
(2009) 03 P&H CK 0168
In the Punjab And Haryana At Chandigarh

Anil Kumar Uppal

APPELLANT

Vs

Punjab State Electricity Board and Others

RESPONDENT

Date of Decision : 02-03-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 226

Citation : (2009) 2 ILR (P&H) 66 : (2009) 154 PLR 191 : (2009) 5 SLR 581

Hon'ble Judges : M.M. Kumar, J;Jora Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.M. Kumar, J.—This petition filed under Article 226 of the Constitution prays for setting aside the appointment of Shri Surinder Singh respondent No. 4 as Accounts Officer under "OBC Category" in the respondent-Punjab State Electricity Board (for brevity, "the Board") being violative of Article 16(4) and Article 14 of the Constitution as well as Government instructions/circulars issued by the Government of India as adopted by the Punjab Government and applicable to various Public Sector Undertakings including the Board. A further direction has been sought for directing the Board to fill up the post of Accounts Officer (Direct Recruit) from OBC Category in consonance with the notifications/instructions applicable to the Board and to consider the petitioner for appointment as Accounts Officer in OBC category. Still further a direction has been sought to the Department of Welfare, Reservation Cell, Government of Punjab—respondent No. 3 to impress upon the Board to comply with the reservation instructions in letter and spirit.

2. Brief facts of the case are that the petitioner has been working as Apprentice Revenue Accountant with the Board since 8.2.2000 and drawing total emoluments of Rs. 4,500/- per month. He belongs to "Thathera" caste, which is recognised as a Backward class as per entry at Sr. No. 47 in Chapter XI of the Manual of Reservations for SC & BC categories, issued by the Reservation Cell of the Department of Welfare Punjab.

3. Shri Surinder Singh-respondent No. 4 joined the services of the Board in the year 1999 as an Internal Auditor in the pay scale of Rs. 6,300-10,700. He belongs to "Kumhar" caste, which is also recognised as a Backward class in the Manual of Reservations for SC & BC categories, issued by the Reservation Cell of the Department of Welfare Punjab. It has been claimed by the petitioner that for more than three successive years, respondent No. 4 is drawing the pay scale which exceeds Rs. 1,00,000/- per annum.

4. On 16.7.2002 (P-1 & P-2), an advertisement, bearing No. 233/2002, was issued by the Board for filling up 21 posts of Accounts Officer under direct recruit quota from amongst the employees of the Board, who were having requisite qualifications and experience. For the post of Account Officer the candidates were required to have passed Chartered Accounts Exam or Works Accountant Examination with three years experience in Supervisory capacity in Government/Public Undertaking etc. The candidates were required to qualify the initial recruitment test of competitive nature with minimum 50% marks and candidates of reserved category were required to secure minimum 40% marks. Apart from various general conditions laid down in Clause 4, there was reservation provided by Clause 3 which reads as under:

3. RESERVATION OF POSTS - The recruitment of reserve categories is for Punjab residents only. The reservation of posts shall be as per Reservation Policy of the State Govt./as adopted by PSEB from time to time.

5. On 3.2.2003 (P-3 & P-4) another advertisement, bearing No. 241/2003, was issued by the Board inviting application for additional 12 posts of Accounts Officer under direct recruit quota. Those who had applied in pursuance to earlier advertisement were not required to apply again. In this advertisement the criteria of qualification was amended by deleting work experience and minimum eligibility of age for entry into service. The age was reduced from 25 to 20.

6. The petitioner also applied in pursuance to the advertisement but he was not issued roll number to take the written test despite his representations dated 7.7.2003, 18.7.2003 and 23.7.2003, which were ultimately rejected vide order dated 28.7.2003 (P-5). The petitioner then filed CWP No. 11699 of 2003 in this Court seeking a direction to the respondents to issue roll number, permit him to appear in the examination for the post of Accounts Officer and select him as per merit. This Court permitted the petitioner to take the written examination held on 2.8.2003, vide interim order dated 1.8.2003. It was further ordered that the result be kept in a sealed cover. On 1.9.2003, the Division Bench perused the result of the written examination and found that the petitioner, who had appeared as Backward Class candidate, has secured 146 marks whereas Shri Surinder Singh-respondent No. 4, also a Backward Class candidate, has secured 164 marks. The Division Bench, thus, observed that Shri Surinder Singh was to be appointed against the solitary Backward Class post and dismissed the writ petition (P-6).

