

(2011) 11 SHI CK 0192
In the High Court Of Himachal Pradesh
Case No : CWP No. 6640 of 2010

Krishan Chand

APPELLANT

Vs

Dr. Y.S. Parmar University and another

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Citation : (2011) 11 SHI CK 0192

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—Brief facts necessary for the decision of the case are that the petitioner, who is working as a Research Associate in the department of Silviculture and Agro Forestry of Dr.Y.S.Parmar University of Horticulture and Forestry, Nauni (hereinafter referred to as the University) has prayed that the appointment of respondent No.2 to the post of Assistant Professor be set-aside and the University be directed to reserve the post for scheduled castes and scheduled tribes candidates.

2. The respondent No.1 University issued an advertisement on 17.08.2007 inviting applications for filling up the posts of Assistant Scientist/Assistant Professor in various departments. The petitioner, who is otherwise duly qualified, applied for the said post. On 15.11.2008 the petitioner made a representation to respondent No.1 stating that the University had not followed the reservation roster and some of the posts should have been reserved for the scheduled castes and scheduled tribes candidates as per the roster. The petitioner appeared in the interview and was not selected. He made a complaint to the National Commission for Scheduled Castes, which called for the records and finally the petitioner filed the present petition praying that the appointment of respondent No.2 be set-aside and a writ of mandamus be issued directing the respondent-University to fill up roster point No. 7 and 15 in the department of Silviculture and Agro Forestry from the candidates belonging to the scheduled caste category.

3. The undisputed facts are that there are 18 posts of Assistant Professor or equivalent in the department of Silviculture and Agro Forestry. It is also not disputed that if the reservation roster is applied then posts at Sr. No. 7 and 15 were to be reserved for scheduled castes and the post at Sr. No. 14 for scheduled tribes. The whole dispute is that the petitioner claims that since these posts have not been filled in by scheduled caste candidates the next available post should have been reserved for scheduled caste candidates. The stand of the University on the other hand is that plotting has been done and persons allotted their slots and scheduled caste candidates can only be considered for appointment when the persons who have been slotted at Sr.No. 7 and 15 of the roster vacate their posts.

4. Shri Ajay Mohan Goel, learned counsel for the petitioner submits that the manner in which the University is interpreting the rules is totally illegal and violative of the provisions relating to reservation of posts. He submits that if the interpretation given by the University is accepted to be correct then the Scheduled Caste and Scheduled Tribe candidates will have to wait for a very long time to get these posts. According to him it is only once adequate number of scheduled caste candidates are in position then the concept of replacement will come into place.

5. On the other hand Shri Onkar Jairath, learned counsel for the University contends that the University is acting strictly in accordance with the instructions given in this behalf by the State Government and the University Grants Commission (UGC) and only when the general category persons who have been adjusted against the slots meant for scheduled caste candidates vacate their posts then the Scheduled Caste candidate can be appointed. His submission is that once the post reserved for scheduled caste has been utilized by the general category candidate the theory of replacement as propounded in R.K. Sabharwal and others Vs. State of Punjab and others, will come into operation and this is what the University is doing.

6. From the material placed on record it appears that the University vide resolution dated 3rd May, 1988 adopted the guidelines issued by the UGC regarding reservation for scheduled caste and scheduled tribe candidates. At that time the UGC had not prescribed any reservation as such but had only indicated that if suitable candidates belonging to schedule castes and schedule tribes were available preference would be given to them. No reservation roster was required to be maintained at that time.

7. Thereafter on 21st May, 1994 the UGC issued fresh guidelines and on 12th January 1995 the University approved the adoption of 40 point roster providing for 15% reservation for scheduled castes and 7.5% for scheduled tribes. The roster being followed by the State was followed by the University. The UGC in its letter dated 20th November, 2006 also directed the University to follow the reservation policy of the concerned State Government, which recommendations were adopted by the University. The University has now even provided

reservation for disabled and other backward classes.

8. The whole dispute revolves around the instructions issued by the State Government on 20th August, 1998. These instructions were issued pursuant to the judgement of the Apex Court in R.K.Sabharwal's case (supra) wherein it was held that reservation of jobs for backward classes, scheduled castes, scheduled tribes, etc. would apply to posts and not to vacancies. The relevant portion of the instructions read as follows:

2. The Constitution Bench of the Supreme Court in the case of R.K. Sabharwal v. State of Punjab as well as J.C. Mallick v. Ministry of Railways has held that the reservation of jobs for the backward classes SC/ST/OBC should apply to posts and not to vacancies. As per the direction of the Court the vacancy bases rosters can operate only till such time, the representation of persons belonging to the reserved categories, in a cadre, reaches the prescribed percentages of reservation. Thereafter, the rosters cannot operate and vacancies released by retirement, resignation, promotion etc. of the persons belonging to the general and the reserved categories are to be filled by appointment of persons from the respective category so as to maintain the prescribed percentage of reservation.

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6. At the stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help in identifying the excesses shortages, if any, in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark "utilized by SC/ST/OBC/Gen. etc." as the case may be against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to reservation) are not to be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments.

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10. The roster is to be operated on the principle of replacement and not as a running account as hitherto. In other words, the points at which reservation for different categories applies are fixed as per the roster and vacancies caused by retirement etc. of persons occupying those points shall be filled by appointment of persons of the respective categories.

11. While operating the roster, persons belonging to communities for whom reservation has been made but who are appointed on merit and not owing to reservation, should not be shown against reserved points. They will occupy the unreserved points.

