

(2018) 08 P&H CK 0527

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 22055 Of 2018

Kailash Sharma And Another

APPELLANT

Vs

State Of Haryana And Others

RESPONDENT

Date of Decision : 31-08-2018

Acts Referred:

Haryana Backward Classes (Reservation in Services And Admission in Educational Institutions) Act, 2016 — Section 2(d), 5, 11, 14
Constitution Of India, 1950 — Article 226

Citation : (2018) 08 P&H CK 0527

Hon'ble Judges : Mahesh Grover, J;Mahabir Singh Sindhu, J

Bench : Division Bench

Advocate : Prithvi Raj Yadav

Final Decision : Dismissed

Judgement

1. Petitioners have filed the present writ petition under Article 226 of the Constitution for quashing of the impugned notifications dated 17.08.2016 and 28.08.2018 (P-10 and P-19) respectively, issued by the State of Haryana under the provisions of The Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 (for short 'Act of 2016').

2. The case of the petitioners is that they have passed their Senior Secondary Examination (10 + 2) and also qualified National Eligibility-cum-Entrance Test - 2018 (for short 'NEET 2018') by securing 517 and 556 marks respectively, out of 720. Thereafter, in response to the Notification-Prospectus dated 15.06.2018, both of them applied for admission to MBBS/BDS Course(s) in the State of Haryana being bonafide residents under the Backward Class, Block-A (for short 'BC-A Category').

3. Admittedly, parents (father) of both the petitioners are working with the Haryana Government and getting annual gross salary of Rs.8,15,712/- and Rs.8,20,998/- respectively. In addition, father of petitioner No.2 is also having an annual income of Rs.76,000/- from other sources. Despite that both the

petitioners were issued the BC-A Category Certificates dated 12.07.2018 and 19.06.2018 respectively (P-1 and P-2 colly.) as the income from salary was not counted in view of the earlier Notifications dated 07.06.1995, 09.08.2000 and 31.08.2010 issued by State of Haryana.

4. The grievance of the petitioners is that in view of the impugned Notifications dated 17.08.2016 and 28.08.2018 (P-10 and P-19) respectively, the salary income of their parents have been included while calculating the annual income for the purposes of "Creamy Layer" of Rs.6,00,000/- (Six Lakhs) and since salary income is more than Rs.6,00,000/- (Six Lakhs); consequently they have been denied the benefit of reservation under BC-A Category. The net result is that both of them have been treated under the General Category and petitioner No.1 could not succeed for admission; whereas, petitioner No.2 has been allotted the seat under General Category in BPS, Medical College Khanpur Kalan, District Sonapat.

For Subsequent orders see RA-CW-341-2018

5. It is contended by learned counsel for the petitioners that both the impugned notifications are legally not sustainable in view of the fact that income from salary should not be included for the purposes of fixing the ceiling of "Creamy Layer" in view of the judgment of Hon'ble Supreme Court in case Indira Sawhney Vs. UOI, 1992 SCC Supp. (3) Page 217 as well as notifications issued by the Central Government and followed by State of Haryana from time to time.

6. Heard learned counsel for the petitioners and perused the paper-book.

7. Before proceeding with the matter, it is appropriate to reproduce both the impugned notifications and which are as under: -

"HARYAN GOVERNMENT WELFARE OF SCHEDULED CASTES AND BACKWARD CLASSES DEPARTMENT NOTIFICATION

The 17th August, 2016 No.808-SW(1) - In exercise of the powers conferred by clause (d) of Section 2 of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016 (15 of 2016), the Governor of Haryana hereby specify the following criteria for exclusion of creamy layer within the Backward Classes as per the Schedules appended to the Act, namely, Schedule I, II & III : -

The children of persons having gross annual income of upto Three Lakh rupees shall first of all get the benefit of reservation in services and admission in educational institutions. The left out quota shall go to that class of Backward Classes of citizens who earn more than Three Lakh rupees but also Six Lakh rupees per annum. The sections of the Backward Classes earning above Six Lakh rupees per annum shall be considered as Creamy Layer under section 5 of the said Act.

