(2007) 10 DEL CK 0083

In the Delhi High Court

Case No : Writ Petition (C) No. 16191 of 2006 and CM No''s. 13156 of 2006 and 7306 of 2007

The Secretary M/o. Personal, Public Grievances and Pensions APPELLANT

Vs

Tanu Kashyap and Another RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2007) 7 ILR Delhi 128

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : H.K. Gangwani, for the Appellant; Manoj Goel, Avinash Kumar and Shuvodeep Roy, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The respondent No. 1, an aspirant of All India Civil Services, appeared in the Civil Services Examination held in the year 2004 by the Union Public Service Commission (UPSC). She was successful in the preliminary examination and was, Therefore, allowed to apply for the main examination. After the result of the main examination and viva voce, the Select List issued by the petitioner, according to merit, ranked the respondent No. 1 at S.No. 93. Having regard to the vacancies available, it is a pretty high ranking, which would have definitely got her allocation to a coveted Service in the Union of India. However, no allocation was made. The reason: the respondent No. 1, who belongs to ''Khangar Community'', which is admittedly an Other Backward Class (OBC), had applied as an OBC candidate. According to the petitioner, on enquiry into the information supplied by the respondent No. 1 regarding income of her father, it turned out that he belonged to the creamy layer of OBC and, Therefore, his child, namely the respondent No. 1, was not entitled to any reservation under the OBC category.

2. The respondent No. 1 challenged the action of the petitioner herein by filing

OA No. 2451/2005 before the CAT, Principal Bench, New Delhi. That OA has been allowed vide judgment dated 29.8.2006 primarily on the following two grounds:

a) as per the criteria mentioned in various office memoranda, etc. to determine the creamy layer, father of the respondent No. 1 did not belong to the creamy layer and, Therefore, the respondent No. 1 was entitled to the benefit which an OBC candidate would be entitled to; and

b) even otherwise, by attaining 93rd rank in the examination without any relaxation, she would be entitled to the allocation even if she is treated as a ''General Category'' candidate irrespective of the fact as to whether she belonged to the creamy layer of the OBC or not.

Challenging this decision of the learned Tribunal, the present petition is preferred by the Union of India under Article 226 of the Constitution of India.

3. The first question which needs determination, as is obvious from the issues raised before the Tribunal, is as to whether the respondent No. 1 belongs to the creamy layer of OBC.

4. It is an accepted position that the caste ''Khangar'' falls in the category of OBC. It is also an accepted fact that the reservation meant for OBC candidates is not available to those OBCs who belong to the ''creamy layer''.

Inadmissibility of reservation to creamy layers of OBC was decided by the Supreme Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . The petitioner has formulated the criteria/guidelines for determination of creamy layer, which are contained in the OM dated 9.3.2004 Perusal of this OM would reveal that the exercise to lay down the guidelines was undertaken following the Supreme Court decision in Indra Sawhney (supra). The Government of India had appointed an expert committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservations for OBCs in civil posts and services under the government of India. The detailed exercise seems to have been done.

Para 3 of this OM also mentions that similar instructions in respect of public sector undertakings and financial institutions, including public sector banks, would be issued by the Department of Public Enterprises and the Ministry of Finance respectively, effective from the date of the said Memorandum. Column 2 of the Schedule attached to this OM specifies the categories of posts and column 3 mentions as to whom the rule of exclusion would apply. The first category relates to constitutional posts. Those constitutional posts are specifically mentioned and it is specified that sons and daughters of the persons holding such constitutional posts would be excluded from the benefit of OBC. Category 2 relates to ''Service Category'' and mentions the following Group- A/Class-I and Group-B/Class-II posts:

Description of category To whom rule of exclusion will apply

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 officers; (b) parents, either of whom is a Class I Officer; (c) parents, both of whom are Class I officers, but one of them dies or suffers permanent incapacitation; xx xx xx B) Group B/Class II Officers of the Central and State Services (Direct Recruitment) Son(s) and daughter(s) of (a) parents both of whom are Class II officers. (b) parents of whom only the husband is a Class II officer and he gets into Class I at the age of 40 or earlier. xx xx xx

There are some other categories of exclusion provided, which we have omitted as not relevant for our purposes.

