

(2009) 11 P&H CK 0038

High Court Of Punjab And Haryana At Chandigarh

Case No: C.W.R No. 5808 of 2009

Dr. Rajesh Kumar Badhan and
Another

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision: Nov. 30, 2009

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 15(4), 16, 19(1)
- Indian Medical Council Act, 1956 - Section 20, 33
- Postgraduate Medical Education Regulations, 2000 - Regulation 9

Citation: (2011) 1 ILR (P&H) 166

Hon'ble Judges: Permod Kohli, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Permod Kohli, J.

This petition proceeds on admitted factual background. The petitioners are presently serving as Medical Officers in the Punjab Civil Medical Service which they joined on 11th March, 1999 and 30th March, 2006 respectively. Both of them belong to Scheduled Caste Category. Certificates of their belonging to Scheduled Caste Category have been placed on record as Annexures P-1 and P-2, respectively. It is also admitted position that their fathers are Ex-servicemen. In response to the advertisement and prospectus issued by respondent No. 2 University for admission to the Postgraduate MD/MS Courses, the petitioners submitted their applications for seeking their consideration for admission to the available Postgraduate courses. Under the prospectus, 50% of the total seats available in Government institutions are to be filled up on All India basis through an All India Competitive Entrance Test and the remaining 40% seats are to be filled up through Post Graduate Entrance Test, known as PGET 2009. Out of 50% seats to be filled up through PGET, 60% are meant for PCMS/PCMS Dental/PDES inservice doctors and the remaining 40% from

Medical Graduates from Open market. Out of State quota, 25% seats are reserved for Scheduled Caste candidates, 5% for Backward Class, 3% for the Physically Handicapped, 2% for Sports Persons, 2% for Defence Personnel/ Wards of Defence Personnel, 2% for Wards of Punjab Police Personnel etc. and 1% for children/grand children of freedom fighters. Clause 3 contained in Para-B of the Prospectus deals with the determination of merit and preference for admission. Sub clause 3.1 prescribes the minimum eligibility for admission which reads as under:--

3.1. Candidates securing at least 50% marks in PGET-2009 will be eligible for admission. However, for SC/BC the eligibility marks shall be 40% instead of 50% in PGET-2009 for the reserve seats for these categories. Further as per Hon"ble Supreme Court judgment reservation of any kind is not permissible for Super Speciality courses so these super speciality courses will be open for all categories.

2. The State Government has also issued the notification dated 17th March, 2008 prescribing the procedure and the eligibility for admission to Postgraduate degree/diploma courses for the Session 2008 onwards. Clause 18 of the aforesaid Notification again deals with the minimum eligibility for admission on the basis of the Entrance Test which reads as under:-

18. Candidates securing at least 50% marks in the Common Entrance Test, shall be eligible for admission. However, for SC/BC candidates, the minimum eligibility marks for admission to reserved seats for the concerned category shall be 40% instead of 50% in PGET. The SC/BC candidates having 40% marks or more but less than 50% marks, shall be considered only for seats reserved for SC candidates.

3. In the admission form filled by the petitioners for Entrance Test, they claimed their consideration under the Scheduled Caste category as also under Wards of Ex-serviceman category. They participated in the Entrance Test and secured 46% and 42% marks, respectively. It is stated that under the Ex-serviceman category represented by Code No. 23, the petitioners ranked 2 and 3 respectively. It is, however, admitted position that under the Scheduled Caste Category their ranking is much below. The petitioners accordingly sought their consideration for admission under the Ex-serviceman category on the basis of their ranking. The respondents, however, refused admission to them under Ex-serviceman category on the plea that the petitioners do not possess minimum 50% marks in the Entrance Test, being the minimum eligibility criteria for admission under this Category and to support the basis of the decision, reliance is placed upon Clause 18 of the Prospectus, which, inter alia, provides 40% marks for admission to reserved seats instead of 50% for General and also the SC/BC candidates having 40% and above marks, but less than 50% marks ought to be considered only for seats reserved for Scheduled Caste Candidates and under no other category. Having been denied admission on this score, the petitioners have filed this petition seeking a direction for their consideration under the reserved category of Ex-serviceman, as per their merit in that category in the Entrance Test and also for quashing the Clause 18 of the

Notification dated 17th March, 2008 to the extent it directs consideration of SC/BC candidates having less than 50% marks in the Entrance Test only for reserved seats. The petitioners have also relied upon proviso to Regulation 9 of the Postgraduate Medical Education Regulations, 2000 framed by the Medical Council of India u/s 33 read with Section 20 of the Indian Medical Council Act, 1956. This proviso was introduced to Regulation 9 of the Postgraduate Medical Education Regulations, 2000,--vide Notification, dated 20th September, 2001 which reads as under :-

Provided that wherever entrance test for Postgraduate admission is held by a State Government or a University or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical courses shall be 50 per cent for general category candidates and 40 per cent for candidates belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes.

