

(2017) 04 BOM CK 0160
In the Bombay High Court
Case No : 3889 of 2017

Mr. Abhinav Dipakbhai Patel

APPELLANT

Vs

Director, Transport Department, Union Territory,
Administration Of Dadra & Nagar Haveli, Silvassa, & Ors.

RESPONDENT

Date of Decision : 21-04-2017

Acts Referred:

Constitution of India, Article 141, Article 342, Article 341 - Law declared by Supreme Court to be binding on all courts - Scheduled Tribes - Scheduled Castes

Citation : (2017) 04 BOM CK 0160

Hon'ble Judges : Anoop V. Mohta, Ravindra V. Ghuge

Bench : DIVISION BENCH

Advocate : A.A. Kumbhakoni, Akshay P. Shinde, S.S. Deshmukh, S.V. Bharucha, Y.S. Bhate, Upendra Lokegaonkar

Judgement

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.

2. We have considered the submissions of the learned senior Advocate appearing on behalf of the Petitioner and the learned counsel appearing on behalf of Respondent Nos.1 to 4 Union Territory of Dadra & Nagar Haveli (hereinafter referred to as U.T.) and the counsel representing Respondent No.5 Union of India. With their assistance we have gone through the Petition paperbook and the record available.

3. The Petitioner in this Petition has put forth his prayers in paragraph 47 in terms of clauses (b) and (c) as under :

b) to direct the Respondents to forthwith issue letter of appointment in favour of the Petitioner thereby appointing the Petitioner to the post in issue i.e. Assistant Motor Vehicle Inspector in the Transport Department of the Union Territory of Dadra & Nagar Haveli w.e.f. date of result of the Written Examination i.e. w.e.f. 11/7/2015;

c) to direct the Respondents to disburse to the Petitioner entire amount towards back wages admissible to the post in issue i.e. Assistant Motor Vehicle Inspector in the Transport Department of the Union Territory of Dadra & Nagar Haveli w.e.f. the date of result of Written Examination i.e. w.e.f. 11/7/2015 till the date of issuance of appointment letter;

4. The first objection raised by the Respondent is to the maintainability of this Petition on the basis of an alternate remedy. It is contended that since the petitioner is seeking an appointment in the service of the Respondent Union Territory, he would first have to approach the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 and he is precluded from approaching this Court directly. Reliance is placed upon the judgment of the Hon"ble Supreme Court in the matter of Kendriya Vidyalaya Sangathan and Another vs. Subhas Sharma, (2002) 4 SCC 145 . The Petitioner submits that after the entire selection process has been completed, the Respondent U.T. has issued appointment order to the candidate at Serial No.2 in the combined merit list. Yet the Petitioner who is at Serial No.1 has not been appointed.

5. We have considered the submissions and have gone through the report cited. There is no dispute that by way of an alternate remedy, the Petitioner could have approached the Administrative Tribunal. However, keeping in view that the High Court is not precluded from taking up a grievance despite an alternate remedy being available and in the light of the peculiar facts of this case, we thought it fit to entertain this Petition. Reasons thereof are found in our conclusions that follow.

6. After considering the extensive submissions of the learned counsel, we find that the following factors are undisputed :

a) An advertisement was published on 25.10.2014 inviting applications for two posts of Assistant Motor Vehicle Inspector in the Administration of Dadra and Nagar Haveli (hereinafter referred to as the Respondent U.T.).

b) The said posts fall under group "C".

c) One post was available for the candidates from the open category and one post was reserved for the Scheduled Tribe category.

d) The advertisement clearly mentions "Any Indian citizen can apply for the post. However, applicant having domicile of Dadra & Nagar Haveli shall be given weightage in accordance with O.M. No.I-12(B-54)/ 2012-ADM/ 1261 dated 26.12.2013 subject to him/her producing Domicile Certificate issued by Mamlatdar, Silvassa/Khanvel".

e) The presidential order placed on record bearing No.CO 65 mentions as under:

THE CONSTITUTION (DADRA AND NAGAR HAVELI) SCHEDULED TRIBES ORDER, 1962

(C.O. 65)

In exercise of the powers conferred by clause (1) of article 342 of the Constitution of India, the President is pleased to make the following Order, namely:

1. This Order may be called the Constitution (Dadra and Nagar Haveli) Scheduled Tribes Orders, 1962.

2 The tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in the Schedule to this Order, shall for the purposes of the Constitution, be deemed to be Scheduled Tribes in relation to the Union territory of Dadra and Nagar Haveli so far as regards members thereof resident in that Union territory.

