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**(2011) 05 DEL CK 0472**

**In the Delhi High Court**

**Case No : Writ Petition (C) No. 3450 of 2011**

Bijender Singh Rathore

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision : 23-05-2011**

**Acts Referred:**

Administrative Service (Appointment by Competitive Examinations) Regulations, 1955 — Regulation 4  
Administrative Service (Recruitment) Rules, 1954 — Rule 7  
Constitution of India, 1950 — Article 12, 14, 141, 15, 16  
Criminal Procedure Code, 1973 (CrPC) — Section 438  
Examination Rules — Rule 4  
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 18  
University Grants Commission Act, 1956 — Section 3

**Citation : (2011) 4 ILR Delhi 675**

**Hon'ble Judges : Dipak Misra, C.J.; Sanjiv Khanna, J**

**Bench : Division Bench**

**Advocate : Karan Singh Bhati and Prikshayat Singh, for the Appellant; Ravinder Aggarwal, for Respondent No. 1/UOI and Naresh Kaushik, for Respondent Nos. 2 and 3/UPSC, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

Dipak Misra, C.J.—Invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the Petitioner has called in question the legal defensibility and substantiality of the order dated 21.3.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short "the tribunal") in OA No. 1079/2011 whereby the tribunal has declined to accept the prayer of the Petitioner which was made to declare Regulation 4(iii-a) of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955 (for short "the 1955 Regulations") as ultra vires the Constitution of India.

2. The facts which are necessitous to be adumbrated are that the Union Public

Services Commission (UPSC), vide notification dated 2.1.2010, invited applications for approximately 965 vacancies in different streams of Civil Services. The Petitioner submitted his form for selection for the post in the stream of Indian Administrative Service on 27.1.2010. It is not disputed that he was aged about 28 years and had already appeared in the examination four times and the present one was the fifth attempt by him. He appeared in the examination conducted by the UPSC on 23.5.2010 but was denied the result on the ground that he could not have been allowed to sit for the fifth time in the competitive examination as he belonged to the general category. Being dissatisfied with the aforesaid, the Petitioner approached the tribunal challenging the said regulation which prohibits a general category candidate to take a fifth attempt to qualify.

3. It was contended before the tribunal that the 1955 Regulations restricts the number of attempts for general category candidates upto a maximum of four whereas for OBC category candidates, the maximum number of attempts allowed is seven and for Scheduled Castes and Scheduled Tribes candidates, the number of attempts is unlimited. Be it noted, the 1955 Regulations also grant age relaxation to the Scheduled Castes and Scheduled Tribes categories but the Petitioner clearly expressed before the tribunal that he had no grievance with regard to the age relaxation and his grievance was only with regard to the difference in chances offered to the general category candidates vis-à-vis other category candidates. It was urged that the 1955 Regulations invited the frown of Articles 14 and 16 of the Constitution of India as there is a restriction on the number of attempts to be made by general category candidates whereas no restriction is made in respect of Scheduled Castes and Scheduled Tribes candidates and more number of attempts have been provided for the OBC candidates. It was also urged before the tribunal that in other examinations conducted by the UPSC, there is no such restriction in respect of the number of attempts as seen in the Civil Services Examination but the said restriction is only with regard to the Indian Administrative Service and, hence, the equality clause enshrined under Article 14 of the Constitution is flagrantly violated.

4. The tribunal, upon hearing the learned Counsel for the parties, came to hold that it is not a discrimination but a classification which is permissible regard being had to the provisions contained in Article 16(4) of the Constitution of India. Being of this view, the tribunal dismissed the Original Application.

5. We have heard Mr. Karan Singh Bhati along with Mr. Prikshay Singh, learned Counsel for the Petitioner, and Mr. Ravinder Aggarwal and Mr. Naresh Kaushik, learned Counsel for the Union of India and UPSC respectively.

6. The 1955 Regulations have been framed in pursuance of Rule 7 of the India Administrative Service (Recruitment) Rules, 1954. Regulation 4 deals with the conditions of eligibility. It reads as follows:

4. Conditions of Eligibility: In order to be eligible to compete at the examination,

a candidate must satisfy the following conditions, namely:

(i) Nationality: (a) He must be a citizen of India,

Or,

(b) He must belong to such categories of persons as may, from time to time, be notified in this behalf by the Central Government.

(ii) Age: He must have attained the age of 21 and not attained the age of 30 on the first day of August of the year in which the examination is held:

Provided that the upper age limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government, to the extent and subject to the conditions notified in respect of each category:

Provided further that the upper age limit shall be raised to 31 years for the candidates appearing at the examination to be conducted by the Commission in 1990.

