

(1997) 07 AHC CK 0015

In the Allahabad High Court

Case No : Special Appeal No's. 110, 111 and 115 of 1991

High Court of Judicature

APPELLANT

Vs

Raj Kumar and Others

RESPONDENT

Date of Decision : 17-07-1997

Acts Referred:

Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 — Rule 23
Constitution (Seventy-Seventh Amendment) Act, 1995 — Section 6(1)
Constitution of India, 1950 — Article 16(4), 229

Citation : (1997) AWC 489 Supp

Hon'ble Judges : R.A. Sharma, J;D.K. Seth, J

Bench : Division Bench

Advocate : K.B. Mathur and S.C, for the Appellant; B.D. Mandhyan, for the Respondent

Final Decision : Allowed

Judgement

R.A. Sharma, J.—Respondent No. 1 in these appeals is Upper Division Assistant and Respondents No. 2 to 9 are Lower Division Assistants in the establishment of the High Court at Allahabad. They filed Writ Petition No. 1834 of 1991 before this Court for writ of mandamus, commanding the Hon'ble Chief Justice and the Registrar of the High Court to extend the benefits of reservation in the matter of promotions to them, who are members of Scheduled Castes and Scheduled Tribes. Promotions with retrospective effect on the basis of reservation were also claimed. This writ petition was allowed by the learned single Judge on 10.10.1991. directing the Respondents therein, namely, Hon'ble Chief Justice and the Registrar of the High Court to extend the benefits of reservation in the matter of promotions to various categories of Class HI and Class IV posts. Further direction to Hon'ble Chief Justice to issue an order under Rule 23 of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 extending the benefits of reservation to the members of Scheduled Castes and Scheduled Tribes in the matter of recruitment to Class I and Class II

posts was also issued. Being aggrieved by the said judgment of the learned single Judge, the High Court has filed Special Appeal No. 115 of 1991. Against the same judgment of the learned Judge, Special Appeal No. 110 of 1991 has been filed by five employees of the High Court. The third Special Appeal No, 111 of 1991 has also been filed by twenty five other employees of this Court. All these appeals were admitted and have been consolidated. This Court has also passed an interim order on 28.10.1991 in Special Appeal No 110 of 1991, staying the operation of the aforesaid judgment of the learned single Judge.

2. The Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 (hereinafter referred to as the Rules) have been framed by the Hon"ble Chief Justice in exercise of powers conferred by Clause (2) of Article 229 of the Constitution of India. These rules have laid down the strength of the establishment of the court, source, modes and method of recruitment to various posts in Classes I, II, III and IV. Rule 23, which contains the provisions for reservation is reproduced below:

23. Reservation for Scheduled Castes, etc.--Reservation for recruitment to the various categories of posts in the establishment in favour of the Scheduled Castes and Scheduled Tribes and from among disabled (Military) personnel and dependents of freedom fighters shall be in accordance with the orders issued by the Chief Justice from time to time, having due regard to the orders issued by the Governor from time to time on the subject.

The Hon"ble Chief Justice passed the following order dated 29.8.1977 under Rule 23 providing for reservation:

In supersession of all earlier orders made in this behalf, it is hereby ordered the reservations are made for Class III and Class IV posts in the Establishment of the High Court as detailed below.

If sufficient number of suitable candidates belonging to Scheduled Tribes are not available at any recruitment the number of posts reserved for them and not filled shall be added to the number of posts reserved for Scheduled Castes at that recruitment.

If sufficient number of suitable candidates belonging to Scheduled Castes are not available at any recruitment, the number of posts reserved for them (including the number of entitled posts added from the reserved posts for Scheduled Tribes) and not filled, shall be added to the number of posts reserved for Backward Classes at that recruitment.

If sufficient number of suitable candidates belonging to any of the categories Nos 3, 4 and 5 specified below, are not available at any recruitment, the number of posts not filled shall be treated as unreserved at such recruitment.

