IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.16764 of 2009
Reserved on : January 10, 2019
Date of decision: January 29, 2019

Randhir Singh Kainth ...Petitioner

Versus

Union of India and others ...Respondents

AND

Civil Writ Petition No.16758 of 2009

Randhir Singh Kainth ...Petitioner

Versus

Union of India and others ...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV SHARMA,
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr.O.P.Sharma, Advocate
for the petitioner.

Ms.Upasana Dhawan, Advocate
for the respondents.

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HARINDER SINGH SIDHU, J.

This judgment shall dispose of two writ petitions, namely CWP Nos.16758 and 16764 of 2009, both filed by Randhir Singh Kainth, as the issue involved therein is the same..

For the purpose of judgment, the facts are taken from CWP No.16764 of 2009.

The petitioner has filed this writ petition impugning the order of the Central Administrative Tribunal, Chandigarh Bench dated

13.07.2009.

The facts in brief are that on 30.9.1969, the petitioner was appointed as Upper Division Clerk in the office of Accountant General, Himachal Pradesh, Shimla in the General Category. After passing the Departmental examination, he was promoted as Section Officer. On 7.5.1983 he was appointed to the post of Accounts Officer in the Central Tool Room, Ludhiana, which is a Government of India Society, .

On 13.8.1990, the Government of India issued Instructions for providing 27% reservation for socially and economically backward classes in civil posts and services under the Government of India. On 8.9.1993, the Government of India issued a notification categorising the creamy layer amongst the OBCs to whom the benefit of reservation of Backward Class would not be applicable.

As the petitioner belongs to Chhimba community, which was notified as a Backward Class by the State of Punjab he applied for and was issued OBC certificate by Tehsildar (West) Ludhiana on 24.10.1997. In January, 1998, the Central Tool Room Ludhiana (respondent No.3) advertised one post of Administrative Manager in the pay scale of Rs.10000-325-15200 which was reserved for the OBC category. The petitioner applied for the same on the basis of OBC certificate issued to him. He appeared for the interview on 9.6.1998. The Central Tool Room Employees Union, Ludhiana submitted a representation to the Sub-Divisional Magistrate, Ludhiana and the Chairman, Central Tool Room for cancelling OBC certificate of the petitioner stating that his salary earned on his existing job was more than Rs.1,00,000/- per annum and he fell within the creamy layer. The petitioner was selected for the post of Administrative Manager, subject to the condition that his certificate be got verified before issue of appointment letter. Thereafter, the petitioner appeared before the Tehsildar and also represented to the Deputy Commissioner to verify his OBC certificate but no action was taken by them. The petitioner was issued appointment letter for the post of Administrative Manager, subject to verification of the OBC certificate. He joined on the said post on 6.7.1999 after resigning from the post of Assistant Manager (Accounts).

The Central Tool Room Employees Union, Ludhiana filed CWP No.16754 of 1999 titled "CTR Ministerial Staff Welfare Association vs. Union of India, etc." in the nature of a PIL praying for quashing the OBC certificate issued to the petitioner and for declaring his appointment as Administrative Manager as illegal. In the said writ petition, an additional affidavit dated 14.9.2001 was filed by the Deputy Commissioner, Ludhiana stating that the OBC certificate had been issued to the petitioner without getting the facts verified and that it had not been countersigned by the District Magistrate. The writ petition was disposed of on 14.2.2002 with a direction to the Central Tool Room to pass appropriate order keeping in view the fact that the OBC certificate produced by the petitioner was not genuine. In compliance therewith, the services of the petitioner were terminated on 2.3.2002. Later on an application filed by the petitioner the order dated 14.2.2002 was recalled. The petition was heard again and finally disposed of on 12.11.2002 with a direction to Deputy Commissioner, Ludhiana to enquire into the genuineness of the OBC certificate issued to the petitioner. It was further directed that if the certificate is not genuine, it would be cancelled. If the certificate is found to be genuine, then the concerned Authority of the Central Tool Room shall pass appropriate order for restoring the appointment of the petitioner on the post of Administrative Manager with retrospective date and all consequential benefits.

