

(2013) 07 DEL CK 0130

In the Delhi High Court

Case No : Writ Petition (C) No. 2943 of 2013

Dr. Debasis Poddar and Others

APPELLANT

Vs

Guru Gobind Singh Indraprastha University and Another

RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 226, 335

Citation : (2013) 07 DEL CK 0130

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Bharat Sangal and Ms. Yanmi, for the Appellant; Rakesh Kumar Khanna and Mr. Mukul Talwar, Advocate and Mr. S. Mohapatra, for the Respondent

Judgement

Valmiki J Mehta, J.—Though only the interim application was listed for hearing, I am proposing to dispose of the main writ petition itself in view of the recent Constitution Bench judgment of the Supreme Court in the case of Faculty Association of AIIMS Vs. Union of India and Ors. in Civil Appeal No. 4500/2002 decided on 18.7.2013. I have gone through the judgment with the assistance of the counsel and I have also heard them as regards the facts of the case. There are three petitioners in the present petition. Petitioner No. 1 is an aspirant to the post of Assistant Professor with the respondent No. 1. Petitioner No. 2 is an Association of Scheduled Castes and Scheduled Tribes Employees and petitioner No. 3 is an aspirant for the post of Professor in the respondent No. 1/University.

2. The basic cause of action which is pleaded in the writ petition is for implementation of UGC guidelines for reservation for all posts. This cause of action is buttressed by reference to clause 3.2 of Statute 31 of the respondent No. 1 which prescribes reservation for posts for candidates belonging to SC/ST/OBC/ Handicapped and other special categories etc. Challenge was laid in the writ petition to the impugned advertisement dated 24.1.2013 which reserved the entire 36 posts of Assistant Professor (which was advertised) for SC/ST and OBC category. One post was also reserved for persons with disability out of the

aforesaid 36 posts. By the same advertisement 15 posts of Professor and 24 posts of Associate Professor were also advertised. Challenge is also laid to appointment process without creating and following the Roster Point System.

3. This writ petition was, in my opinion, filed with delay because the impugned advertisement was issued in January, 2013 and there are pleadings of the respondents that at least from around 8.3.2013 the advertisement was known to petitioners. However, I am not going in depth of this issue because I am otherwise disposing of the writ petition on merits.

4. In the counter-affidavit, it is not disputed that the respondent No. 1-University has not adopted the Roster Point System for appointments. What is stated in the counter-affidavit is that in the past efforts were made to fill in posts by the regular recruitment process, however, that exercise was unsuccessful on various occasions as a result of which in fact many posts in the respondent No. 1-University are still lying vacant. It is contended in the counter-affidavit that the urgency of the matter with respect to appointments was that new academic session starts within a few days from today i.e. 1.8.2013. It is also stated that so far as the posts of Assistant Professor are concerned since there was considerable backlog for the reserved category therefore the entire posts which were advertised in the impugned advertisement of Assistant Professor were to clear the backlog vacancies for the reserved category.

5. During the course of arguments, the following admissions are made by the respondent No. 1-University, and which are recorded herein so that the respondent No. 1-University will be bound by the same henceforth:-

(i) Respondent No. 1-University will create a Roster Point System for appointment of all posts except the super speciality posts of Professor and Associate Professor.

(ii) Since there are many vacancies existing at different levels, respondent No. 1-University will now create a Roster Point System to find out the backlog vacancies in which reservation has to be made and will initiate the process of recruitment in terms of the Roster Point System and any backlog with respect thereto within a period of six months from today.

(iii) Respondent No. 1 agrees that there is a need to take expeditious action for filling up all remaining posts available with the respondent No. 1, and for which purpose, the Roster Point System will be created as per directions issued by the UGC and Supreme Court from time to time.

(iv) The reserved categories will include wherever reservation is prescribed including for SC/ST/OBC and persons with disabilities. The Roster Point System which will be created will no doubt be applicable for appointments henceforth, however, they will take into account for further appointments the vacancies which are already filled up or/and yet to be filled as per the Roster Point System and consequent backlog of vacancies, and hence the posts which have to be now

filled up will be filled up as per the Roster Point System including posts in the reserved category.

