

In the High Court of Punjab and Haryana at Chandigarh

**CWP No. 15091 of 1993
Reserved on : April 28, 2017**

Date of Decision: May 03, 2017

Sanjay Tomar

... Petitioner

Versus

State of Haryana and others

... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. R.K. Malik, Sr. Advocate with
Mr. Tejpal Singh Dhull, Advocate,
for the petitioner.

Mr. Hitesh Pandit, Addl. A.G., Haryana and
Ms. Shruti Jain, AAG, Haryana.

Mr. Manjeet Singh, Advocate,
for respondent No.4.

P.B. Bajanthri, J.

1. In this writ petition, petitioner has sought for the following relief:-

*“a writ in the nature of certiorari be issued to quash the decision of the respondent-authority by which out of 8 posts, 4 have been reserved for reserved category and further direction be issued to the respondents to appoint four candidates of general category out of total 8 posts and consequently the petitioner be appointed as Inspector;
a further direction be issued to the respondent-authority to appoint only two candidates of Scheduled Castes category out of 8 and appointment of respondent no.4 be set aside and direction be issued to the*

respondent-authority to appoint four candidates of general category in order of merit including the petitioner being at No.4 in order of merit.”

2. Brief facts of the case are as follows:-

On 22.01.1988 the Subordinate Services Selection Board notified six posts of Inspectors in the Haryana Police Department, State of Haryana. Thereafter, on 07.07.1988 number of posts of Inspectors of Police was increased to 8 posts. While advertising 06 posts of Inspectors of Police, 01 post was reserved for Scheduled Caste category and 02 for ESM, rest of 03 posts for General category. When it was enhanced to fill up 8 posts, 5 posts were reserved for reserved category, whereas 3 posts were reserved for general category. The petitioner was a candidate for the recruitment. At the time of finalization of the select list, the official respondents proceed to fill up 19 posts. Thus, petitioner is one of the candidate who has been selected against one of the general merit category. Some of the candidates feeling aggrieved by the selection of 19 candidates which were in excess to the notified vacancies, filed a civil writ petition no. 5123 of 1991. This Court was pleased to set aside the selection to the extent of filling up of excess than the notified vacancies. Matter was taken up before the Supreme Court. Supreme Court affirmed the order of this Court passed in CWP No. 5123 of 1991. Consequently, amongst others petitioner services were terminated on 02.11.1991. In this background, petitioner has presented this petition contending that while notifying 8 posts of Police Inspectors there is excess of reservation i.e. more than 50% posts have been reserved for reserved candidates. Thus, 8 posts are required to be re-classified and petitioner's name is required to be reconsidered against one of general merit

for the purpose of selection and appointment to the post of Police Inspector.

3. Learned counsel for the petitioner vehemently submitted that there were no backlog vacancies, no documents have been made available so as to contend that out of reserved posts some of posts are backlog. Thus, reserving 5 posts for other than general category would be in violation of Supreme Court's decision rendered in ***Indra Sawhney vs. Union of India***, reported in ***(1992) Suppl. 3 SCC 217***. Learned counsel for the petitioner relied on para 385, which reads as under:-

“385. I have carefully read the reasoning and the conclusions reached by R.M. Sahai, J. on this issue. Agreeing with him I hold as :

(i) that the reservations under Article 16(4) must remain below 50% and under no circumstance be permitted to go beyond 50%. Any reservation beyond 50% is constitutionally invalid.

(ii) It is for the State to adopt the methodology of providing reservations below 50%. The State may provide the said reservation in respect of the substantive vacancies arising in a year or in the cadre or service. It would be permissible to carry forward the reserve vacancies of one year to the next year. It is reiterated that the vacancies reserved in a year including those which are carried forward shall not exceed 50%.

(iii) No reservation of any kind can be made for any class or category whether backward or non backward under Article 16(1).”

