

(1999) 01 GAU CK 0034
In the Gauhati High Court
Case No : Civil Rule No. 656 of 1997

Bobby Sharma

APPELLANT

Vs

State of Assam and Ors

RESPONDENT

Date of Decision : 07-01-1999

Acts Referred:

Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983 — Rule 8
Constitution of India, 1950 — Article 14, 16, 16(4), 226

Citation : (1999) 1 GLT 57

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : B.D. Das, H.K. Sarma and R. Ali, for the Appellant; T.C. Chutia, P. Prasad, D.C. Mahanta, R.C. Barpatragohain, B. Buragohain, T.J. Mahanta and C.B. Gogoi, for the Respondent

Judgement

A.K. Patnaik, J.—In this application under Article 226 of the Constitution, the Petitioner, Ms Bobby Sarma, has prayed for quashing the order dated 6.3.97 by which the Respondent No. 3, Sri Rupak Kumar Gogoi, was appointed to the post of Lecturer in Master of Computer Application (for short "MCA") and posted in Jorhat Engineering College at Jorhat.

2. Facts briefly are that by and advertisement No. 7/94 dated 25.11.94 published in the Dainik Janambhumi applications were called for 20 posts of Lecturers in different subjects in Engineering Colleges of the State under Education (CTM) Department. By the said advertisement, percentage of reservation for SC/ST(P)/ST(H)/OBC/MOBC was also indicated. Relevant extracts from the said advertisement relating to posts of lecturers and reservations are given here in below:

...5. The following posts of Lecturers in different subjects in Engg. Colleges of the State under Education (CTM) Deptt.

(i) Civil Engg. 6 posts (ii) Mechanical Engg. 4 posts (iii) Electrical Engg. 6 pots

(iv) Electronics & Telecommunication 1 post (v) MCA 3 posts Scale of pay: Rs. 2275/- to Rs 4450/- p.m. plus other allowances as admissible under the rules.

Age:- Between 21 to 36 years as on 1.1.94. The upper age limit is relaxable by 5 years for SC/STP/STH candidates.

Qualification: The candidate must have passed first class Masters Degree in appropriate Branch of Engg. Doctorate Degree or Published work of equal standard is desirable.

For MCA: The appropriate Branch of Engg. is Computer Science and Engg.

In case candidates with first class ME Degree are not available for the post, candidates having first class BE Degree in the appropriate Branch of Engineering will be appointed and allowed usual scale of pay, but they must obtain requisite qualification of Masters degree within 5 years from the date of joining, failing which they will not be allowed any increment till they have attained the required qualification....

...Except otherwise specified in individual cases the reservation for SC/STP/STH/OBC/MOBC in general will be as under:

SC 7% STP 10% STH 5% OBC/MOBC 15%

3. Pursuant to the said advertisement, the Petitioner and the Respondent No. 3 amongst others applied for the posts of Lecturers in MCA. Thereafter, the Assam Public Service Commission, (for brevity, "APSC"), conducted the selection and published a select list dated 20.12.95. In the said select list, the candidates selected and placed in the waiting list for the posts of Lecturers in MCA were as follows:

LIST OF SELECTED CANDIDATES:

1. Sri Amrita Bose Paul
2. Sri Subhrajyoti Bordoloi
3. Mridusmita Barthakur

LIST OF WAIT-LISTED CANDIDATES:

1. Bobby Sharma (writ Petitioner)
2. Rupak Kumar Gogoi (Respondent No. 3)
3. Ujjwala Barua

In accordance with the aforesaid selection, appointment letters were issued to Sri Amrita Bose Paul, Sri Subhrajyoti Bardoloi and Mridusmita Barthakur, but while Shri Amrita Bose Paul and Sri Subhrajyoti Bordoloi joined their respective appointments as Lecturers in MCA, Mridusmita Barthakur did not join. Since the Petitioner, Ms Bobby Sharma was placed in first position in the waiting list, she

expected that she would be appointed on cancellation of the appointment of Ms Mridusmita Barthakur. But coming to learn that instead the Respondent No. 3, Sri Rupak Kumar Gogoi, who was placed below the Petitioner in the waiting list, may be appointed in place of Ms Mridusmita Barthakur, she submitted a representation to the Secretary, Higher Education, Assam against any such proposed appointment of Respondent No. 3. Notwithstanding the said representation, the Respondent No. 3 was appointed as a Lecturer in MCA and posted in Jorhat Engineering College, Jorhat, in place of Ms Mridusmita Barthakur. Aggrieved, the Petitioner has prayed for appropriate relief by this writ application.