(iii) Educational Qualifications:

He must hold a degree of any University incorporated by an Act of the Central or State Legislature in India or other educational institutions established by an Act of Parliament or declared to be deemed as Universities u/s 3 of the University Grants Commission Act, 1956, or a foreign University approved by the Central Government from time to time, or possess a qualification which has been recognized by the Central Government [for the purpose of admission to the examination]

Provided that-

(a) in exceptional cases the Commission may, [ ] treat as qualified a candidate who though not possessing the qualification prescribed in this clause, has passed examinations conducted by other institutions of a standard which, in the opinion of the Commission, justifies the admission of the candidate to the examination; and

(b) candidates who are otherwise qualified but have taken degree from foreign Universities, which are not approved by the Central Government, may also be admitted to the examination at the discretion of the Commission.

Provided further that a candidate may be permitted to take the preliminary examination while studying for his degree so long as by a date to be notified by the Commission, the candidate produces proof of pass in the degree course for being eligible to take the final examination during that year.

(iii-a) Attempts at the examination: Unless covered by any of the exceptions that may from time to time be notified by the Central Government in this behalf, every candidate appearing for the examination after 1st January 1990, who is

otherwise eligible, shall be permitted four attempts at the examination; and the appearance of a candidate at the examination will be deemed to be an attempt at the examination irrespective of his disqualification or cancellation, as the case may be, of his candidature.

Explanation- An attempt at a preliminary examination shall be deemed to be an attempt at the examination, within the meaning of this rule.

(iv) Fees: He must pay the fees prescribed by the Commission.

7. On a reading of the aforesaid Regulation, it is quite clear that every candidate shall be permitted four attempts at the examination; and the appearance of a candidate at the examination will be deemed to be an attempt at the examination irrespective of his disqualification or cancellation, as the case may be, of his candidature.

8. The Central Government in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued a notification on 2.1.2010 dealing with competitive examinations. It included The Indian Administrative Service; The Indian Foreign Service; The Indian Police Service; The Indian P&T Accounts and Finance Service, Group "A"; The Indian Audit and Accounts Service, Group "A"; Indian Revenue Service (Customs & Central Excise) Gr. "A"; The Indian Defence Accounts Service, Group "A"; The Indian Revenue Service, (I.T.) Group "A"; The Indian Ordnance Factories Service, Group "A" (Asst. Works Manager - Administration); The Indian Postal Service, Group "A"; The Indian Civil Accounts Service, Group "A"; The Indian Railway Traffic Service, Group "A"; The Indian Railway Accounts Service, Group "A"; The Indian Railway Personnel Service, Group "A"; Post of Assistant Security Officer, Group "A" in Railway Protection Force; The Indian Defence Estates Service, Group "A"; The Indian Information Service, Junior Grade Group "A"; Indian Trade Service, Group "A" (Gr.III); Indian Corporate Law Service, Group "A"; Armed Forces Headquarters Civil Service, Group "B" (Section Officer's Grade); Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Civil Service, Group "B"; Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Police Service, Group "B"; Pondicherry Civil Service, Group "B"; and Pondicherry Police Service, Group "B". The examinations to the above services are to be conducted by the Union Public Service Commission in the manner prescribed in Appendix I to the said rules.

9. Rule 4 of the Examination Rules reads as follows:

4. Every candidate appearing at the examination who is otherwise eligible, shall be permitted four attempts at the examination:

Provided that this restriction on the number of attempts will not apply in the case of Scheduled Castes and Scheduled Tribes candidates who are otherwise eligible:

Provided further that the number of attempts permissible to candidates belonging to Other Backward Classes, who are otherwise eligible, shall be seven.

The relaxation will be available to the candidates who are eligible to avail of reservation applicable to such candidates:

Provided further that a physically handicapped will get as many attempts as are available to other non-physically handicapped candidates of his or her community, subject to the condition that a physically handicapped candidate belonging to the General Category shall be eligible for seven attempts. The relaxation will be available to the physically handicapped candidates who are eligible to avail of reservation applicable to such candidates.

Note:

(I) An attempt at a Preliminary Examination shall be deemed to be an attempt at the Examination.

(II) If a candidate actually appears in any one paper in the Preliminary Examination, he / she shall be deemed to have made an attempt at the Examination.

(III) Notwithstanding the disqualification / cancellation of candidature, the fact of appearance of the candidate at the examination will count as an attempt.

10. On a perusal of the aforesaid Rule, it is quite clear that the restriction on the number of attempts will not apply to the candidates who belong to Scheduled Castes and Scheduled Tribes and as far as the other Backward Classes are concerned, the attempts are restricted to seven. The said examination Rule has been framed in consonance with Regulation 4(iii-a) on the foundation of the power conferred on the Central Government. On a reading of the said examination Rule, it is vivid that the number of attempts is applicable to all categories of examinations. Thus, the submission of the learned Counsel for the Petitioner that the number of attempts is confined to The Indian Administrative Service alone is not correct and, therefore, the same need not be dealt with.

