

(1976) 01 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No's. 19, 39 and 187 of 1974

Dina Nath Sharma etc.

APPELLANT

Vs

Director of Public Relations etc.

RESPONDENT

Date of Decision : 15-01-1976

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(1), 19

Citation : (1976) 5 ILR HP 147

Hon'ble Judges : R.S. Pathak, C.J.; D.B. Lal, J

Bench : Division Bench

Advocate : M.G. Chitkara, for the Appellant; B. Sita Ram, General, for the Respondent

Judgement

R.S. Pathak, C.J.—This and the connected writ petitions have been heard together in as much as besides the points individual to them they raise an important question concerning the reservation of posts for scheduled castes and scheduled tribes.

2. In this case we are concerned with the Himachal Pradesh Public Relations and Tourism Department Class III Non-ministerial (Non-Gazetted) Services (Recruitment, Promotion and Certain Conditions of Service) Rules, 1966. The rules were made by the President under the proviso to Article 309 of the Constitution. Rule 7 provides for the method of recruitment to various posts. The post of Drama Inspector is shown at serial No. 19 of that rule. It indicates two modes of recruitment, one is by selection to the extent of 50 per cent from amongst the categories of Actors, Harmonium Masters and Stage Masters and the other is by direct appointment to the extent of 50 per cent. The posts of Assistant Radio Engineer are shown at serial No. 20 of the rule. They are to be filled by selection to the extent of 25 per cent from the category of Projector Operators and Projector-cum-Driver, provided they are qualified Radio Mechanics, and to the extent of 75 per cent from amongst Radio Mechanics. The first proviso to Rule 7 lays down that the Departmental Promotion Committee should frame

the merit list for promotion to the posts mentioned in the rules giving due representation to the members of all grades in the service as may be eligible for promotion under it. The second proviso relates to the posts to be filled in by direct recruitment and lays down that 23 per cent and 5 per cent of the posts will be filled up from candidates belonging to the scheduled castes and scheduled tribes. Rule 8 enumerates posts classified as selection posts, and they include the posts of Drama Inspector and Assistant Radio Engineers. Rule 10(4) provides for the seniority of promotees. Clause (ii) thereof declares that where promotions to a higher grade in the service are made from more than one grade the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades, and thereafter the Departmental Promotion Committee would select persons for promotion from each list up to the prescribed quota and arrange all the candidates selected from the different lists in a consolidated order of merit which would determine the seniority of persons for promotion to the higher grade. Rule 15 empowers the Government to relax the rules in certain cases,

3. In the present petition, Civil Writ Petition No. 19 of 1974, the Petitioner Dina Nath Sharma entered service in the Department of Public Relations of the State of Punjab on July 4, 1961. He was promoted to the post of Actor in 1964. The fourth Respondent, Baldev Raj, was appointed as a Harmonium Master on March 19, 1962, while the third Respondent Narpat Ram was appointed as a Stage Master on February 3, 1965. On November 1, 1966 all three were recruited as employees in the Union territory of Himachal Pradesh as constituted after the Re-organisation of Punjab. The three were shown as employees of the Department of Public Relations, Himachal Pradesh. The final joint seniority list issued on July 3, 1970 showed their inter se seniority in the separate categories to which they belonged. In the category of Actor, Dina Nath Sharma was shown at Serial No. 3. The entry discloses that he had not yet been confirmed. In the category of Stage Master, Narpat Ram was shown at serial No. 2. He was also shown as not confirmed. In the category of Harmonium Masters, Baldev Raj was shown at serial No. 1 and his date of confirmation was entered as June 6, 1966. The posts of Actor and Harmonium Master are not inter-changeable, and the officials have their seniority in their respective posts.

