
(2010) 09 AHC CK 0590
In the Allahabad High Court
Case No : C.M.W.P. No. 54870 of 2009

Dr. Neeraj Shukla and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(4A), 16(4B), 335
Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 — Section 3, 3(1), 3(3), 3(3A), 3(3B)

Citation : (2011) 2 AWC 1208

Hon'ble Judges : Sunil Ambwani, J; K.N. Pandey, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sunil Ambwani and K.N. Pandey, JJ.—We have heard Shri G. K. Singh, learned Counsel for the Petitioners. Shri Pankaj Saxena, learned standing counsel appears for the Respondents.

2. All the five Petitioners are Bachelors in Ayurvedic Medicine and Surgery. They do not belong to any reserved category. All of them are working as Medical Officers (Ayurvedic/Unani) Community Health on contract basis since April, 2005. By this writ petition they have prayed for quashing the Advertisement No. 4/2009-10 issued by the U.P. Public Service Commission, Allahabad published in "Dainik Jagran" on 2nd October, 2009, inviting application for selections on 137 posts of Medical Officers, Community Health (Ayurvedic/Unani). Dr. Neeraj Kumar Shukla is co-Petitioner with Dr. Vivek Kumar Singh in Writ Petition No. 1694 (S/B) of 2008 in which an interim order was made on 24.11.2008, permitting them to work on contract basis until regular selections. This fact has been placed before the Court by the standing counsel and is stated in paras 13 and 16 of the counter-affidavit of Dr. Jaishanker Shukla filed on behalf of the State Respondents.

3. The advertisement No. 4 of 2009-10 issued by the Commission inviting

applications for 137 posts of Medical Officers (Ayurvedic and Unani) Community Health Cadre has bifurcated the posts for O.B.C. (22), S.C. (96) and S.T. (90). In this manner all the 137 advertised posts are in the reserved category.

4. Shri G. K. Singh, learned Counsel for the Petitioner has challenged the advertisement on the ground that there are in all 1678 posts of Medical Officers, Community Health (Ayurvedic/Unani) in the State of U.P. out of which 50% posts have to be unreserved, and remaining reserved for O.B.C, S.C. and S.T. in accordance with Section 3 of the U.P. Public Services (Reservation for S.C. S.T. and O.B.C.) Act, 1994.

5. In the year 1995-96 by advertisement No. 3 of 1995-96, 47 posts of Medical Officers (Ayurvedic/ Unani) were advertised including 42 posts for S.C. and 5 for S.T. In the year 1996-97, 433 posts were advertised vide advertisement No. 1/ 1996-97 out of which 389 posts were reserved for S.C. and 44 for S.T. These advertisements were challenged in the High Court in Writ Petition No. 30542 of 1996, which was allowed on 20.5.1998. The judgment was affirmed in appeal, on 20.5.1998, Shashi Kant Rai and Ors. v. State of U.P. 1998 (3) AWC 1821.

6. In the year 2003, 367 posts were advertised. All these posts were reserved for candidates belonging to O.B.C. (149), S.T. (25) and S.C. (193). They were all treated to be backlog vacancies. The advertisement was challenged by one Dr. Chandra Prakash Pandey by filing Writ Petition No. 40656 of 2003. It is stated in para 9 of the writ petition that the aforesaid writ petition was withdrawn, with the result all the vacancies were filled up. The date of withdrawal of writ petition has not been given. It is thereafter stated in para 12 that the appointments made in the year 2003 were challenged in Writ Petition No. 65734 of 2008 filed by Dr. Vivek Singh and others and in Writ Petition No. 10014 of 2009, which are still pending for consideration.

7. It is stated in para 15 that the State Government considering the fact that 840 unreserved category candidates in the cadre, are working in the department, sent a requisition for advertisement of the remaining posts in reserved categories. The Petitioners are at present working on contract. They have become overage. They alleged that since the unreserved posts have not been advertised, they did not get a chance to be considered for appointment.

8. Shri G. K. Singh, learned Counsel for the Petitioner submits that the word "backlog", for the vacancies means that the vacancies should have been advertised atleast once, and could not be filled up on account of non-availability of candidates. He submits that these 137 vacancies all belonging to reserved categories were never advertised earlier, and thus the advertisement is in the teeth of Section 3 of the Act of 1994 and is liable to be set aside. The Petitioners have been denied an opportunity to compete for the vacancies of general category, which has been held back by the State Government arbitrarily and without any good reason. Shri G. K. Singh has relied upon the Full Bench judgment in Heera Lal v. State of U.P. and Ors. 2010 (6) ADJ 1 (FB). He submits

