

*Before Rajiv Narain Raina, J.*

**BRAHAM DUTT—Petitioner**

*versus*

**STATE OF HARYANA AND OTHERS—Respondents**

**CWP No. 21732 of 2010**

September 27, 2013

*Constitution of India, 1950 - Art. 226 - Reservation - Horizontal and vertical - Doctrine of Stare Decisis - Petitioner, a member of backward class - A and also an Ex-Serviceman - Haryana State Selection Commission advertized 38 posts of Taxation Inspectors - 4 reserved for BC-A category and 1 for ESM (BC-A) - Petitioner shown in waiting list in ESM (BC-A) category - Last candidate in*

*BC-A category secured 286 marks - Selected candidate in ESM (BC-A) category secured 315 marks - Petitioner obtained 249 marks - Petitioner represented that selected ESM (BC-A) category candidate be shifted to BC-A category on account of vertical reservation - Representation dismissed by Commission - Civil Writ Petition filed - Allowed - Held, social reservation remains on the front seat on the basis of overall merit and not on the back burner of special reservation - Respondent No.4 was superior in merit in BC-A category and deserved to be accommodated first in BC-A category - Merit is to be understood category wise - Further held, merit list be amended - Respondent No.4 to be fitted in BC-A category - Petitioner to be offered ESM (BC-A) category post with seniority - Respondent No.8 not to be disturbed - Appointment of Respondent No.8 not open to be quashed after three years for no fault of his - Respondent No.8 to be adjusted against existing vacancy - Further held, Stare Decisis is what court actually decides on facts presented and not what may flow from the case unless the court decides on a legal principle of universal application.*

*Held*, that it is well settled that what is stare decisis is what the court actually decides on facts presented and not what may flow from the case by implication unless the Court decides on a legal principle of universal application in which case the ratio is binding and all Courts have to act in aid of the Supreme Court.

(Para 17)

*Further held*, that I think it would make no material difference if the post advertised were to be filled by ESM (BC-A) or BC-A (ESM). Social reservation remains on the front seat on the basis of overall merit and not on the back burner of special reservation. The State was after all looking for the combination and the purpose would be achieved if the petitioner is appointed. Respondent No.4 would be set free and liberated from the horizontal reservation. There is no doubt that the petitioner belongs to the Backward Class-A. He happens to be an Ex-Serviceman as well. Social reservation to my mind would take precedence over special reservation and would dominate the merit list and accordingly tailor it in the appointments that follow. The core question to be seen is whether respondent No.4 had a preferential right of consideration in social reservation de hors his being

an ex serviceman. Both the petitioner and the respondent No.4 belong to the same and identical category of reservation applied for that is reservation within reservation or to put it in another way; social reservation under Article 16 (3) and (4) clubbed with special reservation under Article 15. The birthmark of caste cannot be permitted to be squandered away in the presence of dominating reservation enabled by Article 16 (3) and (4) of the Constitution. It is not disputed that respondent No.4 had secured 315 marks as against last BC-A candidate who secured 286 (respondent No.8). Therefore, respondent No.4 was superior in merit in the category of BC-A and deserved to be accommodated first in the category of BC-A. When that merit procedure is followed, the advertised vacancy of one post of ESM (BC-A) category would fall vacant by respondent No.4 climbing up the vertical ladder in his dominating vertical reservation. If that were to be true and correct position, then the instructions dated 7.10.1998 would not stand in the way of the petitioner. Even if it be so that respondent No.4 has assumed the charge of the post and no vacancy remains unfilled, the present is not a case of vacancy remaining unfilled or of consumption of post to be carried forward for the next recruitment process, respondent No.4 will be taken in law not to have consumed the post of ESM (BC-A) by deeming fiction, to which he is presently appointed in the event of success of this petition. I, therefore, do not see how Rajesh Kumar Daria's case helps the Commission or the State for that matter. In case of clubbing of reservation which also confers benefit of both horizontal and vertical reservation on one person, his vertical status would have to be first recognized as a lawful right by application of *Indira Sawhney* and *Sabharwal* cases. Merit itself, so to speak, is a relative term with no absolute meaning and is to be viewed in the prism of class or group merit and classification worked accordingly. Merit is usually the criteria to be adopted for making fair selection but when we deal with reservation and concessions afforded by the State to a distinct category or classes of persons depending upon there being social and educationally backward and historically depressed since times immemorial, then merit is to be understood category-wise after each vertical reserved candidate is given a fair chance to compete in open general category and then or within his social reservation as per merit.

