

(1975) 06 CAL CK 0026
In the Calcutta High Court
Case No : F.M.A. No. 93 of 1975

Haripada Ray

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-06-1975

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4), 335

Citation : 79 CWN 834

Hon'ble Judges : Sudhamay Basu, J;S.K. Mukherjea, J

Bench : Division Bench

Advocate : Somnath Chatterjee, S. P. Mazumdar and Sushanta K. Kundu, for the Appellant;Prasanta K. Ghose for Respondent No. 1, Suchit K. Banerjee and R.K. Mitra for Respondents Nos. 2 to 30, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mukherjea, J.—This appeal is directed against an-order made by M.M. Dutt J. on 31st July, 1974 by which. His Lordship discharged a Rule. By the Rule the petitioner, who is the appellant before us, challenged an order made by the Commissioners for the Port of Calcutta, who promoted the respondents Nos. 4 to 30, who were all Assistant Medical Officers to the rank of Senior Assistant Medical Officers. The petitioner is a member of a Scheduled Caste. He was employed in the service of the respondent No. 2. The Commissioners for Port of Calcutta as an Assistant Surgeon Grade II and subsequently promoted to the rank of Assistant Surgeon Grade I.

2. On April 26, 1971 the respondent No. 2 with the sanction of the respondent No. 1, Union of India, resolved that Assistant Surgeons were to be divided, into two categories, i.e., Assistant Medical Officers and Senior Assistant Medical Officers. In pursuance of the said decision, 27 posts in the medical department were placed in the higher category of Senior Assistant Medical Officers. The petitioner claimed that as a member of a Scheduled Caste he was entitled to the benefit of reservation of appointments and posts in the service of the respondent

No. 2 by virtue of resolution No. 1790 dated December 29, 1958.

3. By the said resolution, the respondent No. 2 decided to reserve 12 1/2% and 5% of vacancies in all their services for Scheduled Caste and Scheduled Tribe candidates in respect of Class I and Class II posts. By another resolution dated May 24, 1971 the percentage of vacancies reserved for Scheduled Caste and Scheduled Tribe candidates was raised to 15% and 7 1/2% respectively. The said resolution were duly sanctioned by the Government of India u/s 31 of the Calcutta Port Act.

4. By resolution No. 725 dated May 24, 1971 the respondent No. 2 directed that the respondents Nos. 4 to 30 be promoted to the said 27 posts of Senior Assistant Medical Officers, which had been upgraded in pursuance of the decision taken by the respondent No. 2. The petitioner was aggrieved by the said order and challenged the same as illegal, inter alia, on the ground that his claim for promotion to one of those 27 posts on the basis of reservation made in favour of Scheduled Caste candidates under resolution No. 1790 dated December 29, 1958 has been ignored. It was contended on behalf of the respondents that the said resolution did not apply to those vacancies which were filled up by promotion and reservation made in favour of Scheduled Caste and Scheduled Tribe candidates is applicable only to initial appointments, or in other words, under the resolution in question, reservation has been made only in respect of vacancies which are to be filled up by direct recruitment. The learned Judge took the view that if the reservation of posts for Scheduled Caste and Scheduled Tribe candidates were intended to have been made for posts which are to be filled up by promotion, that intention should have been clearly expressed in the resolution. He found that there is no specific indication in the recommendation of the Chairman or in the resolution itself of such an intention. He pointed out that it was not the case of the petitioner that his earlier promotion to the post of Assistant Surgeon Grade I was inspired by the resolution. The learned Judge was right in saying that the petitioner had nowhere stated that the earlier promotion was made on the basis that he was a member of a Scheduled Caste, but it transpires from the records that that was one of the considerations which was responsible for his promotion. In fact, at page 118 of the paper book there is a note given under the signature of Mr. D.B. Sen, the Chief Medical Officer, which says "As Dr. Mirdha is suitable for holding the post, I recommend that his application be favourably considered for one post of Asst. Surgeon Gr. I which is reserved for a Scheduled Caste candidate." Incidentally, the petitioner was formerly known by the name of Dr. Haripada Mirdha. It is necessary to state here that this note which is dated 14th December, 1959 was disclosed in an application made before the Appellate Court and was not a part of the records of proceedings in the court below.

5. The main question, if not the only question, which has to be decided in this appeal, is whether on a proper construction of resolution No 1790, reservations have been made for Scheduled Caste and Scheduled Tribe candidates in respect of vacancies in posts which are to be filled up by promotion and not by direct

recruitment. The resolution speaks of reservation of 12 1/2% and 5% of vacancies in all the services of the Commissioners for the Port of Calcutta for Scheduled Caste and Scheduled Tribe candidates. The resolution does not make any exception in respect of posts or offices which are or may be filled up by promotion. The words "all the services", in our opinion, mean all posts or all offices. It is therefore, not proper to make a distinction between vacancies in posts which are filled up by direct recruitment and those which are filled up by promotion. The language of the resolution is of the widest amplitude and ought to be given its ordinary signification. In this connection reference may be made to Article 16(4) of the Constitution which provides as follows :

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

6. In our opinion, the use of the words "appointments or posts" clearly indicates that the Article contemplates not only initial appointments but also offices or posts to be filled up by promotion. The use of the disjunctive between "appointments" and "posts" shows that the two words are not to be read synonymously. If reservation in respect of those offices which are filled up by any mode other than direct recruitment is warranted by Article 16(4), as we think it is, then it is possible to make reservation in respect of promotion posts or selection grade posts.

