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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : 27.11.2018

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W.P.(C) 12598/2018

UNION OF INDIA

..... Petitioner

Through: Mr Ruchir Mishra with Mr. Sanjiv
Kr. Saxena, Mr. Mukesh Kr. Tiwari,
Mr. Ramneek Mishra and Mr.
Abhishek Rana, Adv. for UOI

versus

DIVYANSHU PATEL

..... Respondent

Through: Mr. Ankur Chibber with Mr. Vikram
Hegde, Advs.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A.K. CHAWLA

VIPIN SANGHI, J. (ORAL)

CAV No. 1081/2018

Learned counsel for the caveator has appeared. Accordingly, the
caveat stands discharged.

C.M. No. 48964/2018

Exemption allowed, subject to all just exceptions. The application
stands disposed of.

W.P.(C) 12598/2018 with C.M. Nos. 48962, 48963, 48695/2018

1. The Union of India has preferred the present writ petition to assail the order dated 25.07.2018 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No. 579/2018 preferred by the respondent. The Tribunal has allowed the said Original Application and directed the petitioner to allocate Indian Administrative Services (IAS) to the respondent applicant with all consequential benefits within two months from the receipt of the copy of the order.

2. The respondent appeared in the Civil Services Examination (CSE), 2016. He claimed benefit of reservation as an OBC category candidate. He secured 204th rank in the list of candidates recommended by the Union Public Service Commission (UPSC) for appointment on the basis of CSE 2016 in the OBC category. The respondent, together with other successful candidates, was directed to undertake training at Lal Bahadur Shastri National Academy of Administration, Mussoorie from 28.08.2017 to 08.12.2017. However, he was not allocated any service. This was on account of the stand taken by the petitioner that he was not entitled to reservation as an OBC candidate, as he fell within the “Creamy Layer” in terms of the O.M. dated 08.09.1993 read with the clarification dated 14.10.2004.

3. The respondent herein was aggrieved by the stand taken by the petitioner and preferred an Original Application i.e. O.A. No. 4366/2017. The Tribunal directed the petitioner to consider the representation of the respondent and pass a speaking order. Consequently, on 17.01.2018 the

petitioner passed an order giving its reasons for non consideration of the respondent as an OBC category candidate and for the petitioner's stand that he fell within the "Creamy Layer". The relevant extract from the said order reads as follows:

"10.3 And whereas above stated para 4(v) read with para 7 of the letter dated 14.10.2004 is applicable to the candidates whose either of the parents was recruited to a Group 'C'/ Group 'B' post and he/ she was further gets into a Group 'A' post by the way of normal career progression i.e. promotion/ induction but not through direct recruitment. In the instant case, father of the candidate is a directly recruited Group 'A' employee, which he himself has accepted while filling the Detailed Application Form and the present representation also, therefore the candidate would fall in "Creamy Layer" by applying the tests given in category II(b) to the Schedule to OM dated 08.09.1993."

4. Consequently, the respondent preferred the aforesaid Original Application which, as noticed above, has been allowed by the Tribunal. The question which fell for consideration before the Tribunal was whether the case of the petitioner is covered by the "Creamy Layer" in terms of the notification dated 08.09.1993 read with the clarification dated 14.10.2004. At this stage, we consider it appropriate to extract the relevant portions of the notification dated 08.09.1993 and the clarification dated 14.10.2004.

5. Relevant extract of the notification dated 08.09.1993 reads as follows:

"2. Consequent to the consideration of the Expert Committee's recommendations this Department's Office Memorandum No. 36012/31/90-Estt. (SCT), dated 13.8.90 referred to in para (1) above is hereby modified to provide as follows:

(a) 27% (twenty seven percent) of the vacancies in civil posts and services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.....

.....

“(c) (i) The aforesaid reservation shall not apply to persons/sections mentioned in column 3 of the Schedule to this office memorandum.(See: The Schedule, in so far as it is relevant reads as follows)”

SCHEDULE

Description of category		To whom rule of exclusion will apply
1	2	3

“II. SERVICE CATEGORY

A. Group A/Class I officers of the All India Central and State Services (Direct Recruits)

Son(s) and daughter(s) of

(a) parents, both of whom are Class I officer;

(b) parents, either of whom is a Class I officer;”

“ B. Group B/ Class II officers of the Central And State Services (Direct Recruits)

Son(s) and daughter(s) of

(a) parents, both of whom are class II officers

(b) parents of whom only the husband is a class II officer and he gets into Class I at the age of 40 or earlier.”