THE SCHEDULE

1. Dhodia 5. Koli Dhor including

2. Dubla including Halpati Kolgha

3. Kathodi 6. Naikda or Nayaka

4. Kokna 7. Varli

f) The Petitioner applied pursuant to the said advertisement since he belongs to the Dhodia tribe which falls under the Scheduled Tribes in relation to the Respondent U.T.

g) The Petitioner was invited pursuant to his application and he has participated in the entire selection process.

h) Only two candidates inclusive of the Petitioner had applied from the Scheduled Tribe category, the other candidate being Shri Ayyappa Jyoti Ramchandran who hailed from the State of Kerala.

i) The said candidate from Kerala did not appear for the selection process and the Petitioner was the only candidate belonging to the Scheduled Tribe category.

j) Not a single candidate from the respondent U.T. belonging to the Scheduled Tribe category was given a call letter by the Respondent.

k) The three candidates who belonged to the open category had scored 28.4, 26.9 and 21.3 marks.

l) The Petitioner though applied from the Scheduled Tribe category, scored 29.6 marks which are more than any of the candidates from the open category.

7. The contention of Shri Kumbhakoni, learned Senior Advocate is that the Petitioner belongs to the Dhodia tribe which has been declared and recognized to be S.T. not only in relation to the State of Gujarat, but also in relation to the Respondent U.T. It is specifically averred below ground "A" in the memo of the Petition that the said S.T. is found in the southern parts of Gujarat, Surat, Navsari, Dang, Valsad districts, Daman and Diu and Dadra and Nagar Haveli

(presently the Respondent U.T.), Madhya Pradesh, Maharashtra, Goa, Karnataka and Rajasthan. The word "Dhodia" has been derived from the word "Dhulia" in the western part of Khandesh. The customs, festivals, Gods and Goddesses are identical to the Dhodia tribe from these different parts of the State of Gujarat, State of Maharashtra and the Respondent U.T.

8. It is further canvassed on the basis of the record that the Petitioner was residing in the Respondent U.T. for the last more than six years, he owns immovable property at Dadra and Nagar Haveli, is married to a girl belonging to the Dhodia Tribe from the same Respondent U.T. and is permanently residing in the said Respondent U.T.

9. It is further pointed out that pursuant to the selection process, the Respondent U.T. has appointed one candidate from the open category. The appointment of the Petitioner has been avoided. This indicates that the Respondent has accepted the results of the selection process.

10. Consequently, the Petitioner approached the National Commission for S.T. (N.C.S.T.) which issued notices to the Respondent U.T. The minutes of the proceedings that were held before the N.C.S.T. on 22.04.2016 have been placed on record. Paragraphs 5 and 6 of the said proceedings read as under :

"5. The matter has been discussed in the Commission again today. The Joint Secretary, Ministry of Home Affairs has categorically stated that they have already given the clear cut directions to the U.T. Administration of Dadra & Nagar Haveli regarding this case and hence there should not be any delay in the appointment of Shri Abhinav Patel against the post of Assistant Motor Vehicle Inspector in the U.T. Administration as the Scheduled Tribes of other States are considered eligible for S.T. benefits in all other Union Territories. The rule position in this case is very clear and the U.T. Administration of Dadra and Nagar Haveli should have given the appointment letter to the applicant long back, which has been viewed very seriously by the Ministry of Home Affairs also. The candidature of Shri Abhinav Patel is all the more relevant since he is the topper in the merit list and is the only S.T. candidate and hence he should be appointed forthwith.

6 Shri Gaurav Singh Rajawat, Collector & Director (Transport), who attended the meeting / hearing on behalf of himself and on behalf of the Administrator of Dadra and Nagar Haveli U.T. Administration has submitted that they have received the clarification from Ministry of Home Affairs recently and they will be giving the appointment letter within 7 days. The Commission expects that necessary action may be taken in this regard and an action taken report submitted to this Commission."

11. It is then pointed out that by subsequent communication by the N.C.S.T. dated 27.07.2016, the Respondent U.T. was called upon to issue an order of appointment to the Petitioner. The relevant observations read as under :

" After going through the correspondence / documents / papers laid down before

this Commission and law points in the case the Commission is of the opinion that there is no bearing of the decision taken by the Home Ministry in the meeting held on 11.7.2016, as the filling up of the post of Assistant Motor Vehicle inspector will be based on the advertisement notified by the UT Administration of Dadra and Nagar Haveli dated 25.10.2014, as all decisions taken can be taken prospective effect and cannot be implemented retrospectively. The advertisement states that any Indian citizen can apply for the post and accordingly the petitioner has applied. There was no bar to the outsider ST candidates to apply for the post. The rules existing on the date of notification will have to be followed and the directions as sought from and as given by the Ministry of Home Affairs is amply clear. Under these circumstances the Commission again directs the UT to release the appointment of Shri Abhinav D. Patel against the post of Assistant Motor Vehicle Inspector in the Transport Department of UT of Dadra & Nagar Haveli, which was held up by them, forthwith within 7 days of receipt of these proceedings, failing which the Commission will be constrained to take action under The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act 1989 against the officers of UT Administration of Dadra and Nagar Haveli. "

