
(2013) 04 SHI CK 0074
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 3174 of 2012-H

Bhajan Dev Negi	Vs	APPELLANT
State of Himachal Pradesh and Others		RESPONDENT

Date of Decision : 08-04-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(1), 16(4)

Citation : (2013) LabIC 3182

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Ajay Mohan Goel, for the Appellant; Promod Thakur, Ms. Meenakshi Sharma, Addl. A.Gs., Neeraj Sharma, Dy. A.G. and D.K. Khanna, for the Respondent

Judgement

Rajiv Sharma, J.—Petitioner was appointed as Constable in the Police Department in the year 1979 against the post reserved for Scheduled Tribe category. He was promoted as Head Constable in the year 1984. He passed his intermediate course by availing the benefit of Scheduled Tribe category. He was promoted to the post of Assistant Sub Inspector in the year 1988. He was further promoted to the post of Sub Inspector on 15.12.1994 with effect from 25.11.1993 on the basis of rule 13.21 of the Punjab Police Rules, applicable to the State of Himachal Pradesh. He was promoted to the post of Inspector on 10.12.1998 but not against the roster point reserved for Scheduled Tribe category. He joined his duties on 20.12.1998. The Departmental Promotion Committee met on 27.11.2006 to consider the case of the petitioner for induction in H.P.P. Services. Petitioner's name was not recommended by the Departmental Promotion Committee for induction in H.P.P. Services. In sequel to the recommendations made by the committee, notification was issued on 2.12.2006. Petitioner made representation for the redressal of his grievance. It was rejected by the competent authority on 6.2.2007. Thereafter, another Departmental Promotion Committee met on 30.9.2008. Petitioner's name was not recommended by the Selection Committee. Representation made by the

petitioner was rejected on 21.3.2009. Mr. Ajay Mohan Goel has vehemently argued that the case of the petitioner was required to be considered against the vacancies of the years 2004, 2005 and 2006 on the basis of seniority list of inspectors. He has further contended that the case of the petitioner for induction in H.P.P. Services was to be considered against the general category and not against the roster point reserved for Scheduled Tribe category. He then contended that private respondents were junior to the petitioner in the seniority list of Inspectors circulated on 22.1.2003, as it stood on 1.10.2002, and also in the seniority list notified on 28.1.2005 as on 1.1.2005. He finally contended that petitioner has not been promoted to the post of Sub Inspector and Inspector against the roster point reserved for Scheduled Tribe category. In other words, his submission is that the "catch up" principle cannot be applied in case of petitioner.

2. Mr. Pramod Thakur, learned Additional Advocate General and Mr. D. K. Khanna have vehemently argued that since the petitioner has availed the benefit under Scheduled Tribe category at the time of passing of intermediate course, it was a case of accelerated promotion and the petitioner could not be considered for further promotion in view of "catch up" principle.

3. I have heard the learned Counsel for the parties and have perused the pleadings carefully.

4. The induction into H.P.P. Services is governed under the Himachal Pradesh Police Service Rules, 1973. According to rule 6, 40% posts are filled up by direct recruitment and 60% posts are filled up by promotion on the basis of selection from amongst the substantive Inspectors of Police, who have passed the Upper School Course from police training college and have two years continuous service in the rank of Inspector. The minimum educational qualification is B.A. The selection of candidates from Inspectors and Prosecuting Inspectors is to be undertaken by the Selection Committee as per Rule 7.

5. Petitioner was promoted as Assistant Sub-Inspector in the year 1988 after he had qualified the intermediate course by taking benefit of Scheduled Tribe category. However, fact of the matter is that when the petitioner was promoted to the post of Sub Inspector, he has not been promoted against the roster point reserved for Scheduled Tribe category, but as per Rule 13.21 of the Punjab Police Rules. Rule 13.21 of the Punjab Police Rules reads as under:

13.21: Power of relaxation.--Where the Inspector-General of Police is of the opinion that it is necessary or expedient so to do, he may, by order for reasons to be recorded in writing relax any of the provisions of this Chapter with respect of any class or category of persons.