	Class III	Class IV	1.
Scheduled Castes	*25%	30%	**

2. Scheduled Tribes 2% 2%
3. Physically handicapped persons 2% 2%
4. Dependent of Freedom Fighters 3% 3%
5. Disabled Military personnels and Emergency Commissioned/ Short -Service Commissioned Officers and Ex military personnels 2% 3%
6. Backward Class 15% 10%

* 25% till their representation reaches 18%

** 30% till their representation reaches 18%

Sd/-

Dated 29.8.1977. D. M. Chandrashekhar Chief Justice

By the above order, the Hon"ble Chief Justice has provided for reservation in recruitment to Class III and Class IV posts. There is no provision for reservation in the matter of promotion.

3. The learned single Judge held that as the word "recruitment" includes appointment by promotion, the order of the Hon"ble Chief Justice dated 29.8.1977 will also apply to appointments made by promotion. While holding as above, the learned Judge also relied upon the last two lines of Rule 23, according to which while making reservation, the Hon"ble Chief Justice will have "due regard to the orders issued by the Governor from Lime to time on the subject". The learned Judge accordingly held that as the Governor has issued orders from time to time giving benefit of reservation to backward class of citizens in the matter of promotion, the Respondents, namely, Hon"ble the Chief Justice and the Registrar of this Court have to give the similar benefit to them.

4. We have heard the learned Counsel for the parties.

5. It has been settled by the Supreme Court that Article 16(4) of the Constitution is an enabling provision conferring discretionary power on the State to provide for reservation; but it neither confers any fundamental right to reservation on any person nor does it cast any duty on the Government to make reservation. In this connection, reference may be made to a recent decision of the Supreme Court in State Bank of India Scheduled Caste/Tribe Employees Welfare Association and another Vs. State Bank of India and others, , wherein it was laid down as under:

Article 16 (4) enables the Government to make reservations for Scheduled Castes and Scheduled Tribes either at the initial stage of recruitment or at the stage of promotion. This Court in the case of C.A. Rajendran Vs. Union of India (UOI) and Others, , has stated that Article 16(4) does not confer any right on the Petitioner and there is no constitutional duty imposed on the Government to

make such a reservation. Article 16(4) is an enabling provision and confers a discretionary power on the State to make reservations either at the stage of the initial recruitment or at the stage of promotion in favour of a backward class of citizens which in its opinion, is not adequately represented in the service of the State.

The same view has been reiterated by this Court in the case of *P and T Scheduled Caste/Tribe Employees' Welfare Association (Regd.) and Others Vs. Union of India (UOI) and Others*, .

6. Rule 23, like Article 16 (4) of the Constitution, is an enabling provision giving discretion to Hon'ble Chief Justice to provide for reservations. It is for the Hon'ble Chief Justice to make or not to make reservations under Rule 23. Reservation is a matter, which has to be decided on the basis of several factors, such as, nature of the job, requirement of maintenance of efficiency, and in adequacy of representation of backward class of citizens in the service. Reservation cannot be claimed and granted as a matter of course. The powers of the Hon'ble Chief Justice, being purely discretionary, no mandamus can be issued, directing his Lordship to pass an order making reservation in favour of any caste or class of persons. The learned single Judge was, therefore, not justified requiring the Hon'ble Chief Justice to make order under Rule 23 for reservation in the matter of appointments to Class I and Class II posts in the establishment of the High Court.

7. It is true that while passing an order under Rule 23 providing for reservation, Hon'ble Chief Justice is to give due regard to the orders issued by the Governor from time to time on the subject. But this does not mean that the orders issued by the Governor on the subject of reservation become binding on the Hon'ble Chief Justice. The expression such as "having regard to" and "regard may be had" are not mandatory words. Supreme Court in *The State of Karnataka and Another Vs. Shri Ranganatha Reddy and Another*, . while considering the phrase "having regard" has laid down as under:

It is worthwhile to quote a few words from the judgment of Fletcher Moulton, L.J. at page 458. Under the Phrase "Regard may be had to" the facts which the Courts may thus take cognizance of are to be "a guide, and not a fetter". This Court speaking through one of us (Beg K., as he then was), has expressed the same opinion in the case of *Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI)*, . Says the learned Judge at p. 959 (of SCR) : (at page 462 of AIR). "The expression" having regard to" only obliges the Government to consider as relevant date material to which it must have regard.