that the advertisement of all the vacancies for the first time only for reserved categories is violative of equality clause under Articles 14 and 16 of the Constitution of India. In *Indra Sawhney v. Union of India* (1992) Supp 3 SCC 217 ; *R.K. Sabharwal and others Vs. State of Punjab and others*, and *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, the Supreme Court has clarified the position and has not approved the advertisement of only reserved category vacancies. He has relied upon the judgment in *Dr. Shashi Kant Rai and others Vs. State of U.P. and others*, and the judgment in *Dr. Vishwajeet Singh*, 2009 (3) AWC 2929, in submitting that this Court has already held that the vacancies cannot be advertised for the first time as backlog vacancies unless they could not be filled up earlier by selections. He submits that this Court and the Supreme Court in *Rana Pratap Singh v. State of U.P.*: 1995 ACJ 200 : 1996 AWC (Suppl) 92 ; *Heera Lal v. State of U.P.* 2010 (6) ADJ 1 (FB) and in *Official Liquidator Vs. Dayanand and Others*, have held that doctrine of stare decisis and judicial discipline requires that the Court should follow its earlier judgments of coordinate Benches of full strength and should not readily infer that they have not followed the law laid down by the Supreme Court. If necessary the matter should be referred to the larger Bench.

9. Shri Pankaj Saxena, standing counsel submits that out of 1678 posts in the cadre, 839 (50%) posts are for general category and remaining posts are reserved for O.B.C. (453), S.C. (352) and S.T. (34). He submits that at present 840 doctors are working in the cadre on unreserved posts, 228 on O.B.C, 98 on S.C. and no one belongs to S.T. is working, and therefore the State Government decided to fill up all the reserved vacancies as backlog vacancies, and has issued advertisement inviting applications for 137 posts including 22 for O.B.C, 96 for S.C. and 19 for S.T. He submits that the advertisement is strictly in accordance with the Act of 1994.

10. Shri Pankaj Saxena, standing counsel submits that an anomalous situation has been created by the interim order obtained by the doctors in unreserved category, working on contract and blocking up all unreserved posts. They have consumed all the unreserved posts. The interim orders granted by the High Court at Allahabad and Lucknow Bench, indiscriminately, one following the others, have been extended from time to time. There is not a single unreserved posts available to be filled up. Infact, one doctor is working excess on unreserved posts. The Petitioners have concealed these facts and are raising bogey, that the State Government is not filling up the posts. There is acute shortage of doctors in the rural areas of the State, and thus it was decided to advertise all the remaining posts, which are reserved, through Commission. Learned standing counsel submits that the judgment in *Dr. Vishwajeet Singh's* case has overlooked the judgment in *M. Nagaraj v. Union of India* (supra). In paras 82, 83, 95, 96, 97, 99 and 100 in *M. Nagaraj* (supra) the Supreme Court held:

SCOPE OF THE IMPUGNED AMENDMENTS

82. Before dealing with the scope of the constitutional amendments we need to

recap the judgments in Indra Sawhney and R. K. Sabharwal. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However in R. K. Sabharwal, this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota-limit has been reached. It was clarified that the judgment in Indra Sawhney was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensure that the reservation remains within the ceiling-limit of 50%.

83. In our view, appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling-limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

95. By Clause (4B) the "carry-forward"/"unfilled vacancies" of a year is kept out and excluded from the overall ceiling-limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-First Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-First Amendment) Act, 2000:

THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT. 2000

(Assented on 9th June, 2000 and came into force on 9.6.2000)

STATEMENT OF OBJECTS AND REASONS

Prior to August 29, 1997, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, which could not be filled up by direct recruitment on account of nonavailability of the candidates belonging to the Scheduled Castes or the Scheduled Tribes, were treated as "Backlog Vacancies". These vacancies were treated as a distinct group and were excluded from the ceiling of fifty per cent reservation. The Supreme Court of India in its judgment in Indra Sawhney v. Union of India, held that the number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of fifty per cent. As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes combined together had already reached forty-nine and a half per cent and the total number of vacancies to be filled up in a year could not exceed fifty per cent, it became difficult to fill the "Backlog Vacancies" and to hold Special Recruitment Drives. Therefore, to implement the judgment of the Supreme Court, an Official Memorandum dated August 29, 1997 was issued to provide that the fifty per cent limit shall apply to current as well as "Backlog Vacancies" and for discontinuation of the Special Recruitment Drive.

Due to the adverse effect of the aforesaid order dated August 29, 1997, various

organisations including the Members of Parliament represented to the Central Government for protecting the interest of the Scheduled Castes and the Scheduled Tribes. The Government, after considering various representations, reviewed the position and has decided to make amendment in the constitution so that the unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) of Article 16 of the Constitution, shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year. This amendment in the Constitution would enable the State to restore the position as was prevalent before August 29, 1997.

