

(2013) 05 AHC CK 0245

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 27319 of 2013

Bhuneshwar Prasad Kureel

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Constitution of India, 1950 — Article 341
New Okhla Industrial Development Authority Service Regulations, 1981 — Clause 22(2)
Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 9

Citation : (2013) 05 AHC CK 0245

Hon'ble Judges : Amreshwar Pratap Sahi, J

Final Decision : Disposed Of

Judgement

Amreshwar Pratap Sahi, J.—Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Sudhanshu Srivastava for the petitioner and Sri Shivam Yadav for the Respondent Nos. 3 and 4 and learned Standing Counsel for the Respondent Nos. 1 and 2.

2. This petition was entertained and the matter was heard on three previous days and ultimately the following questions were framed on 17.5.2013 to enable the learned Counsel to advance their submissions on the legal issues that have been raised vis a vis the challenge to the legality of the impugned order dated 26.4.2013 resulting in the termination of the services of the petitioner. The order passed on 17.5.2013 is quoted hereinunder :

"Heard Sri Ashok Khare, learned Senior Counsel for the petitioners alongwith other Counsel who are appearing in the connected cases and Sri Shivam Yadav for the respondent authority and the Sri A.K. Yadav, learned Standing Counsel for the State.

The issue involved in all these writ petitions is in relation to the claim of benefit as a Scheduled Caste by the petitioners for appointment in the respondent authority.

Prima facie there does not appear to be any dispute with regard to the status of their caste and the only ground on which their services have been terminated is that they are not a domicile or a resident of State of U.P. and therefore they were not entitled to be appointed so as to receive the benefit of reservation as a scheduled caste.

The impugned order proceeds on the law laid down by the Apex Court in the case of Action Committee On Issue Of Caste Certificate To Scheduled Castes of Maharashtra and another v. Union of India and another, reported in (1994) 5 SCC 244.

The matter was heard yesterday and today as well and judgments have been cited at the bar including the decision in the case of Union of India v. Dudh Nath Prasad, reported in (2000) 2 SCC 20; the decision in the case of S. Pushpa and Ors. v. Sivachanmugavelu and Ors., reported in (2005) 3 SCC 1; State of Uttaranchal v. Sandeep Kumar Singh and others, 2010 (12) SCC 794; M. Chandra v. M. Thangamuthu, (2010) 9 SCC 712.

The contention raised by Sri Khare is that the issue of domicile would not be relevant for the purpose of such a consideration, inasmuch as, there is no dispute with regard to the fact that the petitioners are a notified scheduled caste under the presidential order in the State of U.P. He submits that merely because they have migrated to a different State they do not get any benefit of such reservation in the migrated State and it is only in their parent State that they would be entitled to such benefit. He therefore contends that the provisions of Article 341 cannot be interpreted so as to render it nugatory by adding the requirement of domicile. He submits that there is neither any statutory provision nor is there any executive instruction or office memorandum explaining the aforesaid position as sought to be justified while passing the impugned termination order. He therefore contends that the respondent authority could not have terminated the services on this ground.

Sri Shivam Yadav and Sri A.K. Yadav have vehemently urged that the Supreme Court in the decision of Subhash Chandra v. Delhi Subordinate Services Selection Board, reported in (2009) 15 SCC 458, which is being relied upon by the learned Counsel for the petitioners, and which in paragraph 96 declares the earlier law in the case of Dudh Nath Prasad (supra) to be per incuriam, has already been referred to a larger bench in the decision of State of Uttaranchal v. Sandeep Kumar Singh (supra).

They contend that if a scheduled caste of his parent State has migrated to another State, and is not a resident of the State of U.P., as in the present case then he does not suffer from any disadvantage so as to entitle him to claim any benefit within the State of U.P. for public employment. They contend that the issue of domicile therefore is intertwined with the issue of claim of reservation and the same cannot be read in a divorced manner.

Sri Shivam Yadav however prays that the matter be adjourned for today to

enable him to further address the Court on this issue and assist the Court on such requirement. Put up on Tuesday next as fresh alongwith the connected matters."

