

(1996) 10 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 149 of 1988

Bikash Deb Barma

APPELLANT

Vs

Registrar, Gauhati High Court and Others

RESPONDENT

Date of Decision : 04-10-1996

Acts Referred:

Constitution of India, 1950 — Article 12, 15(4), 16, 16(1), 16(4)
Tripura (Courts) Order (Second Amendment) Act, 1992 — Section 4
Tripura Judicial Service Rules, 1974 — Rule 10, 22, 6(3)
Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991 — Section 2, 5

Citation : (1997) 3 GLR 73

Hon'ble Judges : H.K. Sema, J

Bench : Single Bench

Advocate : S. Deb, R. Dasgupta, K.N. Bhattacharjee and S. Mazumdar, for the Appellant; A. Chakraborty, AG. and A.M. Lodh, B. Das, B.B. Deb and B. Bhattacharjee, for the Respondent

Final Decision : Allowed

Judgement

H.K. Sema, J.—The Petitioner is a Scheduled Tribe. On the recommendation of the Tripura Public Service Commission, he was appointed to the post of Tripura Judicial Service, Grade-III by an order dated 15.2.1982 and the Petitioner joined the post on 22.3.1982. The appointment of the Petitioner to the post of Grade-III, Tripura Judicial Service has been made in accordance with the Tripura Judicial Service Rules, 1974, Thereafter, the Government of Tripura by a Notification dated 19.2.1977 reserved quota against the promotion for Scheduled Castes and Scheduled Tribes candidates, because they were not adequately represented. The reservation on promotion quota was to be equivalent to the percentage of reservation in the matter of direct recruitment with immediate effect in respect of all category of posts under the State. Thereafter, the Tripura Legislative Assembly vide Act No. 5 of 1991 enacted an Act called the Tripura Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1991

(hereinafter the Act). Section 5 of the said Act provides for reservation of Scheduled Castes and Scheduled Tribes in vacancies to be filled by promotion. In this writ petition, the Petitioner inter alia prays for a writ of Mandamus for a direction to the Respondent No. 1 and 2 to promote the Petitioner to Tripura Judicial Service Grade-II with effect from 22.3.1984, the date on which the Petitioner completed the period of probation, in terms of Notification dated 19.2.1977 and Section 5 of the Act of 1991.

2. I have heard Mr. S. Deb, learned Counsel for the Petitioner, Mr. B. Das, learned Counsel for the Respondent No. 3, 5, 7, 8, 9, 10, 14, 16, 23, 25, 30, 31 and 32, Mr. B.B. Deb, learned Counsel for the Respondent No. 13, 26 and 34, Mr. A.M. Lodh, learned Counsel for the Respondent No. 21 and Mr. K.N. Bhaitacharjee and Mr. S. Majumdar, learned Counsel for the intervener. Heard also learned Advocate General for Respondent No. 2. Learned Advocate General adopted the argument of the Petitioner.

3. The sole question to be determined in this case is whether Judicial Officers of the Scheduled Castes and Scheduled Tribes in Tripura can claim reservation in promotion quota on the basis of Government Notification dated 19.2.1977 and Section 5 of the Act of 1991, in absence of specific provision made in the Judicial Service Rules, 1974 in this behalf.

4. The main thrust of argument on behalf of private Respondents is addressed by Mr. B.B. Deb and Mr. B. Das. Shri A.M. Lodh adopted the argument of Mr. B.B. Deb. So also Mr. K.N. Bhattacharjee, learned Counsel for the intervener adopted the argument of the Petitioner.

5. Before I advert to the real question in controversy, at this stage I may dispose the common argument put forth by Mr. B.B. Deb and Mr. B. Das. It is argued by both the counsel that the Notification dated 19.2.1977 on the basis of which the Petitioner is claiming promotion from the reserved quota has not been issued in the name of the Governor in terms of Article 166 of the Constitution and therefore, the said Notification is not enforceable in the eye of the law. This submission cannot be accepted for more than one reasons. Firstly, it is now settled principle of law that mere omission of recital in the name of the President or the Governor as the case may be, does not affect the validity or enforceability of the order. Secondly, the aforesaid Notification was earlier challenged by interested parties in Civil Rule No. 61/1979. The Division Bench of this Court after hearing the parties at length disposed of the Civil Rule on 22.4.1986 dismissing the petition as meritless. I am told that no appeal against the decision has been preferred. Therefore, the judgment and order dated 22.4.1986 has attained its finality. Therefore, they are not permitted to raise this issue again. Thirdly, the Notification dated 19.2.1977 has been saved by the Act of 1991.

