

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

COCP No.2038 of 2021(O&M)

Date of Decision: May 13, 2022

Suresh Kumar

...Petitioner

Versus

Baldev Raj Mahajan and Others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. Sandeep Kumar Goyat, Advocate
for the petitioner.

Mr. Lokesh Sinhal, Addl.AG, Haryana
for the respondents.

HARINDER SINGH SIDHU, J.

This contempt petition has been filed under Section 12 of the Contempt of Courts Act, 1971 for initiating action against the respondents for wilful breach of undertaking given by respondent No.1 on 16.05.2019 (P.6) in CWP No.10479 of 2019.

The petitioner along with others filed CWP No.10479 of 2019 titled 'Sohan Lal and Others vs. State of Haryana and Others'. In the said petition, the Notification No.733 SW(1)-2013 dated 27.09.2013 was assailed. By this Notification, the State of Haryana had provided 10% reservation for Economically Backward Persons in General Castes Category (hereinafter to be referred as “EBPGC”) belonging to the State of Haryana for jobs under Government/Government undertakings and local bodies as well as in Educational Institutes. Number of other petitions were also filed

assailing the said Notification.

Vide order dated 08.09.2016 passed in CWP No.18514 of 2016 titled as 'Kalindi Vashishtha vs. State of Haryana and Ors' it was directed that any admission made in pursuance of the impugned Notification shall be subject to the decision of the writ petition. The order was modified on 22.09.2016 to the extent that no admissions on the basis of Notification/Instructions issued for providing reservation to the EBPGC would be made for the Session in question and onwards. It was further directed that even the candidates, who have been admitted on the basis of reservation for EBPGC, pursuant to order dated 08.09.2016 would not be entitled to the benefit thereof.

On 07.12.2017, CWP No.18514 of 2016 and other connected petitions were heard together. The Court took note of the fact that the High Court of Gujarat had quashed a similar Ordinance and the Supreme Court had directed that no further action towards implementation of the reservation made under the Ordinance be taken. The Court also noticed the statement of the Counsel appearing for the State of Haryana that the matter was being reconsidered. In the light thereof it was directed that the impugned Notification be not given effect to.

On 03.08.2018 in CWP No.18178 of 2018 'Sonia Devi and ors Vs. State of Haryana' the following order was passed :

“This Court had issued notice of motion on 25.07.2018, returnable for today. The reason was that the counsel for the petitioners was pressing

hard for grant of interim stay, as according to him, the issue of stay is covered by the decision dated 04.08.2016, passed by the Gujarat High Court in Writ Petition (PIL) No.108 of 2016 and the interim order made by the Supreme Court on 09.09.2016 in Special Leave to Appeal (c) Nos.23544- 47/2016, against the said judgment of Gujarat High Court. The said order of the Supreme Court reads thus:-

“Permission to file the special leave petitions is granted.

Leave granted.

The respondents have entered appearance on caveat. They shall file counter affidavit(s) within four weeks. Rejoinder affidavit(s), if any, may be filed within four weeks thereafter. Pending further orders, we direct that the admissions made to any educational institutions prior to the pronouncement of the impugned order shall not be disturbed. We make it clear that since the impugned ordinance has been struck down by the High Court, no further actions towards implementation of the reservation made under the said ordinance can be taken qua education and service matters. Hearing expedited. The appeals shall now be listed before a three Judge Bench.”

Learned counsel for the petitioners has apprehension that the respondents who have made selection of the candidates and particularly qua 10% reservation for EBPB Category, out of the general category, may start issuing the appointment orders and then create a situation whereby such appointees will have to be made party. In that process, much time will be lost besides other legal complications.

Per contra, Mr, Vivek Saini, DAG, Haryana, Counsel for the respondents seeks time to file reply

to the petition and submits that nothing would happen if time is granted to oppose the prayer for stay.

