
(2008) 05 RAJ CK 0112
In the Rajasthan High Court

Bhawani Singh Kaviya and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 13-05-2008

Acts Referred:

Constitution of India, 1950 — Article 16, 335

Citation : (2008) 4 RLW 3138 : (2009) 1 SLR 647

Hon'ble Judges : Govind Mathur, J

Bench : Single Bench

Judgement

Govind Mathur, J.—The Governor of Rajasthan, to ensure fair and objective selections to various posts in State and Subordinate Services through direct recruitment, enacted the Rajasthan State and Subordinate Service (Direct Recruitment by Combined Competitive Examination) Rules, 1999 (hereinafter referred to as "the Rules of 1999"). The scheme of the examination for direct recruitment to the posts in the State and Subordinate Service under the Rules of 1999 is prescribed as follows:

15. Scheme of Examination, personality and Viva-voce Test.--The Competitive Examination shall be conducted by the Commission in two stages i.e. Preliminary Examination and Main Examination as per the scheme specified in Schedule-III. The marks obtained in the Preliminary Examination by the Candidates, are declared qualified for admission to the Main Examination will not be counted for determining their final order of merit. The number of candidates to be admitted to the Main Examination will be 15 times the total approximate number of vacancies (Category wise) to be filled in the year in the various services and posts but in the said range all those candidates who secure the same percentage of marks as may be fixed by the Commission for lower range will be admitted to the main Examination.

Candidates who obtain minimum qualifying marks in the Main Examination as may be fixed by the Commission in their discretion shall be summoned by them for an interview. The Commission shall award marks to each candidate

interviewed by them, having regard to their character, personality, address, physique and knowledge of Rajasthani Culture. However, for selection to the Rajasthan Police Service Candidates having "C" Certificated of N.C.C. Will be given preference. The marks so awarded shall be added to the marks obtained in the Main Examination by each such candidate; Provided that the Commission, on intimation being received from the Government before declaration being result of the Preliminary Examination may increase or decrease the number of vacancies advertised.

2. The Commission, on 1.6.2007, notified the Rajasthan State and Subordinate Combined Competitive Examinations-2007 to make recruitment against 155 existing vacancies in State service and 426 existing vacancies in subordinate service. Out of 155 vacancies referred above a bifurcation of vacancies is as follows:

State Services	Service/	Total	General	Reserved	Posts	Posts	number	S.C.	S.T.	O.B.C.	of Posts	Gen.	Female	Gen.	Female	Gen.	Female	Gen.	Female
1	2	3	4	5	6	7	8	9	10	Total	155	52	19	27	9	18	4	20	6

The bifurcation relating to the vacancies of subordinate service, as given in the notification dated 1.6.2007, is as follows:

Subordinate Services	Service/	Total	General	Reserved	Posts	Posts	number	S.C.	S.T.	O.B.C.	of Posts	Gen.	Female	Gen.	Female	Gen.	Female	Gen.	Female
1	2	3	4	5	6	7	8	9	10	Total	426	159	61	49	15	44	12	64	22

3. The petitioners - members of Other Backward Class, faced first stage of the Rajasthan State and Subordinate Service Combined Competitive Examinations-2007, i.e. preliminary examination. They are apprehending a loss in public recruitment because of execution mode adopted by the Rajasthan Public Service Commission while determining cut off marks for various categories.

4. The Commission, on 13.3.2008, declared result of the first stage examination of 2007 and also declared category wise cut off marks and those are as given below:

General	General	S.C.	S.C.	S.T.	S.T.	O.B.C.	O.B.C.	Female	Female	Female	Female
1	2	3	4	5	6	7	8	193.14	148.96	156.64	118.58
165.54	113.91	206.90	161.83								

5. The higher cut off marks for OBCs than the general category is the noticeable fact and that is the cause giving rise to present controversy. The petitioners are the persons who have secured marks higher than the cut off marks determined for general categories and less to the cut off marks pertaining to the OBCs. The discontent among the petitioners is for the reason that against unreserved vacancies, commonly called as "General Vacancies", the Commission is not considering the candidature of the members of the OBCs, who stand on higher merit. Consequent thereto, the petitioners, though having more marks than the persons categorised as "general", are not getting opportunity to face selection proceedings at second stage even against the vacancies reserved for the OBCs.

