

\$~53.

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

Date of Decision: 08.07.2019

% **W.P.(C.) No. 2007/2017**

YOGENDER & ORS

..... Petitioners

Through: Mr. M.K. Bhardwaj and Mr. Virendra
Kumar, Advocates.

versus

UNION OF INDIA & ANR.

.....Respondents

Through: Mr. Gigi C. George, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition seeking the following substantive reliefs:

“(i) To quash and set aside the impugned advertisement dated October- November 2016 (P-1) and direct the respondents to consider the claim of Petitioners for appointment to the post of Constable/ Driver as per their merit against the vacancies notified vide aforesaid impugned advertisement with all consequential benefits.

(ii) to declare the action of respondents in exceeding the reservation in appointment to the post of Constable/ Driver in CISF as illegal, arbitrary and unjustified and issue appropriate directions to fill up all the 1203 vacancies amongst suitable candidates as per the applicable rules and by de-reserving the unfilled vacancies of S.C and S.T;”

2. This is the second round of litigation between the parties. On the earlier occasion, the petitioners had preferred W.P. (C) 5/2016 and other connected petitions before this Court, which came to be dismissed as withdrawn vide order dated 19.07.2016 passed by a co-ordinate bench of this Court. The order insofar as its relevant, reads as follows:

*“1. In view of the counter affidavit filed which evinces that for those who sought benefit as an OBC candidate on the strength of OBC certificate certifying them to be members of the Jatt community, post decision of the Supreme Court in W.P.(C) No.274/2014 the department treated all of them as unreserved candidates and no one has been offered appointment in said category who has less marks than petitioners, learned counsel for the petitioners concede that as pleaded the petitioners would have no case and thus pray that the writ petitions may be dismissed as withdrawn granting liberty to the petitioners to file fresh petitions on a different cause of action which petitioners claim now flows in their favour **with reference to de-reservation of the unfilled vacancies in the SC and ST category. The grievance is that whereas diversion takes place for unfilled seats in the ex-servicemen category no such diversion was accorded being seats reserved for SC & ST candidates which remained unfilled.***

2. Granting liberty to the petitioners to file fresh petitions if they so desire on aforesaid aspect of the matter instant four writ petitions are dismissed as withdrawn.” (emphasis supplied)

3. Thus, the grievance of the petitioners was that the unfilled vacancies of SC and ST categories should also be diverted/ distributed like those of the Ex-Servicemen.

4. With the aforesaid background, we may now proceed to notice the relevant facts. CISF issued an advertisement in 2014 for recruitment to the

post of Constable/ Driver (hereinafter referred to as the ‘*first advertisement*’). The closing date to apply in response to the said advertisement was 19.07.2014. A total of 1203 vacancies were notified. The advertisement also included the ‘*backlog vacancies*’ from previous recruitment years which had remained unfilled. The break-up of the vacancies in different categories, as mentioned in the advertisement, was as follows:

<i>Name of post</i>	<i>Category</i>				
	<i>GEN</i>	<i>SC</i>	<i>ST</i>	<i>OBC</i>	<i>TOTAL</i>
<i>Constable/ Driver- Direct (Backlog vacancies)</i>		420	128	195	743
<i>Constable/ Driver- Ex Servicemen (Backlog vacancies)</i>					308
<i>Constable/ Driver- Direct (Current Vacancies)</i>	71	20	10	36	137
<i>Constable/ Driver- Ex- Servicemen (Current Vacancies)</i>					15
<i>Total</i>	71	440	138	231	1203

5. The petitioners applied in the General category.

6. Since 308 vacancies reserved for the Ex-Servicemen category remained unfilled, they were distributed as follows:

	<i>TOTAL</i>	<i>GEN</i>	<i>SC</i>	<i>ST</i>	<i>OBC</i>
<i>Distribution of vacancies of the Ex- servicemen category</i>	308	157	46	23	82

7. The aforesaid was stated to have been done as per the Ex- servicemen (Re-employment in Central Civil Services and Posts) Amendment Rules, 2012, (hereinafter referred to as the '*Ex-servicemen Rules*'), by resorting to the 200-point roster. All the vacancies in the un-reserved and OBC category (including those diverted from Ex-Servicemen backlog category) were filled according to merit up to merit position no. 372. The petitioners, however, could not get selected due to their lower merit. The vacancies in the SC and ST categories could not be filled for want of eligible or qualified candidates to the extent of 46 and 23 vacancies respectively.