4. For promotion to the post of Drama Inspector, the Departmental Promotion Committee met and considered the cases of Dina Nath, Narpat Ram and Baldev Raj. By an order dated September 29, 1973, the Director of Public Relations promoted Baldev Raj and Dina Nath as Drama Inspectors on probation for two years. Baldev Raj was shown senior to Dina Nath. Subsequently, the Director of Public Relations made an order dated January 14, 1974, declaring that the order dated September 29, 1973 was being superseded on account of the Departmental Promotion Committee reviewing the cases of promotion by reason of the clarification rendered by the State Government by its letter dated December 24, 1973 concerning the reservation of selection posts in favour of scheduled caste and scheduled tribe candidates. By the said order dated January

14, 1974, the post occupied by Dina Nath was declared reserved for a scheduled caste candidate and the promotion of Dina Nath to that post was set aside. By the same order, Narpat Ram, Stage Master, was promoted to that reserved post as Drama Inspector, with effect from January 14, 1974, Baldev Raj was shown senior to Narpat Ram. It appears that about the same time direct recruitment was contemplated for filling two other posts of Drama Inspectors, one of which was reserved for a scheduled caste candidate. By an order dated January 15, 1974, the Director of Public Relations called upon the Employment Exchange to refer suitable candidates for such direct recruitment.

5. Dina Nath has filed the present writ petition challenging the order dated January 14, 1974, divesting him of the post of Drama Inspector. He contends that the clarification made by the State Government by letter dated December 24, 1973, cannot operate retrospectively and result in his reversion, that he could not be reverted without an opportunity to show cause against the reversion and the principles of natural justice have been contravened, that the order divesting him of the post, and appointing Narpat Ram instead, contravened the statutory rules as well as Article 311(2) of the Constitution, that in any event the letter dated December 24, 1973, of the State Government referred to selection posts and not to promotion posts, and finally that he should be treated as senior to Baldev Raj, and therefore Baldev Raj and not he should have been divested of the post.

6. Civil Writ Petition No. 39 of 1974 has been filed by Shri R.S. Bhardwaj. He was recruited as Radio Mechanic in 1957 and was confirmed as such on September 5, 1961. The third Respondent Kesho Ram Negi was recruited as Radio Mechanic in 1956. In the seniority list issued by the Department the name of Kesho Ram Negi appears at serial No. 1, that of R.S. Bhardwaj at serial No. 8 and in between are the names of R.K. Gulati, Brij Mohan and Gopal Chander at serial Nos. 5, 6 and 7. A Departmental Promotion Committee was constituted for selecting eligible persons for filling six posts of Assistant Radio Engineers. On September 29, 1973 an order was made promoting R.S. Bhardwaj, Brij Mohan and G. C. Bansal to the posts of Assistant Radio Engineers. Bhardwaj was shown at serial No. 3 while Brij Mohan and G.C. Kansal were shown at serial Nos. 4 and 6 respectively. They were appointed on probation for two years. Bhardwaj joined the post of Assistant Radio Engineer. Subsequently on the basis of the clarification made by the Government in its letter dated December 24, 1973, mentioned above the Director of Public Relations made an order dated February 18, 1974, divesting Bhardwaj and one Vijay Kumar Gautam (the Petitioner in another connected writ petition) of their posts of Assistant Radio Engineers and reverted them to their original posts on the ground that two posts of Assistant Radio Engineers had to be reserved for scheduled caste and scheduled tribe candidates. Kesho Ram Negi, as a scheduled tribe candidate, was promoted to one of the posts. As no scheduled caste candidate was available for promotion to the other post it was reserved for such candidate and kept vacant. Bhardwaj has challenged the order reverting him from the post of Assistant Radio Engineer on a number of grounds.

The first ground is that no reservation was made in law to the posts of Assistant Radio Engineer filled by promotion. The second ground is that any such reservation must be construed as a concession only and its violation would not make the order promoting Bhardwaj void. The third ground is that Bhardwaj could not be divested of the post without observing the minimum requirements of natural justice. The fourth ground is that the reservation is invalid because changed criteria could not be applied to divest him of a promotion which had already been made.