6. The argument advanced on behalf of the petitioners is that the "general" is no category to which reservation applies, thus, against non-reserved vacancies, candidature of all the persons including the persons coming from reserved categories should be considered as per their merit, and then only from among the remaining candidates reserved category wise list should be prepared. The cut off marks for reserved categories should also be determined accordingly.

7. Per contra, the stand of the respondents is that the first stage of the examinations of 2007 i.e. the preliminary examination is not a competitive test but is only a screening to short list the huge number of aspirants. The Commission, as per Rule 15 of the Rules of 1999, declared category wise lists having 15 times the total approximate number of vacancies in each category, thus, at the time of recruitment, adequate number of candidates from OBCs shall be available to satisfy statutory reservation. It is asserted that a Division Bench of this Court in *Dharamveer Tholia and Ors. v. State of Raj. and Anr.* reported in 2000(3) WLC (Raj.) 399, while adjudicating the same controversy, rejected the contention advanced by the petitioners in the present matter by holding as follows:

Our own High Court interpreting the scope and ambit of the very rule and reported in 1995 (2) WLC 223 1996(3) RLW 344 and *Chattar Singh and others Vs. State of Rajasthan and others*, Rule 15 of the rules of 1999 was similar to Rule 13 of the Rules of 1962, which came up for interpretation before this Court as well as the Hon'ble Supreme court. The Supreme Court held that the RPSC is required to prepare a list-category-wise to the extent of 15 times the number of vacancies in each category. In view of the interpretation of the Supreme court, there is absolutely no scope for any different interpretation of of the said rule as suggested by the learned Counsel for the petitioners. The Service Commission has acted only on the basis of the interpretation of Rule 15 as given by the Supreme Court in the case of *Chatter Singh (supra)*.

The argument of the learned Senior Counsel that the list of successful candidates in the preliminary examination should be prepared on the basis of the merits of the candidates secured by them in the preliminary examination and should not be prepared category-wise, has no merit and force. As per the scheme of the examination, final merit is prepared only after holding the main examination and interview as per Rule 17 of the Rules of 1999 and the marks obtained by the candidates in the main examination and the interviews are taken into account and on the basis of the aggregate marks final merit list is prepared. Such a situation, in our view, is not envisaged at the time of holding the screening test for short-listing the candidates as no merit list is prepared by the Commission at the stage of holding the preliminary test and marks obtained by the candidates in the preliminary examination are not taken into account while preparing the final list of the candidates. The interpretation given by the learned Counsel for the petitioner, will in our opinion, result in denying the reserved category candidate a right of consideration in the main examination as reserved category

candidate which will run against the scheme of reservation provided under the Rules and various notifications issued by the State Government.

Rule 15 of the Rules of 1999 provides the procedure to prepare the list of candidates for appearing in the main examinations, therefore, the result of the preliminary examination cannot be considered to be a final result. In regard to the submission made by the Senior Counsel for the petitioner about the reservation policy provided under Article 16(4) of the Constitution as well as the judgments cited are not in dispute but the same in our view, will not be of any help or assistance to the petitioners at this stage of short listing. The judgment of the Hon'ble Supreme Court relied on by the petitioner in Sabharwal's case (supra) pertains to the promotion policy and also of the vacancies based on roster system which in our opinion, will be applicable only at the time of preparing the final select list. As per Rule 15, the RPSC shall permit the candidates 15 times the total approximate number of vacancies in each category in the main examination and this rule has been upheld by the Supreme Court in Chattar Singh's case (supra). The reservation policy is meant for recruitment only and there is no other reservation policy for short listing in examination. As such, the actions of the RPSC are within the mandate of Article 16(4) of the Constitution of India as well as the Rules of 1999. If the contention of the learned Counsel for the petitioners is accepted, the thousands of meritorious candidates who have been selected as per the preliminary examination will be affected and their interest will be jeopardised.

It is seen from the additional affidavit filed by the Service Commission that the Commission has declared the result of the preliminary examination on 27th May, 2000 and the list of successful candidates coming within the range of 15 times the number of vacancies set apart for that category was also published and the list of candidates who were not able to come within that range was also published. It is useful to reproduce the details furnished in Paragraphs 3, 4, 5 and 6 of the additional affidavit:

3. That in general category, there are in all 252 vacancies meant for male candidates and 105 vacancies are meant for female candidates. Thus, combined vacancies in general category comes to 357 and the commission has admitted 5412 candidates for the main examination in terms of Rule 15 of the Rules.

