

(2015) 04 CAL CK 0002
In the Calcutta High Court
Case No : Writ Petition No. 22752 (W) of 2010

Dulal Chandra Sarkar and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4), 16(4A)
West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 — Section 4, 5

Citation : (2015) 04 CAL CK 0002

Hon'ble Judges : Tapabrata Chakraborty, J.

Bench : Single Bench

Advocate : Tarun Kumar Ray, Senior Advocate, Dinesh Chandra Nandi, Biplab Ranjan Bose and Arnab Ray, for the Appellant; Sushovan Sengupta, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Tapabrata Chakraborty, J.—This writ application has been preferred challenging, inter alia, the denial of the respondents to grant promotion to the petitioners in the posts of Upper Division Assistant (hereinafter referred to as UDA) in terms of the reservation policy of the State and the impugned denial of the respondents to follow the provisions of the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 (hereinafter referred to as the said Act of 1976) while granting promotion to the post of UDA and the primary reliefs as prayed for in the writ application are as follows:

a) A writ of and/or in the nature of mandamus commanding the respondent No. 2 to forthwith recall the orders being Nos. 176 and 177 dated 30th July, 2010 and 03rd August, 2010 respectively and consider the candidature of the petitioners No. 1 to 4 for giving promotion to the post of Upper Division Assistants in the 1st, 4th, 7th and 11th vacancy respectively in the lot of promotions sought to be given in the aforesaid orders being Nos. 176 and 177

with retrospective effect from 03rd August, 2010 in lieu of the private respondents No. 4, 7, 10 and 14;

b) A writ of and/or in the nature of mandamus commanding the respondents to pay arrear salary being the difference in salary and other emoluments payable to Upper Division Assistants and the salary and emoluments received by the petitioners at present, from 03rd August, 2010 till the date they are allowed to join the posts of Upper Division Assistants together with interest @ 12% per annum, if salary equivalent to the amount payable to Upper Division Assistants has not already been paid to the petitioners during the pendency of this proceeding.

2. Mr. Ray, learned senior advocate appearing for the petitioners submits that amongst the four petitioners, who have approached this Court, the petitioner Nos. 1, 3 and 4 belongs to Scheduled Caste community and the petitioner No. 2 belongs to Scheduled Tribe community. The petitioner Nos. 1 and 2 were initially appointed as Lower Division Assistant (hereinafter referred to as LDA) by an order dated 14th December, 1998 and the petitioner No. 3 was initially appointed as LDA by an order dated 30th September, 1999 and the petitioner No. 4, who was initially appointed in a Group- "D" post, availed promotion to the post of LDA by an order dated 20th January, 2005. Presently, all the petitioners are continuing in the cadre of LDA. However, by virtue of different administrative orders the petitioner Nos. 1, 2 and 3 are occupying the post of Bench Clerk-II and the petitioner No. 4 is occupying the post of Nazir.

3. He further submits that in compliance with the direction of the Hon'ble Supreme Court to implement the recommendation of the Justice Shetty Commission, the Secretary, Government of West Bengal, Judicial Department issued a memorandum dated 20th July, 2009, wherein it was inter alia stated as follows:

"... Governor has been pleased to decide to implement the following recommendations w.e.f. 01.04.2003:-

1) There will be three grades of Bench Clerks for the three levels of Courts namely:-

i) Bench Clerk-Grade-III, attached to the court of Civil Judge (Jr. Division/Magistrate).

ii) Bench Clerk-Grade-II, attached to court of Civil Judge (Sr. Divn./CJM/CMM).

iii) Bench Clerk-Grade-I, attached to District Court, Additional District Judge Court.

2) Mode of Recruitment

The Bench Clerks are to be appointed generally from the respective cadres in the service and not by restrictive channel of promotion from Bench Clerk Grade-III to Bench Clerk Grade-II and from Bench Clerk-II to Bench Clerk Grade-I. If

necessary, additional posts may be created.

i) Bench Clerk Grade-III

Appointment from the cadre of officials in the pay scale of Rs. 4000-8850/- (U.D. Assistants, Bench Clerk, Accountants) etc.

ii) Bench Clerk Grade-II

Appointment from the cadre of officials in the pay scale of Rs. 4500-9700 (Head Clerk-cum-Translators, Cashier and Accountants, Nazirs) etc.

iii) Bench Clerk Grade-I

By promotion from the cadre of Bench Clerk Grade-II/Head Clerk-cum-Translators, Cashiers, Accountants, Nazirs and appointment of Sheristedars of the court of Civil Judge (Jr. Divn.) to whom the pay scale of Rs. 4800-10925/- is recommended."