5. Under this service category, employees in public sector undertakings are also mentioned and following rule of exclusion is provided therein:

Description of category To whom rule of exclusion will apply II. C) Employees in Public Sector Undertakings etc. The criteria enumerated in A and B above in this Category will apply mutates mutants to officers holding equivalent or comparable posts in PSUs, banks, Insurance Organisations, Universities etc. and also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these situations, the criteria specified in Category VI below will apply to the officers in these Institutions.

Other categories include armed forces, including paramilitary forces, professional class and those engaged in trade and industry and property owners. Last category stipulated is ''Income/Wealth Test'', wherein it is mentioned that sons and daughters of persons having gross annual income of Rs. 1 lakh or above (since revised to Rs. 2.50 lacs) or possessing wealth above the exemption limit, as prescribed in the Wealth Tax Act, for a period of three consecutive years would be treated as creamy layer and their sons and daughters would not be entitled to reservations.

6. Father of the respondent No. 1 was an employee of a public sector undertaking and, Therefore, in order to determine as to whether the respondent No. 1 would fall in the creamy layer or not, the criteria mentioned under ''Service Category'' has to be seen. As is clear from the portion extracted above relating to the employees in public sector undertakings, if such an employee in public sector undertaking, etc. is holding a post which is equivalent to Group-A/Class-I or Group-B/Class-II enumerated therein, then the said criteria would apply mutates mutants to these officers and, Therefore, one will have to fall back to the criteria mentioned against Group-A/Class-I and Group-B/Class-II posts to determine as to whether the rule of exclusion applies or not. In case there is no equivalence or comparison, it is provided that then the criteria would be as specified in Category-C, namely, ''Income/Wealth Test''. Thus, in such a case it will have to be seen as to whether the gross annual income is Rs. 2.50 lacs or above of such an employee.

7. The petitioner had also issued certain clarifications vide Circular dated 14.10.2004 and it would be necessary to take note of paras 3, 6 and 9 thereof, which read as under:

3. The criteria prescribed for determining creamy layer status of sons and daughters of persons in Government service mutates mutants applies to the sons and daughters of persons holding equivalent or comparable posts in PSUs, Banks, Insurance Organisations, Universities, etc. and also holding equivalent or comparable posts and positions under private employment. The creamy layer status of the sons and daughters of employees of organizations where evaluation of the posts on equivalent or comparable basis has not been made is determined on the basis of ''Income/Wealth Test'' given in the Schedule. The Income/ Wealth Test prescribes that the sons and daughters of persons having gross annual income of Rs. 2.5 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years would be treated to fall in creamy layer. An Explanation is given below the Income/ Wealth Test which provides that income from salaries or agricultural land shall not be clubbed.

To a query in Clause (iv) of para 4, the answer given in para 6 is as follows:

6. In regard to Clause (iv) of para 4, it is clarified that sons and daughters of parents who are included in the creamy layer on the basis of service status of their parents shall continue to be treated in creamy layer even if (Illegible).

Para 9 of this Circular prescribes the mode of calculating the gross annual income of Rs. 2.50 lacs. This para was clarification in answer to query contained in Clause (ix) of para 4. This query was - ''How will be the Income/Wealth Test apply in case of Sons and daughters of parent(s) employed in PSUs etc in which equivalence or comparability of posts has not been established vis-a-vis posts in the Government''?. The answer given to this query in para 9 is as follows:

9. In regard to Clause (ix) of para 4, it is clarified that the creamy layer status of sons and daughters of persons employed in organizations where equivalence or comparability of posts vis-a-vis posts in Government has not been evaluated is determined as follows:

Income of the parents from the salaries and from the other Sources (other than salaries and agricultural and) is determined separately. If either the income of the parents from the salaries or the income of the parents from other sources (other than salaries and agricultural land) exceeds the limit of Rs. 2.5 lakh per annum for a period of three consecutive years, the sons and daughters of such persons shall be treated to fall in creamy layer. But the sons and daughters of parents whose income from other sources is also less than Rs. 2.5 lakh per annum and income from other sources is also less than Rs. 2.5 lakh per annum will not be treated as falling in creamy layer even if sum of the income from salaries and the income from the other sources is more than Rs. 2.5 lakh per annum for period of three consecutive years. It may be noted that income from agricultural land is not taken into account while applying the Test.