4. On the basis of the aforesaid proviso and para 3.1 of the Part-B of the Prospectus, it is contended on behalf of the petitioners that they are eligible not only for consideration for admission under the Scheduled Caste Category, but also under the Ex-serviceman Category, notwithstanding their percentage in the Entrance Test being less than 50%.

5. Mr. Sibal, learned counsel for the petitioners has argued that the concession available to the Scheduled Caste entitles him to compete with other category, irrespective of the fact whether they compete with General Class Category or any other Category on the basis of their merit in the Entrance Test. The contention is that a Scheduled caste candidate with 40% and above marks in the Entrance Test has a right of consideration against all seats, subject to his merit and thus restriction imposed under Clause 18 of the Notification dated 17th March, 2008 confining their right of consideration against vacancies meant for Scheduled Caste/Backward Class Categories alone, if their percentage is less than 50 in the Entrance Test, is illegal, unwarranted and amounts to unreasonable restriction of their rights conferred upon them under the Constitution. It is also argued that this condition is arbitrary and violative of Article 14 of the Constitution of India.

6. Mr. Anupam Gupta, learned counsel for respondents has, however, defended the aforesaid stipulation contained in Clause 18 of the Notification. His contention is that to provide reservation and extent thereof is the prerogative of the State and is a matter of policy decision. State Government in its wisdom while recognising the right and entitlement of the Scheduled Caste candidates for admission to PG courses on relaxed criteria thought it proper to confine the benefit only against the reserved vacancies meant for such categories and not to be extended to other categories.

7. The proposition seems to be quite interesting and important. Carrying forward the debate, it is contended on behalf of the respondents that :-

(1) grant of reservation and extent thereof is sole prerogative of the Government as it is a matter of policy and once the State Government has taken a policy decision conferring some benefit by providing a relaxed criteria for Scheduled Caste Candidates, they cannot ask for further relaxation depending upon their suitability;

(2) If on the basis of relaxed criteria, the Scheduled Caste candidates are allowed to compete in other reserved categories, it amounts to providing further reservation for Scheduled Caste/Backward Class in other reserved categories as well. Thus a reservation within the reservation which is impermissible under the present policy of the State Government;

(3) Allowing Scheduled Caste candidates to compete with other Categories on the basis of relaxed criteria will provide leverage to them to eat into their quota as well and thus, the candidates belonging to other reserved category candidates are in disadvantageous position;

(4) If such a recourse is permitted, the percentage of reservation of SC/BC category candidates will go beyond the prescribed percentage of reservation and is thus itself violative of Articles 14, 15 and in the matter of recruitment Article 16 of the Constitution of India as well.

8. To canvass the above points, reference is made to various judgments which are being taken note of here under :-

9. In the case of [Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College and Others](#), a question arose whether a person who is recognized as Scheduled Tribe in the State of his original birth continues to have the privilege or right in the State of migration or where he later goes. While answering this question, the Hon"ble Supreme Court taking into consideration the provisions of Articles 341 and 342 of the Constitution of India, has observed as under :-

13.....The words "for the purposes of this Constitution" must mean that a Scheduled Caste so designated must have right under Articles 14, 19(1)(d), 19(1)(e) and 19(1)(f) inasmuch as these are applicable to him in his area where he migrates or where he goes. The expression "in relation to that State" would become nugatory if in all States the special privileges or the rights granted to Scheduled Castes or Scheduled Tribes are carried forward. It will also be inconsistent with the whole purpose of the scheme of reservation. In Andhra Pradesh, a Scheduled Caste or a Scheduled Tribe may require protection because a boy or a child who grows in that area is inhibited or is at disadvantage. In Maharashtra that caste or that tribe may not be so inhibited but other castes or tribes might be. If a boy or a child goes to that atmosphere of Maharashtra as a young boy or a child and goes in a completely different atmosphere or Maharashtra where this inhibition or this disadvantage is not there, then he cannot be said to have that reservation which will denude the children or the people of Maharashtra belonging to any segment of that State who may still require that protection. After all, it has to be borne in mind that the

protection is necessary for the disadvantaged castes or tribes of Maharashtra as well as disadvantaged castes or tribes of Andhra Pradesh. Thus, balancing must be done as between those who need protection and those who need no protection, i.e., who belong to advantaged castes or tribes and who do not. Treating the determination under Articles 341 and 342 of the Constitution to be valid for all over the country would be in negation to the very purpose and scheme and language of Article 341 read with Article 15(4) of the Constitution.