4. Drawing the attention of this Court to the averments made in the writ application, Mr. Ray submits that pursuant to the said memorandum dated 20th July, 2009 the respondent No. 2 passed two orders being Nos. 141 and 142 dated 28th June, 2010 identifying the posts to be designated in each of the three cadres and accordingly, 10 posts were identified under Bench Clerk Grade-I, 13 posts were identified under Bench Clerk Grade-II and 11 posts were identified in Bench Clerk Grade-III and that subsequent to such identification 13 persons in the list of UDA were first of all appointed to the post of Bench Clerk Grade-II and thereafter 10 amongst them were promoted to the post of Bench Clerk Grade-I since in the midst thereof three persons retired prior to promotion. Thus, 13 vacancies arose consequentially in the posts of Bench Clerk Grade - II, which were filled up by the respondent No. 2 from the incumbents then occupying the post of UDA, immediately below the aforesaid 13 persons in the gradation list and thereafter the next 11 incumbents in the post of UDA were promoted to the 11 vacant posts of Bench Clerk Grade-III, apart from two of such persons, who were notionally so promoted since they had already retired before the date of the order of promotion.

5. According to Mr. Ray, as a consequence of the memorandum No. 141 and memorandum No. 142 dated 28th June, 2010 (Pages 40 and 42 of WP), 13 vacancies arose in the cadre of UDA and the same were erroneously filled up by issuing an order No. 176 dated 30th July, 2010 (Page 46 of WP) as modified by a subsequent order No. 177 dated 3rd August, 2010 (Page 47 of WP) by ignoring the rightful claim of preferential promotion of the petitioners against the vacancies reserved for Scheduled Caste and Scheduled Tribe candidates as per 50-Point Roster detailed in schedule-II of the said Act of 1976.

6. It is the contention of Mr. Ray that while giving promotion from the post of LDA to the post of UDA (Page 47 of WP), the respondents had not followed the reservation policy, which is squarely applicable since the service conditions of the

said LDA and UDA are guided by the West Bengal Service Rules, as would be explicit from the appointment letters issued to the petitioners.

7. Drawing the attention of this Court to the provisions of Sections 4 and 5 and schedule - II of the said Act of 1976 and the memoranda dated 11th March, 1980, 27th March, 1990, 17th April, 1990 and 15th June, 1995 (pages 49 to 55 and 60 of WP), Mr. Ray submits that the said mandatory provisions towards reservation, while giving promotion to the posts of UDA have not been followed by the respondents.

8. According to him, the respondents have neither followed the roster nor the quota of vacancies earmarked for the reserved category candidates and had the reservation policy been followed, the petitioners would have been promoted against the 1st, 4th, 7th and 11th vacancy in place and stead of the respondent Nos. 4, 7, 10 and 14.

9. Drawing the attention of this Court to the gradation list pertaining to LDA cadre (Page 57 of WP), Mr. Ray submits that the incumbents at Serial Nos. 36 to 48 were promoted to the posts of LDA without following the reservation policy and the roster which earmarked the 1st, 4th, 7th and 11th vacancies for Scheduled Castes and Scheduled Tribes. Protesting against such illegalities, the petitioners made representation as would be explicit from the contents of Annexure "P11" and "P12" of the writ application but the same were not attended to.

10. In support of his contention, Mr. Ray has placed reliance upon a judgment delivered in the case of Vishwas Anna Sawant and others Vs. Municipal Corporation of Greater Bombay and others, .

11. Drawing the attention of this Court to the averments made in the affidavit-in-opposition filed by the respondent No. 2, Mr. Biswajit De, learned advocate appearing for the respondent No. 2 submits that the petitioners belonging to SC/ST community have been facilitated with the benefit of reservation at the time of their initial appointment and that as such the allegation to the effect that the reservation policy has not been followed by the respondents is absolutely unfounded.

12. According to Mr. De the respondent No. 2 has rightly passed the orders dated 30th July, 2010 and 3rd August, 2010 in consonance with the contents of the government order dated 20th July, 2010 issued towards implementation of the Justice Shetty Commission's recommendations and that the said Commission never recommended that reservation should be followed at the time of promotion or placement in the Bench Clerk Grade Nos. I, II and III.

13. He further submits that no reservation quota is required to be maintained for the purpose of promotion from the cadre of LDA to UDA. However, in support of such contention Mr. De has not been able to produce any material.

14. While dealing with the averments made in paragraphs 17 and 18 of the writ

application, the respondent No. 2 in paragraph 5 of the affidavit-in-opposition has stated that the petitioner Nos. 3 and 4 were subsequently posted to their appropriate posts in terms of an order No. 244-G dated 29th November, 2010 issued by the respondent No. 2 but no such memorandum has been placed before this Court and no argument as regards the said memorandum dated 29th November, 2010 has been advanced.