11. The other limb of submission of the learned Counsel for the Petitioner is that by providing for four attempts to the general category candidates and unlimited attempts to Scheduled Castes and Scheduled Tribes category candidates and seven attempts to Other Backward Classes category candidates, the Respondents have violated the equality clause and treated the Petitioner in a discriminatory manner. It is noteworthy that Clauses (1) and (2) of Article 16 of the Constitution of India guarantee "Equality of opportunity" in the matter of an appointment to an office or any other appointment but the Clauses (3) to (5) confer concession in favour of Backward Classes with certain exceptions to the above rule of equal opportunity. Clause 4 of the said article stipulates that nothing in the said Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The said clauses of Article 16 confer a concession on the Backward Classes which include the Scheduled Castes and Scheduled Tribes. Article 16(4) basically

permits a reasonable classification which is the basic facet of the equality clause as enshrined under Article 14 of the Constitution of India. The principle of classification with all its contours is attracted to Clause (4) of Article 16.

12. In this regard, we may profitably reproduce a passage from *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, which states as follows:

It needs no emphasis to say that the principle aim of Articles 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14 . The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.

We may also refer with profit to the majority view expressed in *Indra Sawhney (supra)* wherein it has been laid down as follows:

121.(1)(a) It is not necessary that the "provision" under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Para 55)

(b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Para 56)

(2)(a) Clause (4) of Article 16 is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (i). (Para 57)

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 58)

(c) Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for "backward class of citizens" - as explained in this judgment. (Para 60)

In paragraph 122, their Lordships have further clarified as follows:

(1) Article 16(4) is not an exception to Article 16(1) . It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16 .

(2) The expression "backward class" in Article 16(4) takes in "Other Backward

Classes", S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to in Article 46 do include S.E.B. Cs. referred to in Article 340 and covered by Article 16(4).

13. In this regard, it will not be out of place to refer to the decision in AIR 1995 1198 (SC) wherein the Apex Court, while upholding the constitutional validity of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, referred to the Statement of Objects and Reasons of the Act and expressed the view as follows:

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.

True it is, the said decision was rendered in the context of non-availability of the benefit of Section 438 of the Code of Criminal Procedure but we have referred to the same only to highlight the social conditions of the Scheduled Castes and Scheduled Tribes people.

14. In this regard, we may profitably refer to certain paragraphs from *Union of India (UOI) and Others Vs. No. 664950 IM Havildar/Clerk SC Bagari*, wherein the Apex Court has held thus:

13. In *State of Mysore and Another Vs. P. Narasing Rao*, this Court considered the validity of the Rules and it was inter alia held that it is well-settled that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation and when any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied namely classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group, and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved and in other words there must be some rational nexus between the basis of classification and the object intended to be achieved. It was also held that Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other and in other words Article 16 is only an instance of the application of the general rule of equality laid down in Article 14

and it should be construed as such and, therefore, there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured.

14. In the decision of this Court in *Indian Railway SAS Staff Association v. Union of India* (1988) 2 SCC 651 : AIR 1998 SCW 524, it was held that there can be many criteria for classification of posts such as administrative procedure and others which have to be taken into consideration by the authorities concerned before deciding on the classification.

15. Situated thus, broadly speaking, concept of equality has an inherent limitation arising from very nature of the guarantee under the Constitution and those who are similarly circumstanced are entitled to equal treatment. If there is a rational classification consistent with the purpose for which such classification was made, equality is not violated. Article 16 of the Constitution does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate independent classes.

15. In this regard, we may fruitfully refer to the Constitution Bench decision in *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, wherein it has been stated thus:

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in Clauses (1) and (4) of Article 16 . They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14 , 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14 . Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16 , however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State

concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14 , 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to S Cs and S Ts alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is - whether the impugned amendments discard the original constitution. It was vehemently urged on behalf of the Petitioners that the Statement of Objects and Reasons indicate that the impugned amendments have been promulgated by Parliament to overrule the decision of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal Singh, Ajit Singh (I), Ajit Singh (II) and Indra Sawhney were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets - "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

106. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14 . Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [Emphasis added]. Every discretionary power is not necessarily discriminatory. According to the Constitutional Law of India, by H.M. Seervai, 4th Edn. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of "guided power". This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the Courts. This is the basic principle behind

the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B) . Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-?-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14 , is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact situation.

107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4) , 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (See: Affirmative Action by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4) , namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

16. Applying the aforesaid test, it is quite clear that Regulation 4(iii-a) confers

the power on the Union of India to issue a notification. It has so done by issuing a notification. It has limited seven attempts to the Other Backward Classes. The same is a reasonable exercise of power and a guided one. As far as the Scheduled Castes and Scheduled Tribes are concerned, number of attempts is not fixed. In the opinion of the Union of India they are to be given chances to compete to the best of their ability and come to the mainstream. That apart, though unlimited chances are given, yet the upper age limit is prescribed. Thus, it is not unreasonable. Quite apart from the above, it is noteworthy in view of the historical backdrop of the constitutional provisions. Hence, we are of the considered opinion that it meets the test of reasonable classification. Judged from these angles, we are of the considered opinion the said Regulation does not suffer from the vice of Articles 14 or 16 of the Constitution of India.

17. Consequently, the writ petition, being devoid of merit, stands dismissed without any order as to costs.