7. On 1.9.2003 itself the petitioner made a representation to respondent No. 2 for supplying category wise details of 12 posts as well as merit list of serving revenue employees who had taken the examination for appointment as Accounts Officer. The petitioner also sought information whether there is any reserve post lying vacant and if so he may be appointed against the same being first in the waiting list in the backward class category (P-7). On 10.11.2003, respondent No. 2 called upon the petitioner to appear for interview on 4.12.2003 at PSEB, Headquarter, Patiala (P-8). Along with the call letter a proforma of the form of certificate to be produced by a candidate belonging to backward class in support of his claim in terms of column No. 3 of the Schedule to Punjab Government, Department of Welfare's letter No. I/41/93-RCI/459, dated 17.1.1994, was attached (P-8/A). In Column 6 of the said letter dated 17.1.1994 it has been stipulated as under:

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 interrugau (?) may be less.

EXPLANATION: Whenever the expression permanent incapacitation occur in this schedule, it shall mean incapacitation which results in putting an officer out of service.

8. In response to the clarification sought by respondent No. 3 regarding reservation of OBCs in civil posts and services under the Government, the Ministry of Personnel and Training, Government of India, vide their communication dated 21.11.2002 (P-9) intimated 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 O.M. No. 36012/22/93-Estt (Res) dated 8.9.93".

9. On 24.12.2003, the petitioner again made a detailed representation to the Board. Besides other things it was stated that Shri Surinder Singh-respondent No. 4 has obtained the OBC Certificate for availing the benefit of reservation in the backward class category from the competent authority not on the basis of his and their family income but on the basis of parental income. It has been claimed that the interviews which were scheduled for 4.12.2003 were postponed and on 24.12.2003 only Shri Surinder Singh-respondent No. 4 was called for interview

(P-10). On 26.12.2003, the petitioner made another representation (P-11).

10. On 2.3.2004, the petitioner made yet another representation to the Board asserting therein that Shri Surinder Singh respondent No. 4 was interviewed on 4.2.2004 and upon his selection also gave acceptance on 1.3.2004 (P-12). The petitioner has also claimed that Shri Surinder Singh-respondent No. 4 joined as Direct Recruit Accounts Officer in the 1st/2nd week of March, 2004. Despite efforts, the petitioner could not lay his hands on the appointment letter of respondent No. 4. Accordingly, he filed the instant petition.

11. In the written statement filed on behalf of the Board the stand taken is that the instant petition is not maintainable because the earlier writ petition, namely, CWP No. 11699 of 2003, filed by the petitioner has been dismissed by this Court and respondent No. 4 has been appointed being higher in merit, as per the orders passed by this Court (P-6). The locus standi of the petitioner has also been questioned by asserting that he cannot challenge the selection and appointment of respondent No. 4 because the annual income of the petitioner is above Rs. 1,00,000/- and he could not avail the benefit of reservation in the category of backward class. In para 3 of the preliminary objections, it has been highlighted that the income to be reckoned for consideration for exclusion as "creamy layer" is that of the parents and not of the candidate as per instructions of the Government of Punjab issued vide Memo. No. I/41/93-R61/1459, dated 17.1.1994 (R-I) and as per clarification issued by the Government of India, Ministry of Personnel and Training, dated 21.11.2002 (P-9). On merits, while admitting the factual position it has been denied that the income for grant of backward class certificate is the income of parents of the candidate as per rule reproduced in para 10 of the writ petition. It has been pointed out that the petitioner was called for interview provisionally and since his certificate of backward class was more than 4 years old, he was asked to furnish latest certificate, which he failed to produce. Therefore, he could not be called for interview for want of latest certificate of his belonging to backward class eligible category.