3. The dispute centers around the appointment of the petitioner as a mechanic against a ClassTV post in the Respondent NOIDA authority. The petitioner was extended the benefit of appointment on the claim of reservation under the Scheduled Caste Category. The petitioner's appointment has been annulled by the impugned order on the ground that the petitioner is not entitled to the benefit of reservation as a scheduled caste inasmuch as he is a resident of another place out side the State of U.P. Consequently, applying the ratio of the judgment of the Apex Court in the case of Action Committee v. Union of India, (1994) 5 SCC 244, on the issue of caste certificate the impugned order has been passed recording that the benefit of reservation extended to the petitioner was erroneous and, therefore, his appointment was invalid. Consequently, the services have been terminated invoking the powers under Clause 22(2) of the NOIDA Service Rules, 1981.

4. Sri Ashok Khare contends that the impugned order proceeds on a totally erroneous application of law and without even advertng to the facts on the basis whereof the petitioner was claiming reservation as a resident of the State of U.P. under the scheduled caste category. Sri Khare has taken the Court through various documents including the certificates issued to the petitioners from his migratory State, namely, Chhattisgarh, which was part of erstwhile Madhya Pradesh, and he also contends that the ancestors of the petitioner including his father were born in the State of U.P. in the District of Unnao at the time of the issuance of the Presidential Order. In such circumstances the petitioner will be entitled to the benefit of reservation in terms of Article 341 of the Constitution of India.

5. He contends that the caste of the petitioner has not been disputed in the impugned order. The caste of the petitioner is enlisted in the schedule for the State of U.P. and the petitioner belongs to the same caste. He further contends that the issuance of the caste certificate is only a certification of the caste which has been placed in the schedule under the Presidential notification and, therefore, in the absence of any evidence to the contrary the denial of the benefit of reservation is against the Constitutional provision. He, therefore, contends that the impugned order ignoring these vital aspects has proceeded to non suit the petitioner for reasons that cannot be countenanced in law.

6. In short Sri Khare submits that not only factually but also legally the petitioner is a resident within the meaning of Article 341 of the State of U.P. and there is ample evidence to support it on the basis whereof he was offered employment which could not have been cancelled on a summary basis as has been done through the impugned order.

He further submits that against the show cause notice the petitioner had filed a

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7. Advancing his submissions Sri Khare contends that the decision in the case of Action Committee (supra) relies on the Constitution Bench judgment in the case of Marri Chandra Shekhar Rao v. Dean, Seth C.S. Medical College, (1990) 3 SCC 130, and other judgments that have been referred to therein and the said judgments nowhere, in any manner, dilute the status of the claim of the petitioner, as such, the said law has been wrongly applied and the impugned order deserves to be set aside.

8. Countering the said submissions Sri Shivam Yadav has invited the attention of the Court to the case of Union of India v. Doodh Nath Prasad, (2000) 2 SCC 20, and he has further contended that the judgment in the case of Shubhash Chandra v. Delhi Subordinate Services Selection Board, (2009) Volume 15 page 458, the meaning of the words "Ordinary resident and domicile" has been dealt with, and according to which the petitioner has failed to establish his domicile, and consequently the conclusion drawn in the impugned order does not suffer from infirmity. He further submits that if the petitioner does not belong to the State of U.P. then he cannot be extended the benefit of reservation as he had already migrated a generation back to the erstwhile State of M.P. and is now a resident of Chattisgarh. Sri Yadav has relied on the judgment of a learned Single Judge of this Court in the case of Param Jeet and others v. Chief Executive Officer NOIDA, Writ Petition No. 25844 of 2007 decided on 1.6.2012 to substantiate his submission.

9. Sri Shivam Yadav has then urged that the appointment orders of similarly situated employees are available for perusal, and the petitioner as well as the other incumbents whose services have been terminated, have been unable to lead any cogent evidence to factually establish their domicile. They have failed to discharge their burden as such the impugned order does not require any interference by this Court. He, therefore, submits that the claim of the petitioner deserves rejection.

10. He then invited attention of the Court to a Division Bench Judgment in the case of Mohammad Hasan Zafari v. Director of Higher Education, in Writ Petition No. 26044 of 2000 decided on 2.4.2004 to contend that if the petitioner has failed to produce a valid caste certificate from the State of U.P. then the benefit of reservation under Section 9 of the U.P. Public Services Reservation for Schedule Caste and Schedule Tribe and other backward 1994 cannot be extended to the petitioner.