Therefore, re-advertised / corrigendum to fill up 8 posts of Police Inspectors is required to be re-classified and excess post reserved for reserved category is required to be re-adjusted against general category and the petitioner's name is required to be reconsidered for the purpose of selection and

appointment to the post of Police Inspector having regard to the merit of the petitioner's case. Learned counsel for the petitioner relied on the following decisions:-

- 1) **Mrs. Asha Rani Lamba, Headmistress vs. State of Haryana and another**, reported in 1983(1) SLR 400;
- 2) **Dr. Prana Vir Singh vs. Chancellor, Chandra Shekhar Azad**, reported in 2004(1)AWC 240;
- 3) **State of Orissa vs. Sangram Das**, reported in 1995 (4) RSJ, 324;
- 4) **Indra Sawhney vs. Union of India** reported in 1992 (Suppl.3) SCC 217;
- 5) **CWP No. 15415 of 2009 – Mohd. Rafeeq Ahmed vs. State of Haryana and others**, decided on 30.11.2009.
- 6) **CWP No. 13248 of 2010 – Anil and others vs. State of Haryana**, decided on 17.02.2011;
- 7) **Canara Bank and another vs. M. Mahesh Kumar**, reported in (2015) 7 SCC 412;

4. Per contra, learned counsel for the official respondents submitted that petitioner was aware of the notification / advertisement dated 22.01.1988 read with 07.07.1988 by which the official respondents have notified to fill up 8 posts of Police Inspectors and so also classification of reservation. Despite knowingly the classification of reservation, petitioner surrendered his right for the selection and appointment and he did not assert his right to the extent that official respondents have notified excess reservation in the year 1988 so also as and when petitioner's services were terminated and when he resorted for judicial interference even at that point of time he did not raise the issue of excess reservation, only as and when he failed to get relief against his order of termination before this Court and the Supreme Court. He approaches this Court contending that the official

respondents have notified excess reservation to fill up the posts of Police Inspector in the year 1988. Therefore, petitioner is estopped from challenging excessive reservation. When the notification to fill up 8 posts of Inspectors spent its force as and when selection and appointment orders were issued to the eligible candidates. Since the petitioner's appointment was in excess to the notified vacancies and in view of this Court and Supreme Court's decisions, the official respondents have resorted to terminate amongst others petitioner's services. In view of these factual aspects, petitioner cannot at this distance of time challenge the excess reservation issue in the process of selection of Police Inspectors for the year 1988. It was further contended that petitioner has not even challenged the validity of the advertisement dated 07.07.1988 by which 8 posts of Police Inspectors were notified to fill up in the Police Department, State of Haryana, unless and until he challenges the advertisement / notification dated 07.07.1988 he is not entitled to any relief. Cited decisions are not relevant to the present case having regard to the factual aspects of the case. Therefore, instant writ petition is liable to be rejected.

5. Heard learned counsel for the parties.

6. On the preliminary issue of in not challenging the advertisement / notification dated 07.07.1988 by which the official respondents proceeded to fill up 8 posts of Police Inspectors is concerned. In the absence of challenge to the notification/advertisement, petitioner's contention that the official respondents proceeded to fill up the posts of Police Inspectors in excess to the reservation, is liable to be rejected and so also on the ground of delay and laches in raising the issue of excess reservation.

7. Learned counsel for the petitioner contended that reserving excess than 50% to fill up the Police Inspectors post by the official respondents is contrary to the Supreme Court's decision passed in ***Indra Sawhney's case*** (supra), decided on 16.11.1992, such a contention is not available to the petitioner for the reasons that Supreme Court has imposed the ceiling limit of 50% reservation in the case of ***Indra Sawhney's case*** (supra), decided on 16.11.1992 is not applicable to the present case for the reasons that official respondents have notified 8 vacancies of Inspectors post in which 5 posts were reserved for reserved category in the year 1988, whereas the principle of reservation shall not be more than 50% would be prospective. Hence, decision of the Supreme Court and the contention of the petitioner are not acceptable. Cited decisions are all subsequent to ***Indra Sawhney's case*** which are prospective. Therefore, judgments are not applicable and that apart having regard to the factual aspects of the case that the petitioner participated in the process of selection and now he cannot turn around and challenge the process of selection. Supreme Court in the case of ***Madan Lal and others vs. State of J & K and others***, reported in (1995) 3 SCC 486 held as follows:-

“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Upto this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents

concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Parkash Shukla v. Akhilesh Kumar Shukla, (AIR 1986 SC 1043), it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relevant merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as

made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.”