12. In the case of small cadres (upto 13 posts) all the posts shall be earmarked on the same pattern as in the model post bases rosters. Initial recruitment against these posts shall be by the category for which the post is earmarked.

Replacement of incumbents of posts shall be by rotation as shown horizontally against the cadre strength as applicable. While operating the relevant roster, care will have to be taken to ensure that on no occasion the percentage of reserved category candidates exceed 50%. If such a situation occurs at any time, the relevant reserved point occurring as a result of rotation will be skipped.

INITIAL OPERATION:

1. AT the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-à-vis the points earmarked for each category viz. SC/ST/OBC and General in the roster. This may be done by plotting the appointments made against each point of roster starting with the earliest appointee. Thus, if the earlier appointee in the cadre happens to be a candidate belonging to the Scheduled Castes, against point No.1 of the roster the remark "utilized by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilized by general category" shall be made against point NO.2 and so on and so forth till all appointments are adjusted in the respective roster. In making these adjustments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates.

2. After completing the adjustment as indicated above, a tally should be made to determine the actual percentages of representation of appointees belonging to the different categories in the cadre. If there is an excess representation of any of the reserved categories, or if the total representation of the reserved categories exceeds 50% it shall be adjusted in the future recruitment. Vacancies arising from retirement etc. of candidates belonging to such categories shall be filled by appointment of candidates belonging to the categories to which the relevant roster points against which the excesses occur belong.

3. Since recruitment is generally vacancy based, it may happen that the actual number of promotees and direct recruits in the cadre does not correspond to the number of posts earmarked in the respective reservation roster. For the purpose of calculations of representation of reserved category in a cadre, total of promotees and direct recruits may be taken. Rectification of the representation as per prescribed percentage by the prescribed mode of recruitment at the earliest possible should however be the goal.

9. Since there are only 18 posts in the cadre as pointed out above, the posts at Sr. No. 7 and 15 were to be reserved for scheduled castes and post at Sr. No. 14 was to be reserved for scheduled tribe. In compliance with the instructions of the Government, the University prepared a Chart showing all the persons appointed against the post of Assistant Professor right from the very beginning and allotted various slots to them. It is not disputed that there is only one scheduled caste Assistant Scientist and he has come in on his own merit and therefore in accordance with the judgement of the Apex Court he has to be treated as an unreserved candidate. The stand of the University that the seat can be reserved

for scheduled castes candidate only when the incumbents at Sr. No. 7 and 15 vacate their posts cannot be accepted and in my opinion is totally contrary to the law laid down by the Apex Court in R.K.Sabharwal's case. It would be pertinent to mention that in R.K.Sabharwal's case no doubt the Apex Court held that reservation should be post based and not vacancy based. The following observations of the Apex Court are very relevant:

5... When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account " is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.

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...The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at Roster-points 1, 7, 15, retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

10. The aforesaid judgement clearly shows that the Apex Court itself held that the roster will continue to apply till adequate representation is given to the scheduled castes. It is only after adequate representation has been given that the principle and theory of replacement shall come into force. In the present case in a 18 post cadre two posts were to be reserved for scheduled castes and one for scheduled tribe candidates. It is only after there is adequate representation to the reserved categories i.e. people from the scheduled castes actually man the posts at Sr. No.7 and 15 that the theory of replacement will come into force but not prior to that.

11. This case is a glaring instance where there is no scheduled caste or scheduled tribe candidate appointed in the cadre, against a reserved vacancy. The department wants that the scheduled caste and scheduled tribe candidates should wait for their turn till the general category candidate appointed against the slot meant for the scheduled caste & scheduled tribe vacate their posts. It is not disputed that under the 40 point or 100 point roster system, in case a post

meant for scheduled caste and scheduled tribe was not filled in then the same has to be carried forward and in the next year the post is again to be reserved. The University has not followed this system on the pretext that as per the instructions of the Government only the replacement theory has to be followed. I am of the considered view that this interpretation of the University is totally illegal and not at all in consonance with the judgement of the Apex Court rendered in R.K.Sabharwal's case. The judgement itself clearly indicates that the roster can operate till the representation of the persons belonging to the reserved categories reaches the prescribed percentage of reservation. It is only thereafter that the roster shall cease to operate and vacancy released by retirement, promotion etc. of general and reserved categories are to be filled in by appointment of persons from the respective categories i.e. by replacement so as to maintain the prescribed percentage of representation. This principle of replacement will not apply when the required percentage of reservation has not been reached.

12. Therefore, there is merit in the contention of the petitioner. However, I am of the considered view that the appointment of respondent No.2 cannot be set-aside at this stage since the petitioner did not approach this Court for grant of relief when the advertisement was issued. He took a chance to appear in the interview and after he was not selected he waited for more than a year before filing the present petition. Therefore, while allowing the petition and holding that till adequate number of reserved category candidates are not recruited the University shall not follow the principle of replacement and shall carry forward the post(s) meant for scheduled castes and scheduled tribes, the appointment of respondent No.2 is not being set-aside.

13. In view of the above discussion, the writ petition is partly allowed and it is directed that in future the respondent-University shall ensure that it gives due reservation to candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, etc. as per the reservation roster and shall not follow the principle of replacement till the representation of candidates belonging to reserved categories reaches the prescribed percentage of reservation. The petition is disposed of accordingly. No order as to costs.