11. With the support of the aforesaid judgments and the other judgments that have been cited at the bar including the judgment in the case of Bhagwan Das v. Kamal, (2005) 11 SCC 66, it has been urged that the domicile of the petitioner having not been established there is no occasion to extend the benefit of reservation to the petitioner within the State of U.P.

12. After the matter was heard at length, all the learned Counsel for the parties

agreed that the matter be disposed of finally at this stage itself, and that no further affidavits are required to be filed keeping in view the legal issues that have been raised in the present writ petition. Accordingly, this writ petition is being disposed of finally itself with the consent of the parties.

13. The issue of extending the benefit of reservation within the State of origin is no longer *res integra* and beginning with the case of Marri Chandra Shekhar Rao (*supra*), this issue has been universally accepted by all the High Courts, and the judgments being affirmed by the Apex Court, to the effect that a Schedule Caste who is notified within his state of origin as on the date of the Presidential Order the said Scheduled Caste is entitled to the benefit of reservation in his State of origin only.

14. The peculiar circumstances that arise, as has arisen in this case, is on account of migrations. The question of issuing certificates or recognition of the caste in another State was dealt with in the case of Action Committee (*supra*) and the aforesaid issue is no longer *res Integra* where it has been reiterated that it is the state of origin where a schedule caste duly notified will get the benefit of reservation. The peculiarity of the present case is that the petitioner claims that his father was a domicile and resident of the State of Uttar Pradesh as on the date of notification of the Presidential Order and, therefore, the petitioner is also entitled to the benefit of reservation even if he had migrated with his father to the State of Madhya Pradesh and now he is living in the State of Chattisgarh. The aforesaid issue of claim of reservation in relation to the State came up for consideration in two cases of the Bombay High Court, namely, Chetna wife of Rajendra v. Committee for Scrutiny of Caste, 2005 Volume 4 Maharashtra Law general page 711, and in a latest decision of the Bombay High Court in the case of Preeti Gopalrao Kamble v. The Principal, in writ petition No. 3627 of 2011 decided on 10.10.2012. The Bombay High Court was scrutinizing this aspect of the matter and had catalogued the entire law with regard to migration and reorganization of States, and had then drawn its conclusion to hold that the object of including a caste or a tribe in the schedule to the orders was to do away with their disadvantaged position in the areas where they resided vizaviz other population. The crucial test, therefore, was whether the person concerned suffers the decree of disadvantage as claimed by him by virtue of his being a schedule caste of the State of his origin or not. It has further been held that it is the date which is equally relevant in order to identify the persons as belonging to a caste included in the schedule on the date of such notification with reference to the locality. Therefore, according to the said decision a person claiming benefit will have to show that he or his ancestors hailed on the date of the notification from a caste in the schedule from a place identified in the schedule. In other words the relevant date is not the date of migration but the date of inclusion of the caste or tribe in the schedule.

15. It is to be remembered that the benefit of reservation in a State to a particular caste is founded on the social philosophy of the caste having been

oppressed for generations in his place of origin. The inclusion of the caste in the schedule is a testimony thereof. The birth of a person in that caste, therefore, entitles him to the benefit of reservation. How migration can dissolve the status of domicile and on the basis of what legal foundation has not been indicated in the impugned order.

16. Having considered the said decision and the ratio thereof, the aforesaid principle ought to have been observed by the authority before having proceeded to have cancelled the appointment of the petitioner which apparently has not been done nor any exercise has been undertaken to assess the evidence which is being relied upon by the petitioner. It is only on the basis of an incomplete legal proposition and an assumption, that the petitioner does not belong to the State of Uttar Pradesh, that the impugned order was passed. The factual aspects have also not been thrashed out.

17. In my opinion, this exercise resulting in the impugned order was clearly an erroneous assumption both in fact and in law and consequently the impugned order cannot be sustained. The order dated 26.4.2013 is hereby quashed. The petitioner shall be entitled to continue in service and receive salary.

18. It shall be open to the authority to pass any fresh order in case it is so warranted in law, after examining the entire gamut of facts and applying the law as laid down by the Apex Court and as observed hereinabove after giving an opportunity of hearing to the petitioner.

Decided accordingly.