238-2

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-18194-2020 (O&M)
Date of decision: December 06, 2022

Sahil

.....Petitioner

versus

State of Haryana and others

……Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Jasbir Mor, Advocate for the petitioner.

Mr. R.K.S. Brar, Additional AG Haryana.

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ARUN MONGA, J. (ORAL)

Petition herein, *inter alia*, is for issuance of a writ in the nature of Certiorari seeking to quash impugned order dated 07.01.2021 (Annexure P-25) whereby services of the petitioner were terminated for not submitting the fresh sports gradation certificate under new Sports Policy dated 25.05.2018. Further a writ in the nature of Mandamus has been sought directing the respondent-Commission to consider the petitioner's candidature under BCB category, instead of ESP-BCB category as the petitioner secured more marks (66 marks) than the last selected candidate in BCB category (64 marks) as well as more marks than the last waiting list candidate in BCB Category (63 marks).

2. Succinct factual background first as pleaded in the petition. Pursuant to advertisement dated 25.08.2018 (Annexure P-1) for various posts of Group D, petitioner applied for the said post under Eligible Sports Persons-BCB Category. Written examination was conducted and final result/ selection was declared on 19.01.2019. Petitioner was selected under ESP-BCB category. Vide letter dated 24.01.2019 (Annexure P-9), petitioner was appointed on the post of Peon in the Excised Department. Petitioner submitted his joining report on 24.01.2019.

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2.1 As per individual result of selected candidates, petitioner had secured 66 marks. Last selected candidate in BCB category also secured 64 marks. Petitioner made a representation dated 11.03.2019 (Annexure P-11) to change his category from ESP-BCB to BCB, but no action was taken. Vide letter dated 24.07.2019 (Annexure P-12), the office of Chief Secretary issued instructions to get re-issued the sports gradation certificate, if the candidate is having the old gradation certificate. Petitioner again made a representation dated 31.07.2019 (Annexure P-13) requesting to correct the category of the petitioner from ESP-BCB to BCB category. He was transferred to the office of Deputy Excise and Taxation Commissioner, Kurukshetra. Petitioner had participated in the inter university tournament, therefore, his case does not cover under the instructions dated 25.05.2018.Vide an office order dated 07.01.2021 (Annexure P-25), services of the petitioner were terminated for not producing/submitting the Sports Gradation certificate in terms of Sports Policy dated 25.05.2018.

3. I have heard rival contentions of learned counsel for the parties and perused the record.

4. I am of the view that on the analogy of a candidate who belongs to a reserved category having secured more marks in the general category, the petitioner herein also deserves to get the benefit of his having secured higher marks than in the BC-B category than ESP-BCB category, in which he had originally sought benefit of being a sportsperson. Merely, because petitioner had originally applied in the sports category, he cannot be deprived of benefit of having got higher marks than the non-sports persons. Intent and spirit of giving benefit to a sports person is to promote sports and also as a commendation thereof, give out of turn appointment to a deserving sports person. The spirit of the sport policy cannot therefore, be taken to mean that even if a sportsperson has out-performed a non-sports person still the latter, who is lower in merit, should be allowed to jeopardize

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the sportsperson, which if done otherwise, would amount to denying a sportsperson a chance of out of turn appointment.

5. In fact, in somewhat similar circumstances where a person belonging to ex-serviceman category had out-performed a non-ex-serviceman in the category under which he had applied, my learned Brother Rajiv Narain Raina, J. (as he then was in this Court) has rendered his opinion in CWP-21732-2010 dated 27.09.2013 titled ***Braham Dutt v. State of Haryana and others***, in the following words:

> "*I have given much thought to the example given by way of illustration by the Supreme Court in Daria's case to see how it fits Mr. Nehra's arguments. The difference between this and that of Daria's case is that the advertised post of ESM (BC-A) is a combination of both vertical and horizontal reservation which situation did not directly arise in the aforesaid case for decision. It is well settled that what is stare decisis is what the court actually decides on facts presented and not what may flow from the case by implication unless the Court decides on a legal principle of universal application in which case the ratio is binding and all Courts have to act in aid of the Supreme Court. It would be no argument to say as to which one of the respective reservations applied in combination comes first and for whom the reservation was really intended would make little difference. I think it would make no material difference if the post advertised were to be filled by ESM (BC-A) or BC-A (ESM). Social reservation remains on the front seat on the basis of overall merit and not on the back burner of special reservation. The State was after all looking for the combination and the purpose would be achieved if the petitioner is appointed. Respondent No.4 would be set free and liberated from the horizontal reservation. There is no doubt that the petitioner belongs to the Backward Class-A. He happens to be an Ex-Serviceman as well. Social reservation to my mind would take precedence over special reservation and would dominate the merit list and accordingly tailor it in the appointments that follow. The core question to be seen is whether respondent No.4 had a preferential right of consideration in social reservation de hors his being an ex serviceman. Both the petitioner and the respondent No.4 belong to the same and identical category of reservation applied for that is reservation within reservation or to put it in another way; social reservation under Article 16 (3) and (4) clubbed with special reservation under Article 15. The birthmark of caste cannot be permitted to be squandered away in the presence of dominating reservation enabled by Article 16 (3) and (4) of the Constitution. It is not disputed that respondent No.4 had secured 315 marks as against last BC-A candidate who secured 286 (respondent No.8). Therefore, respondent No.4 was superior in merit in the category of BC-A and deserved to be accommodated first in the category of BC-A. When that merit procedure is followed, the advertised vacancy of one post of ESM (BC-A) category would fall vacant by respondent No.4 climbing up the vertical ladder in his dominating vertical reservation. If that were to be true and correct position, then the instructions dated 7.10.1998 would not stand in the way of the petitioner. Even if it be so that respondent No.4 has assumed the charge of the post and no vacancy remains unfilled,*

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the present is not a case of vacancy remaining unfilled or of consumption of post to be carried forward for the next recruitment process, respondent No.4 will be taken in law not to have consumed the post of ESM (BC-A) by deeming fiction, to which he is presently appointed in the event of success of this petition. I, therefore, do not see how Rajesh Kumar Daria's case helps the Commission or the State for that matter. In case of clubbing of reservation which also confers benefit of both horizontal and vertical reservation on one person, his vertical status would have to be first recognized as a lawful right by application of Indira Sawhney and Sabharwal cases. Merit itself, so to speak, is a relative term with no absolute meaning and is to be viewed in the prism of class or group merit and classification worked accordingly. Merit is usually the criteria to be adopted for making fair selection but when we deal with reservation and concessions afforded by the State to a distinct category or classes of persons depending upon there being social and educationally backward and historically depressed since times immemorial, then merit is to be understood category-wise after each vertical reserved candidate is given a fair chance to compete in open general category and then or within his social reservation as per merit. In M. Nagaraj v. Union of India, (2006) 8 SCC 212 the Constitution Bench of the Supreme Court explained merit:

> *"45. Merit is not a fixed absolute concept. Amartya Sen, in a book Meritocracy and Economic Inequality, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of "merit" independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on "merit" depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of "extent of reservation" is not an absolute concept and like merit it is context-specific."*

Therefore, I do not subscribe to the views propounded by Mr. Nehra on behalf of the Commission or the State that in case the petitioner is appointed, it will lower the overall merit of service or compromise the efficiency of administration. Reservation is after all inherently antimeritocracy but enjoys reasonable classification and protection by operation of constitutional enablement, mandates, the parameters of which have been set and constantly shaped and re-shaped by the Constitutional Courts in a refinement by a succession of far reaching precedents delivered at the Apex level and by the various High Courts for our understanding.

It was not disputed by the Commission that the petitioner was placed in the waiting list. Since the petitioner has been in Court since 2010 claiming his rightful due, I am inclined to think that the petitioner has been wronged by the Commission and therefore the State Government by misapplication of the law of reservation as expounded by the Courts and therefore amendments are required to be made through the intervention of this Court.

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For the reasons afore-stated, this writ petition is allowed. The merit list prepared by the Commission (P-1) is directed to be amended in terms of this order. Consequently, the 4th Respondent would be fitted in BCA category as per his own general merit. The respondents would then consider offering the single post of ESM (BC-A) category so vacated to the petitioner by shifting respondent No.4 as above. On appointment the petitioner would get seniority etc. from his batch-mates but not salary for the period prior to joining. However, in this process, respondent No.8 would not be disturbed. His appointment in my view is not open to be quashed after three years for no fault of his. To balance out the equities it is ordered that respondent No.8 would be adjusted against an existing vacancy in the cadre of Taxation Inspectors in the Excise and Taxation Department, Haryana, and if that is not feasible or possible for any reason whatsoever then by creation of a supernumerary post."

6. In view of the aforesaid, writ petition is allowed. Respondents are directed to consider the case of the petitioner as non-sportsperson in the BCB reserved category he belongs to, which is not disputed, subject to the availability of posts as on today. He will not be entitled to any monetary benefits other than notional, that too he shall be treated on the bottom of the seniority list in the category he had applied.

7. Decision be taken within a period of 3 months from today.

8. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

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Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No

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