The 28th August, 2018 No.1282-SW(1) - The Government notification No.808-SW (1) dated 17.08.2016 has been examined in consultation with the Advocate

General Haryana. The Advocate General relying upon the judgment of the Hon'ble Punjab and Haryana High Court has opined that the criteria for computing annual income as prescribed under the above notification as gross income shall include income from all sources. All previous notifications or instructions which provided for a different mode of computing annual income stands over-ridden.

Income certificate mentioning gross annual income issued after 17.08.2016 shall only be considered for availing any benefit under BC(A) and BC(B) category."

8. Concededly, on an earlier occasion also, both the petitioners filed CWP-17167-2018 and CWP-15731-2018, respectively, along with other connected matters and challenged the legality and validity of the notification dated 17.08.2016 (P-10) up to the extent of making sub-classification in BC-A and BC-B Category and all those writ petitions were allowed by a common order dated August 07, 2018 (P-11) by this Court and operative part of the same reads as under: -

"The notification fixing 6 lakh as the limit is not in question. What is challenged is the sub classification granting a preference to those with income upto 3 lakh and hence once it is accepted that certain categories though identified as backward, will be treated as creamy layer with an income more than 6 lakhs, any further sub classification in the list of backwards without any inputs can be termed to be an arbitrary classification that ensures reverse discrimination which closes the doors of equitable distribution amongst the backward classes.

True, economic criteria and well being can be one of the indications for social upliftment but as the Hon'ble Supreme Court has observed, it cannot be the sole criteria. Evidently the social advancement of a caste or a group would have to be identified on an empirical data and it cannot be assumed straightway that those with in income above 3 lakhs would have unshackled the social backwardness; such an exclusion from within the identified backward classes cannot stand the test of constitutional requirement.

The end result is that the State has given a benefit with one hand only to take it away with the other. There is absolutely no established co-relation between the socially backward and the economic deprived and thus, on the said reasoning, we are of the opinion that the impugned notification has to be held to be bad in law and deserves to be set aside.

Consequently, the writ petitions are allowed and counseling of the students shall be held afresh on the basis of the earlier existing criteria limiting the preference to those Backward Classes with an income of upto Rs.6 lakhs with no further sub-classification."

Perusal of the extracted portion of the order dated 07.08.2018 clearly reveals that in the previous round, the petitioners no where challenged the notification dated 17.08.2016 (P-10) thereby fixing the income limit of Rs.6,00,000/- as

"Creamy Layer" while taking into consideration the gross annual income. A further perusal of the BC-A Category Certificates of the petitioners (at pages 28 and 31 of the paper-book) disclose that these were issued by the competent authority without taking into consideration the gross annual income in terms of notification dated 17.08.2016; rather those certificates have been issued only on the basis of earlier Notifications dated 07.06.1995, 09.08.2000 and 31.08.2010.

9. It is necessary to mention here that order dated 07.08.2018 passed by this Court was challenged by way of Special Leave to Appeal (Civil) No.21893 of 2018 and which came up hearing before the Hon'ble Supreme Court on 28.08.2018 and the following order was passed: -

"We are not inclined to grant interim stay, as it is open to the State to fill the seats as per the judgment of the High Court and as per the merits of the backward class students.

List on 05.09.2018."

We are informed that the matter is still pending before the Hon'ble Supreme Court and no further order has been passed.

10. It is to be noticed that although notification dated 09.08.2000 clarified that the income from salary of the Government Employee will not be taken into consideration while calculating the income for the purposes of extending the benefit of reservation to the Backward Classes, but during the course of hearing of CWP-15731-2018 on 06.07.2018, this Court passed the following order: -

"The prospectus containing erroneous information in terms of earlier notifications of 1995 and 2000 which according to the respondents themselves has been superseded in view of the Haryana Backward Classes (Reservation in Services and Admission in Educational Institutions) Act, 2016. It is not denied before us that the information given on the website and the available forms as also the prospectus was on the basis of the earlier superseded instructions and evidently this would have led to supply of improper information leading to serious consequences in ascertaining the merit of the candidates. We, therefore, make it clear that the admissions made to the B.C. category shall be subject to the outcome of the present writ petitions."