12. The Petitioner has placed reliance upon the following judgments:

- 1) S. Pushpa and others vs. Sivachanmugavelu and others, (2005) 3 SCC 1.
- 2) Subhash Chandra and another vs. Delhi Subordinate Services Selection Board and others, (2009) 15SCC 458.
- 3) Deepak Kumar & Ors. vs. District and Sessions Judge, Delhi & Ors., 2012 (132) DRJ 169 (FB).
- 4) State of Gujarat and Anr. vs. R.L. Patel, 1990 SCC OnLine Guj 183 : (1990) 6 SLR 782.
- 5) Puducherry Scheduled Caste People Welfare Association vs. Chief Secretary to Government Union Territory of Pondicherry and others, (2014) 9 SCC 236.

13. The learned counsel for the Respondent U.T. submits that since the Petitioner originally belongs to the State of Gujarat and has his origin in that State, he would be a migrant insofar as the Respondent U.T. is concerned. The Respondent U.T. has a population of about 3-1/ 2 lakhs out of which 52% belong to the S.T. categories. These members of the S.T. have to be given preference in order to ensure that the constitutional mandate on the policy of reservation is given a full effect and the effort to bring the tribals into the main stream is not defeated.

14. In addition to his oral submissions, he has placed on record written notes of submissions. He has pointed out the relevant paragraphs of his written submissions to support his contention that the Petitioner will have to be treated as a migrant and his movement from a State to the U.T. would not entitle him to seek an appointment as is being sought in this Petition.

15. We find it appropriate to reproduce the portions indicated from the written

submissions canvassed by the learned counsel for the Respondent U.T. as under :

.... In fact, the adjoining Union Territory of Daman & Diu has also framed a similar policy on 17.8.2016 to the effect that the SC/ST Candidates who are resident of Daman and Diu as notified in Reorganisation Act, 1987 and OBC Candidates as notified from time to time, will alone get the benefit of reservation for Group C and D posts.

....Though the Union Territories are centrally administered under the provisions of Article 239 they do not become merged with the Central Government as has been stated by this Court in *Satya Dev Bushahri v. Padam Dev* (AIR 1954 SC 587 : (1955) 1 SCR 549).

....Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution".

....But so far as the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges tht he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them...."

.....Further once a Separate presidential order is issued declaring ST's in relation to a Union Territory (DNH in present case) then there cannot be any difference whether the migration is from state to another state or to another Union Territory. Article 342 cannot be interpreted differently for "State" where migrant are not allowed and differently for "Union Territories" where migrants can be foisted upon the local Tribal population. This will frustrate the very Constitutional protection given to the Scheduled Tribe population in Union Territory.

.... The Judgment delivered by Hon"ble Full Bench of Delhi High Court in 2012 (132) DRJ 169 (FB) is also not applicable because basically in respect of Delhi there is no Presidential Order issued declaring ST. Therefore, whether even through this judgment has considered all previous judgments it is distinguishable on facts itself. As there is no separate presidential order for Delhi for Scheduled Tribes, there cannot be any conflict between local ST candidates and migrants. Therefore, the position of Delhi is altogether different compare to the Dadra and Nagar Haveli where more than half of the population is Scheduled Tribe.

..... The aforesaid observations by Hon"ble Madras High Court are clear that it is for the Union Territory to decide whether or not to allow the migrants to have benefits of reservation in the Union Territory. ..

.... It is submitted that any decision to allow the migrants to claim the benefits in the UT of Dadra and Nagar Haveli would result in amending the Constitution

(Dadra and Nagar Haveli) Scheduled Tribes Order, 1962 by Courts which is impermissible. The parliament can alone modify the said Order considering the larger interest of Tribals. In the judgment of Hon'ble Supreme Court in Action Committee on Issue of Caste Certificate to Scs/STs v. Union of India, (1994) 5 SCC 244 at page 247 it is observed that;

"Once a notification is issued under clause (1) of Articles 341 and 342 of the Constitution, parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification. What is important to notice is that the caste or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified."

16. The learned counsel has then pointed out an office memorandum dated 01.09.2006 which lays down the principle of direct recruitment to the posts falling under Group "C" and Group "D" in the Respondent U.T. We find it apposite to reproduce the said memorandum for clarity as under :

Administration of

Dadra and Nagar Haveli, U.T.