6. Petitioner has further been promoted to the post of Inspector on the basis of Seniority of Sub-Inspectors not against the roster point of Scheduled Tribe. Respondent-State was directed to file supplementary affidavit whether the petitioner was considered for the post of Inspector against the roster point

reserved for Scheduled Tribe Category candidate as per order dated 5.3.2013. The supplementary affidavit was filed by the Director General of Police on 26.3.2013. It is specifically stated therein that the petitioner was not given the benefit of reservation while promoting him to the rank of Inspector. In the seniority list of Inspectors of Police circulated on 22.1.2003, as it stood on 1.10.2002, petitioner was at Sr. No. 113 and private Respondent Nos. 4 to 8 were at Sr. Nos. 115, 117, 122, 123 and 131, respectively. In the tentative seniority list of Inspectors of Police issued on 28.1.2005, as it stood on 1.1.2005, petitioner is at Sr. No. 103 and private Respondent Nos. 4 to 8 were at Sr. Nos. 105, 107, 112, 113 and 118, respectively. The Departmental Promotion Committee met on 27.11.2006. Case of the petitioner was required to be considered against the general category and not against the eligible Scheduled Caste/Scheduled Tribe candidates. Case of the petitioner has been considered by treating him as Scheduled Tribe candidate by treating his case as jump up seniority. This is contrary to law. Hypothetically, the promotion of the petitioner to the post of Assistant Sub-Inspection can be taken as L-1. Thereafter, he was promoted as Sub-Inspector on 15.12.1994 with effect from 25.11.1993 but not against the roster point of Scheduled Tribe, but as per rule 13.21 of the Punjab Police Rules. This can be taken as L-2. Thereafter, petitioner was promoted as Inspector on the basis of merit-cum-seniority on the basis of seniority list of Sub-Inspectors. It can be treated hypothetically L-3. He has not taken the benefit of belonging to Scheduled Tribe category at the time when he was promoted as Sub-Inspector on 15.12.1994 with effect from 25.11.1993 and Inspector on 10.12.1998. He was senior to the private respondents, whose names were recommended by the Departmental Promotion Committee in its meeting held on 27.11.2006 by considering the case of the petitioner on the basis of Scheduled Tribe category. Petitioner again has been considered against the post of Scheduled Tribe category, in the Departmental Promotion Committee held on 30.9.2008 instead of general category as per the seniority list of Inspectors of Police issued either on 22.1.2003 or 28.1.2005. Petitioner was fully eligible as per rules since he had two years experience as Inspector of Police. It is not the case of the respondent-State that the persons of the general category have caught up with the petitioner at L-2 or L-3. Thus, the principle of accelerated/jump up seniority would not be applicable and the petitioner was required to be considered as per the seniority list of Inspectors for induction into H.P.P. Services. Respondent-State has misconstrued the notification dated 27.5.1996. In order to complete the facts at this stage, it is noted that the petitioner has been inducted into H.P.P. Services on 18.6.2009.

7. The principle of "catch up" for the first time has been invoked by their Lordships of the Hon'ble Supreme Court in Union of India and others etc. Vs. Virpal Singh Chauhan etc., as under:

29. The Constitution Bench has, however, made it clear that the rule enunciated by them shall operate only prospectively (vide Para 11). It has further been held in the said decision that the "percentage of reservation has to be worked out in

relation to the number of posts which form the cadre strength (and that) the concept of vacancy has no relevance in operating the percentage of reservation." (As a matter of fact, it is stated that this batch of cases was also posted for hearing before the Constitution Bench along with R.K. Sabharwal and others Vs. State of Punjab and others, batch of cases but these cases were delinked on the ground that they raise certain other issues which did not arise in R. K. Sabharwal). Be that as it may, as a result of the decision in R. K. Sabharwal and the views/findings recorded by us hereinabove, the following position emerges:

(i) Once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of rule of reservation should be deemed to have been achieved and thereafter the roster cannot be followed except to the extent indicated in Para-5 of R. K. Sabharwal. While determining the said number, the candidates belonging to the reserved category but selected/promoted on their own merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates.