12. In the written statement filed by respondent No. 4, it has been asserted that no liberty was granted to the petitioner by this Court while dismissing CWP No. 11699 of 2003 vide order dated 1.9.2003, thus, the instant petition is not maintainable. It has been contended that the competent authority after considering the instructions issued by the State of Punjab from time to time has issued certificate of Backward Class in his favour because he belongs to "Ghumiar" caste, which has been declared as a backward class. It has further been submitted that the concerned authority of the Board after considering his merit selected him for the post of Accounts Officer and there is no illegality or infirmity in his selection and appointment under backward category. Respondent No. 4 has asserted that even otherwise he is fully eligible and qualified for appointment to the post of Accounts Officer. It has also been mentioned that for determining the "creamy layer" for an OBC candidate the income of the parents

is to be taken into consideration and the income of his parents does not come within the purview of "creamy layer". In the writ petition there is no challenge in the writ petition to the instructions issued by the Government of India.

13. In the replication filed by the petitioner to the written statement of respondent Nos. 1 to 3 and respondent No. 4, again it has been emphasised that for the purposes of determination of income for taking the benefit of backward class, annual income of respondent No.4 has to be taken into consideration instead of annual income of his parents. It has also been highlighted that after having been appointed as an Internal Auditor in the Board in the year 1999 in the pay scale of Rs. 6300-10750, respondent No. 4, being a qualified Chartered Accountant, was also practicing independently since 1.4.1998 in individual capacity and under the firm M/s Surinder Sangar and Associates from 14.12.1998 with a licence No. 015849. The petitioner has also placed on record a letter dated 13.7.2004 written by the Deputy Secretary of the Institute of Chartered Accountants of India, New Delhi (P-16). It has again been reiterated that respondent No. 4 does not fall within the category of backward class for the reasons that his income is more than Rs. 1,00,000/- per annum.

14. Mr. Sanjay Majithia, learned Senior Counsel appearing for the petitioner has vehemently argued that basic object of excluding the persons belonging to "Creamy layer" from the social and educational backward class category is to ensure that the benefits of reservation percolate to those who are really backward like the petitioner. It would open better chances of coming into public services by restricting the entry of relatively affluent. Learned Counsel has pointed out that the "Means Test" enshrined by the Supreme Court in various judgments, has culminated in the Constitution Bench judgment of Hon'ble the Supreme Court rendered in the case of Ashoka Kumar Thakur Vs. Union of India (UOI) and Others, . Learned Counsel has maintained that the official memorandum dated January 17, 1994, as also the supplementary instructions dated 21.11.2002 (Annexure P-9) must be read down to mean that "a candidate who has already attained the capacity to earn beyond the limits imposed by the official memorandum would merge in the Creamy Layer". He has urged that if the instructions are not interpreted in accordance with the object of excluding Creamy Layer from the reserved category then the very object would be defeated. Referring to the Schedule attached to the official memorandum dated 17.01.1994, learned Counsel has submitted that once a person himself is a Class-I officer, then to rely on the income of his parents for availing benefit of reservation would be wholly contrary to the concept of Creamy Layer laid down by the Supreme Court in the cases of Indra Sawhney and Others Vs. Union of India (UOI), . He has referred to various paragraphs of the judgment in Ashoka Kumar Thakur's case (supra) and argued that by no stretch of imagination, respondent No. 4 is entitled to the benefit of reservation as he belongs to Creamy Layer and loses benefit of belonging to backward class.

15. Mr. Ramesh Goyal and Mr. D.S. Chanan, learned Counsel for the respondents,

however, have argued that the instant petition is not maintainable as the same is barred by the principles of res judicata because in the earlier petition namely C.W.P No. 11699 of 2003, the petitioner had agitated the matter and vide order dated 01.09.2003, the Division Bench of this Court has decided against the petitioner. The Division Bench has ordered after perusing the result that respondent No. 4 is more meritorious in the reserved category of Backward Class and, therefore, deserves to be appointed. The petitioner did not obtain any permission for filing of the fresh petition and in fact had accepted that respondent No. 4 belongs to backward class category. " .

