

(2013) 07 RAJ CK 0096

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 170 of 2013

Megha Shetty (Smt.)

APPELLANT

Vs

State of Raj. and Others

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Citation : (2013) 4 CDR 2226 : (2013) 4 RLW 3227

Hon'ble Judges : Dinesh Maheshwari, J;Arun Bhansali, J

Bench : Division Bench

Advocate : C.S. Kotwani and Manish Rajpurohit, for the Appellant;

Judgement

Arun Bhansali, J.—These intra court appeals by the respective appellants arise out of similar nature orders dated 9.10.2012 passed by the learned Single Judge and involving similar nature issues have been considered together and are taken up for disposal by this common judgment. For convenience sake, facts from D.B. Civil Special Appeal (Writ) No. 170/2013 (Smt. Megha Shetty vs. State of Raj. & Ors.) are taken into consideration.

2. The State Government issued an advertisement for filling up the posts of Teacher Gr. III through Direct Recruitment Examination, 2012, Level-II at District Level; the petition submitted her application from the subject English"; appeared in the examination and obtained 135.75 marks and was placed in the merit list at S. No. 184.

3. As per the advertisement, the available posts in the subject English, in so far as relevant for the present appeal, are indicated as under:-

(In the same manner, posts, were provided for Special Backward Class, Scheduled Castes and Scheduled Tribes).

4. A cut off list was issued on 28.8.2012 by the respondents, whereby the "cut off marks" for subject English, in so far as relevant to the present appeal, was indicated as under-

5. The result declared on 7.9.2009 in terms of the advertisement indicated that for the General Category, out of 42 posts, 4 were occupied by Woman and as 13 seats were available for being allotted as per the horizontal reservation provided for Woman (General) and 4 Women candidates got selected on their own merit, 9 more Women candidates were selected against the General Woman category so as to make the total number of 13. However, as no woman in the category of widow and divorcee was available, the same were filled from the candidates of other categories, while thus filling 13 posts of General (Woman) category, 8 Women belonging to OBC were selected based on merit while filling the reserved posts for Woman (General) on horizontal basis, which is the bone of contention in the present writ petition.

6. It is claimed that the same could not have been done because as per the roster system, the OBC (Woman) candidate can be appointed in General Category but they cannot be appointed as against "General (Woman) Quota". The petitioner submitted a representation to the CEO on 13.9.2012 but no action was taken.

7. The sum and substance of the grievance raised by the petitioner-appellant in the petition has been that as there were 13 posts for General (Woman), OBC (Woman) candidates could not have been selected against the posts reserved for General (Woman).

8. When the writ petition came up before the learned Single Judge, the learned Single Judge by order dated 9.10.2012 held as under:-

After hearing learned counsel for the petitioner, in my opinion, the crux of argument of learned counsel for the petitioner is that no candidate of reserved category, even if she is more meritorious than General (Woman) category candidate, can be appointed on the post of General (Woman) category. The candidates belonging to OBC/SC/ST category can be appointed against vacancies of that respective category only and they cannot be considered against the post of General category.

The above argument of learned counsel for the petitioner is totally contrary to the adjudication made by the Constitution Bench of Hon"ble Supreme Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , so also, in contravention of the judgment rendered by the Supreme Court in the case of R.K. Sabharwal and others Vs. State of Punjab and others, in which, Hon"ble Supreme Court held that object of reservation is to provide adequate representation to the Scheduled Castes/Tribes and Backward Classes in services and as such any mechanism provided to achieve that end must have nexus to the object sought to be achieved. As per verdict of Hon"ble Supreme Court in Indra Sawhney's case (supra), if any candidate from reserved class category comes in General merit, then, he is required to be considered as per his merit first in the General category; and, thereafter, remaining vacancies of reserved category can be filled in from amongst the remaining candidates; meaning

thereby, being citizen of India, all the candidates including candidates from the reserved category are required to be first considered for the posts of General category if they come in merit. In the case on hand, the contention of the petitioner to fill in posts of General (Woman) category from amongst candidates belonging only to the General (Woman) category is totally contrary to the adjudication made by the Constitution Bench of the Hon''ble Supreme Court in Indra Sawhney's case (supra). Therefore, I am not inclined to interfere in all the above writ petitions because the controversy has already been adjudicated by the Constitution Bench of Hon''ble Supreme Court in Indra Sawhney's case.

9. Consequently, the writ petition filed by the petitioner-appellant was dismissed.

10. It is submitted by learned counsel for the appellant that the learned Single Judge fell in error in deciding the present controversy based on the Jaw laid down in the case of Indra Sawhney and R.K. Sabbarwal by the Hon''ble Supreme Court, when in fact, the controversy related to the operation of horizontal reservation provided to woman and not the vertical reservations provided to various categories. Reliance has been placed on the judgment of Hon''ble Supreme Court in Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others,

11. Having considered the submissions made by learned counsel for the appellant-petitioner and having examined the law applicable, we are not persuaded to take any view different from that taken by the learned Single Judge.

