83.29
5.	Painter	65.86	61.71	73.00	N.A.
6.	Plumber	73.29	76.00	77.29	68.14
7.	Turner	77.71	82.43	80.71	75.00
8.	Welder	53.71	71.71	73.57	73.86

NAC marks of candidates who ultimately got selected i.e. at the final selection stage

No.	TRADE	Gen	OBC	SC	ST
1.	Blacksmith	82.43	Nil	86.29	Nil
2.	Carpenter	89.43	Nil	Nil	Nil
3.	Fitter	70.57	70.71	72.43	78.86
4.	Machinist	79.14	78.86	85.29	Nil
5.	Painter	76.29	81.43	Nil	Nil
6.	Plumber	Nil	Nil	80.00	Nil
7.	Turner	84.71	85.43	85.43	Nil
8.	Welder	59.86	72.43	76.00	76.43

It was further indicated :

(D) ...that the NAC exam, the marks scored in which forms the basis of the ranking and the short listing for the written test as per the ratios mentioned in the employment notice is an all India exam conducted by the National Council for Vocational training wherein the candidates are tested in theory and practicals in the respective trades after undergoing on the job industrial training. But as submitted earlier, this constitute only less than 1/3 of the marks to be secured for consideration for final selection. As such the issue raised by some of the petitioners that the candidates with higher cut off (based on NAC score) were not permitted becomes irrelevant since the marks secured therein do not ipso facto mean that a candidate is more meritorious than other candidates.

I further submit that the contention that such reserved candidates ought to have been considered in the general category is in the teeth of the glaring facts as to the benefits of reserved category availed by a large percentage of candidates. It had

been pointed out that 337 SC candidates had availed of age relaxation on the basis of which they were considered against the reserved category and permitted to appear in the written test. On a further scrutiny of the records, it transpires that out of 2170 reserved candidates more than 668 candidates had availed age relaxation which means that almost 1/3 of candidates had availed the benefits of reservation. It may be further highlighted that the extended zone of consideration was larger for reserved category, so much so that the reserved candidates therein were shortlisted in the ratio of 1:18 as against 1:15 for general category. Further the reserved category candidates were interviewed at a separate sitting and judged with relaxed standards, strictly as per Presidential directives. There after the candidates were arranged in the order of merit of all the 3 scores and those of the reserved category who were found to have secured higher marks on their own merit and had not availed any other relaxation, were considered against unreserved vacancies.

I beg to refer in this regard to the relevant Government of India instructions under Department of Personnel and Training O.M.No. 36012/13/88-Estt.(SCT), dated 22.05.1989 and O.M.NO. 36011/1/98-Estt.(Res), dated 01.07.1998 wherein it has been specifically clarified as follows:

In this connection, it is clarified that only such SC/ST/OBC candidates who are selected on the same standard 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 candidate are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

11. In the counter affidavit filed by the impleaded fourth respondent in W.P.No. 8818 of 2006, it is stated that he belongs to "Forward Caste" and coming under the general category and he had paid Rs. 75/- as examination fee and the candidates opted against reserved category are exempted from paying any examination fee. It has been indicated in such counter that the writ petition is not maintainable without making the Union of India as a respondent as the writ petitioner is questioning the policy of reservation as well as the production of non-creamy layer certificate. Maintainability of a public interest litigation relating to service matter is also raised by him. It has been further stated :

(g) ...rejection of the application of OBC candidates who are in the age of between 27 to 30 for non-production of non-creamy layer certificate by the BHEL is perfectly correct, since the OBC candidates below the age 27 are automatically eligible to examination under the notification. Only under the non-creamy layer OBC certificate alone they are entitled for 3 year age relaxation among other OBC candidates.