6. Relevant extract from the Clarification dated 14.10.2004 reads as follows:

“Following questions have been raised from time to time about the application of the above provisions to determine creamy layer:”

“ (v) Will the sons and daughters of parents of whom husband is directly recruited Class III/ Group C or Class IV/ Group D employee and he gets into Class I/ Group A at the age of 40 or earlier be treated to be falling in creamy layer?

.....

“ In regard to clause (v) of para 4, it is clarified that the sons and daughters of parents of whom only the husband is a directly recruited Class II/ Group B officer who gets into Class I/ Group at the age of 40 or earlier are treated to be in creamy layer. If the father is directly recruited Class III/ Group C or Class IV/ Group D employee and he gets into Class I/ Group A at the age of 40 or earlier, his sons and daughters shall not be treated to be falling in creamy layer”

7. The relevant facts for examination of the said aspect may now be noticed. The respondent's father was appointed as a Post Office Clerk in Central Government at the age of 23 years and, subsequently, he was directly recruited as a Lecturer, which is a Group “A” post in Maharani Lal Kunwari Post Graduate College, Balrampur under State Government of Uttar Pradesh at the age of 43 years.

8. The petitioner claimed that the case of the respondent fell under Entry II of the Schedule to the O.M. dated 08.09.1993, and in particular under Clause (A) thereof as extracted above.

9. On the other hand, the respondent claimed that he was not covered by the “Creamy Layer”, since his father was a Group ‘C’ Government servant, and only at the age of 43 years, he got into Group ‘A’/ Class I service. The respondent sought to place reliance on the Entry II (B), which relates to Group ‘B’/ Class II Officers of the Central and State Services (Direct Recruitment) and in particular Entry (b) thereof as extracted above.

10. The respondent also placed reliance on the clarification issued on 14.10.2004 by the DOP&T, Government of India as extracted above.

11. The Tribunal has held that since the respondent’s father was initially recruited as a Group ‘C’ Government servant at the age of 23 years, and he got into Group ‘A’/ Class I only at the age of 43 years, the respondent could not be considered as falling within the “Creamy Layer”. In respect of the candidate whose father was initially directly recruited as a Group ‘C’/ Class III Officer, even if he were to get into Group ‘A’/ Class I service before the age of 40 years, even then he would not fall within the “Creamy Layer” in terms of paragraph 7 of the clarification letter dated 14.10.2004. The Tribunal examined the rationale for laying down the age limit of 40 years in the impugned order. The relevant portion thereof reads as follows:

“Admittedly, the father of the applicant joined as a Post Office Clerk, which is Class III/Group ‘C’ post in the pay scale ₹260-480 on 07.05.1980. Subsequently, he was selected to a Group

'A' post, i.e., Lecturer in Maharani Lal Kunwari Post Graduate College, Balrampur under State Government of Uttar Pradesh. At that time, he was 43 years old. The Schedule attached to Annexure A-10 DoPT O.M. dated 08.09.1993 deals with such a case, as noticed in paragraph 2.3 above. The rationale behind excluding a candidate whose father is a Class I / Group 'A' officer is that such a candidate would have received all facilities and privileges for pursuing his education in a most beneficial manner, and such a candidate would not have suffered vagaries of poverty / economic constraints in any manner. A close reading of this O.M. and the Schedule attached to it would indicate that they have taken note of the ground reality that the basic education of a candidate, aspiring to prepare for CSE, would have been over by the time his/her parents cross the age of 40 years. This alone is the plausible reason for prescribing the age limit of 40 years.

9. In the instant case, admittedly, the applicant's father was a Post Office Clerk, which is a Class III/Group 'C' post. His father had continued in that capacity till he attained the age of 40 years. Only at the age of 43 years, he was fortunate enough to get selected to a Group 'A' post of Lecturer in a college in Uttar Pradesh. Hence, it is crystal clear that the applicant has suffered the vagaries of economic constraints all through his basic education. Certainly, his parents were not able to provide him the kind of facilities, which the parents, in Class I Government services, provide to their children. Hence, we are of the view that the DoPT, in their impugned Annexure A-1 order dated 17.01.2018, has not correctly interpreted the rationale of its own O.M. dated 08.09.1993 as well as the clarification provided in its letter dated 14.10.2004. We have no doubt that in terms of the clarifications provided in DoPT letter dated 14.10.2004 the applicant belongs to non-creamy layer category of OBC. The UPSC and the concerned entities of the Central Government had clearly interpreted 08.09.1993 O.M. and the clarifications given in DoPT letter dated 14.10.2004 in considering the candidature of the applicant in

CSE, 2013 and in offering him appointment to the post of Assistant Commandant, CRPF.”