6. In exercise of the powers conferred by the Proviso to Article 309 read with Article 233 and 234 of the Constitution, the Governor of Tripura in consultation with the Gauhati High Court and Tripura Public Service Commission framed the

Rules, called Tripura Judicial Service Rules, 1974 (hereinafter the Rules). Rule 10 of the Rules provides for special provision for Scheduled Castes and Scheduled Tribes. Rule 10 reads:

10. Appointment to the service made by direct recruitment shall be subject to the orders regarding special representation in the services for the Scheduled Castes and the Scheduled Tribes issued by the Government of India from time to time. If no such suitable candidate is available, the posts will be filled up by the candidates other than those of the Scheduled Castes and the Scheduled Tribes.

7. A cursory reading of the Rules as quoted above, it clearly appear that the reservation has been provided only in case of direct recruitment but no provision have been made with regard to the reservation on promotion quota. It is, however, submitted by Mr. S. Deb, learned Counsel for the Petitioner that the word appointment would include promotion. This submission cannot be accepted because the word "appointment" is qualified by the word "direct recruitment."

8. The Tripura Legislative Assembly enacted the Act vide Tripura Act No. 5 of 1991 called the Tripura Scheduled Castes and Scheduled Tribes (Reservation of vacancies in services and posts) Act, 1991. In Section 5 of the Act provision has been made for reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion. Section 5 reads:

The reservation for members of the Scheduled Castes and the Scheduled Tribes in vacancies in services or posts to be filled up by promotion in any establishment shall be regulated in the following manner, namely: (underlining is mine)

(a) There shall be reservation at fifteen per cent for members of the Scheduled Castes and twenty nine per cent for the members of the Scheduled Tribes.

(b) A separate hundred point roster in the form and manner set out in the Schedule shall be maintained by each establishment.

(c) The candidates belonging to the Scheduled Castes and the Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota.

Mr. B.B. Deb strenuously submits that the judicial service is not a establishment under the State and therefore this Act cannot be extended to the members of Judicial Service. In this connection Mr. B.B. Deb strenuously argued that judicial service is a define service under the Constitution itself and therefore other Act and executive instruction is not applicable in the case of judicial service. He further submits that the judicial service is excluded from the purview of Article 309, same having been placed under different Chapter. Chapter VI of the Constitution. He also submits that placement of the judicial service under Chapter VI indicates that the judicial service are kept separated from other services, in this connection the learned Counsel referred to the decision of the Apex Court reported in The State of West Bengal Vs. Nripendra Nath Bagchi, para

7 to 14, AIR 1979) SC 193 para 33, 58, 62 and 77, AIR (1993) SC 2493 para 4 and 5, AIR (1996) SC 693 para 5 and 6 in which the Apex Court had held that the judicial service is a defined service under the Constitution and the judicial service is not service in the sense of employment. The Judges are not employees, as members of Judiciary they exercise the sovereign judicial power of the State. They are the holders of the public offices but they are not employees of the State Government.

9. There is no dispute with regard to the proposition of law laid down by the Apex Court, In the instant case establishment has been defined u/s 2(b) of the Act as under:

Establishment" means any office of the State Government, a local or statutory authority constituted under the Constitution of India or any other law for the time being in force or a Corporation in which not less than fifty one percent of the paid-up share capital is held by the State Government and includes Universities, and colleges affiliated to the Universities, Primary and Secondary Schools and also other educational institutions which are owned or aided by the State Government and also includes an establishment in Public Sector, (underlining is mine).