Supreme Court in the case of **Pradeep Kumar Rai and others vs. Dinesh Kumar Pandey and others**, reported in **(2015) 11 SCC 493** held as follows:-

“17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. Thus, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted. (See Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150 and K.H. Siraj v. High Court of Kerala, (2006) 6 SCC 395.”

8. Petitioner had cause of action in the year 1988 as and when 5 posts were reserved for reserved category in the year 1988. He had surrendered his right for the selection and appointment and he was selected and appointed against un-notified vacancy. In view of judicial orders, his

services were terminated. Thus, petitioner has not questioned the excessive reservation at the relevant point of time and he is estopped in challenging the same after nearly 5 years from the date of notifying excess vacancies to the reserved category. Constructive *res judicata* principle is also attracted in the case, since petitioner filed writ petition arising out of the 1988 selection process and he has suffered order. Supreme Court in the case of ***Shankara Cooperative Housing Society Limited vs. M. Prabhakar and others***, reported in **(2011) 5 S.C.C. 607** held as under:-

“86. The learned counsel Shri Mukund submits that the respondents herein for the first time in the writ petition filed in the year 1990 had raised a contention that the procedure prescribed under the Evacuee Property Act and the Rules framed thereunder were not followed before notifying the lands in question as evacuee property. Though this ground was available, the same was not raised. Therefore, it is contended that a ground, though opened to be raised, but not raised in earlier writ petition, cannot be allowed to be raised in a subsequent writ petition.

87. Shri Ranjit Kumar, learned senior counsel, would contend that the judgment and order in W.P. No. 1051 of 1966 was not dismissed on merits but only on the ground of delay and laches and therefore, principles of constructive res judicata would not apply. Our attention is invited to the decision of this court in Daryao v. State of U.P. (1962) 1 SCR 574 and in the case of Hoshnak Singh v. Union of India (1979) 3 SCC 135.

88. In our view, this issue need not detain us for long. This Court in the case of Devilal Modi v. STO, AIR 1965 SC 1150, has observed that: (AIR p.1152, para 8)

"8. the rule of constructive res judicata which is pleaded against him in the present appeal is in a

sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding, which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of Public policy...."

89. *In the present case, it is admitted fact that when the contesting respondents filed W.P. No. 1051 of 1966, the ground of non-compliance with statutory provision was very much available to them, but for the reasons best known to them, they did not raise it as one of the grounds while challenging the Notification dated 11.12.1952 issued under the Evacuee Property Act. In the subsequent writ petition filed in the year 1990, initially, they had not questioned the legality of the notification, but raised it by filing an application, which is no doubt true, allowed by the High Court. In our view, the High Court was not justified in permitting the petitioners therein to raise that ground and answer the same since the same is hit by the principles analogous to constructive res judicata."*

The petitioner relying on **Mrs. Asha Rani Lamba's case (supra)** to contend that Government should not raise technical ground to defeat litigant claim is concerned, it is to be noted the conduct of petitioner that surrendering his right for selection, he has suffered judicial order, there is a

delay and latches and in not challenging the notification dated 07.07.1988.

Cited decision is not applicable.

9. Having regard to these facts and circumstances, petitioner has not made out a case so as to claim made in the present petition.

10. Accordingly, instant writ petition stands dismissed.

May 03, 2017
vkd

[P.B. Bajanthri]
Judge

Whether speaking / reasoned : Yes

Whether reportable : Yes