4. That similarly, the combined vacancies reserved in OBC category are 140 and the Commission has admitted 2109 candidates for the main examination, which constitute 15 times the number of vacancies/posts reserved in the OBC category.

5. That similarly, there are 102 combined vacancies reserved in SC category for male and female both and the Commission has admitted 1538 candidates for the main examination, which also constitute 15 times the number of vacancies reserved in that category.

6. That in ST category, 78 combined vacancies meant for both male and female have been reserved and the Commission has admitted 1190 candidates for the

main examination, which constitutes 15 times the number of vacancies reserved in that category.

As held by the Supreme Court, the list of candidates belonging to one category cannot be shifted to another category on the basis of their merit as the list of successful candidates in the preliminary examination is meant only for short-listing the candidates for the main examination and it does not constitute merit of the candidates which is done at the time of preparation of final merit under Rule 17 of the Rules. If the contention of the petitioners is accepted that instead of preparing separate list for each category, a list should be prepared on the basis of over-all merit attained by the candidates appearing in the preliminary examination, it would result in exclusion of 1498 candidates from the general category and in their place 1051 candidates from OBC category will be shifted to the general category; 137 candidates from SC category will also be shifted to the general category and similarly, 175 from the ST category shall have to be shifted to the general category. In addition to that, in general category the female candidates who have secured higher cut-off marks fixed for the general category (male) shall also be shifted to the general category (male) in the number of 157. It is also seen from Para 9 that if the revision is to take place in accordance with the interpretation put forward by the petitioners, the cut-off marks in each category shall have to be revised in the following manner:

CUT-OFF MARKS Revised:

Male Female 1. General 216 139 2. SCs. 158 90 3. STs. 166 72 4. OBCs 185 132.

Existing:

1. General 203 144 2. SCs. 163 91 3. STs. 174 72 4. OBCs 204 136.

52. We are of the opinion that such an exercise is not warranted in view of the Supreme Court decision in Chattar Singh's case (supra).

(Emphasis given by me)

8. It is submitted that in view of the law laid down by this Court in Dharamveer Tholia's case (supra), the issue involved in this petition is no more res-integra.

9. In rejoinder, it is urged by Shri P.P.Chaudhary, learned Counsel for the petitioners that in Dharamveer Tholia's case (supra) the parties moved with an assumption that "general" vacancies form an independent category, whereas, in the instant case the issue deserves to be determined is, "whether "general" vacancies by ignoring the persons belonging to the reserved categories can be treated as an independent vertical category"? It is also urged that the judgment given in Dharamveer Tholia's case (supra) is based on misreading of the judgment of Hon'ble Supreme Court, in the case of Chattar Singh and others Vs. State of Rajasthan and others, , and, therefore, the judgment given by Division Bench referred above is required to be ignored. According to Shri Chaudhary, in Chattar Singh's case (supra) it was nowhere held that a separate list relating to

"general" candidates excluding the candidates from reserved castes and class is to be prepared. It is also stated that in Dharamveer Tholia's case (supra), though a reference of the decision of Hon'ble Supreme Court in R.K. Sabharwal and others Vs. State of Punjab and others, is given, but the ratio of that was not considered.

10. Considered the rival submissions made on behalf of both the parties. The notice of the information supplied by the Commission is also taken that 689 persons coming from OBCs are having marks more than the cut off marks prescribed for the candidates placed in the list termed as "general".

11. The first issue requires consideration of this Court is whether the grievance of the petitioners regarding proper implementation of the reservation for OBCs can be considered at the stage of preliminary examination.

12. According to Shri J.P.Joshi, learned Counsel for the respondent Commission, the result of the preliminary examination was declared category wise and in each category 15 times candidates than the approximate actual number of existing vacancies are included, as such the apprehension for improper application of reservation to OBCs or even to any other category to which reservation applies is ill-founded. The question of proper application of the reservation policy shall be on scene only on preparation of list as per the provisions of Rule 17 (1) of the Rules of 1999.