6. As already stated above, and repeated herein, the appointment to posts which are recorded in the above para, pertain to posts except the super speciality posts and which for the present are the posts of Professors and Associate Professors.

7. At this stage, I would like to refer to relevant paragraphs of the Constitution Bench Judgment in the case of Faculty Association of AIIMS (supra) and which is necessary because no reservations are being made for the super speciality posts and which today are of Professors and Associate Professors. These paras are 2, 5, 17, 18 and 19 and the same read as under:-

2. Although the matter is now before a Bench of five Judges, the terms of reference are not very clear. From what we have been able to gather from the pleadings and the judgment of the Division Bench of the High Court, the question to be considered is whether reservation was inapplicable to specialty and super-specialty faculty posts in the All India Institute of Medical Sciences, hereinafter referred to as "AIIMS". Faced with the decisions of this Court in the case of *Indra Sawhney v. Union of India and Ors.* (1992) Supp. (3) SCC 215; *Dr. Jagadish Saran and Others Vs. Union of India (UOI)*, ; and *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, wherein reservation in admission to specialty and super-specialty courses was disallowed, the Division Bench of the High Court confined itself to the limited issue, namely, whether reservation policy was inapplicable for making appointments to the entry level faculty post of Assistant Professor and to super specialty posts and also whether the resolutions adopted by AIIMS on 11.1.1983 and 27.5.1994 were liable to be struck down.

5. Mr. Rao submitted that the question had earlier been gone into and considered in *Indra Sawhney's* case (supra), wherein while considering the question of reservation the Bench also took into consideration the provisions of Article 335 of the Constitution regarding the claims of Scheduled Castes and Scheduled Tribes to services and posts. Referring to the concurring judgment of Jeevan Reddy, J., Learned Counsel referred to Paragraphs 838 and 839 in particular and the observations made therein. Since Paragraph 838 places in focus the view of the Nine-Judge Bench, the same is extracted hereinbelow:

838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialties and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in

nuclear and space application, provision for reservation would not be advisable.

17. Although, the matter has been argued at some length, the main issue raised regarding reservation at the super-specialty level has already been considered in Indra Sawhney's case (supra) by a Nine-Judge Bench of this Court. Having regard to such decision, we are not inclined to take any view other than the view expressed by the Nine-Judge Bench on the issue. Apart from the decisions rendered by this Court in Dr. Jagdish Saran's case (supra) and Dr. Pradeep Jain's case (supra), the issue also fell for consideration in Preeti Srivastava's case (supra) which was also decided by a Bench of Five Judges. While in Dr. Jagdish Saran's case (supra) and in Dr. Pradeep Jain's case (supra) it was categorically held that there could be no compromise with merit at the super specialty stage, the same sentiments were also expressed in Preeti Srivastava's case (supra) as well. In Preeti Srivastava's case (supra), the Constitution Bench had an occasion to consider Regulation 27 of the Post Graduate Institute of Medical Education and Research, Chandigarh Regulations, 1967, whereby 20% of seats in every course of study in the Institute was to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes or other categories of persons, in accordance with the general rules of the Central Government promulgated from time to time. The Constitution Bench came to the conclusion that Regulation 27 could not have any application at the highest level of super specialty as this would defeat the very object of imparting the best possible training to selected meritorious candidates, who could contribute to the advancement of knowledge in the field of medical research and its applications. Their Lordships ultimately went on to hold that there could not be any type of relaxation at the super specialty level.

18. In paragraph 836 of the judgment in Indra Sawhney's case (supra), it was observed that while the relevance and significance of merit at the stage of initial recruitment cannot be ignored, it cannot also be ignored that the same idea of reservation implies selection of a less meritorious person. It was also observed that at the same time such a price would have to be paid if the constitutional promise of social justice was to be redeemed. However, after making such suggestions, a note of caution was introduced in the very next paragraph in the light of Article 15 of the Constitution. A distinction was, however, made with regard to the provisions of Article 16 and it was held that Article 335 would be relevant and it would not be permissible not to prescribe any minimum standard at all. Of course, the said observation was made in the context of admission to medical colleges and reference was also made to the decision in State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, where admission to medical courses was regulated by an entrance test. It was held that in the matter of appointment of medical officers, the Government or the Public Service Commission would not be entitled to say that there would not be minimum qualifying marks for Scheduled Castes/Scheduled Tribes candidates while prescribing a minimum for others. In the very next paragraph, the Nine-Judge Bench while discussing the provisions of Article 335 also observed that there were certain services and posts where either on account of the nature of duties