*Further held*, that for the reasons aforesaid, this writ petition is allowed. The merit list prepared by the Commission (P-1) is directed to be amended in terms of this order. Consequently, the 4th Respondent would be fitted in BCA category as per his own general merit. The respondents would then consider offering the single post of ESM (BC-A) category so vacated to the petitioner by shifting respondent No.4 as above. On appointment the petitioner would get seniority etc. from his batch mates but not salary for the period prior to joining. However, in this process, respondent No.8 would not be disturbed. His appointment in my view is not open to be quashed after three years for no fault of his. To balance out the equities it is ordered that respondent No.8 would be adjusted against an existing vacancy in the cadre of Taxation Inspectors in the Excise and Taxation Department, Haryana, and if that is not feasible or possible for any reason whatsoever then by creation of a supernumerary post.

(Para 20)

Anil Ghanghas, Advocate, *for the petitioner*:

Sunil Nehra, Sr. DAG, Haryana

Sandeep Goyat, Advocate, for respondent No.4.

Ashwani Antil, Advocate, for respondent No.8.

**RAJIV NARAIN RAINA, J.**

(1) The petitioner is a member of the Backward Class-A, for which category, there is prescribed percentage of reservation in appointments by way of direct recruitment under the existing policies of the Haryana Government on reservation *inter alia* for the Backward Classes. The petitioner incidentally also belongs to the Ex-Serviceman category for which there is entitled to reservation separately and by clubbing of both categories, as advertised in this case for filling a single post earmarked for the ESM (BC-A) category. It is this clubbing of vertical and horizontal reservation and mingling of two different identities rolled into one which has led to the present controversy for decision of this Court where a candidate applying under the ESM (BC-A) category has secured more marks than many and not just the last candidate selected in the BC-A category. Should he be shifted up, is the question that searches for an answer.

(2) The factual back ground first. The Haryana Staff Selection Commission invited applications for filling up a total of 38 posts of Taxation Inspectors in the Excise and Taxation Department, Haryana under advertisement No.15 of 2007. Out of these 38 posts, 4 posts were reserved for Backward Class-A category and one post was reserved for ESM (BC-A). The petitioner applied under ESM (BC-A) category.

(3) The written test was held on 8.9.2010. This was followed by vice-voce. The final result was declared on 8.9.2010 and the roll number of successful candidates was published in the print media. The petitioner was shown in the waiting list of ESM (BC-A) category. In the result, the marks obtained by the last candidate of BC-A category (vertical reservation) was displayed as 286. The marks obtained by the selected candidate of ESM (BC-A) (horizontal + vertical reservation) category were 315. This candidate is arrayed as respondent No. 4 to this petition and is represented by counsel.

(4) The petitioner failed to secure appointment from the waiting list. He sought information from the respondent Commission to disclose the marks obtained by him. The petitioner was informed that he had secured 249 marks (234 in the written test + 15 in Vive-Voce) which brought him in the waiting list No.1.

(5) The petitioner staked claim for appointment on the ground that the BC-A candidate selected as Ex-Serviceman plus BC-A, respondent No. 4 had secured more marks than many BC-A candidates. The petitioner represented to the Commission that the selected ESM (BC-A) category candidate had secured 315 marks which was more than the last BC-A category candidate selected who secured 286 marks should be shifted to BCA category. In other words, ESM (BC-A) with 315 marks should be allocated BC-A category since that candidate-respondent No 4 had a right of consideration on account of vertical reservation though he may have also been an Ex-Serviceman. His social birthmark would overwhelm his service category. There is no dispute that ESM candidate is evaluated on yardsticks of horizontal reservation while backward classes fall in mainline vertical reservation. When ESM (BC-A) candidate selected against one advertised post is re-allocated on merit position in BC-A category, then he would automatically vacate the single advertised post in the ESM (BC-A) category

thus the petitioner deserves appointment from the waiting list against the single post of ESM (BC-A) category of reservation falling vacant on shifting the respondent No. 4.

(6) Having not met with any success before the Commission, the petitioner has approached this Court under Article 226 of the Constitution praying for quashing the selection and appointment of the 4th respondent in ESM (BC-A) category as well as of the last candidate selected in order of merit in BC-A category. On quashing of the appointment of 4th respondent in ESM (BC-A) category, the 4th respondent should be declared selected on the basis of his superior merit in the reserved category of BC-A in place of the last candidate selected in the BC-A category.