12. The outstanding and important feature to be noticed is that it is not the case of the appellant-petitioner that she has obtained more marks than those 8 OBC (Woman) candidates, who have been appointed against the posts meant for General Category (Woman), inasmuch as, while the appellant is at Serial No. 184 in the merit list, the last OBC (Woman) appointed is at Serial No. 125 in the merit list. The controversy raised by the appellant is required to be examined in the context and backdrop of these significant factual aspects.

13. The crux of the issue raised in the present writ petition/appeal is that the selection has not been made in adherence to the Rules of Reservation. For the purpose of coming to a conclusion on the issue, the relevant decision of Hon''ble Supreme Court on the issue need to be noticed. In Indra Sawhney Vs. Union of India (UOI) and Others, the Hon''ble Supreme Court held thus:-

811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

812. We are also of the opinion that this rule of 50% applied only to reservations in favour of backward classes made under Article 16(4). A little clarification is in

order at this juncture; all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservations" and "horizontal reservations". The reservations in favour of Schedule Casts, Scheduled Tribes and other backward classes (under Articles 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations-what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains -and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

14. Further, the proper and correct method to fill up the open quota, vertical reservations and Special reservations such as reservations for women, physically handicapped etc., which are horizontal reservations, cutting cross vertical reservations, was explained in *Anil Kumar Gupta and Others Vs. State of U.P. and Others*, thus:-

18. ...The proper and correct course is to first fill up the OC quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C.; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied- in case it is an overall horizontal reservation- no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/ accommodated against their respective social reservation categories by deleting the corresponding number of candidates there from. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/ accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.)....

15. The judgment of *Indra Sawhney* (supra) was again considered by the Hon"ble Supreme Court in *R.K. Sabharwal and others Vs. State of Punjab and others*, and the Court held as follows:-

4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled

to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Art. 16(4) of the Constitution of India permits the State Government to make 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. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Govt. may take the total population of a particular Backward Class and its representation in the State Services. When the State Govt. after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Govt. to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotes belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.

16. The above judgments in *Indra Sawhney* and *R.K. Sabharwal* case came to be followed in *Union of India and others etc. Vs. Virpal Singh Chauhan etc.*, and in *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others*, Eventually, the Hon'ble Supreme Court in the case of *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and Others*, held as under:-

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies,

equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney*, *R.K. Sabbarwal vs. State of Punjab*, *Union of India vs. Virpal Singh Chauhan* and *Ritesh R. Sah vs. Dr. Y.L. Yamul.*) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus, women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.

17. It is apparent from the above observations that while contrasting the implementation of horizontal reservations in favour of physically handicapped, women etc. with vertical reservations in favour of SCs, STs, and OBCs, the Hon'ble Supreme Court laid down that on filling up the quota for the reserved category in order of merit, if the number of women etc. in such list is equal to or more than the number of special reservation quota, then there is no need for further selection and only if there is any shortfall, the requisite number of reserved category candidates of special reservations quota shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to the respective category.

18. The issue relating to migration of reserved category candidates, who are selected on merit and placed in the list of General/Unreserved Category candidates was considered by a Constitution Bench of Hon'ble Supreme Court in *Union of India (UOI) Vs. Ramesh Ram and Others etc.*, wherein, the Hon'ble Supreme Court held that such a migration as envisaged by Rule 16(2) of the Civil Services Examination Rules, 2005 was not inconsistent with Articles 14, 16(4) and 335 of the Constitution of India.

19. The Hon'ble Supreme Court in *Bihari Lal Rada Vs. Anil Jain (Tinu) and Others*, while considering the meaning and purport of the term "General Category" in the context of election to the office of President of the Municipality observed thus:-

34. The construction suggested by Shri Patwalia, that the words "belonging to" govern "general category" is grammatically attractive but the suggested construction not only would defeat the main purposes of the provisions and the

scheme of the Act, which is to make special provisions for those with special needs, and to understanding of the legislature when it enacted Section 10 and 18 of the 1973 Act. The apprehension that persons belonging to general category may lose their chance forever or for a long time to get themselves elected is totally untenable and unsustainable. The whole idea is to see that minimum number of seats as provided for is filled in by vulnerable sections of the society. There can never be any constitutional or legal objection if more members from those weaker sections get elected to the municipalities on their own merit from the seats meant for the unreserved category.

