
(2010) 03 PAT CK 0171
In the Patna High Court

Anil Kumar Srivastava

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-03-2010

Acts Referred:

Citation : (2010) 03 PAT CK 0171

Judgement

Sudhir Kumar Katriar, J.—This writ petition is directed against the order dated 6.11.2003 (Annexure-15), passed by the Central Administrative Tribunal, Patna Bench, Patna, in O.A. No. 533 of 2003 (Anil Kumar Shrivastava v. Union of India and Ors.), whereby the original application preferred by the present writ petitioner has been rejected.

2. A brief statement of facts essential for the disposal of the writ petition may be indicated. The respondent authorities had issued an advertisement way back in 1992, inviting applications from eligible candidates for appointment to the post of Probationary Assistant Station-Master, which is in the non-technical category of the Indian Railways. The petitioner was one such applicant, and he appeared at the written test held on 12.12.1993. He also appeared in the viva-voce test and psychological test on 4.3.1994. The respondent authorities forwarded their communication dated 28.3.1994 (Annexure-1), to the petitioner, informing him that his name has been recommended for appointment, provided he is found fit on other grounds. As per the direction of the respondents, he was subjected to the medical test. The petitioner was informed by communication dated 13.9.1994 (Annexure-2/1), that he has not been found medically fit as he had deficiency in A/2-vision test. This was followed by a second medical test, but he was again found unfit in the test, and the finding of the earlier occasion was affirmed vide letter dated 2.4.1996 (Annexure-4). The petitioner, therefore, preferred O.A. No. 273 of 2002 (Anil Kumar Shrivastava v. The Union of India and Ors.), which was disposed of by the Tribunal by order dated 22.3.2002 (Annexure-12), whereby the Chairman of the Railway Board was directed to dispose of the petitioner's representation with a reasoned order. The same was rejected by the Chairman of the Railway Board by his order dated 4.12.2002 (Annexure-13), leading to the

present O.A. No. 533 of 2003, which has been rejected by the impugned order leading to the present writ petition at the instance of the petitioner.

3. While assailing the validity of the impugned order, learned Counsel for the petitioner submits that the learned Tribunal has rejected O.A. No. 533 of 2003, on vague generalisations. The Tribunal has not cared to examine the contentions raised on behalf of the parties. He next submits that the Railway Board has issued circulars dated 23.11.1979, and of 7.11.1985 (Annexure-7), wherein provision has been made for alternative appointment of members of the Scheduled Castes and Scheduled Tribes in cases of medical deficiency.

3.1) He next submits that the Railway Board noticed the legal infirmities in the two circulars, issued the later circular dated 20.8.1999 (Annexure-6), and has extended the benefit of alternative employment to all such candidates, but has made the same prospective in its operation. He also submits that two similarly circumstanced persons, though under different advertisements of the Indian Railways, have been given the alternative employment prior to 20.8.1989.

4. Learned Counsel for the respondents has supported the action of the respondents.

5. We have perused the materials on record and considered the submissions of learned Counsel for the parties. The aforesaid circular dated 23.11.1979 is not on record, though adverted to in the later circular of 7.11.1985 (Annexure-7), which provides to the effect that in case a member of Scheduled Caste or Scheduled Tribe is unable to get appointment for medical deficiency, he shall be offered alternative employment. We find these two circulars to be unsustainable in law which overlook the provisions of the Constitution. Articles 14, 15, 16 of the Constitution are relevant in present context and are reproduced hereinbelow:

14. Equality before law.- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

1[(4) Nothing in this article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes].

16. Equality of opportunity in matters of public employment.- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office 1[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

1[(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.]

2[(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.]

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

6. Article 14 of the Constitution provides equality before law, or the equal protection of the laws, within the territory of India. Article 15 of the Constitution is to the effect that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(4) is to the effect that nothing in this article or in Clause (2) of Article 29 shall

prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 16(1) is to the effect that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) is to the effect that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against, in respect of any employment or office under the State. Article 16(4) is to the effect that nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State. Article 19(1)(g) of the Constitution is to the effect that all citizens shall have the right to practise any profession, or to carry any occupation, trade or business. Article 29(2) of the Constitution is to the effect that no citizen should be denied admission into any educational institution maintained by the State, or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them.