The Deputy Commissioner initially vide his order dated 13.3.2003 concluded that the OBC certificate issued to the petitioner was rightly cancelled. The petitioner filed CWP No.7423 of 2003 assailing the said determination and also the order dated 02.03.2002 vide which his services were terminated. Meanwhile, the Government of India issued circular dated 14.10.2004 clarifying that creamy layer status of a candidate is to be determined on the basis of the status of his parents and not on the basis of his own status or income or on the basis of status or income of his/her spouse. Relying on the aforesaid clarification the petitioner submitted a representation to the Deputy Commissioner, Ludhiana to determine his status in the light of the clarification. The Tehsildar, Ludhiana vide his order dated 29.7.2005 clarified that the OBC certificate issued to the petitioner was valid. The Deputy Commissioner, Ludhiana vide his order dated 19.4.2006 also affirmed that the OBC certificate issued to the petitioner was valid and genuine. Thereafter, the petitioner submitted representations to respondent No.3 for restoration of his appointment as per the directions of the High Court dated 12.11.2002 in CWP No.16754 of 1999. Respondent No.3 decided the said representation on 5.9.2006 after much delay and after directions issued by the Court in a Contempt Petition. It was held that the reinstatement in service of the petitioner could not be considered as CWP No.7423 of 2003 filed by the petitioner was pending. The petitioner thereafter amended the writ petition to incorporate a challenge to the said order of respondent No. 3 denying his claim for reinstatement. Meanwhile, the Central Tool Room was notified under Section 14(3) of the Administrative Tribunals Act, 1985 as an Authority to which the said Act would apply w.e.f. 01.11.2007. Hence, the case was transferred to the Central Administrative Tribunal, Chandigarh Bench. Respondent No.3 filed CWP No.5503 of 2007 with a prayer to quash the orders dated 29.7.2005 and 19.4.2006 of the Tehsildar, Ludhiana and Deputy Commissioner, Ludhiana certifying the genuineness of the OBC certificate of the petitioner. This was also transferred to the Tribunal.

The question before the Tribunal thus was regarding the validity of the OBC certificate issued to the petitioner.

The primary ground for challenge to the validity of the certificate by respondent No.3 was that at the time of issue of OBC certificate to him, the petitioner was earning salary of Rs.20,000/- per month i.e., more than One lakh per annum and hence formed a part of the creamy layer and was not entitled to the benefit of reservation. The learned Tribunal relying on a decision of this Court in **CWP No.8551 of 2008** titled **Dr.Kamal Kishore and others vs. State of Punjab and others decided on 12.11.2008** held that as the petitioner at the time when he applied for the post of Administrative Manager was earning a handsome salary, he had to be excluded from the category of OBC. It was held that the creamy layer status is to be determined not only by the income of the parents, but also the income of the candidate himself. Accordingly, the

Tribunal held that the OBC certificate issued to the petitioner by the Tehsildar and the Deputy Commissioner was illegal and invalid. In terms of the order of the Hon'ble High Court in CWP No.16754 of 1999, the certificate was directed to be cancelled and prayer for reinstatement of the petitioner was declined.

Assailing the aforesaid order, learned counsel for the petitioner has relied on a decision of Hon'ble the Supreme Court in **Surinder Singh vs. Punjab State Electricity Board, Patiala, 2014(15) SCC 767** to contend that the creamy layer status of a candidate is to be determined on the basis of status or income of the parents and not on the basis of his own status or income or that of his spouse and the Tribunal has erred in holding otherwise.

We have heard Ld. Counsel for the parties.

In **Surinder Singh v. Punjab SEB, (2014) 15 SCC 767** the Hon'ble Supreme Court referred to the relevant Government instructions and earlier decisions in detail and concluded that there is no manner of doubt that it is only the parents' income, which has to be taken into consideration in computing the total income for determining whether an individual falls within the creamy layer. The Hon'ble Court also held that it was not open to the High Court, to include the individual's income in determining his eligibility for being declared as backward class, by reading down the policy instructions on the subject.

The relevant observations are:

> *"6. In the present appeal, the appellant seeks to assail the aforesaid determination rendered by the High Court. It was the vehement contention of the learned counsel for the appellant, that the judgment referred to by the High Court, for arriving at*

the conclusion, that the personal income of the individual concerned had to be taken into consideration, was a misreading of the judgment rendered by this Court. It is in the aforesaid background, that we shall endeavour to examine the policy instructions regulating the determination of the backwardness of candidates, and the judgments relied upon by the High Court.

7. First and foremost, reference needs to be made to the Office Memorandum dated 8-9-1993 issued by the Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training). It is not a matter of dispute between the rival parties, that the aforesaid office memorandum is applicable to the present controversy. Under the Office Memorandum dated 8-9-1993, the claim of the appellant for grant of a backward class certificate was determinable under Category IV thereof, since it is not a matter of dispute that the appellant is a qualified Chartered Accountant. However, in Column 3 to the Schedule relating to Category IV, it is mentioned that the criteria specified against Category VI would be applicable to those who fall under Category IV. In the above view of the matter, our interpretation on the eligibility of the appellant for being declared as belonging to the backward class, would be determinable on the basis of the description relatable to Category VI. Category VI and the depiction to whom the same would be applicable, are being extracted hereunder:

Sr. No.	*Description of category*	*To whom rule of exclusion will apply*
1	*2*	*3*
VI	*Income/Wealth Test*	*Son(s) and daughter(s) of*
		(a) persons having gross annual income of Rs 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years;
		(b) persons in Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (a) above.
		Explanation:

(i) income from salaries or agricultural land shall not be clubbed;
(ii) the income criteria in terms of rupee will be modified taking into account the change in its value every three years. If the situation, however, so demands, the interregnum may be less.
Explanation: Wherever the expression "permanent incapacitation" occurs in this Schedule, it shall mean incapacitation which results in putting an officer out of service.