13. It is true that the reservation is required to be applied at the time of recruitment and not at the time of holding preliminary examination, however, the duty of the respondents is to ensure a fair and objective competitive examination, while making recruitment to the post in State and Subordinate Services. To ensure fairness, the availability of correct category wise list as per Rule 15 of the Rules of 1999 is necessary. If the lists prepared by the Commission as per Rule 15 of the Rules of 1999 for determination of cut off mark are laconic, than that will certainly affect the entire selection process. If the Commission determine the cut off marks by including the persons in a specific category, though they do not belong to that or do not include the persons belonging to a category in that category, then it shall certainly affect the determination of cut off marks. In the instant matter, the allegation of the petitioners is that the list pertaining to the "general category" is not correct and consequently the cut off marks for "general category" are being reduced drastically. On examination, if it is found that proper categorisation was not made, then that will be having an effect on determination of the cut off marks with adverse effect on implementation of the statutory reservation prescribed to the Scheduled Castes, Scheduled Tribes and to the Other Backward Class. In view of it, this Court certainly requires to examine correctness of the cut off marks determined by the respondent Commission, hence, the petition for writ cannot be thrown on the count that the reservation is to be applied only after main examination and not at the stage of preliminary examination.

14. The important question i.e. to be settled in the instant matter is, what does the term "general category" mean?

15. As per Article 16(4) of the Constitution of India, if the State makes any provision for reservation of appointments in favour of any backward class of citizens, which in the opinion of the State is not adequately represented in the services under the State, that shall be a reasonable classification. The reservation as per Clause (4) of Article 16 of the Constitution of India, as a matter of fact, is a minimum relief extended by the Indian State to those sections of society who have historically and socially suffered the worst oppression over the centuries. It is constitutionally possible in India to discriminate in recruitment on the basis of castes or class to a reasonable extent, even by militating against merit. The merit, while making an effort to uplift the backward categories, must be seen in the context of achieving of real equalities of opportunities and social environment to ensure social justice. The reservation is an effort to provide real equality to depressed sections who have suffered discrimination in choice of occupation, social mobility and control over the means of production. If any interpretation of law is made, that adversely affect the aforesaid effort of the State, then that shall be against the will of the framers of the Constitution and also against the wishes of the legislature. In general, the statistics available shows that a thin stratum of Scheduled Castes and Scheduled Tribes have actually benefited from the reservation. The Other Backward Classes, who are mainly share-croppers, small tenants, poor presents or are in occupation, which are based on traditional caste hierarchy, also have reservation being socially and educationally backward. In the present matter, what appears is that the number of successful candidates of OBCs is quite high and their non-inclusion in "general category" despite merit is affecting cut off marks for the category of OBCs and also for "general category".

16. In Dharamveer Tholia's case (supra), Division Bench of this Court examined the issue relating to issuance of category wise lists as per Rule 15 of the Rules of 1999. Hon''ble Division Bench, while relying upon the judgment of Hon''ble Supreme court in the case of Chattar Singh (supra) upheld the category wise issuance of lists relating to general, Scheduled Castes, Scheduled Tribes and Other Backward Classes. In the instant matter, it is not the grievance of the petitioners that no category wise list should be declared. The point requires attention in the instant matter is that what should be the "general category", whether the "general category" itself is an independent section having vertical reservation or it is a list prepared on basis of the merit irrespective of the availability of social reservation to a candidate.

17. Hon''ble Supreme Court in the case of R.K.Sabharwal (supra), while dealing with the placement of the candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes in "general" list, held as follows:

when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the

reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserved posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. For making any provision for reservation of appointments or posts in favour of any Backward Class of citizens, it is incumbent on the State Government under Article 16(4) of the Constitution of India to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said backward class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward class have already been appointed/promoted against the general seats. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative the same have to be followed.

18. In the case of *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and Others*, , Hon"ble Supreme court held that "where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney, R.K. Sabharwal v. State of Punjab, Union of India v. Virpal Singh Chauhan and Ritesh R. Sah v. Dr.Y.L. Yamul*). But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations".

19. In *Union Public Service Commission v. A.Cletus and Ors.*, C.A. No. 9007 & 98/1996 D.D. 09.08.2001, also Hon"ble Supreme Court held that the reserved community candidates who fall within the list of candidates selected for unreserved posts should not be considered as the candidates of reserved community while fixing number of candidates called for the reserved posts.

