

**251 IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**CWP-23684-2016 (O&M)  
Date of Decision: 27.02.2019**

Malkit Singh Kazal

...Petitioner

Versus

State of Punjab and others

...Respondents

**CORAM : HON'BLE MR. JUSTICE JITENDRA CHAUHAN**

Present : Mr. Gurminder Singh, Sr. Advocate assisted by  
Mr. J.S. Gill, Advocate  
for the petitioner(s).

Mr. Vikas Mohan Gupta, Addl. A.G., Punjab  
for respondent Nos.1 to 3.

Mr. Anurag Goyal, Advocate with  
Mr. Amit Rao, Advocate  
for respondent No.4.

**JITENDRA CHAUHAN J.**

This writ petition under Article 226 of the Constitution of India has been filed for the issuance of a writ, in the nature of certiorari challenging the order dated 25.10.2016 (Annexure P-10), whereby the State Government had excluded the post of Chief Engineer from the reserved quota meant for the Scheduled Caste although it became vacant due to retirement of Scheduled Caste category person, and diverted it to the General Category and further directing the respondents to consider the petitioner and promote him to the post of Chief Engineer.

It is the case of the petitioner that he was appointed as Sub-Divisional Engineer on 22.09.1988 and thereafter he was promoted as Superintending Engineer. There are total 8 sanctioned posts of Chief Engineer in the department out of which two posts were occupied by the Scheduled caste. One Scheduled caste candidate i.e. Sh. Gurbax Singh Bains retired on 31.05.2016 and thus, the petitioner, a Scheduled caste category candidate became eligible for promotion to the post of Chief Engineer. However, the respondents illegally diverted the posts vacated by a Scheduled caste category person towards General Category vide impugned order dated 25.10.2016 (Annexure P-10).

It is contended that when a post occupied by a particular category is vacated, the same is to be filled up by the person belonging to the same category. The petitioner was eligible for promotion to the post of Chief Engineer on the date of retirement of Scheduled caste category Chief Engineer i.e. Sh. G.R. Bains. Further states that the impugned action of the respondents is in gross violation of the dictum of law laid down by Hon'ble the Supreme Court in **'R.K. Sabharwal and others Vs. State of Punjab, 1995(2) SCC 745'** as well as the instructions dated 10.07.1995 (Annexure P-13), dated 08.06.1996 (Annexure P-14) and dated 09.11.2016 (Annexure P-26). Learned Senior counsel further submits that despite specific query put to the State to explain as to what would be the effect of amendment on the speaking order, no response has been filed only with a view to deprive the petitioner of his legitimate right as he is retiring on 28.02.2019.

On the other hand Learned State counsel contends that the matter identical to this issue is pending consideration before Hon'ble Division Bench in LPA 1188 of 2018 wherein the proceedings of CWP-1388-2010 have been stayed wherein Court had directed to consider the case of petitioners therein from the back date from the year 2010. One of the issues in the present case also is whether the petitioner is entitled to be considered for promotion from the back date. Learned State counsel further submits that vide notification dated 14.09.2018, the provisions of the Reservation Act, 2006 which were quashed by this Court were reintroduced, whereby 14% seats were reserved under Clauses A and B and such notification was made effected from 20.02.2018 and order is dated 31.05.2016, date from which the petitioner is claiming entitlement to the promotional post of Chief Engineer under SC Category does not arise. Learned State counsel further refers to order dated 15.11.2018 passed in CWP-28646-2018 titled as '*Paramjyoti Arora Vs. State of Punjab*' wherein this Court had restrained the department from conducting the DPC for promotion to the rank of Chief Engineer without seeking permission of the Court. In the said case, the dispute is that the DPC is being conducted by diverting the post to SC category in violation of statutory provisions, requiring to earmark the post for Physically Handicapped category. The case of the petitioner has been considered as per service rules and the relief claimed by the petitioner cannot be granted without holding DPC even at this stage, which has been stayed by this Court in aforesaid CWP-28646-

2018.

It is further submitted that as per the advice of the Legal Remembrancer, Punjab the reservation for Scheduled Caste under the Act is 14% and roster point Nos.01, 07, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 94 are earmarked in the roster register. The employee belonging to Scheduled Caste Category has already been promoted at roster Point No.51. If roster point No.56 is given to the Scheduled Caste candidate, the reservation will exceed the percentage of 14% and will be in violation of law of the land.