(ii) The percentage of reservation has to be worked out in relation to number of posts in a particular cadre, class, category or grade (unit for the purpose of applying the rule of reservation) and not with respect of vacancies.

(iii) So far as Railway Guards in Railway services are concerned that is the only category we are concerned herewith-the seniority position in the promoted category as between reserved candidates and general candidates shall be the same as their inter se seniority position in Grade "C" at any given point of time provided that at that given point of time, both the general candidates and the reserved category candidates are in the same grade. This rule operates whether the general candidate is included in the same batch of promotees or in a subsequent batch. (This is for the reason that the circulars/letters aforesaid do not make or recognize any such distinction). In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such a situation does not confer upon his seniority over the general candidates even though the general candidate is promoted later to that category.

8. The Constitution Bench had the occasion to consider this principle of "catch up" in *Ajit Singh and Others Vs. The State of Punjab and Others*, as under:

78. During the discussion under this "catch-up" point-for purposes of convenience-we take the example of the cadres in *Ajit Singh* i.e. there is roster point promotion for reserved candidates for promotion from Level 1 to Level 2 and from Level 2 to Level 3. There is no roster for promotion from Level 3 to

Level 4.

Two "catch up" rules contended for by general candidates:

79. Now, as stated earlier, the counsel for the general candidates argued for acceptance of two catch-up rules. Extreme "catch-up" rule:

80. So far as the extreme contention of the general candidates that at Level 3, the roster candidate must wait at Level 3-before being promoted to Level 4-till the last senior general candidate at Level 1 reached Level 3,-we reject the same in as much as that will not amount to a reasonable balancing of the rights of the candidates in the two groups. Nor do we accept that posts must be kept vacant and no promotions of the roster candidates be made.

9. The Constitution Bench had the occasion to consider the principle of "catch up" in *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, after the insertion of Article 16(4-A) in the Constitution of India as under: 69. One of the contentions advanced on behalf of the petitioners is that the impugned amendments, particularly, the Constitution (Seventy-Seventh Amendment) and (Eight-Fifth Amendment) Acts, obliterate all constitutional limitations on the amending power of the Parliament. That the width of these impugned amendments is so wide that it violates the basic structure of equality enshrined in the Constitution.

70. The key issue which arises for determination is-whether the above "catch-up" rule and the concept of "consequential seniority" are constitutional requirements of Article 16 and of equality, so as to be beyond the constitutional amendatory process. In other words, whether obliteration of the "catch-up" rule or insertion of the concept of "consequential seniority code", would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

71. The concept of "catch-up" rule appears for the first time in the case of *Union of India and others etc. Vs. Virpal Singh Chauhan etc.,* . In the category of Guards in the Railways, there were four categories, namely, Grade "C", Grade "B", Grade "A" and Grade "A" Special. The initial recruitment was made to Gr. "C". Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade "C" but at every stage of promotion. The percentage reserved for SC was 15% and for ST, it was 7.5%. To give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SCs and STs respectively. Subsequently, a hundred-point roster was prepared reflecting the same percentages. In 1986, general candidates and members of SCs/STs came within Grade "A" in Northern-Railway. On 1.8.1986, the Chief Controller promoted certain general candidates on ad hoc basis to Grade "A" Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling-up the posts in higher grades in the category of

Guards by applying the rule of reservation; (b) to restrain the Railway from acting upon the seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade "A" Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty-point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved category candidates in the promoted category. (Emphasis added). In this connection, the general category candidates relied upon the decisions of the Allahabad and Madhya Pradesh High Courts. It was contended by the general candidates that giving consequential seniority in addition to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and, therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration inasmuch as by this means the higher echelons of administration would be occupied entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade "A" Special, the seniority list pertaining to Grade "A" alone should be followed; that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade "C" as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade "A", the seniority in Grade "A" alone should apply. In short, the general candidates relied upon the "catch-up" rule, which was opposed by the members of SC/ST. They also relied upon the judgment of this Court in R. K. Sabharwal.