15. Placing reliance upon the averments made in the supplementary affidavit to the affidavit-in-opposition filed by the respondent No. 2, Mr. De has, inter alia, submitted that the government notification dated 27th March, 1990 (Page 49 of WP) has no manner of application in the facts of the instant case inasmuch as the petitioners are under the direct control of the District Judge.

16. Mr. De has further argued that the petitioners are not entitled to promotion which has been effected in strict consonance with the inter se seniority amongst the employees in the UDA cadre.

17. Though it has been averred in paragraph 5 of the said supplementary affidavit that the promotion has been effected according to seniority and in terms of "Government Order" but Mr. De has not been able to produce the said government order as referred to.

18. Records would reveal that all the 13 candidates who were promoted by the memorandum dated 3rd August, 2010 (Page 47 of WP) have been impleaded in the instant writ application inasmuch as the said respondents would be affected in the event relief is granted to the petitioners herein. In the midst of pendency of the writ application the petitioner No. 4 has expired and such fact has been brought on record through an affidavit filed by the petitioners.

19. Mr. Banerjee, learned advocate has appeared on behalf of the said private respondents and placing reliance upon the averments made in the affidavit-in-opposition filed by the said respondents, he submits that the reservation policy of the State Government is not at all applicable to the facts of the instant case and that since there is no change of nomenclature of the three Grades, reservation rules are not applicable and furthermore, the scale benefit which has been availed by the incumbent in the respective Grades is nothing but a financial upgradation to which the reservation policy of the State does not apply.

20. In support of his contention, Mr. Banerjee has placed reliance upon the following judgments:

- a) U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, .
- b) An unreported order passed in the case of West Bengal Court Employees Association-vs.-State of West Bengal and Ors. (W.P. No. 29700 (W) of 2014).

21. According to Mr. Ray, the contention of the respondent No. 2 to the effect that the reservation is applicable only at the stage of initial appointment and that the reservation norms are not required to be followed in case of promotion is

absolutely fallacious and contrary to the provisions of Section 5 of the said Act of 1976.

22. Mr. Ray further submits that the contention of Mr. Banerjee to the effect that there had been a grant of financial upgradation inter se the posts of Bench Clerk Grade-I, Bench Clerk Grade-II and Bench Clerk Grade-III and that in respect of such financial upgradation, the reservation policy of the State is not applicable, has no nexus with the petitioners' claim inasmuch as the grievance of the petitioners is that reservation policy has not been followed by the respondents while granting promotion to the posts of UDA to 13 incumbents in the gradation list.

23. Drawing the attention of this Court to the documents annexed in affidavit-in-reply to the opposition filed by the respondent No. 2, Mr. Ray submits that the reservation policy of the State Government in terms of the 50-Point Roster has been strictly adhered to by the respondents while issuing the order of promotion in other judgeships within the State and thus the respondents have acted arbitrarily and such action warrants interference of this Court.

24. According to Mr. Ray, the order dated 9th February, 2015 passed in the case of West Bengali Court Employees Association (Supra) is an interim order and is also distinguishable on facts and that as such the said order has no manner of application in the instant case.

25. I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

26. There is no dispute as regards the proposition that the right of an employee to be considered for promotion is a fundamental right (see 2011(6) Supreme 462 paras 25 and 28).

27. The rival facts presented by the warring litigants can be summarized as follows:

a) According to the petitioners the respondents have not followed the mandatory reservation provisions as contained in the said Act of 1976 while granting promotion to the post of UDA and as a consequence thereof the petitioners being the members of the reserved category have been deprived of the earmarked vacancies under 50-Point Roster applicable in respect of promotion.

b) According to the respondent No. 2 the promotion was a consequence of implementation of the recommendations of Justice Shetty Commission and that in respect of such promotion reservation norms are not required to be followed and furthermore the petitioners, having availed the benefits of reservation applicable at the juncture of their initial appointment are not in any manner entitled to avail in double benefit of reservation again at the time of promotion from the post of LDA to UDA.

c) According to private respondents the placement in the 3 Grades of Bench

Clerk pertains to financial upgradation in respect of which the reservation policy is not applicable and the private respondents have been rightly granted promotion to the post of UDA strictly in terms of the gradation list and that the right earned by them on the basis of their seniority cannot be curtailed through the application of the reservation norms.

28. No material has placed before this Court to establish the contention of the respondent No. 2 to the effect that the provisions of the said Act of 1976 are not applicable in respect of promotion to the post of UDA.