In response to the above order, an affidavit of Special Secretary, Department of Welfare of SC and BC, Government of Haryana was filed and clarified the position and consequently, this Court passed the following order on 25.07.2018 : -

"On 6.7.2018 we had noticed certain anomalies that might have crept in on account of insistence of the State on the notification dated 9.8.2000. Mr.Sagar, learned State counsel on instructions from Dr.Sheeba, Deputy Director, Medical Education and Research, Haryana states that the said notification is not being insisted upon and rather where some candidates have given information on the basis of aforesaid notification, opportunity has been given to them to rectify the mistake by providing the requisite information in terms of the latter notification

dated 17.8.2016 for the purposes of second counseling."

Both the above interim orders have been incorporated in the final order dated 07.08.2018 while deciding the CWP-15731-2018 and other connected matters (P-11).

11. In view of the above, it has been crystalized that notification dated 09.08.2000 thereby excluding the component of salary income for calculating the annual income for the benefit of reservation under BC Category has already been done away by the State of Haryana after enforcement of the Act of 2016 as well as consequent notification dated 17.08.2016 and as such the petitioners cannot take any benefit of the earlier notifications. Thus, the same have rightly been ignored at the time of counselling of the petitioners and they were validly treated in the General Category being falling in the "Creamy Layer".

12. In view of the above legal and factual background, the State of Haryana has issued the Notification dated 28.08.2018 to the effect that for computing annual income under the notification dated 17.08.2016, the gross annual income shall include income from all sources and the same is perfectly legal and valid.

13. It is also pertinent to mention that validity of the Act of 2016 was challenged by way of CWP-9931-2016 and other connected matters and the same was upheld by this Court, vide order dated 01.09.2017 and concluding part of the same reads as under: -

"For the foregoing reasons,

(i) the 2016 Act is upheld and sustained;

(ii) however, the Haryana BC Commission shall carry out an exercise to determine the extent of reservation, if any, to which the castes mentioned in Schedule III of the 2016 Act are entitled to and also the quantum of reservation provided for them;

(iii) the State Government shall place before the Haryana BC Commission the quantifiable data amongst other things, besides, the Haryana BC Commission itself would be at liberty to seek the data, information, as may be required by it from the State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department;

(iv) any stake-holder or any person interested shall be at liberty to place the material before the Haryana BC Commission in this regard;

(v) the State Government, the Welfare of Scheduled Castes and Backward Classes Department and/or any other department as also any other stake-holder or interested person may submit data for or against the reservation before the Haryana BC Commission by 30.11.2017;

(vi) the State Government shall make due and wide publication for submitting the data to the Haryana BC Commission by the said date;

(vii) the data furnished shall be put by the Haryana BC Commission on its website;

(viii) any person desirous of raising any objection to the data shall file the same by 30.12.2017;

(ix) the Haryana BC Commission shall make its report by 31.03.2018;

(x) the State Government, on receipt of the report of the Haryana BC Commission, shall take decision on the same;

(xi) till such time the exercise is complete the benefit of reservation in services and in admissions for the Backward Classes in Schedule III to the 2016 Act shall be kept in abeyance.

The writ petitions are disposed of accordingly. There shall be no order as to costs."

The above order is still pending for consideration before the Hon'ble Supreme Court in Civil Appeal No.2261-2018.

14. There is no doubt that in view of the provisions of Clause (d) of Section 2 of the Act of 2016, the State Government has the power to specify the class of persons as "Creamy Layer" and which is as under: -

"Section 2(d) - In this Act, unless the context otherwise requires: -

(a) to (c) xxxxxxxxxxxxxxxx

(d) "Creamy Layer" means such class of person within the Backward Classes as the State Government may, by notification in the Official Gazette specify for the purposes of this Act.