20. From the law laid down by Hon"ble Supreme Court in the cases referred above, it is settled that the "general category" means the category of the

candidates who acquires position in order to their merit, irrespective of their belonging to any reserved category. A person belonging to any social reserved category is first required to be considered in the "general category" as per his merit. Such a person cannot be excluded from the "general category" on the count that a reservation is available to him vertically. If a body be permitted to confine general list for the candidates coming from the castes or class for whom no social reservation is prescribed, then it shall be having the effect of providing a reservation for the persons for whom no social reservation is prescribed or even cannot be prescribed under the constitutional scheme. The another effect shall be that the percentage of reservation prescribed for socially and educationally backward categories shall become maximum number of the seats available to them. The intention of the legislature by providing vertical reservation to the socially and educationally backward categories is the minimum number or the minimum representation required in the services and by no administrative fiat or interpretation of law, such minimum representation may be permitted to be converted as maximum representation of the socially and educationally backward categories.

21. In the case of Chattar Singh (supra) Hon''ble Supreme Court was considering the status of OBCs vis- a-vis Scheduled Castes and Scheduled Tribes. In the case aforesaid Hon''ble Supreme Court nowhere examined as to what should be the "general category" and who should be placed in "general category". On the other hand, in the cases of R.K.Sabharwal and Rajesh Kumar Daria (supra) the law on the point is quite transparent and according to that the "general category" includes all the candidates irrespective of their castes or class. The list of "general category", as per Rule 15 of the Rules of 1999, is required to be prepared as per general merit. If a person belonging to OBC, SC or ST stand in general merit, then he is to be placed in "general" category. His candidature is required to be considered in general category as well as in the reserved category. On the other hand, the candidature of a person to whom no social reservation is available, is required to be considered as per his general merit only. No reservation is available to them in the name of "general category".

22. In the present matter, as a matter of fact, 689 persons belonging to the OBCs, who stand at higher pedestal in the merit vis-a-vis a huge number of persons coming from general castes have been deprived from their right to be considered for recruitment to Rajasthan State and Subordinate Services as a consequence to wrong determination of cut off marks. The act of the respondents is apparently illegal and is also in violation of the provisions of Article 335 of the Constitution of India that emphasise for maintenance of efficiency of administration in making of appointments to services and posts in connection with the affairs of the Union or of a State. The Commission, while determining cut off marks for different categories must have included the persons belonging to reserved categories, if they have adequate merit.

23. In R.K.Sabharwal's case (supra) Hon''ble Supreme Court observed that "the

fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative the same have to be followed.

24. Despite any number of appointees/promotees belong to the backward Classes against the general category posts the given percentage has to be provided in addition". In first stage of the Rajasthan State and Subordinate Examinations -2007, the number of candidates belonging to OBCs who have secured higher marks than the persons coming from general castes is quite high. There may also be certain persons in other reserved categories who have secured marks higher than the cut off marks determined for general categories.

25. The representation of the OBCs may be adequate but till the statute prescribes reservation for them, the cut off marks must be determined by the Commission by placing the members of the reserved categories who have secured higher marks in general category as per their merit. The State Government may certainly think to review the status of those on the reserved lists and for identification of those who continue to remain backward, but in any event all efforts should be made to implement the statutory reservation with all its objectivity.

26. For the reasons, whatever stated above, this petition for writ deserves acceptance, hence the same is allowed. The cut off marks as notified on 13.3.2008 are declared illegal. The respondent Commission is directed to re-determine the cut off marks for General Category, Other Backward Classes, Scheduled Castes, Scheduled Tribes including females in all categories by first preparing a list of all the candidates as per merit irrespective of belonging to the categories for those vertical-social reservation is prescribed. Instead of determining the cut off marks afresh, the respondent Commission is also given an alternative by permitting to appear in second stage i.e. the main examination of the Rajasthan State and Subordinate Combined Competitive Examinations-2007 to all those 689 persons from Other Backward Classes

27. who have secured higher marks than the cut off marks determined for general categories, those are 193.4 (in general) and 148.96 (in general female).

28. No order to cost.