12. From the Tables furnished by BHEL in its additional counter affidavit it is apparent that a candidate belonging to reserved category, namely, OBC, SC and ST, even though securing more marks than a candidate belonging to so called general category has not been called for the written test. It is seen that in the Blacksmith trade a general candidate securing 72.14 marks in the qualifying examination has been short-listed for appearing at the written examination, whereas the last cut-off mark in the corresponding OBC category is 73.29, SC category is 76.57 and ST category is 81.57. Similarly in Carpenter trade, a general candidate securing 60.14 marks is short-listed for the written examination, whereas the cut-off mark in the corresponding OBC category is 76.00., SC category is 82.29. In the Fitter trade, the cut off marks for general category is 54.14, whereas it is 70.43 for OBC, 72.43 for SC and 73.57 marks for ST candidates. Similarly for Machinist, a candidate securing 73.57 marks in the general category is short-listed, whereas the cut off mark for the OBC category is 78.86, SC category is 78.71 and ST category is 83.29. So far as Painter trade is concerned, the cut off marks for the general category is 65.86, whereas the cut off marks for OBC category is 61.71 and SC category is 73.00. Similarly for Plumber trade, the cut off mark for the candidates belonging to general category is 73.29, whereas for the candidates belonging to OBC category the cut off marks is 76.00, for SC category 77.20 and for ST category 68.14. Similarly for Turner trade, for General Category the cut off marks is 77.71, whereas for OBC 82.43, SC 80.71 and for SC 75.00 marks. Similarly, in the Welder trade a candidate securing 53.81 marks in the qualifying examination has been shortlisted for appearing at the written examination, whereas the last cut-off mark in the corresponding OBC category is 71.71, SC category is 73.57 and ST category is 73.86.

13. Obviously this anomalous position has arisen because a person belonging to reserved category such as OBC, SC and ST has been considered only against the post reserved for such reserved category. The contention of the petitioners is to the effect that any candidate belonging to OBC, SC or ST, as the case may be, has also the right of being considered against general category or open category and this well settled principle has been violated by the BHEL while short-listing the candidates.

14. The contention of the learned Senior Counsel appearing for the organization as well as the selected candidates is that there is no inherent defect in the method adopted by the BHEL as it had been so indicated in the Employment Notice No. 277.

15. Though initially some submissions have been made by the counsel appearing for the petitioners that all the eligible candidates should have been called for the written examination, they have abandoned such a course obviously because of the well settled principle that it is open to the employer to short-list the candidates. Moreover, as pointed by the learned Senior Counsel appearing for BHEL that the respondent in the Employment Notice No. 277 has categorically indicated as follows:

General (i) BHEL Management reserves the right to restrict the number of candidates to be called for the selection process by raising the eligibility standards in case the number of applications received is very large. In such an eventuality, eligible candidates will be invited for objective type Written Test at their own expense in the ratios of 1:15 to the number of vacancies for General candidates and 1:18 for OBC, SC and ST candidates. In other words all the applications received in each trade will be separately arranged in descending order of merit i.e. based on the percentage of aggregate marks secured in NAC and only the required number (according to ratios mentioned) starting from the top of the list will be called for the Written Test in each trade. In case of a tie at cut off marks, all the candidates scoring cut off marks will be called for the Written Test

16. Learned Counsel appearing for the petitioners have focused their submissions on the question relating to methodology of short-listing adopted by BHEL.

17. Learned Senior Counsel appearing for BHEL has particularly relied upon the contents of the Employment Notice to the effect that "Category once filled up will not be allowed to be changed later. Also the category once declared if found to be false at any later stage will render the candidate liable for suitable actions including termination and prosecution." It is therefore submitted by the learned Senior Counsel and supported by other counsel appearing for the interveners that once the candidates had indicated that they belong to a particular reserved category, short-listing of appearing at the written test has been rightly done in 1:18 proportion out of the candidates belonging to such category.

18. There is a basic fallacy in such approach of the contesting respondent as such a reasoning flies in the face of well settled principle that a person belonging to a reserved category has every right of competing against a general vacancy as well as a reserved vacancy.

