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**(1997) 02 GAU CK 0022**  
**In the Gauhati High Court**  
**Case No : Writ Appeal No. 137 of 1997**

Bijoy Kumar Paul

APPELLANT

Vs

State of Meghalaya and Ors.

RESPONDENT

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**Date of Decision :** 27-02-1997

**Acts Referred:**

Constitution of India, 1950 — Article 14, 14, 16, 16, 16(4)  
MPSC (Limitation of Function) Regulations, 1972 — Regulation 3(f), 3(f)

**Citation :** (1997) 1 GLJ 428

**Hon'ble Judges :** D.N.Chowdhury, J and V.Dutta Gyani, J

**Bench :** Division Bench

**Advocate :** P.K.Roy, D.Majumdar, B.Dutta, B.K.Das, Advocates appearing for Parties

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## Judgement

D.N. Chowdhury, J.—The appeal is directed against the judgment and order dated 22.5.95 passed by the learned Single Judge in Civil Rule No.17 (SH) of 1991 dismissing the petition of the writ petitioner, appellant herein.

2. The appellant/petitioner is working as Subordinate Engineer Grade I (Civil) in the Public Health Engineering Department, under the Government of Meghalaya since 1987. The Meghalaya Public Service Commission, the respondent No.3 called 107 (one hundred seven) candidates for interview. Interview was duly held On the 14th, 15th, 16th, 17th, 21st, 22nd, 23rd March, 1987 and seventy one candidates appeared in the interview. The Commission (respondent No. 3) upon assessment of the performance of the candidates found 40 (fourty) candidates suitable for the posts in order of merit vide communication No.MFSC/D/34/18788/58 dated 29.3.89 issued by the then respondent No.3. The name of the petitioner appeared at serial No.21. The appellant/petitioner moved the High Court seeking a direction for regularisation of his service in pursuance of the recommendation of the respondent No.3. The learned Single Judge turned down the plea of the appellant/petitioner and dismissed the petition.

3. The respondent No.2 placed on record its affidavit at the appellate stage. It

has been stated by the respondent that only those were appointed from the select list who were covered by the reservation policy of the State Government. The respondent also asserted in its affidavit that an interview was also held on 24.5.96 by the respondent No.3, the Public Service Commission for filling up the 66 (sixty six) vacancies of the Subordinate Engineers Grade I (Civil) under the Public Health Department. The PSC found 65 (sixty five) candidates as suitable and accordingly prepared a select list in order of merit. The name of the petitioner appeared at serial No,51 of the 1996 list. According to the policy of reservation as professed by the Government 40% of the vacancies are reserved for the members of the Khasi and Jaintia Community, another 40% of the vacancies are reserved for the Garo Community and 5% are reserved for Scheduled Castes/Scheduled Tribes Communities of Meghalaya. The affidavit disclosed that from the said merit list the first ten vacancies were filled up in order of merit. In the absence of particulars, we could not ascertain as to whether the aforesaid ten candidates also belonged to the reserved quota. It was also revealed from the affidavit that apart from appointing 26 (twenty six) persons from the reserved Khasi quota 15 (fifteen) more candidates belong to the Khasi Jaintia Tribes were appointed from the remaining quotas of the Garo Tribes, All the 11 (eleven) members of the Garo Communities as per the recommendation of the MPSC against the 26 vacancies earmarked for the said community were absorbed and the balance of Garo quota was filled up by the candidates belonging to Khasi and Jaintia Community. According to the respondent No.2 that since the open quota (unreserved) 10 (ten) were filled up on merit by the first ten candidates, there was no further scope for absorbing candidates from the member of the general community (other than the reserved quota).

4. The germ of reservation of appointments or posts in favour of any backward class of citizens is emanated from the great equality clause of Our Constitution embodied in Article 16 of the Constitution of India. Article 16(1) is an extension of Article 14. Article 16 (4) is an enabling provision, clothing the State with a discretionary power to make reservation of appointment in favour of backward classes of citizens who are not adequately represented either numerically or qualitatively in the services of the State. It is indubitably an affirmative action to alleviate the inequality. Clause (4) of the Article 16 however speaks of adequate representation and not of proportional representation. The discretion reposed on the State under clause (4) like all other discretions power are to be exercised justly fairly and reasonably and the provision for reservation is to be made keeping in mind the provisions contained in Article 335 of the Constitution of India. An unreasonably excessive reservation for the backward class is liable to be struck down as violative of Article 14 and 16 (1) of the Constitution. An excessive reservation will make the guarantee under clause (1) altogether illusory and nugatory. The prolonged controversy between the need of reservation under clause (4) of the Article 16 and the requirement for the efficiency of the administration is resolved by the Nine Judges Bench of the

Supreme Court of India in *Indra Sawhney etc vs. Union of India & others* reported in AIR 1993 SC 477. The following passage from the said decision is cited below:

"94A. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislature in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportion of population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits. And what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in *Narayana Rao vs. State* (AIR 1987 Andhra Pradesh 53), striking down the enhancement of reservation from 25% to 44% OBCs. The said enhancement had the effect of taking the total reservation under Article 16 (4) to 65%.