10. A similar view has been expressed by another Constitution Bench of the Hon"ble Apex Court in the case of Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in [Action Committee on Issue of Caste Certificate to scheduled Castes and Scheduled Tribes in the State of Maharashtra and Another Vs. Union of India \(UOI\) and Another](#), wherein the privileges available to a Scheduled Caste/Scheduled Tribe or Backward Class persons in one State were not extended to in another State on migration. The Hon"ble Supreme Court also relied upon its earlier judgment in the case of [Dr. Pradeep Jain and Others Vs. Union of India \(UOI\) and Others](#), where the benefit of reservation in the Medical College to a Scheduled Tribe candidate was confined only to the State of its origin and not beyond that. In a celebrated case of Indra Sawhney and Others versus Union of India and Others, 1992 Supp. (3) S.C.C. 217 decided by a Constitution Bench of Hon"ble 9 Judges of the Supreme Court, the question of reservation was considered threadbare. It is relevant to notice some of the observations of the Hon"ble Supreme Court dealing with the question of reservation :-

808. It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective, Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4)-conceived in the interest of certain sections of society-should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 693). No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the Founding Fathers. Nor are we satisfied that the present context requires us to depart from that concept.

XXX XXX XXX

811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota

reserved for Scheduled Castes; they will be treated as open competition candidates.

812. We are also of the opinion that this rule of 50% applied only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture : all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservation" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other Backward Classes (under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains and should remain the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure....

11. In the case of [Ajit Singh and Others Vs. The State of Punjab and Others](#), and the case of [Ajit Singh and Others Vs. State of Punjab and Others](#), it has been held by Hon'ble Supreme Court that Article 16(4) is an enabling provision which neither imposes any constitutional duty nor confers any fundamental right for reservation. This view of the Constitution Bench in the aforesaid two cases has again been reiterated in a later judgment by another Constitution Bench in the case of [M. Nagaraj and Others Vs. Union of India \(UOI\) and Others](#). While considering the constitutional validity of 85th constitutional amendment, the Hon'ble Supreme Court has reiterated its earlier view. The relevant conclusions are contained in following paragraphs:-

CONCLUSION :

121. The impugned constitutional amendments by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration. 335. These impugned amendments are confined only to S.Cs. and S.Ts. They do not obliterate any of the constitutional requirements, namely, ceiling-limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between O.B.C. on one hand and S.Cs. and S.Ts. on the other hand as held in Indra Sawhney, the concept of post-based Roster with

in-built concept of replacement as held in R.K. Sabharwal.

122. We reiterate that the ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the "extent of reservation". In this regard the concerned State will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for S.C./S.T. in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

12. From the ratio of the aforesaid judgments, it emerges that reservation for a particular class or category is not a Fundamental Right. It is only an enabling provision with a view to achieve equality under Articles 14,15(1) and 16(1) of the Constitution of India. Provisions contained under Articles 15(4)(5) and 16(4) including 16(4)(a) and (b) are all enabling provisions to achieve the mandate contained under Articles 14,15(1) and 16(1) of the Constitution of India. Thus, the reservation for any class or category either for the purpose of employment or admission to the professional colleges is a question of discretion and discretion includes not only to make or not to make reservation, but the extent of reservation as well.

13. In the case of [Union of India \(UOI\) Vs. R. Rajeshwaran and Another](#), Hon"ble Supreme Court while considering the aforesaid question observed that making a provision for reservation for Scheduled Caste and Scheduled Tribes candidates in respect of seats set apart for All India Pool in M.B.B.S. or B.D.S. Courses is the discretion of the Government. On the issue whether the Court can issue a mandamus for making reservation for admission, the Hon"ble Supreme Court has observed as under:-

8. Inasmuch as 15% all-India quota has been earmarked under the Scheme framed by this Court and that Scheme itself provides the manner in which the same should be worked out, we do not think, it would be appropriate to travel outside the said provisions to find out whether a person in the position of the petitioner would be entitled to plead in the manner sought for because each of States could also provide for reservation for the Scheduled Caste and Scheduled Tribe category in respect of

85% of the seats available with them. If we meddle with this quota fixed, we are likely to land in innumerable and insurmountable difficulties. Each State will have different categories of Scheduled Castes and Scheduled Tribes and the Central Government may have a different category and hence adjustment of seats would become difficult. The direction fixing 15% quota for all-India basis takes note of reservations and hence the High Court need not have made any further directions.