16. On merits, learned Counsel for the respondents have argued that on the plain language used by the official memorandum dated 17.01.1994, as amended on 21.11.2002 (P-9), it is the income of the parents which is the determining factor for deciding as to whether a person belongs to Creamy Layer or not? They have maintained that once respondent No. 4 has given a Certificate as per the official memorandum that the income of his parents is less than Rs. One lac per annum, then he has to be granted benefit of official memorandum providing reservation in favour of the socially and educationally backward classes. In that regard, learned Counsel has made pointed reference to Clause VI titled as "Income/Wealth Test of the Schedule", appended to official memorandum dated 17.01.1994.

17. After hearing learned Counsel for the parties, perusing the pleadings with their able assistance along with various provisions and judgments cited by them, the question which needs determination in the instant case is:

Whether income of the parents would continue to be the basis of determining the status of a candidate being socially and educationally backward despite the fact that such a person has already attained affluence to be covered by the expression "Creamy Layer" within the meaning of official memorandum dated 17.01.1994, as amended on 21.11.2002?

It would be appropriate to extract in extenso the relevant parts of the memorandum dated 17.01.1994, which reads, thus:

Subject: Socio Economic Criteria for identification of socially Advanced Persons (Creamy Layer) from the Other Backward Classes in the State of Punjab for their exclusion from the benefit of reservation meant for those classes in the State Services/Posts-revision thereof.

Sir,

I am directed to invite a reference to Punjab Government Letter No. 8/113/38-SWA(4) 9119, dated the 28th November, 1990 vide which it was provided that the members of Backward Classes that is the Castes notified as backward by the State Government from time to time, whose income exceeds Rs. 10,000/- per annum shall not be entitled to the benefit of reservation meant for them in the State Services. The State Government has given a fresh look to the matter. It

has been decided to replace the above mentioned socio-economic criterion with the criteria adopted by the Government of India that is now only those persons/ sections belonging to the constum notified by the Punjab Government as backward from time to time, who are socially advanced (Creamy Layer) as enumerated in column 3 of the Schedule to this letter shall be excluded from the benefit of reservation meant for those classes in the services/posts of the State Government. Henceforth the persons/ sections failing in column No. 3 of the Schedule to this letter shall not be entitled to any such benefit and reservation shall not apply to them.

2. ...

3. ...

4. ...

5. Similar instructions in respect of Public Sector Undertaking and Financial Instructions including Public Sector Banks will be issued by the Government in respective Departments from the date of issue of these orders.

6. The authorities which were earlier competent to issue the Backward Class Certificate shall now certify that the candidate does not belong to creamy layer of other backward classes on and that he/she is eligible to be considered for posts reserved for other backward classes, Revised proforma of the certificate to be issued to the candidates belonging in Backward Classes is enclosed as Annexure "A". Before -issuing a certificate in favour of a Backward Class Candidate for eligibility for reservation of jobs under Backward Classes quota, the concerned authority shall satisfy himself/herself about the genuineness of his claim after obtaining application . from him in the prescribed form as Annexure "B".

18. A perusal of the aforesaid memorandum would show that the criteria of identifying the socially and educationally backward classes would be the socio-economic criteria. It was initially provided in the memorandum dated 28.11.1990 that the members of backward classes, as notified by the State Government from time to time, whose income exceeds Rs. 10,000/- per annum were not to be entitled to the benefit of reservation made for them in the street services. However, by the memorandum, the amount of Rs. 10,000/- was replaced by a sum of Rs. One lac. Accordingly the competent authorities who used to issue the Backward Class Certificate were required to certify that the candidate did not belong to the Creamy Layer of either backward classes, before issuing a certificate in favour of a backward class candidate for eligibility for reservation.