What we find is that the respondents may issue appointment orders to the selected persons in the said category i.e. 10% EBPG as above. In that case, certainly legal objection might arise. If the process of issuing appointment letters/orders is delayed by some time that is till filing of the reply and further hearing on the question of stay, no prejudice can be caused to the either side.

In that view of the matter, we are satisfied particularly because of the aforesaid Supreme Court order made on 09.09.2016 that the respondents for the present, should not be allowed to issue appointment orders in the aforesaid category.

In that view of the matter, we make the following order:-

ORDER

(i) List on 21.08.2018.

(ii) Ad interim stay of issuance of appointment letters/order for the category as above till 21.08.2018.

(iii) Further orders would be made after the respondents file their replies.”

The Court directed an interim stay of the issuance of appointments letters/ orders for the EBPGC category till 21.08.2018.

On February 06, 2019 CWP No.18178 of 2018 and other connected matters were taken up. The interim order dated 28.08.2018 was modified. It was clarified that the order would

continue to operate only in respect of the EBPGC. There was no impediment in issuing appointment letters/orders to the candidates of other categories.

On 16.05.2019 in CM-5052-CWP-2019 in/and CWP-7607-2019 (O&M) 'Sunil Rathee and ors Vs. State of Haryana and ors' order, as under, was passed:

“We are informed at the Bar that a bunch of writ petitions involving identical questions of law, i.e. CWP No.18514 of 2016 and other cases, is fixed for 12.07.2019. Appropriately, the two writ petitions listed before us today should be heard along with the same bunch.

Apprehension is being expressed by learned counsel appearing for the petitioners that in the meantime if appointments are made by the State, it would create third party rights and complications. The issue is in respect of reservation being given to Economically Backward Persons in General Castes' Category (EBPG).

Learned Advocate General appearing for the State of Haryana in the matter very fairly made a statement that status quo in respect of appointment in EBPG category shall be maintained by the State as it exists today till the next date of listing i.e. 12.07.2019.

These matters be listed along with CWP No.18514 of 2016 and other connected matters on 12.07.2019.

A photocopy of this order be placed on the file of

other connected case.”

The statement of the Advocate General, Haryana was recorded that status quo in respect of appointment in EBPG category would be maintained by the State till the next date of hearing i.e 12.09.2019.

Thereafter, the Government of Haryana issued Instructions dated 05.06.2019 withdrawing the Notification dated 27.09.2013 whereby 10% reservation for EBPG category had been provided. These Instructions were adopted by the HVPNL vide office letter dated 17.09.2019.

In August 2020, the HVPNL issued advertisements for the posts of SA/GSO. Legal opinion was sought from the office of Advocate General, Haryana on the question as to whether EBPGC candidates of general category could be allowed to join the posts to which they had been selected, in the light of dismissal of CWP No.18178 of 2018 titled 'Sonia Devi and Ors vs. State of Haryana and Others'.

The office of the Advocate General, Haryana tendered legal opinion dated 07.08.2020 (P.8) opining that *“the Department can proceed to make appointments in EBPG category and allow the candidates to join, if there was no specific interim order in existence with regard to the particular post”*. In the opinion different interim orders were noticed. It was noticed that the undertaking given by the

Advocate General Haryana was no longer in force after 12.07.2019. The factum of CWP No.18178 of 2018 having been dismissed as infructuous was noticed. The factum of CWP No.7607 of 2019 having been transferred to the Supreme Court and its being listed along with Civil Appeal No.9548-49 titled 'State of Gujrat Vs. Ms. Dulari Mahesh' and that there was no interim order in the writ petition or the Transfer application, was also noticed. Having concluded that there was no interim order in existence the aforesaid opinion was tendered.

The case was again received in the office of Advocate General with a request to re-examine the earlier opinion dated 07.08.2020 in the light of order dated 06.02.2019 passed in CWP No.18178 of 2018 'Sonia Devi and ors Vs. State of Haryana and ors.' Another legal opinion dated 13.10.2020 was tendered vide which opinion dated 07.08.2020 was modified to the extent that the appointment to the post of GSSO could not be made until the stay granted vide order dated 06.02.2019 was vacated or the order was otherwise modified by the Court.