9. In *Ajit Singh (II) versus State of Punjab* this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15(4) is identical and the view in *Comptroller and Auditor General of India, Gian Parkash versus K.S. Jagannathan* and *Superintending Engineer, Public Health versus Kuldeep Singh* that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and therefore, these two judgments cannot be held to be laying down the correct law. In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same.

14. It is thus argued on behalf of respondents that reservation to the extent of protective discrimination is permissible under the Constitution. However, where the reservation creates discrimination, the constitutional protection is not available. The argument is that the State in its wisdom considered that the benefit of relaxed criteria to Scheduled Caste/Backward Classes candidates be confined only against reserved vacancies for these categories and be not extended to other categories, particularly, other reserved categories and such a provision cannot be faulted with or interfered in exercise of the power of judicial review. It is also contended that no fundamental, constitutional or even a legal right of the petitioners has been infringed by confining their right of consideration in respect of the reserved vacancies only.

15. Mr. Sibal, learned counsel for the petitioners has, however, contended that the petitioners are entitled to the benefit of relaxed criteria under Clause 3.1 of the Prospectus and the Proviso to Regulation 9 of the Postgraduate Medical Education Regulations, 2000 framed by the Medical Council of India, the apex body created under the Central Legislation which is competent to lay down the norms for admissions to M.B.B.S. course. According to Mr. Sibal, the aforesaid clause of the Prospectus as also the Proviso to Regulation 9 lays down only one condition of eligibility for admission to the professional courses in question for S.C/B.C. candidates i.e. minimum 40% marks in the P.G.E.T. and if on the basis of the eligibility, a candidate on the basis of his merit in the entrance test competes in the General Category or in any other reserved category, he cannot be deprived of his right of consideration and any further condition of eligibility violates the fundamental spirit of the provisions of reservation made for S.C/B.C. It is argued that if a Scheduled Caste/Scheduled Tribe candidate with relaxed eligibility criteria is

able to seek admission in General Category on the basis of his merit, he cannot be denied such admission. In the case of [Ritesh R. Sah Vs. Dr. Y.L. Yamul and others,](#), the Hon"ble Supreme Court has observed as under :-

17. In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.

16. The aforesaid judgment has been followed in the case of Manjit Kaur versus State of Punjab and Others, (2005) 12 S.C.C. 310, with the following observations:--

8. The legal position has been clarified in Ritesh R. Sah that a student who is entitled to be admitted on the basis of merit, though belonging to reserved category, cannot be considered to be admitted in seats reserved for reserved category, but at the same time, provision should be made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the less meritorious reserved category candidate. It was further held that while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation, he will be deemed to have been admitted as an open category candidate....

17. On the basis of the ratio of the aforesaid judgment, it is sought to be projected by Mr. Sibal that if reserved category candidate on the basis of his merit is selected in open category, he cannot be deprived of the privileges available to him as a reserved category candidate and he is still entitled to the privileges and benefits which emanate from his status as a reserved category candidate. Thus, the petitioner has right of consideration under the Ex-serviceman quota, notwithstanding his percentage less than 50 as prescribed under the Government Notification.

18. In the case of [Union of India and others etc. Vs. Virpal Singh Chauhan etc.,](#) , it has been held by Hon"ble Supreme Court that where a Scheduled Caste and Scheduled Tribe candidate belonging to a reserved category is selected on the basis of merit, his selection cannot be considered against the reserved vacancy and has to be treated as an open category candidate leaving the reserved vacancy to be occupied by reserved category candidates below in merit.