From the above definition it clearly appears that the establishment is inclusive of statutory authority constituted under the Constitution of India. Judicial service is constituted under the Constitution of India. This apart, Article 16(4) of the Constitution empowers the executive to prescribe the condition of service by an executive order, instruction with respect to matters upon which the Rules are silent. It will be noticed that notification dated 19.2.77 and Act of 1991 has been made after Judicial Service Rules, 1974 has been framed, As said earlier, there is no provision in Judicial Service Rules for promotion under reservation quota for members of Scheduled Castes and Scheduled Tribes. Therefore, the intention of the Legislature is very clear so as to extend the benefit of the notification and Act to the members of Scheduled Castes and Scheduled Tribes in Judicial Service as they are not adequately represented and the Rules are silent in this regard. There is no dispute that the members of the Scheduled Castes and Scheduled Tribes of the Tripura are getting the benefit of the notification dated 19.2.1977 and Section 5 of the Act 1991, in other services. If that is so, it would be discriminatory if the same benefit is not extended to them.

10. In *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, it has been held by the Constitutional Bench of the Apex Court in paragraph 56 of its judgment as under:

It is well settled that the appropriate Government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. Even where Rules under the proviso to Article 309 are made, the Government can issue orders/instructions with

respect to matters upon which the Rules are silent. It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect reservation in favour of backward classes, it would always be open to the Government to provide for reservation of appointments/posts in favour of Backward Classes by an executive order.

Further the Apex Court had held in paragraph 366(5) and (6) held as under:

(5) Any provision under Article 16(4) is not necessarily to be made by the Parliament or Legislature. Such a provision could also be made by an Executive order.

(6) The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended.

Therefore, it is abundantly clear that the power conferred on the State under Article 16(4) of the Constitution for the benefit of backward class is made applicable to all classes of the backward for whom it is intended despite the Rule is silent in this regard. Denying benefit to a particular backward class of people of the Act and Regulation passed by the State in exercise of power under Article 16(4) of the Constitution would be a negation of the purpose and intent of Article 15(4) of the Constitution.

11. Mr. S. Deb, learned Counsel for the Petitioner has invited my attention to the Ruling of the Apex Court in paragraph 121(7) in *Indra Sawhney (Supra)* in which the Apex Court observed as under:

Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that whether reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of "State" in Article 12- such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4), If any authority thinks that for ensuring adequate representation of "backward class of citizens" in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so, (Ahmadi, J. expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

12. Relying on the aforesaid observation of the Apex Court, it is contended by Mr. S. Deb that the judgment was delivered on 16.11.92 and therefore, the Tripura Act of 1991 reserving in promotion quota for Scheduled Castes and Scheduled Tribes is valid up to 15.11.1997, and therefore, the case of the Petitioner still can be considered till 15.11.1997 on the basis of Section 5 of Tripura Act, 1991.

13. It will be noticed that after Indru Sawhney's judgment, the Parliament in its wisdom amended the Article 16(4) of the Constitution by the Constitution (Seventy-seventh Amendment) Act, 1995. The aforesaid amendment has been published in the Gazette of India, Extra-ordinary, Part II - Section 1 on 19 June 1995. By the aforesaid amendment Article 16 of the Constitution was further amended and after Clause (4) Clause 4 (A) was inserted. Now Article reads:

4 (A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to 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.

14. Mr. S. Deb has referred to the decision of the Apex Court rendered in Commissioner of Commercial Taxes, A.P. Hyderabad and another Vs. G. Sethumadhava Rao and others, This judgment was delivered by the Apex Court after the amendment of Article 16 as quoted above. The Apex Court held in paragraph 10 of its judgment as under:

Parliament by amending the Constitution and introducing Article 16(4A) has removed the base as interpreted by this Court in India Sawhney Case that appointment does not include promotion by making express provisions that when the State forms an opinion that members of the Scheduled Castes or Scheduled Tribes are not adequately represented in any service or to any class or classes of base in the service under the State, the State is empowered to make provisions for reservation by promotion. Article 16(1) does not prevent the State from making such a provision. In Indra Sawhney case also, this Court reiterated that right to equality under Article 16(1) is equally applicable to the Scheduled Castes and Scheduled Tribes and Article 16(4) is not an exception. Reservation is part of the scheme of equality under Article 16(1). Article 16(4A) would establish that the interpretation put up in Rangachari, Thomas and Karamchari Sangh cases received parliamentary approval. It would thus be clear that as a principle of law, rule of reservation can apply not only to initial recruitment but also in promotions where the State is of the opinion that Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in class or classes of service under the State. It is seen that Rule 22 of the General Rules provides reservation for appointment by direct recruitment. By constitutional parameters and interpretation of law by this Court, reservation under Articles 16(1) and 16(4A) would include reservation in promotion as well.

