

(1990) 01 PAT CK 0006

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 380/89

Md. Fasih Ahmad

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 06-01-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 15(1), 15(4), 16(2), 16(4)

Citation : (1990) 1 PLJR 32

Hon'ble Judges : B.P. Singh, J

Bench : Single Bench

Advocate : Chandramauli Kr. Pd., Nand Kishore Pd. Sinha, Bipin Kr. Sinha and Sujeet Kumar Sinha, for the Appellant; J.N.P. Sinha, Nirmal Kr. Sinha, L.S. Sinha and Birendra Singh, for the Respondent

Final Decision : Allowed

Judgement

B.P. Singh, J.—The Petitioner herein has challenged the notification dated 28.4.1988, Annxc-3, issued by the Director, Mines and Geology, Government of Bihar, Respondent No. 2 herein, promoting Lal Babu Rajak, Respondent No. 3, to the post of Senior Selection Grade Typist (Head typist) by application of the principle of reservation. The grievance of the Petitioner is that he was senior to the aforesaid Respondent No. 3 and despite this fact, his case was not considered for promotion in the post reserved for a Selection Grade Typist whereas Respondent No. 3 who was junior to him has been promoted in that post treating it as a post reserved for a member of the scheduled caste. According to the Petitioner, there is only one post of Senior Selection Grade Typist (Head typist) and hence it is not permissible in law to treat the same as reserved for members of the scheduled castes and scheduled tribes.

2. The relevant facts of the case are not in dispute. The Petitioner claims that he was appointed as a typist on the 2nd of May, 1964 in the department of Mines & Geology. Similarly Respondent No. 3 joined the post of typist in the same department on 13.12.1965. Obviously, therefore, Respondent No. 3 was junior to

the Petitioner. In the seniority list published in the month of September, 1977, the name of the petitions appeared at serial No. 5; whereas the name of Respondent No. 3 appeared at serial No. 10. By order dated 11.10.1982, the Petitioner as well as Respondent No. 3 were promoted as Head typist. The promotion granted to Respondent No. 3 was on the basis of reservation; whereas the Petitioner was promoted in normal course in the regular category. However, since the Petitioner was senior to Respondent No. 3 and both were promoted simultaneously as Head typist, the Petitioner maintained his seniority over Respondent No. 3. Subsequently by order dated 1.5.1980, the Petitioner as well as Respondent No. 3 were simultaneously promoted to the post of junior selection grade typist. The Petitioner claims that he maintained his seniority in the grade of junior selection grade typist as well. The grievance of the Petitioner is that despite the fact that the Petitioner was always senior to Respondent No. 3, by the impugned order dated 28th April, 1988, Respondent No. 3 was promoted to the post of Senior Selection Grade Typist treating the said post as reserved for being filled up by promotion of a member belonging to the scheduled caste. The Petitioner has contended, and this has not been disputed in the counter affidavit filed in behalf of the Respondents, that there is only one post of Senior Selection Grade Typist, and further that this post can be filled up only by promotion and not by direct recruitment. The post had fallen vacant because of the promotion of one Krishna Deo Pandit who was a Senior Selection Grade Typist but was promoted to the post of Superintendent (Typist) by order dated 28th April, 1988. The contention of the Petitioner is that the post of Senior Selection Grade Typist being only one, the State has no authority to fill up the said post by treating it as a reserved post for the benefit of members of the scheduled castes or tribes. Since the State has treated the post as reserved, it has acted in violation of Articles 14 and 16 of the Constitution of India. The Petitioner represented before Respondent No. 2 when he came to know about the fact that Respondent No. 3 was going to be promoted treating the post as reserved, but, despite his representation, the impugned order promoting Respondent No. 3 was passed treating the post as reserved. Even thereafter, the Petitioner represented, but, received no response from the State of Bihar.