(7) On notice of motion having been issued on 6.12.2010, the respondent Commission put in appearance to contest the case by filing the written statement. It is not disputed that the petitioner was selected and placed in the waiting list. It is not disputed that the waiting list is to be operated in terms of Government Instructions dated 7.10.1998 in a case where no one assumes the charge of the post in the main selection list or on account of a vacancy remaining unfilled for any reason. The legal position obtaining after the judgment of the Constitution Bench of the Supreme Court rendered in *Indira Sawhney versus Union of India (1)*, is not disputed, neither can be. It is, however, explained that both BC-A and ESM (BC-A) are reserved categories and the principle laid down in *Indira Sawhney* is not applicable in the reserved category itself as according to which the candidates of reserved category securing more or equal marks to the general category candidate, such reserved category candidates are to be treated in general category. However, nothing of any consequence has been stated in the cursory 4 page written statement filed by the Commission. The Commission was responsible for drawing up the merit list and working out the reservation among competing categories.

(8) Private 4th respondent appointed in the single has defended the case by filing a separate written statement. It is his contention that his selection/appointment on merit in ESM (BC-A) category (same as that of the petitioner) is legal and valid and is not open to be disturbed. He obviously appears satisfied with the selection and it matters little to him

whether he is retained where he stands or is pushed vertically up the merit ladder as a BCA candidate. He has, therefore, no stake in this case, since his appointment is unexceptionable notwithstanding that he has secured more marks in than the last BC-A candidate selected and appointed. However, in case he is pushed up on the vertical ladder, the last BC-A category candidate may have to be pushed out of the list to accommodate the upward movement of the 4th respondent. In the event this Court agrees with the contention of the petitioner for appointment out of the waiting list in ESM (BC-A) category, then the further question would be whether it is fair and reasonable after three years of appointment to disturb the appointment of the last BC-A category candidate who secured 286 marks though higher in general merit than the petitioner who secured 249 marks.

(9) This Court would first address itself on the merits of the petitioner's claim and whether his prayer is justified. Mr. Anil Ghanghas, learned counsel appearing for the petitioner contends that as a general and universally established principle of service law in the field of reservation is that any candidate of any vertically reserved category shall be first considered in open competition and, thereafter, he shall be considered in his own category as per his merit determined by the Selecting Agency/Commission as per the merit of the candidate so that the benefit of reservation policy percolates down to the reserved category candidate which would sub-serve the object and reason of the reservation policy itself to achieve the prescribed percentage of reservation. He relies on *Indra Sawhney* versus *Union of India* and *R.K.Sabharwal* versus *State of Punjab (2)*; chain of cases in support of his case. It is pleaded in the writ petition on which the argument is based as follows:-

*"In the result, the marks obtained by the last candidate of BC-A category was shown as 286 and the candidate shown selected in the ESM (BC-A) category has obtained 315 marks. As per the service rules, general precedent and settled law by the courts of law as well as the principle of natural justice, the candidate who is higher in merit should have been considered in open category at the place as per his merit and thereafter he shall be considered for his reserved category. Therefore, the candidate*

*shown selected in the ESM (BC-A) category should first be given appointment under the BC-A category as per his merit and thereafter the person among the Ex-Serviceman in BC-A category should have been considered for appointment."*

(10) The sequential order in the constitutional scheme of appointments to public service and reservation in appointments would, therefore, run like this; a candidate who is both BC-A and ESM (BC-A), a combination of both vertical and horizontal, would have to be considered against the open general category in the first instance on his own merit and thereafter, in his respective reserved category in order of merit in that category.

(11) Mr. Ghanghas complains that the respondent Commission has not displayed the marks of each candidate in each category. The list of selected candidates sent in order of merit to the Government also shows that no marks have been mentioned against each candidate (P-5). It is, thus, argued that from the above list (P-5), it is clear that respondent No.4 has been kept above of the BC-A candidates at Serial No.20 and the 8th respondent has been kept at the fag end of the merit of the BC-A category. Meaning thereby, respondent No.4 is more meritorious in BC-A category and thus he should first have been considered under such category and the last candidate in BC-A category should have been kept at No.1 in the waiting list. In this manner, the petitioner can be appointed against the single post of ESM (BC-A) category on principle of stepping up the 4th respondent on replacement theory. If it is not so done, then, there may be violation of Articles 14 and 16 of the Constitution making the action of the respondent Commission arbitrary and discriminatory and against the principles of natural justice and judge made precedents.

(12) I have heard the learned counsel for the parties at great length including the submissions Mr. Ashwani Antil, Advocate for likely to be affected-respondent No.8 in case the plea of the petitioner is accepted.