The Bill seeks to achieve the aforesaid object.

THE CONSTITUTION (EIGHTY-FIRST AMENDMENT) ACT, 2000

(Assented on 9th June, 2000 and came into force on 9.6.2000)

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Fifty-first Year of the Republic of India as follows:

1. Short title.--This Act may be called the Constitution (Eighty-first Amendment) Act, 2000.

2. Amendment of Article 16.--In Article 16 of the Constitution, after Clause (4A), the following clause shall be inserted, namely:

(4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or Clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

96. The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R. K. Sabharwal. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise. Therefore, in effect, Article 16(4B) grants legislative assent to the judgment in R. K. Sabharwal. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post-based, subject

to replacement theory and within the limitations indicated hereinafter.

97. As stated above Clause (4A) of Article 16 is carved out of Clause (4) of Article 16. Clause (4A) provides benefit of reservation in promotion only to S. Cs. and S. Ts. In the case of S. Vinod Kumar and Anr. v. Union of India and Ors., this Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in Indra Sawhney.

99. This proviso was added following the benefit of reservation in promotion conferred upon S. Cs. and S. Ts. alone. This proviso was inserted keeping in mind the judgment of this Court in Vinod Kumar which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of Clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to S.Cs. and S.Ts. alone. The said proviso is compatible with the scheme of Article 16(4A).

INTRODUCTION OF "TIME" FACTOR IN VIEW OF ARTICLE 16(4B):

100. As stated above, Article 16(4B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling-limit of 50% on current vacancies continues to remain. In working-out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies ; on the other hand, we have a time-spread over number of years over which unfilled vacancies are sought to be carried-over. These two are alternating factors and, therefore, if the ceiling-limit on the carryover of unfilled vacancies is removed, the other alternative time-factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact-situation. What is stated hereinabove is borne out by Service Rules in some of the States where the carry-over rule does not extend beyond three years.

11. Shri G. K. Singh, learned Counsel for the Petitioner could not explain as to why scope of 81st and 82nd amendment to the Constitution as explained in M. Nagrj's case was not cited and referred to in Dr. Vishwajeet Singh's case. We are of the opinion that once the Constitution has been interpreted, and the law has been declared by the Constitution Bench of the Supreme Court, any judgment in ignorance of such judgment attracts the doctrine of perineurium vide V. Kishan Rao Vs. Nikhil Super Speciality Hospital and Another, State of Rajasthan and Others Vs. Jagdish Narain Chaturvedi, and Subhash Chandra and Another Vs. Delhi Subordinate Services Selection Board and Others,

12. The judgment in M. Nagrj's case did not lay down any new principle of law.

It only explained the judgment in Indra Sawhney and R. K. Sabharwal, and the object and reasons of 81st and 82nd amendment to the Constitution of India. The judgment was delivered on October 19th, 2006 much before the decision of this Court in Dr. Vishwajeet's case.

13. The argument of Shri G. K. Singh that the appointment can only be made in accordance with the roster, and thus the reserved vacancies cannot be advertised separately in a particular year overlooks the law explained in M. Nagaraj's case.

14. Shri B. P. Singh appears for the intervenors, Dr. Ravindra Kumar Tyagi and four others impleaded as Respondent Nos. 4 to 8. The impleadment application was allowed and Shri B. P. Singh was heard.

15. In the affidavit of Dr. Ravindra Kumar Tyagi accompanying the impleadment application it is stated that 47 backlog posts of Medical Officers, Ayurvedic were advertised by the Commission vide advertisement No. 3 of 1995-96 as hill cadre posts out of which 42 were reserved for S.C. and 5 for S.T. The appointments were made on 9.10.2006. By advertisement No. 1 of 1996-97, 433 posts were advertised out of which 389 were made for S.C. and 44 for S.T. The advertisement was challenged by Dr. S. K. Rai in Writ Petition No. 30542 of 1996 in which interim order was passed on 1.10.1996. In the meantime, the advertisement No. 1 of 1996-97 was issued of which result was declared for 121 candidates for SC, S.T. category and recommendation was made by the Commission on 30.7.1997 for appointment of 121 candidates. As out of 433 only 121 candidates could be appointed, a third advertisement No. 3 of 1997-98 was issued for 318 posts (312 in unfilled backlog and 6 female backlog) out of these 225 posts were for S.C. and 43 for S.T.