12. The tribunal also examined the aspect of the respondent falling in the “Creamy Layer” on the basis of the income/wealth test criteria, and found that the income criteria for taking the respondent into the “Creamy Layer” was not met. This fact is not disputed by the present petitioner. The relevant extract in this regard reads as follows:

“Another touchstone to be applied for determining creamy layer is the Income / Wealth test criteria. At the time when the applicant applied for CSE, 2016, the income limit prescribed was ₹6,00,000/- per annum. The applicant had indicated clearly that his parents’ annual income was ₹5,20,000/- per annum only. This fact has not been disputed by the respondent anywhere and hence it has to be accepted.”

13. The submission of Mr. Mishra, learned counsel for the petitioner is that the tribunal has not considered the fact that the respondent’s father was a Direct Recruit Class I/ Group A Officer, and it was not a case where he was holding a Group ‘C’ post in the Central Government Service and he got into a Class I/ Group “A” service by way of career progression, such as, through promotion. Mr. Mishra submits that the respondent resigned from the said earlier held Group “C” Post, as the said posts were in two different services, under two different employers. Learned counsel submits that since the respondent’s father was a direct recruit Group “A” Officer, his case is covered by category “A”, and there is no age limit prescribed – to say that the direct recruit Group “A” officer should have been recruited before he attained the age of 40 years, or the like. The age at which the respondent’s

father became a Group “A” Officer is not relevant, since he is a Direct Recruit.

14. Learned counsel for the petitioner further submits that the case is not covered by the clarificatory letter dated 14.10.2004, as the rule of exclusion from “Creamy Layer” would apply, only when induction into the Group ‘A’ post occurs by way of promotion from a lower Group “B” Post in light of the O.M. dated 08.09.1993.

15. On the other hand, Mr. Chibber, learned counsel for the respondent supports the view taken by the tribunal in the impugned judgment. He submits that the respondent’s father had got into the Group ‘A’ post after attaining 40 years of age and, previously, he was holding a Group ‘C’ post and, thus, the respondent is excluded from the Creamy Layer of the OBC’s. Relying on Entry II (B), which has been already extracted above, he submits that the words ‘gets into’ are of general import, and would cover those ‘Directly Recruited’ into Group “A”. Clarificatory letter dated 14.10.2004, paragraph 7, provides that the respondent’s father was excluded from the “Creamy Layer”, as he got into the Group ‘A’ service after the age of 40 years and from a Group “C” service.

16. Relying on a Division Bench judgment dated 05 October 2007 of this Court in *The Secretary M/O. Personal, Public Grievances & Pensions vs Tanu Kashyap And Anr*, (2007) ILR 7 Delhi 128, wherein a similar issue had arisen, and exclusion from the “Creamy Layer” was allowed as the father of the respondent therein had secured the Class I post after the age of

40 years, the respondent draws our attention to paragraph 9 of the said judgment which reads as follows:

“9. The father of the respondent No. 1 admittedly joined the job in the pay scale of Rs. 725-1325 on the basis of which it cannot be said that he would belong to the creamy layer as it is not Group- A/Class-I post. At the age of 40 years, he was enjoying the pay scale of Rs. 1130-2400, equivalent to Rs. 1640-2900, which is again Class-II post. He was promoted to the scale of Rs. 1640-2900 after he had crossed the age of 40 years, i.e. at the age of 40 years 4 months and 12 days. Therefore, father of the respondent No. 1 neither joined Class-I post nor he could get promotion to the Class-I post before he attained the age of 40 years. On this happening, therefore, he would not fall in the creamy layer of OBC.”(emphasis supplied)

17. The only question which arises for determination is if the respondent falls under the “Creamy Layer” of OBC. Thus, the issue that arises is whether the case of the respondent is covered by sub-category “A” of the “II Service Category”, or sub-category “B” of the “II Service Category”. The argument of Mr. Mishra is very simplistic. The submission is that one has to only see whether, on the relevant date, a parent of the candidate is a Direct Recruit Class I Officer. If the parent is a Direct Recruit Class I Officer, the son or daughter would fall within the “Creamy Layer” by reference to clause (b) of sub-category “A”.

18. In conjunction with this submission, Mr. Mishra has submitted that clause (b) of sub-category “B” of the “II Service Category” of the Schedule, relates to those cases where the Class II Officer gets into Class I Service at the age of 40 years, or earlier, through promotion or by any other mode,

except by Direct Recruitment. Thus, the submission is that once the parent of the concerned candidate gets into Class I/ Group A Service of All India Central or State Services by Direct Recruitment, it does not matter whether he has got into the said service under the age of 40 years or above the age of 40 years and, in either case, his sons and daughters would not be entitled to reservation since they would be covered by “Creamy Layer”.