15. In view of the constitutional amendment and the judgment of the Apex Court

as quoted above, the 1991 Act survive. It is submitted at the bar that the members of the Scheduled Castes and Scheduled Tribes in other services are getting the benefit of Section 5 of the Act in promotion quota. If that is so, mandate of Article 16(4) would be used discriminatorily if the same benefit is not extended to the members of Scheduled Castes and Scheduled Tribes in Judicial Service. There cannot be discriminatory treatment amongst the members of Scheduled Castes and Scheduled Tribes.

16. In Prem Prakash Vs. Union of India (UOI) and Others, the Apex Court had the occasion to deal with the similar matter, and held in paragraph 16 and 17 as under:

16. We must record our dissatisfaction at the fact that the Rules of the Delhi Judicial Service have not been amended so as to bring them in conformity with the administrative instructions and notifications which have been issued by the Ministry of Home Affairs. Department of Personnel and Administrative Reforms from time to time. The situation is virtually chaotic for which we must clarify the High Court of Delhi cannot be blamed. It is surprising that though 13 years have gone by since the Delhi Judicial Service was established no attention whatsoever has been paid to a matter which concerns the future of a large number of young men and women who aspire for posts in the Judiciary. The instant case and the cases of Ajaib Singh and Ram Swarup show that the worst sufferers of this inaction are members of the Scheduled Castes and Scheduled Tribes. Sooner the Rules are amended easier will it be for the High Court to administer and superintend the affairs of the subordinate Judiciary with the object of achieving the ideals enshrined in Article 16(4), 38 and 46 of the Constitution.

17. Though the Rules ought to be amended that does not mean that administrative instructions can be ignored by the High Court until that is done. The Assistant Registrar says in paragraph 9 of his counter-affidavit that "administrative instructions cannot be allowed to prevail over the statutory rules." That would be correct provided that the administrative instructions are contrary to the statutory rules. In this case Rule 28 itself says that "Appointments made to the service by competitive examination shall be subject to order regarding special representation in the service for Scheduled Castes and Scheduled Tribes issued by the Central Government from time to time." Therefore far from their being any inconsistency between the statutory rules and the administrative instructions it is clear that the two have to be read together.

17. The aforesaid ruling has" been referred for two purposes. Firstly, even pending the amendment of the rules, the administrative instructions cannot be ignored by the High Court until that is done. Secondly, in the additional affidavit filed by the Respondent No. 2 on 4.3.1996, the 2nd Respondent filed the letter dated 7th November, 1994 addressed to the 1st Respondent, Registrar, Gauhati High Court for amendment of Rule 6(3) (C)(ii) and Rule 10 of the Tripura Judicial Service Rules, 1974 so as to keep consistency with Section 4 of the Tripura (Courts) order (Second amendment) Act, 1992 and Section 5 of the Tripura SC/

ST (Reservation of vacancies in Services and Posts) Act, 1991. The Respondent in its letter dated 7th November, 1994 explained the detailed circumstances inserting the amendment of the Judicial Service Rules. This was followed by another letter dated 10th November 1995 (Annexure-R/3) addressed to the 1st Respondent, by the Chief Secretary, Govt, of Tripura.

18. I am constraint to observe that the case in hand has been pending since 1988. Registrar, Gauhati High Court has been impleaded as Respondent No. 1. In such an important issue the Respondent No. 1 did not care to file affidavit. So also no reply whatsoever has been communicated to the State by the Respondent No. 1 in response to the letter at Annexure-R/2 and R/3, Such practice of shifting the responsibility is deprecated. Therefore, the case of 1st Respondent has gone by default.

19. For the reasons aforestated, I hold that the Petitioner is entitled to be considered for promotion on the basis of notification dated 19.2.1977 and Section 5 of the Act 1991. The Respondent No. 1 and 2 are directed to consider the case of the Petitioner for promotion to the post of Grade-II Judicial Service with effect from he is eligible for such consideration. Needless to say that thereafter all consequential relief would follow. The case of the Petitioner shall be considered within a period of one month from the date of receipt of this order.

With the aforesaid direction, this petition is allowed. No costs.