8. The case of the respondent No. 1 was that her father''s date of birth was 1.1.1943. He joined Eastern Coal Fields Ltd., a public sector undertaking, on 15.4.1977 in the grade of Rs. 725-40-1325. He was promoted to the scale of Rs. 1680-2700 at the age of 40 years 4 months and 12 days. At the age of 40 years, he was in a lower pay scale of Rs. 1130-2400 in Coal India Ltd. He retired from service, on attaining the age of superannuation, on 31.12.2002. His gross income, as certified by his employer, for the last three years of his service was as under:

2000-01 Rs. 2,94,640/- 2001-02 Rs. 7,15,218/- 2002-03 Rs. 5,45,585/- 2003-04 NIL (drawing pension of Rs. 5000/- p.m. approx.)

In his entire career, prior to the year 2000-2001, the father of the respondent No. 1 had an income of much less than Rs. 2.50 lacs per annum. A conjoint reading of OM dated 9.3.2004 with Circular dated 14.10.2004 would demonstrate that the parent of the respondent No. 1 would be treated as belonging to the ''creamy layer'' if any of the following conditions are satisfied:

a) in case the service of the respondent No. 1''s father, who joined a public sector undertaking is equivalent or comparable to the Government service, he could be treated as equivalent to Group-A/Class-I officer of All India Central and State Services (Direct Recruitment) or who joined Group-B of the said Services and got into Group-A/Class-I service at the age of 40 or earlier; and

b) in case his service cannot be treated as equivalent or comparable to the Government service, he was having gross annual income of Rs. 2.5 lacs for three consecutive years.

9. In order to show that the post held by the respondent No. 1''s father was comparable to the Government post, reliance was placed by learned Counsel for the petitioner, before us as well as before the learned Tribunal, to the Order No. 11021/6/86/CSW dated 22.9.1986 of the Department of Coal. In terms of option 2, Clause (a) Sub-clause (iv) of the said Order dated 22.9.1986, pay scale of Rs. 1130-2400 is stated to be equivalent to Rs. 1640-2900. The pay scales of Rs. 1640-2900 and Rs. 2000-3500, in accordance with the notification of the Central Commission, related to Class-II officers of the Central Government. Thus, orders dated 22.9.1986 suggest that there was equivalence of posts of the persons working in Coal India Ltd. or Eastern Coal Fields Ltd. with the employees of the Central Government. The father of the respondent No. 1 admittedly joined the job in the pay scale of Rs. 725-1325 on the basis of which it cannot be said that he would belong to the creamy layer as it is not Group- A/Class-I post. At the age of 40 years, he was enjoying the pay scale of Rs. 1130-2400, equivalent to Rs. 1640-2900, which is again Class-II post. He was promoted to the scale of Rs. 1640-2900 after he had crossed the age of 40 years, i.e. at the age of 40 years 4 months and 12 days. Therefore, father of the respondent No. 1 neither joined Class-I post nor he could get promotion to the Class-I post before he attained

the age of 40 years. On this happening, Therefore, he would not fall in the creamy layer of OBC.

10. Further, the Department of Coal had addressed letter dated 16.1.1987 to the Director (Personnel), Coal India Ltd., reading whereof would also indicate that equivalence was done. In fact, Gazetted Officers of erstwhile Coal Mines Labour Welfare Organisation (a Government department) were taken over on abolition of the said organization vide the Coal Mines Welfare Fund (Repeal) Act, 1986 by the Coal India Ltd. The question of fixation of their pay arose and this necessitated the exercise of equivalence as they had to be put on equivalent and comparable pay scales in Coal India Ltd. Orders dated 22.9.1986 were issued pursuant thereto and options were given to such Government employees, who were absorbed in Coal India Ltd. Option No. 1 was to retain Government service and option No. 2, which is relevant for us, was for absorption in the Coal India Ltd. Herein the corresponding pay scales which were to be given in Coal India Ltd. were prescribed in the following manner:

CPC pay scale CIL Scale Pay Designation

I. Rs. 1100- 1600/1800 Rs.2400-100-3200 Medical Supdt./Supdt. Engineer as the case may be

II. Rs. 700-1300 Rs.2200-100-2900 Dy. Personnel Manager/Dy. P.M. (Admn.)/ Entomologist/Dy. Medical Supdt., as the case may be. Note: No. 1 and II not revised

III. Rs. 2000-3500 Rs. 1680-60-1800-100 -1800-100-2700 Sr. Law Officer/Sr. Personnel Officer/Executive Engineer/Sr. Surveyor (Illegible) as the case may be.

IV. Rs. 1640-2900 Rs.1130-50-1380-60- 1800-100-2400 Personnel Officer (Admn.) Sports Officer, as the case may be.

Thus, so far as the Coal India/the PSU where the respondent No. 1''s father worked, is concerned, the exercise of equivalence had been undertaken in the aforesaid circumstances.

11. We may point out at this stage that even as per the petitioner, DoPT had written letter dated 8.7.2005 to the Ministry of Coal as to whether the aforesaid pay scales were classified as Class-I or Class-II and if not, whether these posts were comparable or equivalent to Class-I or Class-II posts under the Central or State Government. According to the petitioner, Ministry of Coal informed, vide OM dated 18.1.2006, that DoPT may take a decision in the matter in consultation with the Department of Public Enterprises and when the matter was taken up with the Department of Public Enterprises, it informed vide OM dated 12.4.2006 that it was not possible to draw any equivalence of posts between IDA and CDA pay scale. Two things follow, which are glossed over by the petitioners:

(i) the earlier orders dated 22.9.1986 of the Department of Coal, which are relied upon by the respondent No. 1 were not considered or pointed out; and

(ii) the OM dated 12.4.2006 of the Department of Public Enterprises is based on the pay pattern, namely, IDA pay pattern applicable in the public sector understandings and CDA pay scales to the Central Government employees. It is a matter of common knowledge that all the public sector understandings were brought on IDA pay pattern only in the year 1990 after the judgment of the Supreme Court in Jute Corporation of Jute Corporation of India Officers'' Association Vs. Jute Corporation of India Ltd. and Another, . Prior to that, many public sector undertakings, were having CDA pay scales and many others were governed by IDA pay scales. It was to remove this anomaly and to bring all the employees of public sector undertakings on IDA pay pattern that the Supreme Court had issued such directions in Jute Corporation of India (supra). Therefore, this OM dated 12.4.2006 of the Department of Public Enterprises would be no relevance as the position underwent change much after. For the purpose of equivalence in the present case, we have to see the orders dated 22.9.1986 which, as aforesaid, have been ignored by the petitioners.

12. Even if we presume that the post held by the respondent No. 1''s father was not comparable with the Government service or there is no equivalence and in that case income criteria is to be applied, we are of the opinion that father of the respondent No. 1 did not fulfill the said income criteria as well so as to bring home within the sweep of creamy layer. It is not in dispute that for this purpose gross income of three consecutive years is to be seen. The question is determination of cut off date with reference to which income of three preceding years is to be looked into. The notification issued by the UPSC for Civil Services Examination, 2004, pursuant to which the respondent No. 1 had appeared in the said examination, will have to be looked into as certain clauses contained therein would throw light on this issue. This examination notice stipulated that preliminary examination of the Civil Service Examination for recruitment to the services and posts mentioned therein would be held on 16.5.2004 It was to be followed by the main examination. This notice mentions about ''Plan of Examination'' as under:

(B) PLAN OF EXAMINATION:

The Civil Services Examination will consist of two successive stages (vide Appendix I Section-I below).

(i) Civil Services Preliminary Examination (Objective Type) for the selection of candidates for the Main Examination; and

(ii) Civil Services Main Examination (Written and Interview) for the selection of candidates for the various Services and posts noted above.