The arbitrator, therefore, reading Section 6(1) as a whole is not obliged to fix the amount as specified in the Schedule. But he has to fix the amount which appears to him just and reasonable on the totality of the facts and circumstances keeping primarily in mind the amount mentioned in the Schedule.

The order issued by the Government as regards reservation in the Government

service cannot be binding on the Hon''ble Chief Justice. They can be used only as guidelines. Therefore, merely because the Government has provided for reservation in the matter of promotion, the Hon''ble Chief Justice is not bound to make the similar reservation for appointment in the establishment of the High Court.

8. The Hon''ble Chief Justice vide order dated 29.8.1977 has made reservation at the requirement stage and no provision for reservation in the appointments by promotion has been made. On 18.1.1978, the Hon''ble Chief Justice passed an order that "in the High Court Ministerial Service, reservation is made at the stage of initial recruitment and not at the stage of promotion". The said order of the Hon''ble Chief Justice has been quoted both in the counter and supplementary counter-affidavits filed on behalf of the High Court. In para 3 (c) of the counter-affidavit, it has further been stated that the question of reservation in the matter of promotion was considered on several occasions and it was always held that the reservation is to be applied at the stage of initial recruitment and not to be extended to promotion. Supreme Court in *Indra Sawhney v. Union of India* JT 1992 (6) SC 263, has held that reservation of appointment or post under Article 16(4) of the Constitution is confined to initial appointment only and it cannot be extended to the appointment by promotion. Even if the word "recruitment" includes appointment by promotion, the question of extending the benefit of reservation in the matter of promotion does not arise for the following two reasons:

(i) Hon''ble the Chief Justice has himself held and clarified that the reservation is not to be given in the matter of promotion; and

(ii) the Supreme Court in *India Sawhney*'s case has held that the reservation can be made at the stage of initial recruitment and not at the stage of promotion.

9. In support of the judgment of the learned single Judge, the learned Counsel for the Petitioners Respondents has placed reliance on *Commissioner of Commercial Taxes, A.P. Hyderabad and another Vs. G. Sethumadhava Rao and others*, . In that case, the Supreme Court observed that although in *Indra Sawhney v. Union of India*, (1992) 6 SCR 321 , it was held that reservation of appointment or post under Article 16(4) of the Constitution is confined to initial appointment only and it cannot be extended so as to provide reservation in the matter of promotion; but in view of the 77th Constitution Amendment Act, 1995, whereby Clause (4A) was added to Article 16(4), the position has changed giving power to the State to make provision for reservation in the matter of promotion in favour of Scheduled Castes and Scheduled Tribes. The Supreme Court accordingly held that "It would thus be clear that as a principle of law. rule of reservation can apply not only to initial recruitments but also in promotions where the State is of the opinion that Scheduled Castes and Scheduled Tribes are not adequately represented in promotional posts in class or classes of service under the State." Supreme Court in the above case has not laid down that after 77th Constitutional Amendment, the reservation in the matter of promotion in

favour of Scheduled Castes and Scheduled Tribes must be made or must be presumed to have been made in every case. Clause (4A), like Clause (4), of Article 16(4) of the Constitution is an enabling provision giving power to the State to make reservation in the matter of promotion in favour of Scheduled Castes and Scheduled Tribes. As held hereinbefore, no mandamus can be issued to Hon''ble the Chief Justice to pass orders providing for reservation.

10. In the instant case, the order dated 29.8.1977 passed by the Hon''ble the Chief Justice has provided for reservation at the recruitment stage and no provision for reservation in the matter of promotion has been made. In a subsequent order passed in 1978 referred to hereinbefore, Hon''ble the Chief Justice has categorically laid down and clarified that in the establishment of the High Court, reservation has been made only at the initial recruitment and there is no reservation in the matter of promotion. In Chief Justice and the position of law as explained above, the writ petition filed by Respondent Nos. 1 to 9 is liable to be dismissed.

11. These appeals are accordingly allowed. The impugned judgment of the learned single Judge is set aside. Writ Petition No. 1834 of 1991 is dismissed. In view of the facts and circumstances of the case, there shall be no order as to costs.