16. The result of third advertisement No. 3 of 1997-98 was declared on 20.11.1997 in which 57 candidates of S.C, S.T. category were selected. Dr. S. K. Rai again filed Writ Petition No. 30542 of 1996 (second writ petition), which was allowed on 20.5.1998 and against which SLP No. 14557 of 1998 was dismissed on 11.9.2008. Consequently only 57 appointments could be made, and 261 backlog vacancies remained unfilled for which 4th Advertisement No. 21 of 2003 was made for 655 posts including 228 for Medical Officer (Ayurvedic) and 367 for Medical Officer (Community Health) by corrigendum dated 9.8.2002. The number of posts for Medical Officer (Ayurved) were increased to 348. Once again Shri S. K. Rai filed Writ Petition No. 45304 of 2003 (third writ petition) in which interim order was passed on 8.10.2003 and selection process was stayed. In the meantime, to meet the exigency and shortage of doctors a number of adhoc appointments were made by General Category candidates and while vacancies for O.B.C., S.C. and S.T. were kept vacant, many of these candidates appointed on adhoc basis were regularised leaving 180 backlog vacancies for S.C, 23 for S.T. and 85 for O.B.C for which requisition was sent by the Commission and advertisement was made. Dr. S. K. Rai again filed Writ Petition No. 45304 of 2003 (4th writ petition) in which again an interim order was passed on 8.10.2003. He withdrew the writ petition on 17.11.2008.

17. It is stated by Shri B. P. Singh that the unreserved candidates led by Dr. S. K. Rai time and again filed writ petitions and stalled the process of appointment on reserved category posts.

18. In *M. Nagrj* it was clearly held in para 96 that once it is held that each point in the roster indicates a post, which on falling vacant has to be filled up by the particular category of candidate to be appointed against it, and any subsequent vacancy has to be filled up by that category candidate alone, then the question of clubbing the unfilled vacancy with current vacancies does not arise. In effect Article 16(4B) grants legislative assent to the judgment in *R. K. Sabharwal*'s case. If it is within the power of the State to make reservation, then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based subject to the replacement theory and within the limitation indicated in the judgment. The 50% cap on carry forward vacancy (backlog vacancy) was lifted by Article 16(4B) introduced by the Constitution 81st Amendment Act, 2000. The ceiling limit of 50% on current vacancies, however continued to remain. In working out the carry forward rule, it was cautioned in *M. Nagrj*, that two factors are required to be kept in mind, namely unfilled vacancies and the time factor. Where there are unfilled vacancies and there is a time spread over number of years over which the unfilled vacancies are sought to be carried over, are alternative factors, and therefore if the ceiling limit on the carry over or unfilled vacancies is removed, the other alternative time factor comes in and in that event, time factor has to be imposed in the interest of the efficiency in administration as mandated by Article 335. If the time factor is not kept, then the posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will have to introduce a time-cap depending upon the fact situation. In some sets the carry forward rule does not extend beyond 3 years.

19. In the State of Uttar Pradesh the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 was amended by U.P. Act No. 1 of 2002 providing for filling up the reserved vacancies as separate class of vacancies:

(4) Where, in respect of any year of recruitment, any vacancy reserved for any category of persons under Sub-section (1), remains unfilled even after recruitment made under Sub-section (3) or Sub-section (3A) or even after special recruitment under Sub-section (3B) such unfilled vacancy may be filled up in any succeeding year or years of recruitment as a separate class or vacancy and such class of vacancy shall not be considered together with the vacancies of the year of the recruitment in which it is being filled up, for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year.

20. In the present case, there are 840 doctors working on unreserved posts filling up all the 839 unreserved posts, in the cadre. Many of these doctors

working on contract, have obtained interim orders in the writ petitions. They cannot, therefore, be heard to say that these unreserved posts have not been advertised and that advertisement of the remaining posts, on reserved category, which have not been filled up, will cause discrimination to them. If the Constitution and the reservation in the State Law permit advertisement of such unfilled posts of reserved categories in any year, (when all the unreserved posts have been filled up), the advertisement of these posts separately inviting applications only from reserved categories does not violate the Constitution, State Act and does not result in discrimination to the persons in unreserved category.

21. The Petitioners are already working on contract, and have obtained interim orders, which they have concealed from the Court. In the absence of any interim order in such writ petitions, we are unable to find, reasons for which the reserved vacancies could not be advertised. The Petitioners have to blame themselves for holding up selections on the unreserved posts. The larger interest of the society, and the right to health of the citizens require that all the posts of doctors of Community Health, to be posted in rural areas should be filled up without any further delay.

22. For the aforesaid reasons, we do not find any good ground to interfere with the advertisement and selections.

23. The writ petition is dismissed.