40. Be that as it may, neither Article 243T of the Constitution nor Section 10(5) of the Haryana Municipal Act provide for any reservation to the office of the President in favour of any candidate who does not belong to Schedule Caste or Backward Class. Obviously there cannot be any such reservation of seats in municipalities nor to the office of Chairperson in favour of candidates belonging to general category. There is no separate category like general category. The expression "belonging to the general category" wherever employed means the seats or offices earmarked for persons belonging to all categories irrespective of their caste, class or community or tribe. The unreserved seats euphemistically described as general category seats are open seats available for all candidates who are otherwise qualified to contest to that office.

20. Admittedly, as noticed above, none of the candidates, who have been provided appointment have secured less marks than the appellant. The submissions made by learned counsel for the appellant in the context of prohibition for migration of reserved category candidates to general category in the case of special horizontal reservation for woman cannot be read into either the principles or the law laid down by the Hon'ble Supreme Court. Once the horizontal reservation in favour of woman in general/open category is to be applied, the candidates belonging to all categories, including SC, ST and OBC, are also entitled to be considered against the said posts reserved for General Category (Woman).

21. The reliance placed by the learned counsel for the appellant on the judgment of Hon'ble Supreme Court in the Case of Public Service Commission, Uttaranchal vs. Mamta Bisht & Ors. (supra) is not apposite to the facts of the present case, inasmuch as, in the said case the High Court of Uttaranchal had held that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in General Category, which observations were found by Hon'ble Supreme Court contrary to the judgment in the case of Rajesh Kumar Daria (supra).

22. In the present case, it is evident from a bare look at the part of Advertisement (Annexure-3) that 13 posts were reserved for OBC category. From the result-sheet (Annexure-4) it is seen that out of 42 unserved seats, 4 women candidates found place and, therefore, they were counted against the horizontal

reservation provided for woman and thereafter, 9 more women candidates in order of their merit were selected which included candidates belonging to General as well as OBC Category. It is also noticed that in the main list, 3 women candidates belonging to OBC (Woman) found place on their own merits and after 9 candidates against General (Woman) Category which included OBC (Woman) also, further reservation has not been provided qua 2 posts despite the fact that 5 posts were reserved for OBC (Woman), which clearly shows that the horizontal reservation was correctly applied.

23. The plea sought to be raised by the appellant regarding impermissibility for migration from OBC (Woman) to General (Woman) in case of special reservation under Article 15(3) of the Constitution of India also apparently has no applicability in the present case, inasmuch as, once the candidate belonging to OBC (Woman) category has obtained more marks than a candidate belonging to the General (Woman) category and, therefore, finds place in the select list meant for General (Woman), the same cannot even be termed as migration and, therefore, the plea raised in this regard is without any substance.

24. The principle laid down by the Hon"ble Supreme Court in the case of vertical and horizontal reservations have apparently been properly applied and, therefore, the appeal filed by the petitioner-appellant has no substance.

25. There is another aspect of the matter that though the appellant sought quashing of the order dated 7.9.2012 issued by the Chief Executive Officer relating to giving appointment to the OBC (Woman) candidates against the General (Woman) Category candidates, the appellant has not impleaded any of the selected candidates as party respondent. In *Public Service Commission vs. Mamta Bisht & Ors.* (supra), the judgment cited on behalf of the appellant herself it has been held as under:-

9. In case Respondent 1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in *Udit Narain Singh Malpaharia vs. Board of Revenue*, wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "CPC") provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh vs. State of Gujarat*, *Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot* and *Sarguja Transport Service vs. Stat.*)

10. In Prabodh Verma vs. State of U.P. and Tridip Kumar Dingal vs. State of W.B., it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties.

26. In the absence of necessary party also the petition was liable to be dismissed.

27. In D.B. Civil Special Appeal (W) No. 15/2013 the appellant-petitioner submitted her application form for subject Hindi for the post of Teacher Gr. III, Level-II with Zila Parishad, Nagaur. In the result, she stood at Merit No. 146 and the last OBC (Woman) candidate, who was given appointment in the category of General (Woman) stood at Merit No. 99.

28. In D.B. Civil Special Appeal (W) No. 31/2013 the appellant-petitioners Smt. Madhu Shekhawat, Minaxi Dave and Monika Dave submitted their application forms for subject English for the post of Teacher Gr. III, Level-II with Zila Parishad, Jalore. In the result, they stood at Merit Nos. 150, 213 & 215 respectively and the last OBC (Woman) candidate, who was given appointment in the category of General (Woman) stood at Merit No. 125.

29. Therefore, in above two special appeals as well the status of the appellants is not different than that of appellant in D.B.C.S.A. (W) No. 170/2013, inasmuch as, they also stood lower in merit than the last OBC (Woman) candidate, who was appointed in the category of General (Woman).

30. In view of the above discussion, we find no substance in the appeals and the same are, therefore, dismissed. The Registry is directed to place copy of this judgment on record of each connected file.