It needs no emphasis to say that the principal aim of Article 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 principles 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. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (see his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of

their being out of the main stream of to and characteristical to them, need to be treated in a different way, some relaxation in this subject rule may become imperative. In doing so, extreme caution is to be and a special case made out.

In this connection it is well to remember that the reservations under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes, they will be treated as open competition candidates."

The reservation policy on the basis of which the respondents are defending their action in not regularising and/or not appointing the petitioner in a regular post came up for consideration before this Court in a similar case in Writ Appeal No.243 of 1995 (arising out of Civil Rule No.77 (SH) of 1991) disposed on 28.5.96 (1996 (2) GLJ150). The relevant passages from the said judgment are extracted below:

"8. Mr. NM Lahiri, the learned Advocate General for the State of Meghalaya has produced before us the reservation policy which is applicable in the State of Meghalaya. The aforesaid reservation policy is spelt out from a letter of the Commissioner and Secretary to the Govt of Meghalaya which has been sent specifically for the purposes of this appeal. As far as the present case is concerned, paragraphs 2 of the resolution No.PER.222/71/138, dated 12.1.72, would be relevant which runs as follows:

"2. If sufficient number of suitable candidates for filling up the reserved vacancies is not available from the respective classes in any particular year, then such vacancies will be available to others. But the deficiency in the number of Scheduled Tribes and Scheduled Castes will be carried forward to the next recruitment year and made good in the recruitment of that year, provided that the reservation on account of the deficiency shall not be carried forward for more than one year. After the expiry of the second year, these reservations shall be treated as lapsed. It has also been decided that at no time shall the aggregate number of normal reserved vacancies and the "carry forward" vacancies together exceed 90 percent of the total number of vacancies in that year."

9. From a bare perusal of the reservation policy which has been spelt out in paragraph 2 of the aforesaid resolution as quoted above, it would be clear that if suitable number of candidates for filling up the reserved vacancies are not available from the respective classes, then such vacancies would be available to others (emphasis provided). It will be pertinent to note that the aforesaid paragraph 2 of the resolution takes care of the reservation policy as the reserved vacancies which had not been filled up will be carried forward and made good in the subsequent recruitment year. From the aforesaid, it is therefore clear that the decision of the Government that approval for appointment of the twenty five persons selected runs counter to the Government's accepted policy in our

opinion is not correct on the other hand the policy itself contemplates that in such a situation appointments should be offered to other categories of the employees including the general categories of candidates. In our opinion, the decision of the Government as communicated in the letter dated 22.5.90, was therefore arbitrary and liable to be struck down.

10. It has not been disputed that the appellants are continuing in service though it has been labelled that their continuance is under Regulation 3 (f) of the Regulations, 1972. However, we are of the opinion that mere labelling of the appellants' appointment under Regulation 3 (f) of the Regulations, 1972 would not be conclusive. It has not been denied that the vacancies are mere! In fact, as has been quoted above, the Adviser (PHE) had requested for filling up the vacancies from the persons who had been selected by the MPSC."

The present case is squarely covered by the said judgment, in the merit list prepared by the MPSC in 1989 the name of the petitioner found place at serial No.21 whereas the names of Sri Prasun Ankur Dutta and Sri Rupal Kumar Bhattacharyya (the appellants in the Writ Appeal No.243 of 1995 in Civil Rule No.77 (SH) of 1991) appeared at serial No.24 and 40 respectively. The petitioner is working about ten years as an ad hoc employee in spite of being recommended by the MPSC on both the occasions. The existence of vacancies is an admitted fact.

5. We have heard Mr: BK Das the learned senior counsel assisted by Mr. PK Roy Advocate and Mr. D. Mazumdar, Advocate on behalf of the appellant.

We have also heard at length Mrs. Binoya Dutta the learned Government Advocate, Meghalaya.

6. On consideration of the facts situation, in our mind the impugned action of the respondents in not regularising the service of the petitioner is patently arbitrary, which can be said to be so "unreasonable" as to give rise to "Wednesbury unreasonableness" Associated Provincial Picture House Ltd vs. Wednesbury Corporation (1948) 1 KB 223.

7. The petitioner was appointed under Regulation 3 (f) of the Meghalaya Public Service Commission was consulted by the appointing authority in this regard and the Commission recommended the name of the petitioner on both the occasions, i.e. in the year 1989 and as well as in the year 1996. In the teeth of the recommendation of the name of the petitioner by the MPSC persons in excess of the reservation quota were appointed disregarding its own reservation policy. In our view the impugned action of the respondent Nos.1 and 2 is essentially in breach of its duty to act fairly and therefore the same is violative of Article 14 and 16 of the Constitution of India.

Bearing in mind the length of service of the appellant and his continuance thereon, will be treated to be a regular appointment made in conformity with recommendation of the MPSC.

In the result the impugned judgment and order dated 22.5.1995 passed by the learned Single Judge in Civil Rule No. 17 (SH) of 1992 is set aside and the writ petition is allowed to the extent indicated. The appeal is allowed. There shall be no order as to costs. Rule is made absolute.