4. At the hearing, Mr. B.D Das, learned Counsel appearing for the Petitioner, submitted that since the Petitioner was placed in first position in the waiting list of candidates she was entitled to be appointed to the post of Lecturer in MCA on the cancellation of the appointment of Smti Mridusmita Barthakur. Mr. T.C. Chutia, learned Junior Government Advocate, Assam, and Mr. D.C. Mahanta, learned Counsel appearing for Respondent No. 3, on the other hand, contended that the Respondent No. 3 was appointed in place of Smti Mridusmita Barthakur as the Respondent No. 3 was an OBC candidate and was the only candidate in the reserved category appointed to the post of Lecturer in MCA. Mr. T.C. Chutia and Mr. D.C. Mahanta in particular referred to the averments in the affidavit-in-opposition filed by the Respondents-1 and 3 to the effect that the Respondent No. 3 was appointed by the impugned order in accordance with the policy of the Government of Assam relating to reservation of posts for OBC and MOBC categories and the 20-point Roster that has to be maintained in accordance with the aforesaid policy. Mr. B.D. Das, learned Counsel for the Petitioner, however, submitted that the 20-point Roster that has been produced before the court has not been maintained in accordance with the aforesaid policy for reservation. According to Mr. Das, reservation of 15% for OBC/MOBC candidates has to be worked out from amongst the three posts of lecturers in MCA and 15% of three posts will work out to 0.45 which was less than the minimum of 0.50 necessary for reservation of one post. In support of this submission, Mr. Das relied on a decision of this Court in the case of Manoj Kr. Roy Vs. State of Assam and Others, Mr. Das further argued that unless the percentage of reservation is worked out on the basis of specific three posts of Lecturers in MCA, the authorities would have a free hand with regard to reservation and there will be arbitrariness while applying the reservation policy. Mr. Das further relied on the instructions contained in Office Memorandum dated 30.12.67 of the Government of Assam, Appointment (A) Department, Appointment Branch relating to appointment of Scheduled Castes and Scheduled Tribes in services and posts under the State Government - Maintenance of a roster of appointments and in particular Appendix II(a) thereto in which it has been stated that a separate roster should be maintained in the form given in Appendix-II for each type of recruitment and within it for each grade or service or a group of posts formed for the purpose of the orders relating to reservation. In support of his submission

that percentage of reservation has to be applied post wise and subject wise and not to all the posts of lecturers in different subjects in the Engineering Colleges under the Education (CTM) Department, Mr. Das cited the decisions of the Supreme Court in Chakradhar Paswan Vs. State of Bihar and Ors, State of Uttar Pradesh Vs. Dr. Dina Nath Shukla and another, and Satbir Singh Vs. State of Haryana and another, Finally, Mr. Das submitted that Rule 8 of the Assam Scheduled Castes & Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983 provided that if any doubt arises in regard to the interpretation of any rule, sub-rule or clause contained in the said Rules, the matter shall be referred to the Government and the interpretation given by the Government would be final.

5. The Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983, do not apply to reservation of vacancies in services and posts for OBC/MOBC categories and applies to such reservation for Scheduled Castes and Scheduled Tribes. Hence, Rule 8 of the said Rules, 1983 relied on by Mr. Das is not of much assistance in this case. Similarly, the instructions appended to Office Memorandum dated 30.12.67 of the Government of Assam, Appointment (A) Department, Appointment Branch also relate to appointment of Scheduled Castes and Scheduled Tribes in services and posts under the State Government - Maintenance of a roster of appointments and the said instructions also do not apply to appointment of OBC/MOBC candidates in services and posts under the State Government. For reservation in services and posts under the State Government in favour of OBC/MOBC candidates, the State Government has formulated a policy in Office Memorandum dated 30.6.93 of the Government of Assam, Department for Welfare of Plains Tribes and Backward Classes. The relevant portion of the said Office Memorandum dated 30.6.93 is extracted here in below:

OFFICE MEMORANDUM

Sub: Representation of other backward classes and more other backward classes in public services and public sector undertaking. After due consideration and keeping in view the maintenance of efficiency of the administration and to provide adequate representation in the services to the other backward classes (other backward classes including more other backward classes) who are not adequately represented in service, the Governor of Assam in pursuance of Article 16 of the Constitution of India have been pleased to order reservation of 15% of vacancies in all posts under the state and in service connected with the affairs of the state and its public sector undertaking for members of other backward classes (other backward classes including more other backward classes), vide personal department's OM number ABP.338/83/14, dated 4.1.84. To ensure proper implementation of the order for reservation for the member of the notified other backward classes/more other backward classes indirect recruitment to services and posts in an establishment under the Government of Assam and its public sector undertaking the Government of Assam have now decided to adopt a

roster of 20 (twenty) vacancies for giving effect the reservation of vacancies for the other backward classes/more other backward classes as below:

The roster shall be adopted for the purpose of direct recruitment by each establishment for each cadre of below:

ROSTER POINTS:

1st vacancy - Reserved for ST(P) under Assam SC&ST(RVSP) Act 1978 2nd vacancy OBC/MOBC -do- 3rd vacancy SC -do- 4th vacancy Unreserved 5th vacancy Unreserved 6th vacancy Unreserved 7th vacancy ST(H) -do- 8th vacancy OBC/MOBC 9th vacancy Unreserved 10th vacancy Unreserved 11th vacancy Reserved for ST(P) under Assam SC&ST (RVSP) 12th vacancy SC -do- 13th vacancy Unreserved 14th vacancy Unreserved 15th vacancy OBC/MOBC 16th vacancy Unreserved 17th vacancy Unreserved 18th vacancy Unreserved 19th vacancy Unreserved 20th vacancy Unreserved Reservation Posts: ST(P) - 1, 11 ST(H)- 7 SC - 3, 12 OBC - 2, 8, 15

A register shall be maintained separately for each cadre in each establishment for giving effect to the roster prescribed above....

6. The underlined portions of the aforesaid Office Memorandum show that the Governor of Assam in pursuance of the Article 16 of the Constitution of India has passed an order for reservation of 15% of the vacancies in all posts under the State and in service connected with the affairs of the State for members of OBC including MOBC and that as per the aforesaid policy a roster has to be adopted for the purpose of direct recruitment by "each establishment for each cadre." It is thus clear that for the purpose of reservation of 15% of the vacancies in different posts under the State and in service a roster has to be maintained by each establishment for each cadre and not for specific posts. The advertisement No. 7/94 dated 25.11.94 relevant extract of which has been quoted above, would show that the posts of lecturers in different subjects in the Engineering Colleges of the State under Education (CTM) Department advertised were a total of 20. In the affidavit-in-opposition filed by the Respondent No. 1, it is clearly stated in paragraph-6 that 20-point Roster Register was maintained against the combined cadre of lecturers of Engineering Colleges. According to the State Government, therefore, since the lecturers of the Engineering Colleges in Assam constitute one combined cadre, 20-point Roster Register has to be maintained with regard to such combined cadre of lecturers and not with regard to lecturers subject wise in the said cadre of lecturers of Engineering Colleges. The Petitioner has not shown before the court that the lecturers in MCA of the Engineering Colleges in Assam constitutes a separate cadre from the lecturers of Engineering Colleges of Assam in other subjects. Reservation and the roster in favour of the OBC/MOBC candidates therefore has to be cadre wise and not post wise or subject wise as submitted by Mr. Das.

7. In the case of Chakradhar v. State of Bihar, (supra), cited by Mr. Das, the Supreme Court found that though the Directorate of Indigenous Medicines

comprised of four posts, namely, that of the Director and the three Deputy Directors, which were Class-I posts, the posts of the Director and the Deputy Directors did not constitute one cadre. The Supreme Court further observed that the Director and three Deputy Directors belonged to the same service but did not belong to the same cadre, and held that the sole post of Director which carried a higher scale of pay than that of the Deputy Directors could not be reserved for a candidate of reserved category in accordance with the policy as laid down in the circular of the Government issued under Article 16(4) of the Constitution regarding reservation. In the case of *State of UP v. Dina Nath Shukla*, (supra), relied on by Mr. Das, the Supreme Court found on an interpretation of the provisions of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act (1994) and in particular Section 57 thereof that the reservation under the said Act had to be made post wise, i.e. subject wise. In the case of *Satbir Singh v. State of Haryana* (supra), however the question as to whether roster or reservation has to be post wise and subject wise was not decided.