19. Article 16(1) of the Constitution ensures equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. That, the respondent Bharat Heavy Electricals Limited being an "other authority" comes within the expression "the State" as defined in Article 12, is not disputed by the respondent BHEL. Article 16(4) enables the State to make any provision for reservation of appointment or post in favour of any backward class of citizens. Pursuant to the aforesaid enabling provision, BHEL has made provisions for reservation, but, merely because provisions have been made for reservation in favour of Scheduled Castes, Scheduled Tribe and Other Backward Classes, does not take away the right of such persons belonging to these class of being afforded equality of opportunity relating to employment or appointment to any office under the BHEL.

20. The fact that certain percentage of posts are reserved for any backward class of citizens does not obviously mean that rest of the posts, which are not reserved,

become ipso facto reserved in favour of the citizens not belonging to the reserved category.

21. In [Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.](#), it was observed :

94A. ...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.

In the decision in [Ritesh R. Sah Vs. Dr. Y.L. Yamul and others](#), , it has been held as under:

...There is sufficient force in the contention of the petitioner. A student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidates and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different college's which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but in computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate....

In the decision reported in [Union of India \(UOI\) and Another Vs. Satya Prakash and Others](#), , the Supreme Court has held as follows:

...If a candidate of the Scheduled caste, the Scheduled Tribe and Other Backward Class, who has been recommended by the Commission without resorting to the relaxed standard could not get his/her own preference in the merit list, he/she can opt a preference from the reserved category but while computing the quota/percentage of reservation he/she will be deemed to have been allotted a seat as an open category candidate (i.e. on merit) and not as a reserved category candidate recommended by the Commission by resorting to the relaxed standard. Simply because he opted a preference from the reserved category would not exhaust the quota of OBC category candidate selected under the relaxed standard....

22. As a matter of fact, to be fair the learned Senior Counsel appearing for BHEL has not combated this position, but he has submitted that at the time of final selection and appointment, if it is found that any person belonging to reserved category is selected on his own merit, he need not be considered as having been selected on the basis of reservation, but he can be considered as part of selection relating to general category. However, he has emphasized that such a question would not arise for consideration at the time of short-listing and would only arise at the time of selection and appointment.

23. Learned Senior Counsel has also pointed out that there are certain exceptions to such general rule. For the aforesaid purpose, he has placed reliance upon the clarifications issued by Government of India, Department of Personal and Training in O.M.No. 36012/13/88 dated 22.5.1989, which are to the following effect:

2. The above OM and the OM 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 standard 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 candidate are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

He has also invited our attention to the Presidential Directives on the aspects relating to reservation.

Particularly he has placed reliance upon paragraph 4.2 which is to the following effect:

4.2. In cases of direct recruitment to vacancies in posts under Public sector enterprises, the Scheduled Castes and Scheduled Tribes candidates who are selected on their own merit without relaxed standard, 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/ST candidates which will thus comprise SC/ST candidates who are lower in merit than the last candidate in the merit list but otherwise found suitable for appointment even by relaxed standards, if necessary.

24. Learned Senior Counsel has also placed reliance upon the letter issued by the Government of India, Personal & Training dated 22.5.1989 on the subject relating to reserved vacancy. The relevant portion relied upon by him are extracted hereunder:

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."

Clarification. -

2. The above OM and the OM 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 standard 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 candidate are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against unreserved vacancies.

On the basis of this, it is submitted by him that since there has been relaxation of age and qualifying marks for the candidates belonging to OBC, SC and ST, such candidates are to be considered only against the reserved category and therefore they cannot compete against the vacancies available for general category.

25. The validity of the above Presidential Directives/clarifications not being in issue in the present case and assuming that such Presidential Directives/clarifications are valid, the legality of the method adopted is required to be considered.