19. In the Schedule, various constitutional posts, services, including armed forces/ paramilitary forces/professional class and candidate engaged in trade and industry, property owners and income/wealth test have been laid down. Entry-IV deal with the professional class and also refers us to the Income/Wealth Test. Both the entries deserve to be read, which are as under:

II. SERVICE CATEGORY

A. Group A/Class I officers of the All India, Central and State Services (Direct. Recruits) Son(s) and daughter(s) of (a) parents, both of whom are Class I Officer; (b) A lady belonging to OBC category has got married to a Class-I officer, and may herself like to apply for a job.

IV. PROFESSIONAL CLASS AND THOSE ENGAGED IN TRADE AND INDUSTRY - (1) Persons engaged in profession as a doctor, lawyer, Chartered Accountant, Income Tax Consultant, Financial or management consultant, Surgeon, engineer architect, computer specialist film artists and other film professionals, author, playwright, sports person, sports professional, media professional or any other vocations of like status. Criteria specified against Category VI will apply;

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 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 incurring may be less.

Explanation: Whenever the expression permanent incapacitation occur in this schedule, it shall mean incapacitation which result is in putting an officer out of service.

20. A perusal of the entries concerning the service category would show that Rule of Exclusion from reservation would apply if both the parents are a Class-I Officer. In other words, sons and daughters of such parents would not be entitled to claim reservation under the backward class category. However, this Rule of Exclusion is not to apply in case the parents of such person have died. It is also not applicable when a lady after marriage to Class-I officer wishes to apply for a job. In other words, an orphan who had his/her parents in service who were working on Class-I post, would be entitled to reservation. Likewise, a lady who is married to a Class-I officer, would also be entitled to the benefit of reservation. The Schedule further guide us that professionals like Chartered Accountants etc. would be subjected to the criteria of income provided by Clause (VI). In Clause (VI). the guidance available is that sons and daughters of those persons who have gross annual income of Rs. One lac or above or possessing wealth above the exempted limit prescribed in the Wealth Test can for a period of three consecutive years would be hit by the Rule of Exclusion.

21. The question in the present case is that when the parents have gross income of Rs. One lac or more then the exclusion principle would apply and whether the exclusion principle would not apply if the sons and daughters themselves are

earning Rs. One lac or more as gross income for the three consecutive years. The answer to the aforesaid question has to be in affirmative because if the exclusion principle to such an affluent person is not applied, then the basic object of providing reservation for backward classes would be defeated and the benefits accruing from reservation would be taken away by those who are affluent and belong to creamy layer because the income of the parents has to be clubbed with that of the children if they claim to be one unit.

22. The concept of "creamy layer" has been evolved by Hon"ble the Supreme Court in various judgments. In the case of K.C. Vasanth Kumar and Another Vs. State of Karnataka, , it was held that the root cause of social and educational backwardness lies in economic backwardness and therefore, economic criterion should be applied to identify social and educational backwardness for the purpose of compensatory discrimination or affirmative action. Although, the Supreme Court had observed that economic criterion is worth applying for reservation to Scheduled Castes and Scheduled Tribes but the aforesaid view has not met with an approval of the Supreme Court in its later pronouncement. Accordingly, directions were issued re-determining the question of backwardness of the various Castes/Tribes and for the purposes of Articles 15(4) and 16(4) in the light of the latest figures which were to be collected on various relevant factors in order to re-fix the extent of reservation for backward classes. It is significant to notice that the reservation based on occupation-cum-income can in any event be availed of by members of backward communities and castes.