8. It is the case of the petitioner herein that on 16.08.2016, the petitioners made representations to the respondents asserting their grievance that the unfilled posts in the SC & ST category should also be diverted to the general category, in the same way, in which the diversion had taken place from the Ex-servicemen category. However, the respondents did not take any action on the aforesaid representation submitted by the petitioner. Instead of passing any order or considering the representations of the petitioners, the respondents issued another advertisement in 2016 (hereinafter referred to as the '*impugned advertisement*'), being a special recruitment drive for filling up backlog vacancies of SC and ST in the trade of Constable/ Driver. The unfilled vacancies in the SC and ST category

which could not be filled in pursuance to the first advertisement were carried forward and notified vide the impugned advertisement in the following manner:

<i>Particulars</i>	<i>SC</i>	<i>ST</i>	<i>Total</i>
<i>Unfilled vacancies against Ex-SM quota</i>	<i>46</i>	<i>23</i>	<i>69</i>
<i>Vacancies unfilled for the year 2014 including backlog (other than ESM quota)</i>	<i>318</i>	<i>54</i>	<i>372</i>
<i>TOTAL</i>	<i>364</i>	<i>77</i>	<i>441</i>

9. Invoking the liberty granted to them by this court vide the order dated 19.07.2016, the petitioners have filed the instant writ petition challenging the impugned advertisement as well as the action of respondents in carrying forward; non de-reservation, and; non- diversion of the unfilled vacancies reserved for SC & ST towards general category.

10. Learned counsel for the petitioners, Mr. M.K. Bhardwaj submits that the unfilled vacancies in the Ex-Servicemen category should have been left open to be filled by candidates belonging to all categories, i.e. General, SC, ST and OBC, and they should not have been further placed into rigid compartments of SC, ST and OBC categories. He submits that the respondents have issued the impugned advertisement to fill up the unfilled vacancies of Ex-Servicemen by diverting them into the SC & ST category by applying the carry forward rule, which is arbitrary and unconstitutional. He submits that the reserved seats have been carried forward to the next

recruitment process even though they had remained unfilled for more than three recruitment years.

11. He further submits that the 200-point roster system followed for distributing vacancies of the Ex-servicemen is incorrect. He submits that in view of the Ex-servicemen Rules, the unfilled vacancies of the Ex-servicemen category had to be diverted towards the '*non ex-servicemen category*' i.e, only towards General category, and not compartmentalized into SC, ST & OBC categories. In this regard, he refers to the proviso to Rule 4 sub-rule (3) of the Ex- Servicemen Rules.

12. Lastly, Mr. Bhardwaj submits that the act of the respondents in reserving more than 50% of the posts in the first advertisement is illegal and unconstitutional. Only 71 posts were notified for the General category, whereas, over 1000 vacancies were notified for the reserved categories. He submits that the ceiling of 50% was mandatorily required to be followed.

13. On the other hand, Id. counsel for the respondents submits that there is no infirmity in the action of the respondents in diverting the Ex-servicemen vacancies for, inter alia, SC, ST and OBC categories. Proviso to rule 4 sub-rule (3) of the Ex-servicemen Rules expressly provide for diversion of the unfilled vacancies of the Ex-servicemen category to non ex-servicemen category, which includes General, SC, ST and OBC category. He submits that, on the contrary, there are no such express or implied Rules or Regulations providing for diversion of the unfilled Ex-Servicemen category vacancies only to the General Category.

14. Mr. George places reliance on the Office Memorandum dated 25.04.1989, which provides for the embargo on *de-reservation in direct recruitment to vacancies under the government*. He submits that in view of this O.M., the respondents were obliged to carry forward the reserved vacancies for SC, ST and OBC categories (which included the unfilled vacancies of Ex-Servicemen which fell to their share) of a particular recruitment year to the next recruitment year in case they remained unfilled. He submits that there is no illegality in carrying forward the unfilled vacancies of SC, ST and OBC categories by way of the impugned advertisement.

15. Lastly, Mr. George submits that the 50% ceiling on reservation is only applicable to the fresh vacancies notified in a recruitment year. He submits that out of the total 137 fresh vacancies which were notified in the first advertisement, only 66 vacancies were reserved. He submits the said reservation was within the permissible limits and thus, there is no illegality in it. In this regard he places reliance on the O.M. dated 15.07.2008 which provides for - *Treatment of backlog reserved vacancies of SCs, STs & OBCs as a distinct group*. Moreover, the petitioners had not raised this issue in their earlier writ petition and the same cannot be raised now in this second round.

16. Having heard learned counsels for the parties and perused the record, we are of the view that there is no merit in the present petition and the action of the respondents does not call for any interference.