(Personnel Section)

Secretariat

Silvassa.

No.I-2(B)(23)/2006-ADM/ 771 Dated-01/ 09/2006

OFFICE MEMORANDUM

This Administration has received several representations from the Public Representatives regarding giving due consideration to the candidates from local region in the recruitment process for Government Services under the Administration of Dadra and Nagar Haveli and after examination of the same, the following has been decided in principle for direct recruitment in cases of Group "C" & "D" posts in the U.T. Administration of Dadra & Nagar Haveli.

(1) The Candidates applying for the direct recruitment in case of Group "C" & "D" posts will be required to furnish the Domicile Certificate of U.T. Of Dadra & Nagar Haveli issued by the Mamlatdar, DNH alongwith other requirements for the posts, as prescribed.

(2) For the reserved category of Group "C" and "D" the candidates belonging to the Castes/Tribes and Other Backward Classes notified by the U.T. Administration of Dadra & Nagar Haveli in respect of the SC/ST/OBC are only to be considered.

Therefore, I am directed to bring the above decision to the notice of all the Heads of Departments and Heads of Offices, Dadra & Nagar Haveli that the above decisions may please be adhered to while processing the direct recruitment for Group "C" & "D" posts.

This is issued with the approval of the Hon"ble Administrator of Daman & Diu and Dadra & Nagar Haveli.

(N.R. Shah)

Deputy Secretary (Personnel).

17. It is then submitted that the abovesaid policy has undergone a brief change which is evident from the office memorandum dated 26.12.2013. It is specifically pointed out through clauses 1 and 2 of the said Office Memorandum that the policy insofar as direct recruitment is concerned, as it stood by virtue of the Office Memorandum dated 01.09.2006, has undergone a partial modification. It is contended that candidates from the open category are entitled to apply for various posts in the Group "B" and Group "C" categories and those candidates falling under the S.T. Category, who do not have their origin in the Respondent U.T., have been specifically excluded.

18. To consider the submissions of the learned counsel in their right perspective, we find it proper to reproduce clauses 1 and 2 of the Office Memorandum dated 26.12.2013 as under :

OFFICE MEMORANDUM

Subject: Direct Recruitment in Group "B" and "C" (including Multi Tasking Staff) posts.

1) Ministry of Home Affairs, Government of India, New Delhi vide letter No. (I-14014/ 38/2012-CPD dated 14.10.2013 has advised the UT Administration of Daman & Diu and Dadra & Nagar Haveli to consider giving some weightage/preference to the local people in direct recruitment in respect of group "D", "C" & "B" (NonGazetted) posts, instead of making a provision for exclusive reservation of posts for local people under these categories.

2) Accordingly in partial modification of the Office Memorandum No.I-2(B) (23)/2006-ADM/ 771 dated 01.09.2006 and in supersession of Office Memorandum No.I-12(B-54)/ 2012ADM/ 138 dated 12.02.2013 the Administrator of Daman & Diu and Dadra & Nagar Haveli hereby prescribes the following guidelines for selection procedure for direct recruitment through Employment Exchange/Advertisement for all the posts in Group "B" (Gazetted). Group "B" (NonGazetted), Group "C" (Technical & Non Technical) and Multi Tasking Staff in the UT of Dadra & Nagar Haveli.

Allocation of Marks:

(a)

Category of post Written Test Marks Educational and other Qualification Marks Interview Total

Group "B" (Gazetted) 75 10 15 100

(b)

Written Test Marks Educational and other Qualification Marks Interview Weightage for local candidates Total

Group "B" (NonGazetted) Teacher 60 10 10 20 100

Group "B" (NonGazetted) Other 70 10- 20 100

(c) For posts where skill test is not required as per the Recruitment Rules:

Written Test Marks Educational and other Qualification Marks Weightage for local candidate Total

Group "C" (including Multi Tasking Staff) 70 10 20 100

(d) For the posts where Skill test is prescribed in Recruitment Rules:

Written Test Marks Educational and other Qualification Marks Skill Test Marks Weightage for local candidates Total

Group "C" (including Muti Tasking Staff) 60 10 10 20 100

* Local candidates will be required to furnish Domicile Certificate of U.T. of Dadra & Nagar Haveli issued by Mamlatdar (Silvassa/Khanvel) along with other documents required for the post.

19. While countering the submission of the Petitioner that he was allowed to appear for the selection process and he stood first even in the combined list of candidates, learned counsel for the Respondent U.T. submits that allowing the Petitioner to appear for the selection process may have been a mistake on the part of the Respondent U.T. The said mistake, however, will not overbear or water down the policy of the U.T. in giving exclusive right of selection to the S.T. candidates whose origin is from U.T.