An opinion of the office of the Advocate General, Haryana was then sought on the issue of appointment of Excise Inspectors and Taxation Inspectors in the Excise and Taxation Department, Haryana against the posts advertised in EBPG Category. Said opinion dated 05.04.2021 is extracted as under:

“Subject: (i) Selection for the post of Taxation

Inspector of Excise & Taxation Department, Haryana against Advt No.11/2015, Cat No.02- Recommendation thereof.

(ii) Selection for the post of Excise Inspector of Excise & Taxation Department, Haryana against Advt No.11/2015, Cat No.01- Recommendation thereof.

The advice of the O/o the Advocate General, Haryana has been sought with regard to appointment of the Excise Inspectors and Taxation Inspectors in the Excise & Taxation Department, Haryana against the posts advertised in EBP category under Category No.1 & 2 of Advt No.11/2015.

The issue with regard to grant of reservation to Economically Backward Persons in General Category, is pending before the Hon'ble Court in a bunch of Writ Petitions with the lead case being CWP No.18514 of 2016 and others titled Kalindi Vashistha V. State of Haryana and others. In CM No.5052 of 2019 filed in a connected case, CWP No.7607 of 2019, Sunil Rathee and ors Vs. State of Haryana and ors, a statement was made by the Ld. Advocate General, Haryana on 16.05.2019 that status quo in respect of appointment in EBP Category shall be maintained till the next date of listing i.e 12.07.2019. On subsequent hearings in this matter and all the connected matters, neither the prayer was made nor was any order passed extending the interim direction or undertaking given by the Ld. Advocate General, Haryana. However, in CWP No.21343 of 2020 titled as

Sandeep Malik Vs. State of Haryana, considering that the statement of the Ld. Advocate General is still subsisting, the Hon'ble Court vide order dated 11.12.2020, directed the State to maintain the status quo with regard to appointments under EBPG category as it existed on 16.05.2019.

Now, the Haryana Staff Selection has moved an application, CM No.4428 of 2021 in CWP No.21434 of 2020 for modification of the order dated 11.12.2020 wherein notice of motion has been issued for 20.07.2021. Therefore, till the time the order dated 11.12.2020 is modified by the Hon'ble Court, no appointment in the EBPG category can be made on any post.”

It was opined that till the time the order dated 11.12.2020 is modified by the Hon'ble Court, no appointment in the EBPG category can be made on any post.

It had been alleged in the petition that despite various interim orders passed by this Court as also the undertaking given on 16.05.2019 by the Advocate General, Haryana, particularly, after withdrawal of Notification dated 27.09.2013 the UHBVNL/HVPNL/DHBVNL and various other Departments had given appointments to the EBPG category candidates for the post of Shift Attendant and also to the candidates selected through various other Advertisements. They were thus guilty of having committed contempt of Court. This had been done under the shelter of legal opinion tendered by respondent Nos.1 & 2.

At the time of arguments, Ld. Counsel did not press this

ground as no particulars of any appointment allegedly made in violation of any interim order or undertaking had been given in the petition.

He only argued that the legal opinions (P.8, P.9 and P.10) tendered by respondent Nos.1 & 2 are in violation of the orders passed by this Court as also the undertaking dated 16.05.2019 of the learned Advocate General, Haryana before this Court. Respondents No.1 and 2 are thereby guilty of contempt. Respondent No.2 has authored the opinions which have been endorsed and countersigned by respondent No.1.

It is well settled that to examine whether contempt is committed or not, what has to be looked into is the ultimate order and not any preceding consultation, noting or opinion.