(emphasis supplied)

7.1 Having minutely examined Category VI, as also the description contained in the Schedule, to whom the same would apply, there is really no room for any doubt, that in clauses (a) and (b) thereof, it is the income/wealth of the parents of the individual concerned, which is of relevance. The description is clearly silent about the individual's own income. It is not possible for us to accept, that the individual's own income could have been taken into consideration. The above determination of ours, is with reference to Categories IV and VI. Therefore, even with reference to Category IV, which includes professionals, the income of the professional, has not been included. Thus viewed, we are satisfied, that on the plain reading of Category VI of the Office Memorandum dated 8-9-1993, that it was not the income of the individual concerned, but that of his parents, that would determine whether he would fall within the creamy layer or not.

8. The question which still arises is, whether it was open to the High Court, to include the individual's income in determining his eligibility for being declared as backward class, by reading down the policy instructions on the subject? Insofar as the instant aspect of the matter is concerned, there can be no doubt that the issue is determinable with reference to the decision rendered by this Court in Indra Sawhney v. Union of India [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . But for the determination of the present controversy, we need not travel to the decision in Indra Sawhney case [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . It will be sufficient to make a reference to the decision rendered by this Court in Ashoka Kumar Thakur v. State of Bihar [Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159] , wherein this Court, having *examined the Office Memorandum dated 8-9-1993, approved the same by observing as under: (SCC p. 417, para 10)*

> *"10. We have carefully examined the criteria for identifying the 'creamy layer' laid down by the Government of India in the Schedule, quoted above, and we are of the view that the same is in conformity with the law laid down by this Court in Mandal case (Indra Sawhney v. Union of India [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]). We have no hesitation in approving the rule of exclusion framed by the Government of India in Para 2(c) read with the Schedule of the Office Memorandum quoted above. The learned counsel for the petitioners have also vehemently commended that the State Governments should follow the Government of India and lay down similar criteria for identifying the 'creamy layer'."*
>
> *(emphasis supplied)*
>
> *It is apparent from the observations recorded by this Court, as have been extracted hereinabove, that the Office Memorandum dated 8-9-1993 had been examined by this Court, specifically with reference to the decision rendered in Indra Sawhney case [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . Having done so, this Court expressly approved and confirmed the Schedule to the Office Memorandum dated 8-9-1993.*

9. Based on the aforesaid declaration of law, we are of the view that it was not open to the High Court to evaluate the Office Memorandum dated 8-9-1993 from any other parameters. It also needs to be noticed, that the issue which came up for determination in Ashoka Kumar Thakur case[Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159] came to be re-examined before a Constitution Bench of this Court in Ashoka Kumar Thakur v. Union of India [Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 : 3 SCEC 35] , wherein on the subject of identification of the "creamy layer", the Constitution Bench observed as under:

> *"1-B. Identification of creamy layer*
>
> *415. Income as the criterion for creamy layer exclusion is insufficient and runs afoul of Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] . (SeeSCC p. 724 at para 792.) Identification of the creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer exclusion, the Government may use its post-Sawhney [Indra Sawhney v. Union of India,*

> *1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] criteria as a template. [See OM of 8-9-1993, Para 2(c)/Column 3, approved by this Court inAshoka Kumar Thakur v. State of Bihar [Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159] , SCC para 10.] This Schedule is a comprehensive attempt to exclude the creamy layer in which income, government posts, occupation and landholdings are taken into account."*

(emphasis supplied)

9.1 Here again, this Court expressly approved the Office Memorandum dated 8-9-1993. In view of the decisions rendered by this Court in both Ashoka Kumar Thakur cases[Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159] , [Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 : 3 SCEC 35] , we are of the view that the High Court clearly erred in reading down the Office Memorandum dated 8-9-1993 and to include therein the income of the individual concern while determining whether or not he fell within the "creamy layer".