17. The main grievance of the petitioners in the instant writ petition is the diversion of the unfilled vacancies of Ex-servicemen notified under the first advertisement to the SC, ST and OBC categories, and not to treat them as “open category” seats, i.e. open to be filled by candidates according to merit from whichever category (i.e. General, SC, ST or OBC) the candidate may be drawn. Alternatively, the petitioners have argued that since category wise diversion has taken place for the 308 unfilled vacancies in the Ex-servicemen category, the unfilled vacancies in the SC & ST category must also be diverted to the general category.

18. Rule 4 of the Ex-servicemen Rules reads as follows:

“4. Reservation of vacancies

(1) Ten per cent of the vacancies in the posts of the level of Assistant Commandant in all paramilitary forces; ten per cent of the vacancies in each of the categories of Group ‘C’ posts and of such posts in each Group ‘C’ Service; and twenty per cent of the vacancies in each of the categories of Group ‘D’ posts and of such posts in each Group ‘D’ Service, including permanent vacancies filled initially on a temporary basis and temporary vacancies which are likely to be made permanent or are likely to continue for three months and more, to be filled by direct recruitment in any year shall be reserved for being filled by ex-servicemen:

Provided the percentage of reservation so specified for ex-servicemen in a category of posts shall be increased or decreased in any one recruitment year to the extent to which the total number of vacancies reserved for ex-servicemen, Scheduled Castes and Scheduled Tribes (including the carried forward reservations for Scheduled Castes and Scheduled Tribes) and for any other categories taken together, falls short

or is in excess, as the case may be, of fifty per cent of the vacancies in that category of posts filled in that year:

Provided further that in case of an increase in the reservation for the ex-servicemen under the preceding proviso, the additional vacancies so made available for them shall be utilised first for the appointment of disabled ex-servicemen and if any such vacancies still remain unfilled thereafter the same shall then be made available to other ex-servicemen.

(2) Out of the vacancies reserved for being filled by exservicemen, vacancies shall be reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes in accordance with such orders as are issued in this behalf by the Central Government from time to time:

Provided that if any ex-serviceman belonging to the Scheduled Caste or Scheduled Tribe is selected, his selection shall be counted against the overall quota of reservations that shall be provided for the Scheduled Castes or Scheduled Tribes in accordance with the orders issued by the Central Government from time to time

(3) No vacancy reserved for ex-servicemen in a post to be filled otherwise than on the results of an open competitive examination, shall be filled by appointing authority by any general candidate, until and unless the said authority-

(i) has obtained a 'Non-availability Certificate' from the employment exchange (where a requisition is placed on an employment exchange);

(ii) has verified the non-availability of a suitable candidate by reference to the Director-General Resettlement and recorded a certificate to that effect ; and (iii) has obtained approval of the Central Government.

Provided that in case of recruitment to the vacancy reserved for Ex-servicemen in the Central Para Military Forces, the reserved vacancy remained unfilled due to non-

availability of eligible or qualified candidates, the same shall be filled by candidates from non-ex-servicemen category.”
(emphasis supplied)

19. Horizontal reservation operates as a percentage on the total number of vacancies which are advertised to be filled. The manner in which horizontal reservation is implemented has been considered by the Supreme Court in ***Indira Sawhney and Ors. v. Union of India & Ors***, (1992) Supp (3) SCC 217, which provides that candidates who fall in the category for which horizontal reservation is provided (in this case for Ex-servicemen), would first be allocated the vacant seats according to their merit (provided they are otherwise eligible and qualified). If a candidate in respect of the horizontal reservation category occupies a General category post, he would consume the said post. Similarly, if he is an SC category candidate, or ST category candidate, he would consume one of such posts, which is reserved for the SC or ST category, as the case may be. In ***Indira Sawhney*** (supra), the Supreme Court observed:

“812 There are two types of reservations, which may, for the sake of convenience, be referred to as ‘vertical reservations’ and ‘horizontal reservations’. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations — what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be

placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains — and should remain — the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.”

20. A perusal of the first advertisement shows that the respondents sought to separately advertise the Ex-servicemen category posts, which included 308 backlog vacancies and 15 current vacancies. In fact, these 323 vacancies – which were meant for horizontal reservation for the Ex-servicemen category, should have provided for reservation for the SC and ST categories in accordance with the prescribed policy for reservation which stipulates 15% reservation for the SC category and 7.5% reservation for the ST category to comply with Rule 4(2) aforesaid.

21. In the present case, the first grievance raised by the petitioner would not have arisen at all, had the respondents correctly computed and notified the overall vacancies, and applied the principle of horizontal reservation in respect of the Ex-servicemen, coupled with the stipulation prescribed in Rule 4(2) aforesaid. Thus, out of the 323 vacancies shown separately reserved for the Ex-Servicemen category, in the first instance reservation should have been provided for the SC and ST categories. However, if they remained unfilled due to non availability of eligible or qualified candidates, they were liable to be filled by candidates from non ex-servicemen category, but from within the SC and ST category, as the case may be. (as per the proviso to sub rule (3).