7. It is thus evident on a plain reading of the aforesaid provisions that equality of opportunity, and for that matter, equality of opportunity in State employment, is the dominant note of the Constitution. Reservation for certain deprived sections as contemplated by Article 16(4) of the Constitution is permissible provided it is done by Legislation. Indeed in the present case the requisite reservation was made in the advertisement for members of the Scheduled Castes and Scheduled Tribes. The relevant circular of 7.11.1985, provided alternative employment to selected candidates who could not obtain public employment because of medical deficiency, is evidently not covered by Article 16(4) of the Constitution, much less by administrative instructions. Therefore, the action of the respondent authorities in declining alternative employment to the petitioner, in a situation where he was finally selected on merits, could not have been denied on the ground that he was found deficient in medical test. This was a discriminatory and arbitrary act on the part of the respondent authorities. The Supreme Court has held in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , that every action of the State which is violative of the equality clause is Per Se arbitrary. Equality and arbitrariness are sworn enemies. It was open to the respondent authorities not to make provision for alternative employment at all to medically deficient persons, particularly in a situation like the present one where the advertisement was confined to the post of Probationary Assistant Station-Master. However, it was open to the respondent authorities to make such a provision for alternative employment, not on selective basis but for all such candidates, irrespective of religion, race, caste, sex, descent, place of birth, residence, or any one of them. Therefore, we have no manner of doubt that the circulars dated 23.11.1979 and 7.11.1985, are Per Se discriminatory, arbitrary, illegal and unenforceable, being confined to select body of citizens of this country. However, the respondent authorities saw reason and extended the benefit of alternative

employment to all such candidates by its circular dated 20.8.1999 (Annexure-6), but the same has been made prospective in nature. We are clearly of the view that the benefit of the circulars dated 23.11.1979, and 7.11.1985, had to be extended to all the candidates who have been selected on merits and were deprived of employment on the ground of medical deficiency.

8. There is yet another aspect of the matter. The writ petition states in paragraph 21 that Sanjay Kumar Suman, and Anil Kumar, two similarly circumstanced persons, though with respect to different advertisements of the Indian Railways, were granted alternative employment who had earlier been denied employment on the ground of medical deficiency. The rigours of the circular dated 23.11.1979 and 7.11.1985, were not applied in their cases. The respondent authorities have in paragraph 20 of the counter affidavit answered the question as follows:

20. That the cases mentioned in paragraph 21 of the writ petition under reply are not pertaining to Western Railway. Moreover, these candidates said to have been given alternative appointment do not belong to the panel of Railway Recruitment Board, Ajmer, in which the petitioner was placed hence no comments.

It is thus evident that the respondent authorities have not answered the question on merit. We, therefore, proceed on the basis that two similarly circumstanced persons were given alternative employment by the Indian Railways in similar circumstances, the two circulars of 23.11.1979 and 7.11.1985 notwithstanding. The petitioner has evidently been subjected to hostile discrimination.

9. We must record the submission of the learned Counsel for the petitioner that he would be satisfied if he is given alternative and medically permissible employment if notional benefits are given to him with due seniority, but without any claim for arrears of salary.

10. In the result, this writ petition is allowed. The order dated 4.12.2002 (Annexure-13), passed by the Chairman of the Railway Board, and the order dated 6.11.2003 (Annexure-15), passed by the Central Administrative Tribunal, Patna Bench, in O.A. No. 533 of 2003, are hereby quashed. The respondent authorities are directed to offer alternative employment of the level of Assistant Station-Master to the petitioner with effect from August, 1994, with all notional benefits, and without the liability of payment of arrears of salary. In other words, the petitioner's seniority shall be counted from August 1994, and salary at the time of joining shall be calculated after taking into account all the money benefits that would have accrued to him had he been allowed to join in August 1994. This Court will be pleased that this order is implemented within a period of four months from today failing which the petitioner shall be entitled to interest at the rate of 11% on all his money benefits, commencing from today till the date of payment. In the circumstances of the case, there shall be no order as to costs.