(13) Mr. Ghanghas for the petitioner relies on the division bench judgment of this Court in *Ajit Singh versus State of Haryana and others* (3), in which this Court has culled out the following principles of law while



dealing with a case on the nature of reservation provided for Ex-Servicemen and whether such reservation would be social reservation or special reservation contemplated by Article 16(3) and 16(4) of the Constitution of India and further whether the posts which are reserved for Ex-Servicemen category should be filled up by following the course as prescribed by law applicable to vertical reservations or by the method followed in the cases of horizontal reservations. The division bench considered a large number of judgments of the Supreme Court and of this Court including the decision of the Supreme Court in *Rajesh Kumar Daria* versus *Rajasthan Public Service Commission and others* (4), which would be adverted to later while considering the arguments of Mr. Nehra learned counsel appearing for the State and the Commission. The following principles were culled out by the division bench of this Court in *Ajit Singh* case:-

*(i) The reservations for Physically Handicapped, Ex-servicemen, dependants of freedom fighters and women etc. are the horizontal reservations.*

*(ii) The candidates belonging to horizontal reservations will cut across the vertical reservations in the following manner:*

*(a) Firstly the seats for Open Category candidates will be filled up on the basis of merit;*

*(b) Secondly, the seats meant for vertical reserved categories will be filled up on the basis of merit in their own quota;*

*(c) Thirdly, the seats equal to the number of the candidates belonging to horizontal reserved category and also falling within vertical reserved category, shall stands consumed in the vertical reserved category. The candidate lower in vertical reserved category will make way for him;*

*(d) Fourthly, if a candidate belonging to horizontal reserved category does not belong to any of categories of reservations, a candidate in the open category will make way for such reserved category so as to satisfy quota of the seats meant for the horizontal reserved category.*

*(c) Lastly, in case of women candidates, who also fall within any one of special reservations or social reservations, such candidate shall be taken into consideration for determining the quota for both women and social reservations.*

(14) Mr. Sunil Nehra, learned Senior DAG, Haryana on the other hand relies on **Rajesh Kumar Daria** case (supra) which was noticed and dealt with by the division bench of this Court in **Ajit Singh** case (supra).

(15) Mr. Nehra has read out in Court with much emphasis paragraphs 5 to 7 of the judgment which deserve reproduction: -

*5. Before examining whether the reservation provision relating to women, had been correctly applied, it will be advantageous to refer to the nature of horizontal reservation and the manner of its application. In Indra Sawhney vs. Union of India [1992 Supp.(3) SCC 217], the principle of horizontal reservation was explained thus (Pr.812):*

*"..... 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 reservations' 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 relatable to clause (1) of Article 16. The persons selected against the quota 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."*

*A special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in Anil Kumar Gupta vs. State of U.P. [1995 (5) SCC 173] thus :*

*"....The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/ accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.)" [Emphasis supplied]*

6. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus:

*"For SC: 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of 'male' or 'women'.*

7. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. 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 nonreserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the 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 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 - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab (1995 (2) SCC 745), Union of India vs. Virpal Singh Chauhan (1995 (6) SCC 684 and Ritesh R. Sah vs. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs

*from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:-*

*If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]*

(16) Mr. Nehra submits that in the above illustration, 'SC' candidate should be read as 'BC-A' and 'women' for 'E:SM' in their application to the case in hand. This goes without saying. It is his case forcefully argued that the illustration given by the Supreme Court applies to this case inasmuch as Ex-Servicemen selected on merit within the vertical reservation quota will be counted against horizontal reservation for E:SM. The result can be easily achieved by replacing 'women' by Ex-Servicemen since both belong to the same species of special reservation being horizontal in nature. In **Daria's** case, the question arose that when rules prescribed horizontal reservation of 20% for women category-wise, the Rajasthan Public Service Commission while preparing the selection list of Munsiff Magistrates had wrongly applied the principles of vertical reservation and had selected women in excess of quota, thereby denying selection of the appellants and

other male candidates. The OBC and male candidates were aggrieved since they had secured higher marks than the selected women candidates, then they deserved to be selected and appointed.