19. I have heard counsel for the parties and examined the Prospectus, Notification dated 17th March, 2008 and Regulations framed by the MCI. From the careful perusal of Clause 3.1, it is evident that securing at least 50% in PGET is the eligibility condition for admission to the candidates other than S.C./B.C. The eligibility at 40% instead of 50% in P.G.E.T. is prescribed for the reserved seats for S.C./B.C. categories. Similar provision is contained in Clause 18 of Notification dated 17th March, 2008, wherein it has been provided that for S.C./B.C. candidates, the minimum eligibility marks for admission to reserved seats for the concerned category shall be 40% instead of 50%. It is further reiterated that candidates belonging to these categories having 40% marks or more, but less than 50% shall be considered only for seats reserved for S.C./B.C. candidates. From a bare perusal of proviso to Regulation 9 framed by the MCI, it is evident that this proviso relates to Entrance Test for Postgraduate admission and not at Graduate level like M.B.B.S./B.D.S. Hence no benefit can be drawn on that basis by the petitioners.

20. Coming to the fundamental and basic question whether a S.C./ B.C. candidate whose eligibility is 40% for admission to M.B.B.S./B.D.S. courses on the basis of an Entrance Test can be permitted or allowed to compete for admission with other reserved category candidates with the relaxed criteria which is otherwise notified only for the reserved seats by the Government policy. The petitioners have relied upon Clause 3.1 of the Prospectus. However, from a conjoint reading of both the provisions i.e. Clause 3.1 in the Prospectus and Clause 18 of the Notification dated 17th March, 2008 and the analysis of both provisions independently as well, it is abundantly clear rather apparent that there is no conflict between the two provisions. Both these provisions provide for relaxed criteria for S.C./B.C. qua reserved seats earmarked for these categories and for all other categories, the minimum eligibility is 50%. It is not in dispute that the petitioners do fall in Ex-serviceman Category as well. However, for this Category or for that matter any other reserved categories, except S.C./B.C, the minimum eligibility is 50% marks in the P.G.E.T. Petitioners do not have the minimum eligibility for other categories, they having secured 46 and 42 per cent marks in the P.G.E.T. They have also failed to achieve the merit in S.C. category for which they were eligible on the basis of the relaxed criteria. However, on the basis of their identity as Scheduled Caste Candidates, they want to have the benefit of the relaxed criteria for seeking admission under the Ex-serviceman Category even though under the laid down norms, they do not qualify for such consideration. It has been vehemently argued by Mr. Sibal that a Scheduled Caste or a Backward Class candidate carries his identity

wherever he goes and on the basis of his merit, if he is selected in General Category, he is entitled to the benefit of his identity if required. With a view to support his contention, refuge is taken under two judgments of the Hon"ble Apex Court in the cases of Ritesh R. Sah (supra) and Manjit Kaur (supra). In the aforesaid two judgments, Hon"ble Supreme Court has ruled that reserved category candidate on account of high merit is entitled to be admitted in General Category. However, merit of a reserved category candidate cannot be read to his disadvantage and he cannot be deprived of College/discipline of his choice as against a less meritorious candidate who has been selected against the reserved vacancy and is able to obtain admission in a better College/course. Accordingly, keeping the balance between the merit and the advantage, the Hon"ble Supreme Court has carved out the rule of earmarking meaning thereby a candidate, if selected in General Category on account of his higher merit, though he will be treated as a General category candidate, but for the purpose of the benefit for allocation of college/course, he has to be given an option to opt as a reserved category candidate as if he would have been selected against reserved vacancy as compared to a candidate belonging to the same reserved category with lesser merit selected against the reserved vacancy. In the case of Virpal Singh Chauhan (supra), the Hon"ble Supreme Court has clearly held that a candidate selected on merit against a reserved vacancy is to be treated as an open category candidate leaving the field open for a reserved category candidate with lesser merit to occupy the reserved vacancy. The spirit of the aforesaid judgments is that a meritorious candidate should not be deprived of the privileges of reservation merely because on account of his better merit and performance, he has been admitted in General Category. In these judgments, the privilege was allowed to be carried with the candidate along with his better merit. However, in the present case, the position is reverse. Here the candidate wants to take the benefit of his demerit for admission against a reserved category meant for particular class of people. It is true that a candidate may fall in two categories simultaneously and has the option to seek admission in any of the two based upon his merit. Can he be permitted to take the benefit of relaxed criteria to seek admission in a category where he is not eligible under the laid down norms. In the case of Indra Sawhney (supra), the Hon"ble Supreme Court has defined two kinds of reservation operating vertically and horizontally. The reservation of the S.C./S.T. or may be B.C. is vertical in nature, but the reservation of the kind like Ex-serviceman, Sportsmen, Physically Handicapped persons are horizontal in nature. Horizontal reservation operates and cut across the line in all categories. As per the illustration given in Indra Sawhney (supra), a handicapped candidate can conveniently be adjusted cutting across all categories may be for open or the Scheduled Caste Categories. However, the same principle cannot be applied to reservation which operates vertically. In case of [Akhil Bharatiya Soshit Karamchari Sangh \(Railway\) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India \(UOI\) and Others,](#) it has been held that remedy of reservation to correct inherited imbalances must not be an over kill. All the judgments on the