29. It has not been disputed by the respondents that in the event the provisions of reservation under the said Act of 1976 are applied, the petitioners are entitled to be placed in the 1st, 4th, 7th and 11th vacancies in terms of the 50-Point Roster. No explanation has also been given by the respondents to negate the specific contention of the petitioners to the effect that the respondents have practiced discrimination. Such discrimination as practiced by the respondents would be explicit from the documents annexed to the affidavit-in-reply to the opposition filed by the private respondents and the said documents clearly reveals that while granting promotion to UDA post the District Judge of Nadia had applied the reservation provisions.

30. The petitioners are holding posts sanctioned by the State Government and their service conditions are guided by the West Bengal Service Rules and accordingly the provisions of the said Act are squarely applicable to the said posts. No document exempting the application of the provisions of the said Act of 1976 in respect of the petitioners have been brought to the notice of this Court. Thus, while issuing the memorandum dated 3rd August, 2010 the respondent No. 2 ought to have followed the provisions of Section 5 of the said Act and ought to have promoted the petitioners in the 1st, 4th and 7th vacancies.

31. Prior to the Constitution (Seventy-Seventh amendment) Act, 1995, reservation in public employment was not permissible for the purpose of promotion. The said amendment has empowered the State to make provision for reservation in 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. The concept of double reservation as argued in the case of *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, has been overruled through insertion of Clause (4A) in Article 16 of the Constitution with effect from 17th June, 1995 and the said Clause (4-A) of Article 16 has already been upheld by the Constitution Bench of the Hon'ble Apex Court in the case of *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, observing, inter alia, that the said Clause (4A) of Article 16 is an enabling provision and it gives freedom to the State to provide reservation in the matters of promotion.

32. Mr. Banerjee has argued that at the time of preparation of gradation list the authority concerned has followed Article 16(4) and Article 16(4A) of the

Constitution of India and such list has been prepared after ensuring that there has been adequate representation of backward class of citizens and as such question of alteration of the said gradation list does not occasion. Such submission of Mr. Banerjee is absolutely fallacious inasmuch as the provisions of the said Act of 1976, though operative and applicable, were not followed by the respondents at the time of preparation of such gradation list.

33. The preamble of the said Act of 1976 runs as follows:

"An Act to provide for the reservation of vacancies in services and posts for the members of the Scheduled Castes and Scheduled Tribes.

Whereas the members of the Scheduled Castes and Scheduled Tribes who are backward classes of citizens are not adequately represented in the services and posts within the State;

And whereas it is expedient to provide for the reservation of vacancies in services and posts for them".

34. From the preamble it is thus explicit that the Act has been promulgated to ensure adequate representation of the backward class. Upon considering and ascertaining the elements of "backwardness" and "inadequacy of representation" the State by the said Act has provided for reservation both in respect of direct recruitment and also for promotion, without any compromise with the efficiency of administration. Furthermore, the respondents have not been able to show that the vires of the said Act had ever been challenged and has also not been able to establish that the said Act of 1976 runs contrary to the dictum in N. Nagaraj (Supra).

35. In the instant case, the provisions of the said Act of 1976 have not been taken into consideration by the respondents while issuing the impugned order No. 176 dated 30th July, 2010 and the order No. 177 dated 3rd August, 2010 and such non-observance of the statutory provisions has resulted in erroneous grant of promotion, which accordingly, needs to be rectified.

36. In the conspectus of the facts and the arguments advanced, I am of the opinion that the respondents have not followed mandatory provisions of the said Act of 1976 while granting promotion to the post of UDA and as a consequence thereof the petitioners have been deprived of promotion in the vacancies which are earmarked under the 50-Point Roster and they are entitled to be promoted to the 1st, 4th and 7th vacancy.

37. Accordingly, the respondents are directed to recall the orders being Nos. 176 and 177 dated 30th July, 2010 and 3rd August, 2010 respectively and to take immediate steps towards grant of promotion to the petitioner Nos. 1, 2 and 3 in the post of Upper Division Assistant pertaining to the 1st, 4th and 7th vacancy respectively in the lot of promotions sought to be given in the aforesaid orders being Nos. 176 and 177, with effect from 3rd August, 2010 in lieu of the private respondent Nos. 4, 7 and 10 and to grant all consequential benefits to the

petitioners with effect from 3rd August, 2010, within a period of 8 weeks from the date of communication of this order.

38. Needless to observe, the authorities would be at liberty to accommodate the private respondent Nos. 4, 7 and 10 in appropriate vacancies.

39. With the above observations and directions, the writ application is, accordingly, disposed of.

40. There shall, however, be no order as to costs.

41. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.