(17) I have given much thought to the example given by way of illustration by the Supreme Court in **Daria's** case to see how it fits Mr. Nehra's arguments. The difference between this and that of **Daria's** case is that the advertised post of ESM (BC-A) is a combination of both vertical and horizontal reservation which situation did not directly arise in the aforesaid case for decision. It is well settled that what is *stare decisis* is what the court actually decides on facts presented and not what may flow from the case by implication unless the Court decides on a legal principle of universal application in which case the ratio is binding and all Courts have to act in aid of the Supreme Court. It would be no argument to say as to which one of the respective reservations applied in combination comes first and for whom the reservation was really intended would make little difference. I think it would make no material difference if the post advertised were to be filled by ESM (BC-A) or BC-A (ESM). Social reservation remains on the front seat on the basis of overall merit and not on the back burner of special reservation. The State was after all looking for the combination and the purpose would be achieved if the petitioner is appointed. Respondent No.4 would be set free and liberated from the horizontal reservation. There is no doubt that the petitioner belongs to the Backward Class-A. He happens to be an Ex-Serviceman as well. Social reservation to my mind would take precedence over special reservation and would dominate the merit list and accordingly tailor it in the appointments that follow. The core question to be seen is whether respondent No.4 had a preferential right of consideration in social reservation de hors his being an ex serviceman. Both the petitioner and the respondent No.4 belong to the same and identical category of reservation applied for that is reservation within reservation or to put it in another way; social reservation under Article 16 (3) and (4) clubbed with special reservation under Article 15. The birthmark of caste cannot be permitted to be squandered away in the presence of dominating reservation enabled by Article 16 (3) and (4) of the Constitution. It is not disputed that respondent No.4 had secured 315 marks as against last BC-A candidate who secured 286 (respondent No.8). Therefore, respondent No.4 was superior in merit in the category of BC-A and deserved to be

accommodated first in the category of BC-A. When that merit procedure is followed, the advertised vacancy of one post of ESM (BC-A) category would fall vacant by respondent No.4 climbing up the vertical ladder in his dominating vertical reservation. If that were to be true and correct position, then the instructions dated 7.10.1998 would not stand in the way of the petitioner. Even if it be so that respondent No.4 has assumed the charge of the post and no vacancy remains unfilled, the present is not a case of vacancy remaining unfilled or of consumption of post to be carried forward for the next recruitment process, respondent No.4 will be taken in law not to have consumed the post of ESM (BC-A) by deeming fiction, to which he is presently appointed in the event of success of this petition. I, therefore, do not see how **Rajesh Kumar Daria's** case helps the Commission or the State for that matter. In case of clubbing of reservation which also confers benefit of both horizontal and vertical reservation on one person, his vertical status would have to be first recognized as a lawful right by application of **Indira Sawhney** and **Sabharwal** cases. Merit itself, so to speak, is a relative term with no absolute meaning and is to be viewed in the prism of class or group merit and classification worked accordingly. Merit is usually the criteria to be adopted for making fair selection but when we deal with reservation and concessions afforded by the State to a distinct category or classes of persons depending upon there being social and educationally backward and historically depressed since times immemorial, then merit is to be understood category-wise after each vertical reserved candidate is given a fair chance to compete in open general category and then or within his social reservation as per merit. In *M. Nagaraj* versus *Union of India* (5), the Constitution Bench of the Supreme Court explained merit:

*"45. Merit is not a fixed absolute concept. Amartya Sen, in a book Meritocracy and Economic Inequality, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of "merit" independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact*

*of any affirmative action policy on "merit" depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of "extent of reservation" is not an absolute concept and like merit it is context-specific."*

(18) Therefore, I do not subscribe to the views propounded by Mr. Nehra on behalf of the Commission or the State that in case the petitioner is appointed, it will lower the overall merit of service or compromise the efficiency of administration. Reservation is after all inherently antimeritocracy but enjoys reasonable classification and protection by operation of constitutional enablement, mandates, the parameters of which have been set and constantly shaped and re-shaped by the Constitutional Courts in a refinement by a succession of far reaching precedents delivered at the Apex level and by the various High Courts for our understanding.

(19) It was not disputed by the Commission that the petitioner was placed in the waiting list. Since the petitioner has been in Court since 2010 claiming his rightful due, I am inclined to think that the petitioner has been wronged by the Commission and therefore the State Government by misapplication of the law of reservation as expounded by the Courts and therefore amends are required to be made through the intervention of this Court.

(20) For the reasons aforesaid, this writ petition is allowed. The merit list prepared by the Commission (P-1) is directed to be amended in terms of this order. Consequently, the 4th Respondent would be fitted in BCA category as per his own general merit. The respondents would then consider offering the single post of ESM (BC-A) category so vacated to the petitioner by shifting respondent No.4 as above. On appointment the petitioner would get seniority etc. from his batch mates but not salary for the period prior to joining. However, in this process, respondent No.8 would not be disturbed. His appointment in my view is not open to be



quashed after three years for no fault of his. To balance out the equities it is ordered that respondent No.8 would be adjusted against an existing vacancy in the cadre of Taxation Inspectors in the Excise and Taxation Department, Haryana, and if that is not feasible or possible for any reason whatsoever then by creation of a supernumerary post.

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*J.S. Mehndiratta*