19. Mr. Mishra has laid much emphasis on the use of the words “(Direct Recruits)” in sub-category “A” of the “II Service Category” of the Schedule. According to him, the sub-category “A” would not be attracted in respect of wards of Group A/ Class I Officers who reached the said position through promotion, or any other mode, other than Direct Recruitment.

20. On the other hand, the submission of the respondent is that clause (b) of sub-category “B” under the “II Service Category” of the Schedule shows that the ward of a Class I Officer, who gets into Class I Service after the age of 40 years, would not fall within the “Creamy Layer”. Reliance is placed on the observations made by the tribunal, which sets out the rational for excluding the wards of such officers from the “Creamy Layer”.

21. Clause(b) of the sub-category “B” uses the expression “*Parents of whom only the husband is a Class II Officer and he gets into Class I at the age of 40 or earlier*”. The use of the expression “*gets into Class I*”, in our view, is very general and cannot be restricted to cover cases only of promotion, or to exclude cases of Direct Recruitment. A Class II Officer could get into a Class I Service either through promotion, or through absorption on deputation, or through transfer on deputation, or even through Direct Recruitment. The

spirit behind prescription of the age limit of 40 years, or earlier, in clause (b) of sub-category B of “*Category II Service Category*” of the Schedule, is what the tribunal has taken note of and we entirely agree with it. The ward of an officer who gets into Class I Service, from a Class II Service at the age of 40 years or earlier, would enjoy the status, pay and environment (both social and academic) of a Class I Officer from a relatively young age, since, by the time an officer is 40 years, the children of such an officer would still be fairly young and of impressionable age. The backwardness attached to the caste to which the family of the officer/ his wards belong, would be overcome on account of the parent of such a child enjoying the status and pay of a Class I/ Group A Officer when the ward was relatively small. However, the situation would be different if such Class II/ Group B Officer were to get into Group A/ Class I Service after the age of 40 years since, by then, his or her children would, normally, have grown up a little more beyond the impressionable age, without the parent of the child enjoying the status and pay attached to a Class I/ Group A post.

22. The well settled rule of interpretation is that if there are two or more entries which may cover a situation, they have to be harmoniously construed and the one which is most appropriate – keeping in view the object, with which the entries are framed, should be preferred.

23. We may refer to the judgment of the Supreme Court in *Calcutta Gas Company (Proprietor) v. State of West Bengal & Ors.*, AIR 1962 SC 1044. The Supreme Court was examining the constitutional validity of the Oriental Gas Company Act, 1960. The issue raised by the appellant was with regard

to the legislative competence to frame the said law. The Supreme Court examined entries 7 and 52 of the List I – Union List, and Entries 24, 25, 26 and 27 of the List II – State List under the 7th Schedule to the Constitution, which read as follows:

“List I—Union List

Entry 7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

Entry 52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

List II—State List

Entry 24. Industries subject to the provisions of Entries 7 and 52 of List I.

Entry 25. Gas and gas-works.

Entry 26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

Entry 27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.”

24. The Supreme Court concluded that “Gas and Gas Works” – in Entry 25 of List II fall within the exclusive field allotted to the States, even though the same also qualify as “Industries” which, under Entries 7 and 52 of List I fell within the domain of the Central/ Union Government. The relevant extract from the discussion in the judgment on the said aspect reads as follows:

“10. The first question that occurs to one's mind is, what is the meaning of the expression “industry” in Entry 24 of List II? Is it different from the meaning of that expression in Entry 52 of

List II? Whatever may be its connotation, it must bear the same meaning in both the entries, for the two entries are so interconnected that conflicting or different meanings given to them would snap the connection. Entry 24 is subject to the provisions of Entry 7 and Entry 52 of List I. Entry 7 of List I provides for industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war, and Entry 52 for industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Therefore, ordinarily industry is in the field of State legislation; but, if Parliament by law makes a relevant declaration or declarations, the industry or industries so declared would be taken off its field and passed on to Parliament. In the premises, the expression "industry" in all the entries must be given the same meaning. Now, what is the meaning of the word "industry"? In *Tika Ramji v. State of U.P.* [(1956) SCR 393] the expression "industries" is defined to mean the process of manufacture or production and does not include the raw materials used in the industry or the distribution of the products of the industry. It was contended that the word "industry" was a word of wide import and should be construed as including not only the process of manufacture or production but also activities antecedent thereto such as acquisition of raw materials and subsequent thereto such as disposal of the finished products of that industry. But that contention was not accepted. It is not necessary in this case to attempt to define the expression "industry" precisely or to state exhaustively all its ingredients. **Assuming that the expression means only production or manufacture, of gas? Entry 24 in List II in its widest amplitude takes in all industries, including that of gas and gas-works. So too, Entry 25 of the said List comprehends gas industry. There is, therefore, an apparent conflict between the two entries and they overlap each other. In such a contingency the doctrine of harmonious construction must be invoked. Both the learned counsel accept this principle. While the learned Attorney-General**