interpretation of Articles 15 and 16 of the Constitution right from [M.R. Balaji and Others Vs. State of Mysore,](#) to [M. Nagaraj and Others Vs. Union of India \(UOI\) and Others,](#) have a common ratio that the provisions for reservation are only enabling provisions and the State has the option to make reservation based upon the ratio of the population and other related factors where such deprived categories have inadequate representation and need to be encouraged by making reservation. This includes also not only the option to make reservation but also to provide for extent of reservation. It is the sole prerogative of the State. The State Government in its Wisdom has formulated the policy for grant of benefit of the relaxed eligibility criteria to Scheduled Castes/Backward Class categories in respect of only the seats earmarked/reserved for them and not to permit them to compete in other categories. The petitioners have not been able to point out any disadvantage to them with this criteria. The policy is clear and unambiguous. If a Scheduled Caste or B.C. category candidate participates in the Entrance Test and secures more than 50% marks, he is entitled to compete not only the Open Category vacancies, but other reserved Category vacancies as well if he belongs to any of such categories. The restriction is imposed only if a Scheduled Caste category candidate secures less than 50% marks then he can compete only against a reserved vacancy. Hence they have not been put to any disadvantageous position. If any of the S.C./B.C. category candidate has secured more than 50% marks, he is entitled to be considered against any of the vacancies on the basis of his merit. But his de-merit cannot be allowed to percolate into a category for which he does not possess even minimum eligibility of 50% in the Entrance Test. In case of Ritesh R. Sah and Manjit Kaur, the candidates admitted under Open category were meritorious having achieved higher merit in the Entrance Test so as to compete with the General Category Candidates. In the present case, at the threshold, the petitioners are disqualified and are rendered ineligible even to enter into the category of Ex-serviceman having less than 50% marks. The petitioners are not entitled to seek consideration under Ex-servicemen Category on the basis of the relaxed criteria, exclusively notified for Scheduled Caste candidates in respect of the vacancies reserved for them. This amounts to further relaxing the minimum criteria fixed for Ex-servicemen Category and for the petitioners alone. This itself is discriminatory in nature and is impermissible. The policy of the Government clearly provides that even a scheduled caste/backward class candidate if secures more than 50% marks, the minimum prescribed criteria for Ex-servicemen Category, he is entitled to be considered for admission under the said category. If petitioners with less than 50% marks in the Entrance Test are also allowed to compete with a Scheduled Caste candidate having more than 50% marks for the Ex-servicemen category, this itself will create two classes in the same category and thus violative of Article 14 of the Constitution of India. If a Scheduled Caste candidate is permitted to apply under Ex-servicemen Category with relaxed criteria, it also amounts to reservation within reservation. Without going into the question of its constitutional validity, suffice it to say, it is beyond the scope of the Government policy. To accede to the contention of the petitioner amounts to

re-writing the policy which is not the function of the Court.

21. It is, however, necessary to observe that Scheduled Caste/ Backward Class candidates with more than 50% marks in the Entrance Examination can conveniently and legally seek consideration/admission under the Ex-servicemen Category, subject to inter se merit with other candidates applying under the said category and if he is selected/admitted, he will be considered as an Ex-servicemen Category candidate and in such a situation, the percentage of the Scheduled Caste/Backward Class candidates cannot be said to be increased nor it can be argued that they have eaten the quota of Ex-servicemen Category candidates. These issues have been settled by the two Constitution Bench Judgments of Hon"ble Apex Court in the cases of Indra Sawhney (supra) and [R.K. Sabharwal and others Vs. State of Punjab and others](#) . In the case of Indra Sawhney (supra) commonly known as Mandal case, the Constitution Bench of Hon"ble Supreme Court held as under:--

811... In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

22. In the case of R.K. Sabharwal (supra), the Constitution Bench of Hon"ble Apex Court considered the question of appointment and promotion and roster points vis-a-vis reservation and held thus :

4...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-reserve 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....

23. In view of the discussion on various aspects of the matter and the ratio of the various judgments, referred to above, and considering the impact of the Government policy, the petitioners cannot be granted the relief prayed for. This petition is accordingly dismissed. No order as to costs.