26. In the present case, the notice has prescribed for relaxation relating to upper age limit in respect of candidates belonging to reserved category. It had also prescribed lower qualifying marks for such candidates as compared to other candidates. The method of selection has been described in the notice as well as the counter affidavit. The selection is on the basis of 50% of the marks obtained at the written examination, 30% of the marks obtained at the qualifying examination and marks obtained out of 20 at the interview. By applying the Presidential Directives and clarifications, a candidate belonging to reserved category, if he is over-aged and found eligible only because he is given relaxation of upper age limit, selection of such candidate, including the question of short-listing for appearing at the written examination, can be only on the basis that he belongs to reserved category. Similarly any candidate who has been found eligible to appear at the examination

notwithstanding the fact that he has secured less than 60% at the qualifying examination, which is the eligibility criteria for the general category, can be considered for selection only against the reserved category. This may be so because such a candidate belonging to reserved category would not have been otherwise eligible to appear at the written examination if he would have been considered as a general candidate. We, however, fail to see any logic in applying such a restrictive interpretation to a candidate who is otherwise eligible within the normal upper age limit and the prescribed mark of 60% at the qualifying examination. As a matter of fact, the main basis of the challenge by the petitioners is that notwithstanding the fact that the candidate belonging to reserved category has secured more marks at the qualifying examination as compared to a candidate belonging to general category, such candidate has not been called for the written examination merely because he did not come within the zone of consideration of 1:18 for reserved category.

27. If the Presidential Directives and the subsequent clarifications are to be followed, the following consequences would ensue in respect of the candidates belonging to reserved category. If such candidate is over-aged as applicable to general category and he is eligible only because of the relaxation relating to age, such candidate can be considered eligible for appearing at the written examination by virtue of short-listing only if he comes within the proportion of 1:18. However, if a candidate belonging to reserved category is not required to avail of the relaxation of upper age limit, that is to say, if he is in the same age group as the candidates belonging to general category, his case for being considered at the written examination in the general category cannot be ignored merely because he does not come within the proportion of 1:18 because he is reserved category and if such a candidate has secured more marks than a candidate belonging to general category, such person should not have been ignored merely because he belongs to a reserved category. Article 16(4) only envisages conferment of certain additional benefits. Article 16(4) nowhere contemplates that merely because some person is belonging to reserved category, he would not be allowed to be considered against general category even though he has secured more marks than the persons belonging to other categories. The submission that this is applicable only at the time of final selection and not at the time of initial short-listing is bereft of any rhyme or reason. In our considered opinion, the BHEL has done short-listing in a fundamentally erroneous manner which has vitiated the selection process.

28. If the Presidential Directives and the clarifications are applicable, a person who becomes eligible by relaxation of age or by relaxation of qualification, can be considered only as a candidate belonging to reserved category and he may not have a right to compete in respect of general category. Where, however, a candidate belonging to reserved category is otherwise eligible by taking into account the normal age limit as well as the prescribed qualification applicable to a general candidate, he cannot be deprived of his fundamental right of equality of opportunity

in matters relating to employment or appointment to any office under the States. It is obvious that the matter relating to employment would include every stage of the selection process and it cannot be said that only at the time of final selection such candidate belonging to reserved category would be considered to be adjusted against general category notwithstanding the fact that he is otherwise eligible and he is not required to avail of any of the relaxation contemplated for a candidate belonging to the reserved category.

29. What the BHEL should have done is to first find out whether a candidate belonging to reserved category is eligible by virtue of any relaxation applicable to reserved category. If such candidate is found to be eligible only because he has availed of some relaxation applicable only to reserved category, his application is to be considered against the reserved vacancy within the proportion of 1:18 meant for reserved category. On the other hand, if a candidate belonging to reserved category is otherwise eligible and does not require any relaxation either relating to age or relating to qualification, such a candidate is first required to be considered in the selection process relating to the general vacancy within the proportion prescribed for general category. However, if he fails to make the cut relating to general category, his candidature is still required to be considered as against the proportion of 1:18 meant for particular reserved category.