In this regard reference may be made to the decision of Hon'ble Supreme Court in ***State of Bihar v. Kripalu Shankar, (1987) 3 SCC 34***. The relevant observations therein are as under:

“12. It cannot be disputed that the appeal raises an important question of law bearing upon the proper functioning of a democratic Government. A Government functions by taking decisions on the strength of views and suggestions expressed by the various officers at different levels, ultimately getting finality at the hands of the Minister concerned. Till then, conflicting opinions, views and suggestions would have emanated from various officers at the lower level. There should not be

any fetter on the fearless and independent expression of opinions by officers on matters coming before them through the files. This is so even when they consider orders of courts. Officers of the Government are oftentimes confronted with orders of courts, impossible of immediate compliance for various reasons. They may find it difficult to meekly submit to such orders. On such occasions they will necessarily have to note in the files, the reasons why the orders cannot be complied with and also indicate that the courts would not have passed those orders if full facts were placed before them. The expression of opinion by the officers in the internal files are for the use of the department and not for outside exposure or for publicity. To find the officers guilty for expressing their independent opinion, even against orders of courts in deserving cases, would cause impediments in the smooth working and functioning of the Government. These internal notings, in fact, are privileged documents. Notings made by the officers in the files cannot, in our view, be made the basis of contempt action against each such officer who makes the notings. If the ultimate action does not constitute contempt, the intermediary suggestions and views expressed in the notings, which may sometimes even amount to ex facie disobedience of the court's orders, will not amount to contempt of court. These notings are not meant for publication.

13. In our considered view the internal notes file of the Government, maintained according to the rules of business, is a privileged document. If the government claims privilege or quasi-privilege regarding the notes file we will not be justified in rejecting the claim

outright. In this case, the notes file was brought to the court not voluntarily by the Government. It was summoned by the court. The court can always look into it. The right of the court to look into any file can never be denied. The contents of the notes file brought to court got communicated to the court because the court looks into it. It would be dangerous to found an action for contempt, for the views expressed in the notes file, on the discovery of unpleasant or unsavoury notes, on a perusal of the notes file by the court after getting them summoned. This would impair the independent functioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Government. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in some cases, technically speaking is in disobedience of an order of the court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon the notings in a file for the purpose of initiating contempt, in our view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over-sensitive, when we come across objectionable notings made by officers, sometimes out of inexperience, sometimes out of over-zealousness and sometimes out of ignorance of the nuances of the question of law involved...

15. Article 166(1) requires that all executive action of the State Government shall be expressed to be taken in the name of the Governor. This clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the

mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this article nor even noting by a Minister. Every executive decision need not be as laid down under Article 166(1) but when it takes the form of an order it has to comply with Article 166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2).

16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the concerned officer on the subject under review. To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set up, it is conducted through the agency of a large number of officers. That being so,

the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in notes file at different levels by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring it within the vice of sub-section (c) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. Expression of a view is only a part of the thinking process preceding Government action.”

A legal opinion sought in a case is also one of the many stages/ steps in the consultative process for taking a decision.

The legal opinion/ advise of the Advocate General, though it is to be given substantial weight and respectful consideration, is not binding on the Government [*State of Kerala vs. Havea Combines (Kerala)(DB) 2008(31) RCR(Civil) 901*].

In any event, the petitioner having given no particulars of any appointment alleged to have been made in violation of any interim order or undertaking before the Court, there exists no ground to proceed with the contempt.

Moreover, apart from merely asserting that the legal opinions are in violation of the orders passed by this Court as also the undertaking dated 16.05.2019 of the learned Advocate General, Haryana before this Court, Ld. Counsel for the petitioner has not been able to demonstrate how it is so. In the opinions, various orders

passed in different petitions as also the undertaking of the Ld. Advocate General have been referred to and their effect noted. Only thereafter, the advise has been tendered. The petitioner or for that matter any one else may or may not agree with the opinion. But that is no ground to hold that the undertaking and the various orders have been disregarded and an opinion wholly contrary thereto given. Further, on additional relevant facts and Court orders having been pointed out the earlier opinion dated 06.08.2020 (P-8) was even modified.

Thus, there is no merit in the present petition and the same is dismissed.

May 13, 2022

(HARINDER SINGH SIDHU)
JUDGE

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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No