20. It is further submitted that unless a presidential order indicates that a candidate belonging to the Dhodia tribe from Gujarat would be entitled for all the benefits even in the Respondent U.T. as were available in the parent State, by mere inference or implication, the Petitioner cannot be said to have acquired those privileges of S.T. even in the Respondent U.T. In this regard, reliance has been placed upon the judgment of the Hon"ble Apex Court in the matter of Action Committee On Issue of Caste Certificate To Scheduled Castes and Scheduled Tribes in the State of Maharashtra and Another vs. Union of India, (1994) 5 SCC 244 (5 Judges Bench). A specific reliance is placed on the observations of the Hon"ble Apex Court in paragraph 16 which read as under:

" 16. We may add that considerations for specifying a particular caste or tribe or

class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitutionmakers as is evident from the choice of language of Articles 341 and 342 of the Constitution."

21. Insofar as the issue as to whether the Dhodia tribe is recognized as S.T. to the extent of the Respondent U.T. is concerned, the presidential order reproduced above bearing No.CO 65 clearly indicates that the members of the tribes or tribal communities or parts or groups within such communities specified in the schedule would, for the purposes of the constitution, be deemed to be belonging to the S.T. in relation to the Union Territory of Dadra and Nagar Haveli which is Respondent U.T. It is specifically mentioned in the presidential order that those members of such tribes or tribal communities "RESIDENT IN THAT UNION TERRITORY" would be treated to be members of the S.T. for all purposes.

22. Mr. Deshmukh learned counsel for the Respondent U.T. has strenuously contended that the word "RESIDENT" appearing in the presidential order will necessarily have to be construed to mean a person whose "ORIGIN" is from the Respondent U.T. and/or who is a domicile of the said U.T. He further submits that unless the petitioner qualifies by being covered in either of these two types, he would continue to be deemed to be a migrant.

23. As is rightly pointed out by the learned senior Advocate for the petitioner, the Hon"ble Supreme Court (3 Judges Bench) in the matter of Puducherry Scheduled Caste People Welfare Association (supra) has considered an identical situation in relation to the Union territory of Pondichery as it stood then. It would be apposite to reproduce paragraph Nos.3 to 7, 10 and 11 of the said judgment here under:

3 Both Government Orders take note of the Constitution (Pondicherry) Scheduled Castes Order, 1964 and also the judgment of this Court in S. Pushpa and others Vs. Sivachanmugavelu (2005) 3 SCC 1:2005 SCC (L&S) 327 and then provide for extension of reservation only to the Scheduled Castes origins of the Union Territory.

4 Para 5 of G.O.M. 11/2005 reads as follows :

" Having examined the demand made by various Welfare Associations and Scheduled Castes (origin) people of the Union Territory of Pondicherry and taking into account the observations made by the Hon"ble Supreme Court at para 21 of the said judgment dated 11.02.2005, the Lieutenant Governor, Pondicherry is pleased to order that the reservation benefits in promotion, employment to Group "C" and "D" posts shall henceforth be extended only to the Scheduled Caste origins of the Union Territory as notified in the Constitution (Pondicherry) Scheduled Castes Order, 1964 read with the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 (Central Act 61 of 2002)."

5. Similarly, para 5 of G.O.M. 12/2005 reads as follows :

" Having examined the demand made by various Welfare Associations and Scheduled Castes (origin) people of the Union Territory of Pondicherry and taking into account the observations made by the Hon"ble Supreme Court at para 21 of the said judgment dated 11.02.2005, the Lieutenant Governor, Pondicherry is pleased to order that the reservation benefits in the field of education and welfare shall henceforth be extended only to the Scheduled Caste origins of this Union Territory as notified in the Constitution (Pondicherry) Scheduled Castes Order, 1964 read with the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 (Central Act 61 of 2002)."

6. Leave was granted in these matters on 13.12.2010 and it was ordered that these matters be tagged with Civil Appeal No. 4494 of 2006.

7. It so happened that subsequently by order dated October 7, 2010, Civil Appeal No. 4494 of 2006, came to be referred to a 3Judge Bench as the 2Judge Bench, inter alia, observed that in Subhash Chandra Vs. Delhi Subordinate Service Selection Board, the 2Judge Bench could not have held that the decision rendered in S. Puspha case is obiter and not binding.