7. In *The General Manager, Southern Railway Vs. Rangachari*, , *Gajendragadkar*, J. speaking for the majority observed :

We must in this connection consider an alternative argument that the word "posts" must refer not to selection posts but to posts filled by initial appointments. On this argument reservation of appointments means reservation of certain percentage in the initial appointments and reservation of posts means reservation of initial posts which may be adopted in order to expedite and make more effective the reservation of appointments themselves. On this construction the use of the word "posts" appears to be wholly redundant. In our opinion, having regard to the fact that we are construing the relevant expression "reservation of appointments" in a constitutional provision it would be unreasonable to assume that the reservation of appointments would not include both the methods of reservation, namely, reservation of appointments by fixing certain percentage in that behalf as well as reservation of certain initial posts in order to make the reservation of appointments more effective. That being so, this alternative argument which confines the word "posts" to initial posts seems to us to be entirely unreasonable. On the other hand under the construction by which the word "posts" includes selection posts the use of the word "posts" is not superfluous but serves a very important purpose. It shows that reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may fall to be filled by employees

after their employment. This construction has the merit of interpreting the words "appointments" and "posts" in their broad and liberal sense and giving effect to the policy which is obviously the basis of the provisions of Art. 16(4). Therefore, we are disposed to take the view that the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts.

8. The question arises whether reservation has been made by the relevant resolution in respect of posts which are to be filled up by promotion and not by direct recruitment. The resolution has not used the words "appointments or posts." The respondent No. 2 has made reservations by the resolution for Scheduled Caste and Scheduled Tribe candidates in respect of vacancies in all their services. In our opinion, it will be legitimate to equate "all their services" in the resolution with all their "appointments or posts" in Clause (4) of Article 16 of the Constitution. In that view of the matter, it must be held that the petitioner was entitled to claim the benefit of the resolution as a member of a Scheduled Caste in the matter of appointment to one of the posts of Senior Assistant Medical Officers. It is not in dispute that the Commissioners for the Port of Calcutta, in making appointment to those posts, have not acted on the basis of any reservation made by the resolution in question in favour of Scheduled Casts and Scheduled Tribe candidates.

9. It appears that out of the 27 higher posts, i.e., the posts of Senior Assistant Medical Officers, the incumbents of 10 posts are required to possess special qualifications and experience.

Those are:

- (1) Officer-in-Charge, Eye Clinic, New Hospital,
- (2) Radiologist, New Hospital,
- (3) Pathologist, New Hospital,
- (4) Anaesthetist, New Hospital,
- (5) Officer-in-Charge, Chest Clinic, Dock Hospital,
- (6) Officer-in-Charge, Eye Clinic, Dock Hospital,
- (7) Radiologist, Dock Hospital,
- (8) Pathologist, Dock Hospital,
- (9) Dental Surgeon,
- (10) Health Officer.

10. The petitioner does not claim that he possesses special qualifications which are required in respect of any of these 10 posts. No question therefore arises as

regards his appointment to any of these posts. We are, therefore, not disposed to disturb the appointments which have been made to these posts. As regards the other 17 posts of Senior Assistant Medical Officers, we are of the view that the appointments to those posts in disregard of the reservation made in favour of the Scheduled Caste and Scheduled Tribe candidates under the resolution dated 17th December, 1956 cannot be sustained and must be set aside. We therefore quash the order of appointment to the posts of Senior Assistant Medical Officers except as regards the incumbent of the aforesaid 10 posts which are specified in Annexure "G" to the petition and printed at page 27 of the paper book. Needless to say that the respondent No. 2, will be at liberty to make fresh appointments to those 17 posts by direct recruitment or by promotion as the Rules or the practice might require, but in doing so they will act on the basis of reservation for Scheduled Caste and Scheduled Tribe candidates made by the resolution dated the 17th December, 1956, the resolution dated the 24th May, 1971 and any further resolution. Needless to say that the respondent No. 2, the Commissioners for the Port of Calcutta will consider the application or claim of the petitioner on the basis that he is a member of the Scheduled Caste and reservation has been made for Scheduled Caste candidates. In considering his claim the respondent No. 2 will, however, have due regard to the maintenance of efficiency of administration of their medical services, as is enjoined by Article 335 of the Constitution.

11. In the view we have taken, the appeal is allowed. The order of the learned Judge is set aside and the Rule is disposed of in the manner indicated above. In the facts and circumstances of the case we make no order as to costs. On a prayer made by the learned Advocate Mr. Suchit Kumar Banerjee, appearing on behalf of the respondents Nos. 2 to 30 the operation of the order is stayed for a period of eight weeks from date. During the time the order for stay remains in force, the respondent No. 2 is directed to maintain status quo with regard to the 17 posts of Senior Assistant Medical Officers referred to in the judgment.

Sudhamay Basu, J.

I agree.