72. This Court gave following reasons for upholding the decision of the tribunal. Firstly, it was held that a rule of reservation as such does not violate Article 16(4). Secondly, this Court opined, that there is no uniform method of providing reservation. The extent and nature of reservation is a matter for the State to decide having regards to the facts and requirements of each case. It is open to the State, if so advised, to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the "catch-up" rule in the service conditions governing the promotions (See: para 24). Thirdly, this Court did not agree with the view expressed by the tribunal (in Virpal Singh Chauhan) that a harmonious reading of clauses (1) to (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior general category candidates in the feeder grade shall necessarily be junior in the promoted category to such general category. This Court categorically ruled, vide para 27, that such catch-up principle cannot be said to be implicit in clauses (1) to (4) of Article 16 (Emphasis supplied). Lastly, this Court found on facts that for 11 vacancies, 33

candidates were considered and they were all SC/ST candidates. Not a single candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. This Court opined that the above situation arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to "posts" and not "vacancies" and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs. In other words, this Court based its decision only on the faulty implementation of the rule by the Railways which the Court ordered to be rectified.

73. The point which we need to emphasize is that the Court has categorically ruled in *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, that the "catch-up" rule is not implicit in clauses (1) to (4) of Article 16. Hence, the said rule cannot bind the amending power of the Parliament. It is not beyond the amending power of the Parliament.

74. In *Ajit Singh and Others Vs. The State of Punjab and Others*, the controversy which arose for determination was - whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in the higher grade. The appellant took a clear stand that he had no objection if members of SC/ST get accelerated promotions. The appellant objected only to the grant of consequential seniority. Relying on the circulars issued by the administration dated 19.7.1969 and 8.9.1969, the High Court held that the members of SCs/STs can be promoted against general category posts on basis of seniority. This was challenged in appeal before this Court. The High Court ruling was set aside by this Court on the ground that if the "catch-up" rule is not applied then the equality principle embodied in Article 16(1) would stand violated. This Court observed that the "catch-up" rule was a process adopted while making appointments through direct recruitment or promotion because merit cannot be ignored. This Court held that for attracting meritorious candidate a balance has to be struck while making provisions for reservation. It was held that the promotion is an incident of service. It was observed that seniority is one of the important factors in making promotion. It was held that right to equality is to be preserved by preventing reverse discrimination. Further, it was held that the equality principle requires exclusion of extra-weightage of roster-point promotion to a reserved category candidate (Emphasis supplied). This Court opined that without "catch-up" rule giving weightage to earlier promotion secured by roster point promotee would result in reverse discrimination and would violate equality under Articles 14, 15 and 16. Accordingly, this Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position. Therefore, this Court set aside the factor of extra-weightage of earlier promotion to a reserved category candidate as

violative of Articles 14 and 16(1) of the Constitution.

75. Therefore, in *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, this Court has said that the "catch-up" rule insisted upon by the Railways though not implicit in Articles 16(1) and 16(4), is constitutionally valid as the said practice/process was made to maintain efficiency. On the other hand, in *Ajit Singh and Others Vs. The State of Punjab and Others*, , this Court has held that the equality principle excludes the extra-weightage given by the Government to roster-point promotees as such weightage is against merit and efficiency of the administration and that the Punjab Government had erred in not taking into account the said merit and efficiency factors.