seeks to harmonize both the entries by giving the widest meaning to the word “industry” so as to include the industrial aspect of gas and gas-works and leaving the other aspects to be covered by Entry 25, learned counsel for the contesting respondents seeks to reconcile them by carving out gas and gas-works in all its aspects from Entry 24. If industry in Entry 24 is interpreted to include gas and gas-works, Entry 25 may become redundant, and in the context of the succeeding entries, namely, Entry 26, dealing with trade and commerce, and Entry 27, dealing with production, supply and distribution of goods it will be deprived of all its contents and reduced to “useless lumber”. If industrial, trade, production and supply aspects are taken out of Entry 25, the substratum of the said entry would disappear: in that event we would be attributing to the authors of the Constitution ineptitude, want of precision and tautology. On the other hand, the alternative contention enables Entries 24 and 25 to operate fully in their respective fields: while Entry 24 covers a very wide field, that is, the field of the entire industry in the State, Entry 25, dealing with gas and gas-works, can be confined to a specific industry, that is, the gas industry. There may be many good reasons for the authors of the Constitution giving separate treatment to gas and gas-works. If one can surmise, it may be that, as the industry of gas and gas-works was confined to one or two States and was not of all-India importance, it was carved out of Entry 24 and given a separate entry, as otherwise if a declaration by law was made by Parliament within the meaning of Entry 7 or Entry 52 of List I, it would be taken out of the legislative power of States. Be it as it may, the express intention of the Constitution is to treat it, in normal times, as a state subject and it is not in the province of this Court to ascertain and scrutinize the reasons for doing so. It is, therefore, clear that the scheme of harmonious construction suggested on behalf of the State gives full and effective scope of operation for both the entries in their respective fields, while that suggested by learned counsel for the appellant deprives Entry 25 of all its content and even makes it redundant. The former interpretation must,

therefore, be accepted in preference to the latter. In this view, gas and gas-works are within the exclusive field allotted to the States. On this interpretation the argument of the learned Attorney-General that, under Article 246 of the Constitution, the legislative power of State is subject to that of Parliament ceases to have any force, for the gas industry is outside the legislative field of Parliament and is within the exclusive field of the legislature of the State. We, therefore, hold that the impugned Act was within the legislative competence of the West Bengal Legislature and was, therefore, validly made”.(emphasis supplied)

25. Viewed in the aforesaid light, we find that sub-category “A” under “II Service Category” is a general sub-category of Group A/ Class I Officers of All India Central and State Services (Direct Recruits), whereas the category of officers covered by clause (b) of sub-category “B” of the “II Services Category” is a more specific category in respect of those Class I Officers, who were earlier Class II Officers and got into Class I service after the age of 40 years. Thus, even if the respondent’s father was a Class II Officer before getting into Class I service, he would be covered by clause (b) of sub-category B of the Services Category of the Schedule, and not by sub-category A of the Services Category. In the present case, the Respondent’s father was not even a Class II Officer. He was a Class III Officer and, thus, in any event, even Clause (b) of Sub- Category ‘B’ is not strictly attracted.

26. The position stands clarified by para 7 of the clarification dated 14.10.2004 and leaves no room for doubt. It specifically deals with a situation like the present – where the father of the candidate is directly recruited Class III or Group ‘C’ employee, and he gets into Class I/ Group A

at the age of 40 years or earlier, even then his sons and daughters are not to be treated as falling in the “Creamy Layer”.

27. The decision in *Tanu Kashyap* (supra) is also attracted in the facts of the present case. We reject the submission of the petitioner that all cases of Direct Recruitment into Class I/ Group ‘A’ service are covered by sub-category ‘A’ of the “II Services Category”. On a harmonious reading of sub-categories ‘A’ & ‘B’ of the “Services Category”, what emerges is that if the direct recruitment in Class I/ Group A Services has taken place before the age of 40 years, the case would fall under sub-category ‘A’, else under sub-category ‘B’.

28. For the aforesaid reasons, we find no merit in the present petition and dismiss the same. We direct the petitioner to comply with the order passed by the tribunal positively within the next four weeks.

VIPIN SANGHI, J.

A.K. CHAWLA, J .

NOVEMBER 27, 2018