30. Learned Senior Counsel appearing for BHEL has pointed out that in the Employment Notice itself it had been indicated that short-listing may be done if the "candidates became disproportionately large". The question here is not whether BHEL was justified in short-listing the candidates for appearing at the examination, but the question is whether the proper methodology was applied.

31. Learned Senior Counsel has also submitted that in the Employment Notice itself it was indicated that 48 posts were reserved for Scheduled Castes, 2 posts for Scheduled Tribes and 68 posts for Other Backward Classes and it was further indicated "Category once filled up will not be allowed to be changed later." In our opinion, this particular clause in the notice cannot be construed as indicating that a candidate belonging to a reserved category cannot be considered and shall not be short-listed for appearing at the examination, if he fails to make the cut for the particular reserved category. As a matter of fact, if any such specific instruction would have been incorporated, such clause would have been violative of the fundamental right guaranteed under Article 16(1) of the Constitution.

32. Learned Senior Counsel has also submitted that in view of General Condition No. (i) stipulated in the notice, short-listing has been done and if the candidates were aggrieved by any such notice, they could have challenged such notice earlier. Such General condition No. (i) has already been extracted earlier.

33. We have carefully gone through the said condition. It does not spell out categorically that a candidate belonging to a reserved category would be

short-listed only in respect of that particular reserved category. On the other hand, the expression. "In other words all the applications received in each trade will be separately arranged in descending order of merit i.e. based on the percentage of aggregate marks secured in NAC and only the required number (according to ratios mentioned) starting from the top of the list will be called for the Written Test in each trade" should not be construed in the manner which is likely to defeat the purpose for which the provision for reservation has been made and inconsistent with the provisions contained in Article 16(1) of the Constitution.

34. Learned Senior Counsel has placed reliance upon the decisions of the Supreme Court reported in [Government of Andhra Pradesh Vs. P. Dilip Kumar and Another](#) ; [Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and another](#), and [Union of India and another Vs. T. Sundararaman and others](#), .

35. The above decisions clearly lay down that short-listing on any reasonable basis is possible. As already indicated, the main grouse is not against short-listing. There cannot be any two opinion about the fact that when number of candidates are disproportionately large, short-listing on any reasonable basis can be made. It, however, passes our comprehension as to how while short-listing a candidate who secured in the qualifying examination higher marks than that of a candidate belonging to unreserved category would be excluded merely because he belongs to a reserved category and he is otherwise eligible on his own steam and he is not required to avail of any relaxation relating to upper age limit or relating to qualification. The decisions cited by the learned Senior Counsel have not advocated such a position.

36. It is to be noticed that in the present case the question of short-listing is not in dispute, but the core question is relating to proper method of short-listing. At the cost of repetition, we are constrained to emphasise that the authority should have first short-listed the candidates on the basis of merit irrespective of the question of reservation

37. In course of hearing, the learned Senior Counsel appearing for BHEL and Mr. N. Sivakumar, learned Counsel, who has appeared for a person belonging to general category, submitted that more number of candidates belonging to the reserved category have already been selected and if all the candidates would have been considered against the general category, there is a distinct possibility of selection being overwhelmingly confined to candidates belonging to reserved category.

38. We do not think such a submission can at all be countenanced within the four corners of the present dispute. The provisions contained in Article 16(4) are only enabling provisions. The question as to whether the authority, should provide for reservation in respect of certain candidates is essentially a matter of policy to be decided by the law-makers. The duty of the Court is to enforce the law as available and not to make the law. The law, as presently applicable, envisages reservation to a

particular extent and therefore the Courts are required to interpret and enforce such law consistent with the well settled principles recognized by the Supreme Court.

39. Mr. T. Arul, appearing for a candidate, who has been selected against the quota available for Physically Challenged category, has submitted that irrespective of the view to be taken by this Court, appointment of such persons against Physically Challenged category need not be questioned.