Heard.

Para No.7 of the judgment passed by Hon'ble the Supreme Court in ***R.K. Sabharwal's case (supra)*** reads as under:-

*“When all the roster-points in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong.”*

It is to be noticed that during the pendency of the writ petition, the petitioner moved an application i.e. CM-1871-CWP-2018 for issuance of direction to the respondent-department to consider his case for promotion to the post of Chief Engineer. Vide order dated 19.02.2018 passed by this Court, the respondents were directed to take a final view in the matter in the light of instructions dated 09.11.2016 (Annexure P-26). In pursuance

thereof, the respondent-department passed speaking order dated 15.05.2018 (Annexure A-8), relevant portion whereof reads thus:-

*“After going through the advice of the Department of Welfare and the advice of the office of Advocate General, Punjab, it is clear that the case of promotion of Sh. Malkit Singh Kazal in so far as he has been on extension from 01.03.2017 is covered as per the advice of the O/o Advocate General Punjab that the claim has to be seen from the date when the post became available and Sh. Malkit Singh Kazal was eligible to be considered from that date and therefore, instructions of Finance Department dated 30.10.2015 do not have any effect on his promotion. The second issue to be seen in this case is the effect of the judgment of the Hon'ble Punjab and Haryana High Court dated 20.02.2018 in CWP-16039-2014. While the Department of Welfare has intimated that the competent authority has taken the decision to file review petition/SLP, the advice from the office of Advocate General, Punjab as discussed above clarifies that no promotion at this stage can be given to any Reserved Category candidate since the provisions under Sections 4(3), 4(4) & 4(8) of the Reservation Act, 2006 have been struck down. While Section 4(1) is still in operation, however, since no percentage as of now has been defined, no promotion can effectively be made on the basis of Reservation Act, 2006.*

*22. In view of the position explained above, the representation of the petitioner/applicant Sh. Malkit Singh Kazal claiming promotion on the basis of Welfare Department's Instructions dated 09.11.2016 (Annexure P-26) cannot be accepted at this stage. It shall however, be open to the petitioner/applicant to approach the department if the appellate Court modifies order dated 20.02.2018 in any manner entitling Reserved Category particular*

*percentage of reservation in promotion at that time.”*

A perusal of the above reveals that the only ground taken by the respondent-Department while denying the benefit of promotion as claimed by the petitioner is striking down of Sections 4(3), 4(4) & 4(8) of the The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 (for short 'the Reservation Act, 2006), which read thus:-

*“(3) The percentage of reservation for filling up the vacancies by promotion by Scheduled Castes in Group 'A' and Group 'B' services shall be fourteen per cent.*

*(4) The percentage of reservation for filling up the vacancies by promotion by Scheduled Castes in Group 'C' and Group 'D' services shall be twenty per cent.*

*(8) Reservation shall also be applicable to proforma promotion and appointment by transfer.”*

However, it is to be noticed that the Reservation Act, 2006 was further amended vide notification dated 14.09.2018, whereby, Sections 4(3), 4(4) and 4(8) of the Reservation Act, 2006 have been restored.

After this development the matter came up for hearing before this Court on 24.01.2019 and the following order was passed:-

*“Learned State counsel seeks time to explain as to what would be the effect of amendment on the speaking order.*

*To come up on 15.02.2019, the date already fixed in the main case.”*

When the matter came up for hearing on 15.02.2019, this Court

passed the following order:-

*“Learned State counsel seeks time to comply with the order dated 24.01.2019.*

*Post again on 26.02.2019.”*

Despite availing several opportunities, the respondents have not been able to respond to the query of the Court. Even otherwise, vide the aforesaid amendment of Reservation Act, 2006, Sections 4(3), 4(4) & 4(8) have been restored and the sole impediment in promotion of the petitioner to the post of Chief Engineer as pointed out in speaking order dated 15.05.2018 (Annexure A-8), stands removed. Therefore, the petitioner is liable to be promoted to the post of Chief Engineer w.e.f. 01.06.2016.