7. In the other connected writ petition, Civil Writ Petition No. 187 of 1974, the Petitioner is Vijay Kumar Gautam. He was appointed as Projector Operator, and confirmed in that post on January 6, 1966. On the basis of the Departmental Promotion Committee's recommendations he was appointed to the post of Assistant Radio Engineer by the order dated September 29, 1973 mentioned above. As in the case of R.S. Bhardwaj, he was served with an order dated February 18, 1974 setting aside his promotion and reverting him to his original post. The grounds upon which he challenges the order of reversion are substantially the same as those taken by Bhardwaj in his writ petition.

8. At the outset, the Respondents point out that the Petitioners have based their respective cases on Articles 15 and 16 of the Constitution and it is said, having regard to the order made by the President dated June 27, 1975, during the Proclamation of Emergency, suspending the right of any person to move any court for the enforcement of the fundamental right guaranteed by Article 14 of the Constitution, the proceedings in the present writ petitions have to remain suspended for the period during which the Proclamation of Emergency is in force. It seems to me that the point taken by the Respondents has no substance.

9. It is now well settled that Articles 14, 15 and 16 form part of the same Constitutional Code of guarantees and supplement each other: The General Manager, Southern Railway Vs. Rangachari, It has also been observed that Article 16 is an instance or incident of the concept of equality enshrined in Article 14, in that it gives effect to the doctrine of equality in the matter of appointment and promotion: The State of Mysore and Another Vs. P. Narasing Rao, and Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others, To my mind, what is material for the purpose of deciding the question before us is the intention to be gathered from the terms of the order made by the President. It is an order made under Article 359(1). Under that provision the President is empowered to make an order declaring that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order, and all proceedings pending in any court for the enforcement of the rights so mentioned, shall remain suspended for the period during which the Proclamation of Emergency is in force. Part III consists of several Articles. The Articles conferring rights include Articles 14, 15, 16, 19, 20, 21, 22 and so on. The President's order mentions Articles 14, 21 and 22 only. Had it been intended that Articles 15 and 16 should also be affected, they would have been specifically

mentioned even as the other Articles were. Plainly, it was never intended that Articles 15 and 16 should be included within the scope of the President's order. Consequently, the objection raised by the Respondents must be rejected.

10. The first point on the merits which deserves consideration is whether the Petitioners in these three writ petitions should have been afforded an opportunity of being heard before the impugned orders reverting them were passed. The Petitioners were appointed to the posts of Drama Inspector and Assistant Radio Engineers respectively, and it was after they had held those posts for a period of time that for the first time the posts were treated as reserved for scheduled caste and scheduled tribe candidates. Now, no doubt the Petitioners held those posts on probation. As holders of posts on probation, it is said, they have no right to hold the post. That proposition rests on the basis that the contract of employment and the Rules governing them stipulate that they can be removed from the post on their services being terminated in accordance with contract and Rules. Ordinarily, such a contract or the Rules envisage the termination of services of the Government servant being found unsuitable and unfit for the post. A period of probation is a period during which the Government servant is on trial. It is only if the Government servant is found fit and suitable to be confirmed on completing his probation that he is confirmed. This is a matter falling within the terms of the contract and the provisions of the Rules. It is in this sense that the statement is generally made that a Government servant on probation has no right to hold the post. So long as the action is taken within the terms of the contract and the provisions of the Rules, no question arises of any breach of Article 311(2) of the Constitution. And the Government servant has no right to be heard in the matter. But it seems to me that the proposition cannot be extended to those "cases where the services of the Government servant are terminated for reasons outside the terms of the contract and the provisions of the Rules. So long as the post continues, the Government servant is entitled to continue in that post subject to the terms of this contract and the provisions of the Rules. He cannot be divested of the post except for reasons within his contract and the Rules. The contract of service and the Rules envisage that if the Government servant is found fit and suitable within the contemplation of the terms of his contract and the Rules he would ordinarily be confirmed. If for reasons outside the contract and the Rules the Government servant is divested of the post, the contract and the Rules which confer certain rights on him are violated. In that event, he is entitled to an opportunity of being heard against the termination of his appointment to the post. There is no doubt that the question whether posts should be reserved for scheduled caste and scheduled tribe candidates is a matter falling within the domain of Governmental policy, and it is not open to a Government servant to be consulted in the matter merely because but for that reservation he might have been appointed to such post. But once his appointment to such post takes place, a contract comes into existence and his appointment and tenure in that post is governed by the terms of his contract and the relevant rules applicable to the post. The rights and obligations flowing from