22. Mr. Bhardwaj submits that '*non ex-servicemen*' only means the General Category, and not other categories. This submission is neither here nor there. The proviso to Rule 4 sub-rule (3) of the Ex-servicemen Rules merely mentions that the unfilled vacancies in the Ex-servicemen category shall be filled by candidates from '*non ex-servicemen*' category. A plain and literal interpretation of the term '*non ex-servicemen*' means all categories, excluding the ex-servicemen category. It is fallacious to suggest that the term '*non ex-servicemen*' only signifies the General category. Thus, there is no merit whatsoever in the contention of the petitioner that the unfilled vacancies should've been diverted to the General category only.

23. Not having done so, subsequently, the respondents have sought to make amends by distributing the unfilled Ex-servicemen category posts in the ratio in which the posts are required to be filled under the constitutional scheme for reservation. Thus, in our view, no prejudice has been suffered by the petitioner and there is no merit in the petitioner's submission that all the vacancies reserved for the Ex-servicemen category candidates should have been filled only on merit considerations, *dehors* reservation for the SC and ST categories.

24. The second submission of the petitioner – that the unfilled backlog vacancies of the SC and ST category should also be distributed, is meritless.

25. The respondents have relied upon the office memorandum dated 25.04.1989, which casts an embargo on the respondents from de-reservation of direct recruitment vacancies under the Government. The said O.M. provides that the unfilled vacancies of a particular recruitment year will have

to be carried forward to the next recruitment year in a separate category i.e., 'backlog vacancies'. Such vacancies will have to be carried forward to every subsequent recruitment year till the time they are filled by eligible and suitable candidates. The O.M. dated 25.04.1989, insofar as it is relevant, reads as follows:

“

OFFICE MEMORANDUM

Subject:- Ban on dereservation in direct recruitment to vacancies under the Government

1. The existing orders and instructions with regard to reservation for Schedule Castes and Schedule Tribes in posts/services under the government have been reviewed. In order to protect the interest of SC/ST communities and to ensure that posts reserved for them are filled up only by such candidates, it has now been decided that where sufficient number of candidates belonging to SC/ST are not available to fill up the vacancies reserved for them in direct recruitment, the vacancies shall not be filled by not belonging to these communities. In other words, there will be a ban on dereservation. This will come into effect from 1-4-89 in respect of all direct recruitment to be made to fill up vacancies in Group 'A', 'B', 'C' & 'D'. It is further clarified that this ban will apply not only to vacancies which arise after 1-4-89 but also to the vacancies reserved for SC/ST communities of earlier years which have not yet been filled up by other community candidates whether such vacancies have been dereserved or not.

2. Hereafter, in all cases of direct recruitment to fill up vacancies in posts/services in Group 'A', 'B', 'C' & 'D' if sufficient number of suitable SC/ST candidates are not available to fill up vacancies reserved for them in the first attempt of recruitment, then a second attempt shall be made for recruiting suitable candidates belonging to the concerned category in the same recruitment year or as early as possible

before the next recruitment to fill up these vacancies. If the required number of SC/ST candidates are not even then available, the vacancies which could not be filled up shall remain unfilled until the next recruitment year. These vacancies will be treated as “backlog” vacancies.

3. In the subsequent year when recruitment is made for the vacancies of that year (called the current vacancies), the “backlog” vacancies will also be announced for recruitment, keeping the vacancies of the particular recruitment year i.e. the current vacancies and the “backlog” vacancies as two distinct groups. While in respect of vacancies for the year of recruitment, the normal instructions relating to the calculations of vacancies reserved for SC/ST as well as the instructions that not more than 50% of the vacancies could be reserved for SC/ST, physically handicapped etc. will apply, all the “backlog” vacancies reserved for SC/ST will be filled up by the concerned candidates belonging to the reserved category without any restriction whatsoever as they belong to distinct group of “backlog” vacancies.....” (emphasis supplied)

26. When there are express instructions of the respondents debarring them from de-reserving the unfilled vacancies for SC & ST, we cannot over-ride those instructions, especially when we find no illegality therein. Pertinently, the said O.M. is not under challenge in this petition. The said O.M. is explicit in its terms. In support of his submission, the petitioner has also submitted that unfilled vacancies of the SC and ST categories of a particular recruitment year cannot be carried forward for more than three successive recruitment years. We may observe that paragraph 7 of the O.M. dated 25.04.1989 takes care of this argument. The said paragraph reads as follows:

“7. While the ban on dereservation comes into effect from 1-4-89 on direct recruitment to Group A, B, C & D, in case of direct recruitment to the vacancies in Group ‘A’ services, there may be rare and exceptional cases where after the non-availability

of suitable SC and/or ST candidates, posts cannot be allowed to remain vacant in public interest. In such situations, the administrative Ministry/ Department under which the recruitment is being made shall make a proposal for dereservation giving full justification for such action, and consult the Commissioner for Schedule Caste and Schedule Tribes and obtain his comments on each proposal. After obtaining the comments of the Commissioner for Schedule Castes and Scheduled Tribes the administrative Ministry shall then place the proposal for dereservation along with the Commissioner's comments before a Committee comprising the Secretaries in the Ministry of Personnel, in the Ministry of Welfare and the Ministry/ Department under which the recruitment is being made for consideration and recommendation. The recommendation of this Committee shall be placed before the Minister incharge of the Ministry of Personnel for a final decision."

27. From the aforesaid extract, it can be seen that there is no automatic de-reservation of the unfilled 'backlog vacancies' which have been carried forward for three successive recruitment years. The petitioners cannot, as of right, claim mandatory diversion of such backlog SC and ST vacancies. The O.M. dated 25.04.1989 is unambiguous in as much, as, it is only in rare and exceptional cases of non-availability of suitable SC and/or ST candidates, that the vacancies not filled in three successive recruitment years can be de-reserved. However, the decision on whether it is a rare and exceptional case is a decision which falls within the domain of the respective Ministry/ Department under which the recruitment process is underway. The final decision as to whether the unfilled seats should be de-reserved, or not, is of the Minister in-charge of the Ministry of Personnel. It is not for us in this petition to determine whether, or not, the carrying forward of reserved vacancies constitutes a rare and exceptional case and whether such vacancies

should be de-reserved, or not. The submission of the petitioner seeking de-reservation of unfilled vacancies which had remained unfilled for 3 successive recruitment years is completely baseless and lacks merit.

28. Thus, in our view, there is no infirmity in either action of the respondents. Respondents are justified in carrying forward the unfilled vacancies by issuing the impugned advertisement. Similarly, the non-diversion of the unfilled vacancies of SC & ST vacancies is also justified.

29. Insofar as the submission of the petitioner that the respondents have exceeded the 50% ceiling of reservation is concerned, the O.M. dated 15.07.2008 lays down the relevant guidelines with respect to treatment of backlog vacancies. The said O.M., insofar as it is relevant, reads as follows:

“OFFICE MEMORANDUM

Subject- Treatment of backlog reserved vacancies of SCs, STs & OBCs as a distinct group and non applicability of 50% ceiling thereon.

*The undersigned is directed to refer to this Department's O.M. NO.36012/5/97-Estt(Res) dated 29th August 1997 which provided that 50% limit on reservation would apply to current as well as backlog reserved vacancies. These instructions were modified by O.M. No. 36012/5/97-Estt(Res).Vol.II dated 20.7.2000 to the effect that the backlog reserved vacancies of Scheduled Castes (SCs) and Scheduled Tribes (STs) would be treated as a separate and distinct group and would not be considered together with the reserved vacancies of the year in which they are filled for determining the ceiling of 50% reservation on total number of vacancies of that year. **It has now been decided to treat the backlog reserved vacancies of Other Backward Classes (OBCs) also as a separate and distinct group the same way as the backlog reserved vacancies***

of the SCs and STs are treated. Thus, the ceiling of 50% reservation on filling of reserved vacancies would now apply only to the vacancies which arise in the current year and the backlog reserved vacancies of SCs, STs and OBCs in case of direct recruitment and backlog reserved vacancies of SCs and STs in case of promotion of earlier years, would be treated as a separate and distinct group, and would not be considered together with the reserved vacancies of the year in which they are filled for determining the ceiling of 50% reservation on total number of vacancies of that year.....” (emphasis supplied)

30. This O.M., in clear terms, states that 50% ceiling on reservation is only applicable to the fresh/ current vacancies in a recruitment year. The backlog vacancies are not to be counted against the reservation accorded in a recruitment year. This O.M. is not under challenge in this petition. Out of the total 137 vacancies notified in the first advertisement, 50% i.e., 66 posts were correctly reserved. The other 71 vacancies were advertised in the General category. Thus, this submission of the petitioner must also be rejected.

31. We are, therefore, not inclined to interfere with the action of the respondents. Dismissed.

VIPIN SANGHI, J.

RAJNISH BHATNAGAR, J.

JULY 08, 2019