The plea raised by Learned State counsel that roster point No.56 has been rightly diverted to General Category in view of the opinion of the Legal Remembrance, has no legs to stand in view of the fact that Mr. G.R. Bains, who was holding the post reserved for Scheduled Caste category candidate, retired from the post of Chief Engineer and thus, the Court feels that the post vacated by him deserves to be offered to a Scheduled Caste category candidate. At this stage, legal opinion (Annexure P-4) sought by the department deserves a special mention, which is reproduced as under:-

*“Opinion of this office has been sought by the letter dated 16.03.2016 that, out of two posts which are becoming available on 31.05.2016, one post is to go to the General Category and against the second post, which is being vacated by a number of Reserve Category, two persons have claimed the promotion against the same. One belonging to*

*reserve category the other belonging to general category.*

*From the fact which has been mentioned in the note, it is clear that there are seven posts of Chief Engineer with the department. It is also a matter of fact that out of seven posts, two posts have been given by way of reservation to the reserve category candidate and at present, two reserve category candidates have got promotion as a Chief Engineer (Civil) on the basis of reservation.*

*From the note, it also transpires that two posts are becoming vacant on 31.05.2016 on account of retirement of the Officer one Officer belonging to General Category and another Officer belonging to the reserve category. From the note, it further transpires that Sh.Malkit Singh Kajal is claiming the promotion against the post which is being vacated by a reserve category candidate, which claim is being opposed by Sh. Satish Kumar Gupta on the ground that the roster should be operated upon and as the next that the roster point was unreserved, therefore, he should be given promotion against one of the two vacancies, which are becoming available on 31.05.2016.*

*The law point in this, is clear and well settled. The Hon'ble Supreme Court of India vide their judgment dated 10.02.1995 in R.K. Sabharwal Vs. State of Punjab and others, has categorically held that the roster will continue to operate till all the posts are filled up as per the roster and once all the posts are filled up as per roster, then the roster stops working and the vacancy arising thereafter will be filled up from the same category, which is vacating the post. This means that if a general category candidate retire, the post will be given to the general category candidate and if a reserve category candidate retire, the post will be given to the reserve category candidate. After the judgment, the State of Punjab had issued instructions in this regard on*

*10.07.1995 giving the details. The said instructions dated 10.07.1995 were amended on 08.07.1996 wherein it was clearly mentioned that once all the cadre posts are filled up then, the roster will stop working and vacancy will go to the category, which is vacating the post. Roster cannot work thereafter. This is the position for the last about 20 years. The department must be having those instructions with them, which should be put into operation. The contentions of Sh. Satish Kumar Gupta that as the next to roster point i.e. roster point Nos.55 and 56 are unreserved and therefore, the roster should be operated upon and the vacancies which are becoming available on 31.05.2016 should be filled up by operating the roster, is against the settled proposition of law.*

*Further, it is a matter of fact that cadre is of for more posts and instructions have already been issued by State of Punjab more than once that in the cadre of seven posts or more two roster points are to be given to the members of Scheduled Caste. This is clear from the latest instructions also dated 30.12.2004 which have been mentioned in the note itself. Therefore, as there are seven posts, even according to the department, and two posts have already been given to the reserve category candidate and one post out of the same is becoming available on 31.05.2016, the same is liable to be filled up from the same category as per the judgment of Hon'ble Supreme Court of India in R.K. Sabharwal's case and the roster cannot be operated in respect of these vacancies.”*

In view of the above and the changed circumstances i.e. the amendment dated 14.09.2018, whereby the provisions of Sections 4(3), 4(4) & 4(8) of the Reservation Act, 2006 were restored, the assertion of learned State counsel that the identical issue is pending adjudication before Hon'ble

LPA Bench, does not hold the ground at this stage.

As a sequel of the above discussion, the instant petition is allowed and the petitioner is ordered to be promoted as Chief Engineer w.e.f. 01.06.2016 against the post vacated by Sh. Gurbax Singh Bains, who retired on 31.05.2016.

Considering the fact that the petitioner is retiring on 28.02.2019, keeping in view the exigency of the situation, the State is directed to forthwith offer the post of Chief Engineer to the petitioner. Respondent No.1 is directed to ensure the compliance of the order. A copy of the judgment be faxed to the Office of Chief Secretary, Punjab for information and compliance.

**27.02.2019**  
*ps-I/atul sethi*

**(JITENDRA CHAUHAN)**  
**JUDGE**

|                           |   |        |
|---------------------------|---|--------|
| Whether speaking/reasoned | : | Yes/No |
| Whether reportable        | : | Yes/No |