10. The Presidential Order, 1964 reads as follows :

" THE CONSTITUTION (PONDICHERRY) SCHEDULED CASTES ORDER, 1964
(C.O. 68)

In exercise of the powers conferred by clause (1) of article 341 of the Constitution of India, the President is pleased to make the following Order, namely:

1. The Order may be called the Constitution (Pondicherry) Scheduled Castes Order, 1964.

2. The castes, races or tribes or parts of or groups within castes, races or tribes specified in the Schedule to this Order shall, for the purposes of the Constitution, be deemed to be Scheduled Castes in relation to the Union Territory of Pondicherry so far as regards members thereof resident in that Union territory.

Provided that no person, who professes a religion different from the Hindu or the

Sikh religion, shall be deemed to be a member of a Scheduled Caste.

THE SCHEDULE

1. Adi Andhra 9. Pallan
2. Adi Dravida 10. Parayan, Sambavar
3. Chakkiliyan 11. Samban
4. Jambuvulu 12. Thoti
5. Kuravan 13. Valluvan
6. Madiga 14. Vetan
7. Mala, Mala Masti 15. Vettiyan
8. Paky"

11. It will be seen from para 2 of the above Presidential Order that the castes, races or tribes or parts of or groups within castes, races or tribes (15 in all) specified in the Schedule appended thereto are deemed to be Scheduled Castes for the purposes of the Constitution in relation to the Union Territory of Pondicherry so far as regards members thereof are resident in the Union Territory. The Government Orders, however, have confined reservation benefits to Scheduled Castes origins of the Union Territory of Pondicherry. It would be seen that the Presidential Order does not speak of "origins" of the Union Territory of Pondicherry, it only speaks of "resident".

24. It is evident from the above judicial pronouncement in the matter of Puducherry (supra) that an identical situation had arisen where the term "RESIDENT" was used in the presidential order of 1964 which is reproduced in paragraph 10 above. The contention before the Hon"ble Apex Court was that the word "RESIDENT" should be interpreted to mean and tantamount to "ORIGIN". Dealing with the said situation, the Hon"ble Apex Court has laid down the law in paragraphs 11 and 13 by concluding that when the presidential order speaks of "ORIGIN" in relation to the Union Territory of Pondichery, it needs to be accepted as being "RESIDENT" and the word RESIDENT would not therefore mean ORIGIN.

25. Keeping this judicial announcement in view, we find that the submission of the Respondent U.T. with regard to the presidential order No.CO 65 at issue needs to be rejected. The term RESIDENT mentioned in the said presidential order would therefore only mean a resident of the Union Territory and not a person of origin or who shall be a domicile of the said Union territory. In this background, the contention of the Respondent that the Petitioner is not entitled to be covered by the said presidential order No.CO 65 stands rejected. Consequentially, the Petitioner would not stand excluded from the selection process as is the contention of the Respondent as he is squarely covered by CO 65.

26. It is trite law that a mere selection of a candidate would not vest a right in such candidate to seek an appointment. We would have refrained from entertaining the prayers of the Petitioner in this background, but for the distinguishing features and the fallacious stand taken by the respondent U.T., which are considered in this judgment.

27. It cannot be ignored that the Respondent has not shelved or discarded the entire selection process on the ground that the advertisement may be defective or it may run counter to the policy of the Respondent U.T. The Office Memorandum dated 26.12.2013 which we have reproduced above, indicates that the earlier policy dated 01.09.2006 has been subjected to a change. Paragraph 2 of the 2013 Office Memorandum indicates that direct recruitment through employment exchange or by advertisement for all the posts in Group "B" and Group "C" for the Respondent U.T. would be covered by the manner of allocation of marks mentioned below Clause 2 of the Memorandum which we have reproduced above. Learned counsel for the respondent U.T. has strenuously contended that it would not apply to the S.T. as the appointment to the post is restricted and limited exclusively to the S.T. from the U.T. alone. We find that the said submission is against the record for the reason that the Memorandum of 2013 does not carve out such an exception and in fact provides for allocating 20 marks more to those S.T. candidates belonging to the U.T. in comparison to those candidates who do not belong to U.T. Clause 2 of the Memorandum uses the word "FOR ALL THE POSTS IN GROUP "B" AND GROUP "C" ". The submission of the Respondent U.T. that this will have to be understood as excluding the members of the S.T. Category from outside the U.T., is unsustainable. We cannot read something that does not meet the eye. We have no reason to consider such submission of the Respondent U.T. which is against what is specifically mentioned in the Memorandum of 2013.