10. Despite the declaration of law in the judgments, referred to hereinabove, it is also necessary to take into consideration the clarification issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) dated 21-11-2002. The aforesaid clarification was with reference to the Office Memorandum dated 8-9-1993. Relevant extract of the clarificatory letter dated 21-11-2002 is being reproduced below:

> *"I am directed to refer to your Letter No. 2/25/2001 RC-1/670 dated 17-10-2002 on the abovenoted subject and say that determination of creamy layer for an OBC candidate is done with reference to the income of parents as per instructions contained in DoPT's OM No. 36012/22/93-Estt(res) dated 8-9-1993."*

(emphasis supplied)

10.1 Based on the aforesaid conclusion, there is really no room for any doubt, that the exposition with reference to Category VI in the Office Memorandum dated 8-9-1993 related only to the income of the parents of the individual concerned. And that, the income of the individual concerned was not to be taken into consideration.

11. The above issue came to be examined yet again by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) through its memorandum dated 14-10-2004. In the above memorandum, a large number of queries were clarified. Queries at Serial Nos. (vi) and (vii) of Para 4 are relevant to

> *the present controversy, and are accordingly reproduced hereunder:*
>
> > *"4. Following questions have been raised from time to time about the application of the above provisions to determine creamy layer.*
> >
> > > *(vi) Will a candidate who himself is a directly recruited Class I/Group A officer or a directly recruited Class II/Group B officer who got into Class I/Group A at the age of 40 or earlier be treated to be falling in creamy layer on the basis of his service status?*
> > >
> > > *(vii) Will a candidate who has gross annual income of Rs 2.5 lakhs or above or possesses wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years be treated to fall in creamy layer?"*
>
> *11.1 The aforesaid queries came to be answered in Para 8 by observing as under:*
>
> > *"8. In regard to clauses (vi), (vii) and (viii) of Para 4, it is clarified that the creamy layer status of a candidate is determined on the basis of the status of his parents and not on the basis of his own status or income or on the basis of status or income of his/her spouse. Therefore, while determining the creamy layer status of a person the status or the income of the candidate himself or of his/her spouse shall not be taken into account.*
> >
> > *(emphasis supplied)*
>
> 11.2 *In view of the above, there is no room for any further consideration, whether or not the individual's income is to be taken into consideration, while computing the total income relevant to determine whether an individual belongs to the "creamy layer". The above clarification reveals, that it is only the parents' income, which has to be taken into consideration."*

In view thereof the order of the Tribunal cannot sustain and is hence set aside. The OBC certificate issued to the petitioner is held to be valid and the petitioner is held entitled to reinstatement.

It has come on record that even before the filing of this writ petition the petitioner would have superannuated on 31.12.2008. Hence he has prayed for directions to respondent No.3 to pass an order of deemed reinstatement on the post of Administrative Manager with all consequential benefits.

During the course of hearing, it was pointed out that after his termination, the petitioner had joined at Eveline International, Dhandari Kalan, Ludhiana. Accordingly, he was directed to file an affidavit as regards the appointment during the period from 2.3.2002 to 31.12.2008 giving details of the salary and other benefits he received from his employer. Pursuant thereto, an affidavit dated 21.9.2015 was filed as per which the total salary plus other benefits during the period 2.3.2002 to 31.12.2008 (minus short periods during which he was not employed) was Rs.14,17,462/-, which after deductions on account of P.F, TDS and Gratuity was Rs.14,04,349/-.

Respondent No.3 also filed affidavit dated 10.9.2015 giving details of the salary and other perks including increments, which the petitioner would have received had he continued in service from 3.3.2002 to 31.12.2008 and the consequential benefits, which would have been payable to him. The total of pay and allowances was calculated at Rs.24,28,381/-.

In the order dated October 9, 2015 this Court recorded its prima facie view that the petitioner was entitled to reinstatement. It noticed the contention of the petitioner that had he continued in service of respondent No.3 he would have earned Rs.24,00,000/- which would amount to Rs.28,00,000/- if the benefit of the 6th Pay Commission recommendations been extended to the employees of Respondent No.3. As against this he had earned only Rs.14,00,000/- through his private employment. The matter was referred to the Mediation and Conciliation Centre of this Court to resolve the dispute with regard to back wages to be payable.

In the order dated 26.02.2016 while recording that the mediation has failed it was noticed that the petitioner stuck to his demand of difference in pay of about Rs.14 lacs whereas the respondent No.3 was willing to pay Rs.4 lakhs only. There has thus been no agreement on the amount to be paid to the petitioner.

In our view, in the facts and circumstances of this case, it would be fair and just, if the respondents are directed to pay a sum of Rs.8 lakhs to the petitioner as a final settlement of all claims. It is so ordered.

The amount be released to the petitioner within four weeks from today.

Petitions are disposed of in the above terms.

(RAJIV SHARMA)
JUDGE

(HARINDER SINGH SIDHU)
JUDGE

January 29, 2019
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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No