3. I may only mention that according to the Petitioner the post of Senior Selection Grade Typist had fallen vacant for the fifth time. According to 50 point roster, the appointment for the fifth time should have been treated as unreserved. On the other hand, Respondents contend that the post had fallen vacant for the third time. Since on the earlier two occasions, the post was filled up by members of the general category, it was treated as reserved when the promotion was made for the third time. This was because the post could have been treated as reserved when promotion was made for the second time, but, since no one belonging to one of the scheduled castes was promoted on the second occasion, when the vacancy arose for the third time, it was sought to be filled up by promoting a person belonging to one of the scheduled castes.

4. Earned Counsel appearing for the Petitioner placed reliance upon a judgment

of the Supreme Court reported in *Chakradhar Paswan Vs. State of Bihar and Ors.*. In that case, a question arose as to whether the post of Deputy Director (Homeopathy) could be treated as a reserved post. It appears from the report that two points were seriously urged before the Supreme Court; firstly that there could be no reservation in respect of a single post in the cadre such as the post of Deputy Director (Homeopathy). Secondly it was urged that even if the principle of 50 point roster was followed, the vacancy being the first vacancy, it had to be treated as unreserved. The Supreme Court held that even though there were two other Deputy Directors such as Deputy Director (Ayurvedic) and Deputy Director (Unani), the three posts did not constitute one cadre and, therefore, the post of Deputy Director (Homoeopathy) was an isolated post. Thus, the Supreme Court held that even applying the principle of 50 point roster, the vacancy having arisen for the first time, it had to be treated as unreserved.

5. The Court, however, dealt with the other aspect of the matter as well. It held that if there was only one post in the cadre, there could be no reservation under Article 16(4) of the Constitution. In paragraph 9 of the report, their Lordships observed:

Another serious infirmity in the argument of the learned Counsel for the Appellant is that it overlooks the basic principle that if there is only one post in the cadre, there can be no reservation under Article 16(4) of the Constitution. The whole concept of reservation for application of the 50 point roster is that there are more than one post, and the reservation as laid down by this Court in *M.R. Balaji* case can be up to 50 per cent. The Government cannot for instance declare that the post of the Director of Indigenous Medicines shall be reserved for the candidate belonging to Scheduled castes. The Director in a para-medical service with Director as its head and the three Deputy Directors belonging to three distinct and separate disciplines viz. Homeopathic, Unani and Ayurvedic under him. In the para-medical system the three posts of Deputy Director, pertain to three distinct systems and therefore each of them is an isolated post by itself. The same principle should, we think, as in the case of the Director, apply.

While it is true that in paragraph 9 the court had observed that it had refrained from expressing any opinion on the moot point whether the isolated posts like those of the Deputy Directors can be subjected to the 50 point roster by the rotational system, the Court thereafter proceeded to consider several decisions of the Supreme Court. After considering the various decisions of the Supreme Court, the Court concluded:

It is quite clear after the decision in *Devadasan* case that no reservation could be made under Article 15(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Articles 15(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under

Article 15(4), presupposes the availability of at least more than one post in that cadre.

6. From the aforesaid decision of the Supreme Court it is quite apparent that a reservation which would come under Article 16(4) of the Constitution of India presupposes the availability of at least more than one post in the cadre. In the instant case, it is not in dispute that there is only one post of Senior Selection Grade Typist (head typist). That being so, applying the principle laid down by the Supreme Court in Chakradhar Paswan's case, it must be held that the post of Senior Selection Grade Typist (head typist) cannot be treated as reserved and that in the matter of promotion to the said post, it should be treated as general that is unreserved and a candidate belonging to the scheduled caste had therefore to compete with others. The aforesaid decision of the Supreme Court is binding upon me and therefore, following that the principles laid down I quash Annexure-3, the order promoting Respondent No. 3 to the post of Senior Selection Grade Typist (head typist). treating the said post as reserved. The State of Bihar is directed to fill up that post by promotion after considering the cases of all eligible candidates and having regard to the principles that apply in the matter of promotion to a post treating the same as unreserved. This writ application is accordingly allowed. There will be no order as to costs.