28. Insofar as the contention of the respondent U.T. is concerned, that the Administration may have committed a mistake in drafting the advertisement or in allowing the Petitioner to apply, we find that such submission is equally fallacious for reasons more than one. Firstly, the presidential order indicating that the S.T. resident of the Respondent U.T. will carry all the benefits and privileges as are available to the said S.T. and belonging to the particular tribe, has been interpreted in the judgment of the Hon'ble Apex Court in the matter of Puducherry (supra). Secondly, the Memorandum of 2013 which modifies the earlier Memorandum of 2006, clearly indicates that all the posts falling under Group "B" and Group "C" would have a specific selection process and allotment of marks and candidates belonging to the U.T. will be given weightage and preference by an additional 20 marks. This evidently presupposes that those candidates not belonging to the U.T. who apply for all the posts of Group "B" and Group "C" categories, would not be entitled for such 20 marks which are exclusively to be allocated to the members of the S.T. from U.T. This legally leads to the inference that even those persons not belonging to the U.T. would be entitled to apply. Needless to state, since the presidential order No.CO 65 and

the law laid down by the Hon''ble Apex Court in Puducherry (supra) indicate that a S.T. resident of U.T. would be entitled for the benefits and privileges of the S.T., clearly indicates that this Petitioner will have to be treated as being a resident of the Respondent U.T.

29. The contention of the Respondent U.T. that the Petitioner would not be entitled to appointment is concerned, we could have entertained these submissions if the Respondent U.T. would have scrapped the selection process pursuant to the advertisement dated 25.10.2014. It is categorically submitted before us that there was no reason to cancel or scrap the advertisement as the Petitioner would not be entitled to be treated as being a domicile of Respondent U.T.

30. We have settled the dispute with regard to the Petitioner being a resident of the Respondent U.T. Keeping in view that the Respondent U.T. has proceeded with the entire selection process and has effected the selection of the candidate from the open category, avoiding the appointment of a tribal on misplaced assumption or interpretation proves that it has deprived the Petitioner of an appointment. This is the reason why we find the facts of this case to be peculiar and distinguishable and for which purpose we deemed it appropriate to entertain the prayers of the Petitioner. When the selection process has been fully effected and appointment orders have been issued and only because Respondent U.T. illogically presumed that the petitioner tribal is a migrant and for which exclusive reason has specifically stated that it has not issued the appointment order to the Petitioner, is a good ground to entertain this Writ Petition. We have concluded on the basis of the judicial pronouncement of the Hon''ble Apex Court that the Petitioner will be covered by the presidential order No.CO 65 and would therefore, render the Petitioner a resident of the Respondent U.T.

31. The learned counsel for the Respondent has strenuously contended that the judgment of the Hon''ble Apex Court in the Action Committee case (supra) and the judgment delivered in the case of Subhash Chandra, would clearly indicate that the case of the Petitioner as a migrant from a State to a Union Territory, would deprive him of all the benefits which a member of the S.T. from the Respondent U.T. would be entitled to. We find that the judgment of the Hon''ble Apex Court in the matter of S. Pushpa (3 Judges Bench) (supra) has been delivered earlier than the judgment delivered in Subhash Chandra (supra) (2 Judges Bench).

32. This aspect of purported conflict between the view of the Hon''ble Apex Court in the matter of S. Pushpa (supra) and Subhash Chandra (supra) was considered by the learned Full Bench of the Delhi High Court in the matter of Deepakkumar and others (supra). A similar argument was canvased before the learned Full Bench with regard to the Union Territory of Pondichery that the migration of a person from the State to the Union Territory of Pondichery would deprive him of all benefits and privileges which he was entitled to in his parent State.

33. In fact, this issue would not now crop up before us since the Hon"ble Apex Court, in the Puducherry case (supra) has interpreted the word "RESIDENT" as not meaning origin and consequentially domicile, and therefore, renders the Petitioner covered by the Notification No.CO 65. Yet, as the learned advocates have addressed us on this point, we are dealing with the said issue. We find it appropriate to reproduce the conclusions of the learned Full Bench from paragraph 66(1) to (6) as under :

66. This court summarizes its conclusions, as follows:

(1) The decisions in Marri, Action Committee, Milind and Channaiah have all ruled that scheduled caste and tribe citizens moving from one State to another cannot claim reservation benefits, whether or not their caste is notified in the state where they migrate to, since the exercise of notifying scheduled castes or tribes is region (state) specific, i.e " in relation" to the state of their origin. These judgments also took note of the Presidential Notifications, which had enjoined such citizens to be "residents" in relation to the state which provided for such reservations.