23. In Ashoka Kumar Thakur's case (supra) one of the fundamental issues raised before the Five Judge Constitution Bench is Whether Creamy Layer is to be excluded from the category of socially and educationally backward classes and considerable time has been devoted to determine the aforesaid issue. The Supreme Court has noticed 9-Judge Bench decision rendered earlier in Indra Sawhney's case (supra) and after critically examining the constitutional desirability of exclusion of "Creamy Layer" has issued direction to the government that there was no way out but to accept the principles of exclusion of the Creamy Layer from the category of backward class for the purposes of configuring the constitutional benefit of reservation. All these questions and related issues have been critically examined by Professor Dr. Virendra Kumar in his learned Article titled as "Dynamics of Reservation Policy", Vol.50 Journal of Indian Law Institute (2008) Oct-Dec p.478. The Supreme Court in Ashoka Kumar Thakur's case (supra) has laid down that exclusion of Creamy Layer is imperative for upholding the paramount principles of equality and that it is basic structure of the Constitution. Therefore, non-exclusion of "creamy layer" violates the principle of equality in two principal ways. If one continues to confer reservation benefits on "creamy layers", on the one hand that would amount to "treating equals unequally" vis-a-vis persons belong to "forward" or "advanced" class; on the other hand, to rank them with the rest of backward classes would amount to "treating "un-equals equally". Thus, non-exclusion of "creamy layer" leads to "perverting" the very objective of special constitutional provisions. It

discourages the beneficiaries to stand at their own feet and compete with the forward classes as equal citizens. Non-exclusion would also keep the backward class "in-perpetual backwardness" as if by saying: "Once a backward class is always a backward class". The resultant impact of non-exclusion has been put forward as an aphorism by Bhandari, J: Creamy layer inclusion robs the poor and gives to the rich. Realizing the constitutional imperative of "creamy layer exclusion" for upholding the paramount principle of equality, the Supreme Court sealed the possibility of inclusion of creamy layer even in future by resorting to the amendment of the Constitution. Such an amendment will be totally illegal and violate the basic structure of the Constitution. Inclusion of creamy layer, therefore, cannot be allowed to be perpetuated even by constitutional amendments.

24. It is in the aforementioned context that the application of official memorandum dated 17.01.1994, as amended on 21.11.2002, deserves to be considered. It can hardly be argued that if a candidate himself is covered by "Means Test" laid down by the official memorandum then it would continue to be socially and economically backward on the basis of income criteria applied to the income of his parents. Even otherwise, on the interpretation of the official memorandum it becomes evident that no such benefit is intended to be conferred on a candidate who himself is in the domain of "Creamy Layer". In Category No. II-Service Category, exceptions have been carved out where the Rule of Exclusion is not applicable to some of the cases. One exception carved out provides that a lady belonging to other backward class category if gets married to a Class-I officer, then she would not lose the status of backward class if she herself wishes to apply. In other words, the Class-I status of her husband in contradistinction to her parents has become a determining factor. Her husband being Class-I would certainly lose the benefit of being "socially and educationally backward". It would be absurd to hold that if an officer himself holds a Class-I status subject to the fulfilling of income criteria of Rs. One lac or more then he would be entitled to the benefit of reservation. Therefore, we are of the view that respondent No. 4 is not entitled to the benefit of reservation because his gross income is more than Rs. One lac.

25. The question then is "Whether the petitioner would be entitled to the grant of benefit of reservation?" On facts it is not clear whether the income of petitioner on the relevant date is less than Rs. One lac. If he answers the income criteria and is not hit by the Rule of Exclusion, then he deserves to be considered as per law.

26. The argument of learned Counsel for the respondents that the writ petition is not maintainable and is hit by the principles of res judicata have failed to impress us because the question raised in the earlier writ petition was the eligibility of taking examination and not whether respondent No. 4 is hit by the criteria of Creamy Layer. We have, therefore, no hesitation in rejecting the aforesaid argument.

27. For the reasons aforementioned, this petition succeeds. The appointment of respondent No. 4 is hereby quashed. Respondents No. 1 and 2 are directed to consider the case of the petitioner and if he answers the economic criteria of backward class candidate on the relevant date as laid down in the official memorandum dated 17.01.1994 as amended on 21.11.2002, then to appoint him on the post of Accounts Officer in accordance with law.

The needful shall be done within a period of two months from the date of receipt of copy of this order.