76. In the case of *Ajit Singh (II)*, three interlocutory applications were filed by State of Punjab for clarification of the judgment of this Court in *Ajit Singh (I)*. The limited question was - whether there was any conflict between the judgments of this Court in *Virpal Singh Chauhan 1* and *Ajit Singh (I)* on one hand and vis-?-vis the judgment of this Court in *Jagdish Lal and others v. State of Haryana and others (1997 Lab IC 2301)*. The former cases were decided in favour of general candidates whereas latter was a decision against the general candidates. Briefly, the facts for moving the interlocutory applications were as follows. The Indian Railways following the law laid down in *Virpal Singh Chauhan 1* issued a circular on 28.2.1997 to the effect that the reserved candidates promoted on roster-points could not claim seniority over the senior general candidates promoted later on. The State of Punjab after following *Ajit Singh (I)* revised their seniority list and made further promotions of the senior general candidates following the "catch-up" rule. Therefore, both the judgments were against the reserved candidates. However, in the later judgment of this Court in the case of *Jagdish Lal*, another three-Judge bench took the view that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster point promotees were entitled to the benefit of continuous officiation. In *Jagdish Lal*, the bench observed that the right to promotion was a statutory right while the rights of the reserved candidates under 16(4) and 16(4A) were fundamental rights of the reserved candidates and, therefore, the reserved candidates were entitled to the benefit of continuous officiation.

77. Accordingly, in *Ajit Singh and Others Vs. The State of Punjab and Others*, three points arose for consideration:

(i) Can the roster point promotees count their seniority in the promoted category from the date of their continuous officiation vis-?-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?

(ii) *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, and *Ajit Singh (I)* have been correctly decided and has *Jagdish Lal* been correctly decided?

(iii) Whether the catch-up principles are tenable?

78. At the outset, this Court stated that it was not concerned with the validity of constitutional amendments and, therefore, it proceeded on the assumption that 16(4A) is valid and is not unconstitutional. Basically, the question decided was whether the "catch-up" principle was tenable in the context of 16(4). It was held that the primary purpose of 16(4) and 16(4A) is to give due representation to certain classes in certain posts keeping in mind Articles 14, Article 16(1) and 335; that, Articles 14 and 16(1) have prescribed permissive limits to affirmative action by way of reservation under Articles 16(4) and 16(4A) of the Constitution; that, Article 335 is incorporated so that efficiency of administration is not jeopardized and that Articles 14 and Article 16(1) are closely connected as they deal with individual rights of the persons. They give a positive command to the State that there shall be equality of opportunity of all citizens in public employment. It was further held that Article 16(1) flows from Article 14. It was held that the word "employment" in Article 16(1) is wide enough to include promotions to posts at the stage of initial level of recruitment. It was observed that Article 16(1) provides to every employee otherwise eligible for promotion fundamental right to be considered for promotion. It was held that equal opportunity means the right to be considered for promotion. The right to be considered for promotion was not a statutory right. It was held that Articles 16(4) and 16(4A) did not confer any fundamental right to reservation. That they are only enabling provisions. Accordingly, in *Ajit Singh (II)*, the judgment of this Court in *Jagdish Lal* case was overruled. However, in the context of balancing of fundamental rights under Article 16(1) and the rights of reserved candidate under Articles 16(4) and 16(4A), this Court opined that Article 16(1) deals with a fundamental right whereas Articles 16(4) and 16(4A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State, the rights under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.

79. Reading the above judgments, we are of the view that the concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the "catch-up" rule nor the concept of "consequential seniority" are implicit in Clauses (1) and (4) of Article 16 as

correctly held in Union of India and others etc. Vs. Virpal Singh Chauhan etc.,

Accordingly, in view of the observations and discussions made hereinabove, the writ petition is allowed. Respondents are directed to consider the case of the petitioner for induction into H.P.P. Services for the vacancies, which were available in the years 2004, 2005, 2006 onwards, on the basis of seniority list circulated on 22.1.2003 or 28.1.2005 by convening review Departmental Promotion Committee, within a period of eight weeks from today. If the petitioner is found suitable, he shall be promoted with all the consequential benefits. In normal circumstances, promotions of private respondents were liable to be quashed and set aside, but in order to balance the equities, their promotions are not quashed and the respondent-State is directed to create supernumerary post if the petitioner is found suitable for the post of Deputy Superintendent of Police. Pending application(s), if any, also stands disposed of. No costs.