such contract and the rules, including the right to be considered for confirmation, come into action, and if the Government servant is reverted from that post for reasons falling outside the envelope of those rights and obligations the principles of natural justice require that he should be heard in the matter. That is the position so long as the post continues in existence. It is a different matter if the post is abolished for bona fide reasons.

11. In the present case, there is considerable debate on the question whether the Himachal Pradesh Public Relations and Tourism Department Class III Non-ministerial (Non-Gazetted) Service (Recruitment, Promotion and Certain Conditions of Service) Rules, 1966 necessarily exclude the reservation of posts for scheduled caste and scheduled tribe candidates. If they do, the State Government must be taken as acting contrary to the Rules and the Petitioners have a right to show that the envelope of the rights and obligations within which they held the posts is being terminated by State action which the law treats as void. It has also been contended on behalf of the Petitioners that the reservation made for scheduled caste and scheduled tribe candidates is in the nature of a concession, and the omission to give effect to a concession cannot invalidate appointments already made. These are questions which require consideration, and in regard to which the Petitioners should be afforded an opportunity of being heard in conformity with the principles of natural justice.

12. It has been urged on behalf of the Respondents that the appointments of the Petitioners to those posts were made by mistake. To my mind, that by itself does not deprive the Government servant of the right of being heard. Reference may be made to *B.S. Sindhu v. Union of India* 1971(1) S.L.R. 600, *Abdul Rashid Qadiri v. State of Jammu and Kashmir* 1973 (3) S.L.R. 184, and *Divisional Superintendent, Eastern Railway, Dinapur v. Shri L.N. Keshri* 1974 (2) S.L.R. 546.

13. There is another ground by reason of which the Petitioners had a right to be heard. They were entitled to be heard on the question whether there are junior officials holding similar posts who should have been reverted instead of the Petitioners. Dina Nath Sharma contends that he was senior to Baldev Raj, and it is Baldev Raj who should have been divested of the post. Bhardwaj and Gautam contend that there were persons junior to them and those persons instead of these Petitioners should have been reverted. The question whether they can succeed on that point is a matter primarily for the appropriate authorities to consider. In my opinion, the Petitioners are entitled by virtue of Article 16(1) of the Constitution, to show that they should not be the victims of discrimination and that the advantage which they enjoy by reason of their seniority should not be taken away by retaining junior officials while requiring the Petitioners to revert. That seems to be the position even though the Petitioners are mere probationers. When the question arises of reserving some of the posts and reverting the holders of those posts, the Petitioners are entitled to establish that as between the probationers they are not liable to be reverted.

14. I, therefore, hold that the impugned order reverting the Petitioners in each of

these writ petitions must be quashed. It is not necessary, in the circumstances, to enter into the other questions raised before us.

15. Civil Writ Petitions Nos. 19 of 1974, 39 of 1974 and 187 of 1974 are allowed. The order dated January 14, 1974, reverting Dina Nath Sharma, and the order dated February 18, 1974, reverting R.S. Bhardwaj and V.K. Gautam made by the Director of Public Relations, Himachal Pradesh are quashed. The Director of Public Relations will now proceed in accordance with law and in the light of the observations made in this judgement. There is no order as to costs.

D.B. Lal, J:

16. I agree.