8. In the instant case, so far as reservations for OBC/MOBC categories are concerned, no Act has been made by the State Legislature of Assam. Reservation however for the Scheduled Castes and the Scheduled Tribes has been provided for by the Assam Scheduled Castes and Scheduled Tribes (Reservation by Vacancies in Services and Posts) Act, 1978. Reservation in favour of OBC/MOBC categories in different vacancies and posts under the State Government has however been made by an Executive Policy of the State Government contained in Office Memorandum dated 30.6.93. But as has been indicated above, the Office Memorandum dated 30.6.93 clearly stipulates that roster with regard to 15% reservation in favour of OBC/MOBC candidates has to be maintained cadre wise by each establishment. Mr. Das vehemently contended that such cadre wise maintenance of roster for reservation in favour of the OBC/MOBC categories of candidates indirect recruitment may lead to practical difficulties and arbitrariness. But I am afraid, I am not in a position to deal with this contention of Mr. Das in this writ petition as the Office Memorandum dated 30.6.93 of the Government, which provides for such maintenance of roster cadre wise by each establishment for the purpose or reservation of 15% of vacancies in all posts under the State and in service connected with the affairs of the State in favour of OBC/MOBC candidates, has not been challenged in this writ petition. In a given case, if a challenge is made to such cadre wise maintenance of roster, and an opportunity is given to the State Government to counter the said challenge, the court will consider the said challenge and decide the matter. But so far as the present case is concerned, since the Office Memorandum issued by the State Government in exercise of the executive powers making reservation under Article 16(4) of the Constitution clearly provides that roster has to be adopted for the purpose of 15% reservation in favour of OBC & MOBC by each establishment for each cadre, the court will go by the said Office Memorandum and decide the question of reservation in this case.

9. In the case of *Manoj Kr Roy v. State of Assam (supra)*, cited by Mr. Das, the learned single Judge found that six posts of Principal of Diet had been advertised for direct recruitment and as per the advertisement 7% was reserved for Scheduled Castes. The court found that since 7% of six posts worked out at 0.4% which was below the minimum of 0.5% required for reservation for one post, the court held that no post could be reserved for the scheduled caste candidates. In the instant case, the advertisement provided for reservation of 15% in favour of OBC & MOBC candidates. The said advertisement did not specify that such 15% reservation was for the posts subject wise. Of course, it also did not specify that such 15% reservation was to be for the posts cadre wise. But, then, the advertisement had to be read in the light of the policy of the Government contained in the Office Memorandum dated 30.6.93 which clearly indicated that roster for the purpose of reservation of 15% of vacancies in favour of OBC & MOBC candidates had to be maintained by each establishment for each cadre and not subject wise or post wise. Advertisement indicated that a total of 20 posts in the cadre of lecturers of the Engineering Colleges of the State under the Education (CTM) Department had been advertised. 15% of such 20 posts of lecturers works out to 3 posts. The roster produced before the court indicates that out of the 20 posts, 16 posts have been filled up by general candidates, 1 post has been filled up by ST(P) candidate and 3 posts have been filled up by OBC candidates including Respondent No. 3. Thus, the appointment of Respondent No. 3 under the impugned order dated 6.3.97 to the post of Lecturer in MCA was in accordance with the reservation policy of the Government as contained in Office Memorandum dated 30.6.93.

10. Mr. Das finally argued that no intimation was sent to the APSC as to how many posts and which of the posts of lecturers in Engineering Colleges advertised by the said Advertisement No. 7/94 were reserved for reserved categories and as a result while making the recommendation for the posts of Lecturers in MCA, the APSC has not drawn up a separate list of reserved candidates for appointment and has drawn up one select list and one waiting list of candidates. According to Mr. Das, if the APSC was duly intimated about the exact position regarding reservation of posts, the APSC would have certainly selected the reserved candidates separately and the general candidates separately. There appears to be a lot of sense in the aforesaid submission of Mr. Das and normally a selection has to be made by the APSC separately for general candidates and for reserved candidates. But in the instant case, the Petitioner, Bobby Sharma is not a selected candidates and, as such, she is not entitled to mandamus from this Court to the Government for appointment on the basis of her position in the waiting list. She could however contend before the court that she cannot be arbitrarily by-passed by the Government while making appointment out of the candidates placed in the waiting list and the Respondent No. 3 having been placed below the Petitioner could not be appointed unless the Petitioner was first appointed to the post of lecturer in MCA. But from the affidavit-in-opposition filed by the Respondent No. 1, it appears that the State

Government has appointed the Respondent No. 3 because it found that under the policy of reservation, 15% of vacancies were reserved for OBC & MOBC and that the Respondent No. 3 being an OBC candidate was entitled to such appointment in accordance with the said policy of reservation. This reason given by the State Government for appointing the Respondent No. 3 to the post of Lecturer in MCA even though he was placed below the Petitioner in the waiting list of candidates recommended by the APSC cannot be held to be arbitrary and violative of Articles 14 and 16 of the Constitution of India.

11. For the reasons stated above, I find no merit in this writ application and accordingly I dismiss the same. However, considering the entire facts and circumstances of the case, the parties are left to bear their respective costs. Interim order passed by this Court on 19.2.97 is vacated.