Applications are now invited for the Preliminary Examination only. Candidates who are declared by the Commission to have qualified for admission to the Main Examination will have to apply again, in the detailed application form which would be supplied to them. The Main Examination is likely to be held in October/ November, 2004

Age limit prescribed for candidates who appeared in the said examination are stipulated in the following terms:

Age Limits:

(a) A candidate must have attained the age of 21 years and must not have attained the age of 30 years on 1st August, 2004, i.e. he must have been born not earlier than 2nd August, 1974 and not later than 1st August, 1983.

(b) The upper age limit prescribed above will be relaxable:

(i) up to a maximum of five years if a candidate belongs to Scheduled Caste or a Scheduled Tribe.

(ii) up to a maximum of three years in the case of candidates belonging to Other Backward Classes who are eligible to avail of reservation applicable to such candidates.

xx xx xx

13. We may also reproduce here Note 1 and Note 2 beneath ''Minimum Educational Qualifications''. These are:

NOTE 1 : Candidates who have appeared at an examination the passing of which would render them educationally qualified for the Commission''s examination but have not been informed of the results as also the candidates who intend to appear at such a qualifying examination will also be eligible for admission to the Preliminary Examination. All candidates who are declared qualified by the Commission for taking the Civil Services (Main) Examination will be required to produce proof of passing the requisite examination with their application for the Main Examination failing which such candidates will not be admitted to the Main Examination. The applications for the Main Examination will be called sometime in the month of July/August, 2004

NOTE 2 : In exceptional cases the Union Public Service Commission may treat a candidate who has not any of the foregoing qualifications as a qualified candidate provided that he has passed examination conducted by the other institutions, the standard of which in the opinion of the Commission justifies his admission to the examination.

14. From the Plan of Examination it is clear that it consists of two successive stages, namely, Preliminary Examination (objective type) and Main Examination (written and interview). Insofar as Preliminary Examination is concerned, it is only ''for selection of candidates for the Main Examination''. Thus, candidates are to be filtered and short-listed to enable them to appear in the Main Examination. That is the purpose of holding Preliminary Examination. It is the Main Examination which is for the selection of candidates for the ''various Services and

posts''. Not only that, a candidate is to apply afresh for appointment to the Main Examination and, Therefore, process for Main Examination starts after the application for the said examination is given by the candidates who have become eligible to appear in the Main Examination. Even the age limit which is prescribed, i.e. 30 years, has reference to the Main Examination as the candidate should not attain the age of 30 years on 1.8.2004 Preliminary Examination was held on 16.5.2004 and, Therefore, this date had no relevance with the age limit. It is only after the results of Preliminary Examination were declared and the applications for Main Examination submitted in August 2004 that the date of 1.8.2004 is relevant. Reading of this clause cumulatively would clearly demonstrate that the reference to Services and posts is in the Main Examination and likewise, the reference of date mentioned for the purpose of age limit is in the context of Main Examination.

15.Going by the aforesaid criteria, the income for three years has to be seen as on the date of making application for Main Examination and not the Preliminary Examination. Since this application was given in August 2004 by the respondent the income for three years, which was to be taken into consideration, would be 2001-02, 2002-03 and 2003-04. In all these three years, income of the respondent No. 1''s father should have been more than Rs. 2.50 lacs to bring him within the sweep of the creamy layer. However, as the respondent No. 1''s father had retired on 31.12.2002, he had no income for the year 2003-04.

16.The expression ''income'' has a definite connotation and it does not include ''pension''. However, even if pension is to be treated as income, it was much less than Rs. 2.50 lacs. Therefore, even if the income criteria is applied, the respondent did not come under the exclusion category and, thus, could get the benefit of being OBC. This is also clear from the letter dated 8/9.2.2007 which was written by Bharat Coking Coal Ltd. to the General Manager (Personnel), obtained under the Right to Information Act, and clearly demonstrates the equivalence. This letter reads as under:

Kindly refer to your letter No. CIL/CSA(vi)/Krinal Sinha/RTI/355 dated __.1.2007 on the above mentioned subject.