(e) to (i) xxxxxxxxxxxxxxxx"

Still further Sections 11 and 14 of the Act of 2016 being material are extracted here as under: -

"Section 11. If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order, published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of three years from the commencement of this Act.

Section 14. The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other State law for the time being in force or any instrument having effect by virtue of any such law."

A perusal of Section 11 reveals that the State Government is well empowered to issue an order for removal of any difficulty while giving affect to the provisions of

this Act within a period of three years from the date of commencement i.e. 12th May, 2016.

Again the provisions of Section 14 are like non-obstante clause and the same is having the over-riding effect on the State law as well as against any other law for the time in force. Meaning thereby, the earlier notifications dated 07.06.1995, 09.08.2000 and 31.08.2010 issued by State of Haryana while following the Central Government are validly superseded.

15. The purpose of fixing the "Creamy Layer" is to safeguard the interest of really deserving persons of the backward segment of the society and in case the same is not applied meaningfully, then the whole scheme of reservation shall be rendered as otiose.

16. In the present case parents of both the petitioners are Government employee and their gross annual income is Rs.8,15,712/- and Rs.8,96,998/- respectively. Therefore, the petitioners, although may not be termed as members of affluent class, but at the same time, by no stretch of imagination it can be said that they are the real sufferers of any backwardness. There are really deserving cases who are not having the income of Rs.6,00,000/- per annum from all sources and they will be beneficiaries of the decision taken by the State of Haryana. In the opinion of this Court, there is nothing wrong while taking into consideration the salary component received by a Government employee for the purposes of "Creamy Layer" until and unless the same is interdicted by the State Government in a lawful manner. Even otherwise, a Government employee has a secured future and if he is to be designated as a Backward citizen by employing the device of exclusion of his salary for "Creamy Layer", then it is very difficult to extend the benefit of reservation to the poor and needy persons. Thus, it seems to be absolutely justified that the gross income from all the sources be counted for the purposes of seeking the benefit of reservation in the Backward Class Category. Otherwise generation after generation, people will get the advantage and deserving candidates will be kept at bay standing in the queue. The persons like petitioners and their families have attained adequate progress at a reasonable level, after getting the employment with the Government and they have been rightly asked to pave the way to the deserving persons waiting in the line. The decision taken by the State of Haryana is a balanced approach for the harmonious progress of the under privileged strata and remedial measure for the backwardness. The State Government have wisely issued the impugned notifications and in real sense skimmed off the comparatively non-deserving cases who were taking the undue benefit of reservation without any justification. Realistically whatever may be the legitimate income, that will certainly enhance the status of a person in the society and ameliorate his backwardness. The income of a Government employee is not an abstract form; rather that is obvious and meaningful basis for leading the life. Still further, this Court is very well conscious of the fact that Government employment is the most preferred avocation in our country and that is the reason that even for Class-IV

employment, there are thousands and thousands of applicants and even the graduates and post-graduates are in the queue and there is sufficient data available to substantiate the above observations, but this Court will refrain from multiplying the pages of this order and leave the matter here only. Time has come and the State Government has rightly pondered over the gamut of reservation for backward class of citizenry and taken a valid decision while issuing the impugned notifications in the best interest of the society at large. Therefore, instead of expressing any doubt about the wisdom of the State, they deserve an endorsement having acted in consonance with the spirit of the Act of 2016 and which has already been upheld by this Court.

17. Nothing has been brought to our notice from the judgment rendered by Hon'ble Supreme Court in Indira Sawhney's case (supra) that the course adopted by the State of Haryana would be impermissible in law after enactment of the Act of 2016.

18. In view of the facts and circumstances as discussed hereinabove, both the impugned notifications dated 17.08.2016 and 28.08.2018 (P-10 and P-19) respectively, issued by the State of Haryana, are to be legal and valid and do not require any interference by this Court. As a result thereof, the Backward Class Certificates issued in favour of the petitioners are dehors the abovesaid notifications and as such the same have rightly been ignored by the respondents.

19. No merits.

20. Dismissed.