attached to them or the level in the hierarchy at which they stood, merit alone counts. In such situations, it cannot be advised to provide for reservations. In the paragraph following, the position was made even more clear when Their Lordships observed that they were of the opinion that in certain services in respect of certain posts, application of rule of reservation may not be advisable in regard to various technical posts including posts in super specialty in medicine, engineering and other scientific and technical posts.

19. We cannot take a different view, even though it has been suggested that such an observation was not binding, being obiter in nature. We cannot ascribe to such a view since the very concept of reservation implies mediocrity and we will have to take note of the caution indicated in Indra Sawhney's case. While reiterating the views expressed by the Nine-Judge Bench in Indra Sawhney's case, we dispose of the two Civil Appeals in the light of the said views, which were also expressed in Dr. Jagdish Saran's case, Dr. Pradeep Jain's case, Dr. Preeti Srivastava's case. We impress upon the Central and State Governments to take appropriate steps in accordance with the views expressed in Indra Sawhney's case and in this case, as also the other decisions referred to above, keeping in mind the provisions of Article 335 of the Constitution.

(underlining added)

8. Reference to the aforesaid paras shows that the Supreme Court in the case of Faculty Association of AIIMS (supra) has held that the observations of the Nine Judge Constitution Bench in the case of Indra Sawhney Vs. Union of India and Ors. (1992) Supp. (3) SCC 215 case are not obiter dicta but are binding precedent observations. Specific reference has been made by the Supreme Court in Faculty Association of AIIMS (supra) to para 838 of Indra Sawhney (supra) and in which the posts of Professors in education have been held to be super speciality posts and no reservations can be made in such posts. Observations in paras 17 to 19 show that observations in the case of Indra Sawhney (supra) have been held to be binding and hence applicable i.e. no-reservation for super speciality posts of Professor. I may also put on record that counsel for the respondent No. 1 states that qualifications for appointment to the posts of Associate Professor and Professor are more or less the same and therefore Associate Professor is being treated by me as a super speciality post alongwith the post of Professor. Mere difference of years of experience will not make the post of an Associate Professor a less super speciality post than as envisaged by the Nine Judge Constitution Bench in the case of Indra Sawhney (supra) and as interpreted by a Five Judge Constitution Bench in the case of Faculty Association (supra).

9. So far as the appointments which have already been made though formal appointment letters have not been issued, and which are made pursuant to the impugned advertisement dated 24.1.2013 I am not inclined to exercise my discretionary and extraordinary powers under Article 226 of the Constitution of India for three important reasons. First reason is that sufficient numbers of posts

are still available by which the Roster Point System of reservation can be framed and implemented by the respondent No. 1. This aspect is taken into account by me alongwith the fact that in the counter affidavit the statement is made on oath that earlier recruitment processes for many posts were unsuccessful and hence many posts could not be filled. There was exigency for filling up of the posts otherwise the education of the students would have suffered. The second reason for me not to in any manner interfere with the appointments as already made is that the classes of students are to start from 1.8.2013 i.e. within a week. Thus, at this stage, I am not inclined to interfere with the recruitment initiated through the impugned advertisement dated 24.1.2013 taken especially with the first point stated by me above. The third aspect which I would like to state is that by the time the petitioners brought up the writ petition to this Court for the first time, entire recruitment process stood completed, selections and appointments were made however formal appointment letters were not issued only in deference to the petition pending in this Court.

10. In view of the above, the writ petition is dismissed so far as the challenge is laid to the recruitment through the advertisement dated 24.1.2013 is concerned, however, the respondent No. 1 will be bound by the admissions for further admissions including for making Roster Point System as stated in para 6 above. Parties are left to bear their own costs.

C.M. Nos. 5740/2013 (stay) and 10490/2013 (condonation of delay)

Since the main writ petition stands disposed of, all the pending applications also stand disposed of accordingly.