40. We find such submission to be justified as the core question raised in the three writ petitions do not at all relate to the question of selection as against the quota available for physically challenged category.

41. In the course of hearing, it was submitted that since selection was made not only on the basis of the marks obtained at the qualifying examination but also on the basis of the written examination and the interview, there could not be any conclusion that the candidates left out if called for to the written examination would have ultimately-succeeded in the selection.

We do not think it would be appropriate for the Court to hazard a guess whether the candidates excluded by the erroneous method adopted by BHEL would have been otherwise successful after the written examination and the interview. It is very much possible for a candidate to obtain excellent marks in the written examination and the interview, even though the marks obtained by him at the qualifying examination would have been much less than the candidates already selected.

42. Since the entire selection process has become defective, it would not be proper to speculate whether the candidates kept out of the written examination would have ultimately succeeded or not. Since an undertaking has already been taken from the successful candidates that their selection and appointments are subject to the result of the writ petitions, it would be more appropriate to quash the entire selection process and to direct the authorities to hold a fresh written test and interview by following the proper procedure of short-listing except relating to the persons selected against physically challenged category. Since the Presidential Directives and the clarifications already extracted have not been challenged, we are assuming that such policy is required to be followed.

43. Therefore, on that basis, we direct that short-listing may be done in the following manner:

(1) The fresh process for identifying the candidates eligible for written examination shall be done on the basis of the applications already received and it is not necessary to issue any fresh notice inviting any fresh application. This is so because the notice itself has not been challenged by any person.

(2) If any candidate belonging to the reserved category is above the normal age applicable to the general category and he is eligible only because of age relaxation,

he can be considered only as a reserved candidate for the particular category and if he is ultimately successful, he is also required to be considered only against such reserved category.

(3) A candidate belonging to reserved category securing less than the qualifying marks prescribed for general category but availing the relaxed standard can be considered only as against that particular reserved category at the time of short-listing as well as selection.

(4) After keeping apart the applications of the candidates coming within the above category, the names of other candidates belonging to general category as well as reserved category should be prepared in the descending order of merit in respect of each trade as envisaged in General Condition No. (i) of the notification No. 227 of BHEL, Tiruchirappalli.

(5) On the aforesaid basis, the candidates coming within the proportion of 1:15 as meant for general category are obviously eligible and should be called for the written test.

(6) After completing the aforesaid process, the applications of all the applicants belonging to a particular reserved category, including those coming within paragraphs 2 and 3 supra should be considered and those coming within the proportion of 1:18 of that particular reserved category shall be held to be eligible to appear for the same written test.

(7) Thereafter the process of selection through written examination and interview and issuing appointment orders should be completed. This may be done as expeditiously as possible, within a maximum period of four months from the date of receipt of the present order. Those selected against Physically Challenged category shall be allowed to continue.

(8) Till the selection process is completed and fresh appointment orders are issued in respect of general category and reserved category, the persons who have already been allowed to work shall be paid their salary for the period during which they continue to work.

(9) If any candidate who joined the service as per the defective procedure adopted was made to resign from any of his job and is not re-selected, he would be allowed to make a representation to his former employer and it is hoped and expected that such former employer would take back such person in service.

44. Learned Senior Counsel as well as some of the counsel appearing for the interveners have raised a question that public interest litigation relating to such service matters may not be maintainable. Apart from the fact that one individual aggrieved candidate has filed a writ petition, we find that two other writ petitions have also been filed by recognized associations purporting to represent the employees, and also persons belonging to Scheduled Castes and Scheduled Tribes.

In the peculiar facts and circumstances of the case, we do not think that the technical plea of maintainability would stand in the way of granting the relief, as otherwise a grave illegality would be allowed to be perpetuated.

45. With the above observations and directions, the writ petitions are allowed to the extent indicated. No costs. Consequently the connected miscellaneous petitions are closed.