The desired details are furnished as under in the prescribed proforma:

Classification of Pay scale in Offered pay scale Grade offered in post of service CMWO (Rs.) in CIL (Rs.) CIL e.g. E1, E2 in CMWO and E3 etc. Group-A 1100-1600/1800 3000-100-3500- E-5 (unrevised) 125-4500 (revised) 2400-100-3200 Group-A 700-1300 2200-75-2800-EB- E-4 (unrevised) 100-4000 (revised) 2280-100-2900 Group-B 2000-3500 1680-60-1800-100-E3 (revised) 2700 Group-B 1640-2900 1130-2400 E-2 (revised)

17. Learned Counsel for the petitioner submitted that in the Circular dated 14.10.2004 it was abundantly clarified that in case a person belonged to the creamy layer, even after his retirement he would continue to fall in this category and his sons and daughters would not be entitled to the benefit of OBC. However,

attracting of this kind of situation presupposes the existence of two pre-conditions:

(i) there was a determination about the creamy layer of the parent(s); and

(ii) it happened when the parent(s) was/were in the service.

An interesting question may arise for consideration, namely, whether a person would be treated as belonging to ''creamy layer'' the moment his income touches Rs. 2.50 lacs p.a. for three years or such a determination is to take place with reference to the date when benefit of OBC is claimed by the sons and daughters of such a person. No such clarification is issued in this behalf. From the Examination Notice and the certificate which the candidate is required to submit, i.e. for the last three years, it implies, in the absence of specific clarification, that the question of creamy layer would be determined on the date when any child of such a parent(s) is/are seeking benefit of OBC. As on that date if the parent(s), after applying the yardstick contained in the Notification dated 9.3.2004, are found in creamy layer, then that situation would continue to apply even if such a parent(s) retires. Even otherwise, this would be the logical date for determination of the question about the creamy layer, else it may lead to absurd consequences. For example, in case a person retired from Government service 10 years ago, though at that time he earned income of Rs. 2.50 lacs per annum for three years, but his son or daughter applies for Government job as OBC category 10 years after his retirement when he is drawing pension and there is hardly any income, can such son or daughter be denied the status of OBC only because at one point of time his/her father had the requisite income. Likewise, for those engaged in trade and industry, for whom Income/Wealth Test is applicable, may have good income much earlier, but if such person is, because of losses suffered in the business, is living in penury for the last number of years before his child applies for the job, can such a child be denied the benefit of reservation only because number of years ago his/her father was having good income. In any case, this is for the Government to clarify and in the absence of any such clarification and coupled with the fact that the Examination Notice requires income for the last three years to be submitted, the cut off date for determining the creamy layer will have to be the date when any child of such a parent is seeking the benefit of reservation under OBC category.

In the present case, however, there was no determination as to whether the father of the respondent No. 1 was covered under the creamy layer. It fell for consideration only when the respondent No. 1 applied and as on that date, since her father had retired and had no income in the year 2003-04, he did not satisfy the criteria of creamy layer mentioned in the notification. If the Government intends it otherwise, it will have to specifically provide so. For this, many questions may arise which will have to be determined and it is not for us to lay down any such guideline or take a policy decision. The provisions which stand as of today and which we have examined above, on application thereof, we are of the opinion that the learned Tribunal rightly held that the respondent No. 1 was an OBC candidate and did not belong to the creamy layer on the date she applied for the test, i.e. August 2004 and, Therefore, she could rightly apply under the OBC category.

18. That apart, indubitably, the respondent No. 1 has secured 93rd rank in the All India Merit List. This credulous effort of the respondent No. 1 should not go in vain. Denying appointment to such a candidate would be grossly unjust.

19. Reverberating the issue from all these angles and after taking a holistic view of the matter, we do not deem it to be a fit case where we should interfere with the decision of the CAT in exercise of our power of judicial review under Article 226 of the Constitution of India.

20. This petition is, accordingly, dismissed.

21. Pursuant to the orders dated 30.10.2006 passed in this petition, the respondent No. 1 was allowed to join professional training course, which commenced from 15.12.2006. She was also allowed to undertake foundation course subsequently after finishing the professional training course. She would be allowed to complete these courses. Further, she will be allocated the requisite Service, as per her rank in the Merit List, within two weeks from today. No costs.