(2) The considerations which apply to Scheduled Caste and Tribe citizens who migrate from state to state, apply equally in respect of those who migrate from a state to a union territory, in view of the text of Articles 341 (1) and 342 (1), i.e. only those castes and tribes who are notified in relation to the concerned Union Territory, are entitled to such benefits. This is reinforced by the Presidential Notification in relation to Union Territories, of 1951. Only Parliament can add to such notification, and include other castes, or tribes, in view of Articles 341 (2), Article 342 (2) which is also reinforced by Article 16 (3). States cannot legislate on this aspect; nor can the executive Union or state, add to or alter the castes, or tribes in any notification in relation to a state or Union Territory, either through state W.P.(C) 5390/10, 7717/10, 7878/10, 8368/10, 816/11, 1205/11, 1513/2011, 1713/11, 3278/11, & 3223/11 Page 74 legislation or through policies or circulars. Differentiation between residents of states, who migrate to states, and residents of states who migrate to Union Territories would result in invidious discrimination and overclassification thus denying equal access to reservation benefits, to those who are residents of Union Territories, and whose castes or tribes are included in the Presidential Order in respect of such Union Territories. The Pushpa interpretation has led to peculiar consequences, whereby:

(i) The resident of a state, belonging to a scheduled caste, notified in that state, cannot claim reservation benefit, if he takes up residence in another state, whether or not his caste is included in the latter State's list of scheduled castes;

(ii) However, the resident of a state who moves to a Union Territory would be entitled to carry his reservation benefit, and status as member of scheduled caste, even if his caste is not included as a scheduled caste, for that Union Territory;

(iii) The resident of a Union Territory would however, be denied the benefit of

reservation, if he moves to a State, because he is not a resident scheduled caste of that State.

(iv) The resident of a Union Territory which later becomes a State, however, can insist that after such event, residents of other states, whose castes may or may not be notified, as scheduled castes, cannot be treated as such members in such newly formed states;

(v) Conversely, the scheduled caste resident of a state which is converted into a Union Territory, cannot protest against the treatment of scheduled caste residents of other states as members of scheduled W.P.(C) 5390/10, 7717/10, 7878/10, 8368/10, 816/11, 1205/11, 1513/2011, 1713/11, 3278/11, & 3223/11 Page 75 caste of the Union Territory, even though their castes are not included in the list of such castes, for the Union Territory.

(3) The ruling in Pushpa is clear that if the resident of a state, whose caste is notified as Scheduled caste or scheduled tribe, moves to a Union Territory, he carries with him the right to claim that benefit, in relation to the Union Territory, even though if he moves to another state, he is denied such benefit (as a result of the rulings in Marri and Action Committee). The ruling in Pushpa, being specific about this aspect vis-a-vis Union Territories, is binding; it was rendered by a Bench of three judges.

(4) The later ruling in Subhash Chandra doubted the judgment in Pushpa, holding that it did not appreciate the earlier larger Bench judgments in the correct perspective. Yet, Subhash Chandra cannot be said to have overruled Pushpa, since it was rendered by a smaller Bench of two judges. This approach of Subhash Chandra has been doubted, and the question as to the correct view has been referred to a Constitution Bench in the State of Uttaranchal case.

(5) By virtue of the specific ruling applicable in the case of Union Territories, in Pushpa, whatever may be the doubts entertained as to the soundness of its reasoning, the High Courts have to apply its ratio, as it is by a formation of three judges; the said decision did notice the earlier judgments in Marri and Action Committee. Article 141 and the discipline enjoined by the doctrine of precedent compels this Court to follow the Pushpa ruling.

(6) In matters pertaining to incidence of employment, such as seniority, promotion and accelerated seniority or promotional benefits, flowing out of Articles 16 (4A) and (4B) of the Constitution, there may be need for clarity, W.P. (C) 5390/10, 7717/10, 7878/10, 8368/10, 816/11, 1205/11, 1513/2011, 1713/11, 3278/11, & 3223/11 Page 76 whichever rule is ultimately preferred i. e the Pushpa view or the Marri and Action Committee view. In such event, it may be necessary for the guidance of decision makers and High Courts, to spell out whether the correct view should be applied prospectively. Furthermore, it may be also necessary to clarify what would be meant by prospective application of the correct rule, and whether such employment benefits flowing after recruitment, would be altered if the Marri view is to be preferred.

34. It is thus, concluded in clause (ii) below subclause 66 (2) that the resident of a State who moves to a Union Territory would be entitled to carry his reservation benefit and status as member of scheduled caste, (to be read as S.T. in the context of this case) even if his caste is not included as a scheduled caste, for that Union Territory. In the case in hand the Petitioner belongs to the Dhodia tribe which is recognized to be a S.T. in the Respondent U.T. and being a resident of the Respondent U.T., the Petitioner would stand on a better footing and the issue of migration from the State to U.T. would not be an impediment.

35. It also needs mention that the State of Gujarat and Respondent U.T. are neighbours and are divided mainly by a demarcation line. It cannot be disputed that the Dhodia tribe in the State of Gujarat is the same tribe in the Respondent U.T. for the purposes of the cultural trades and religious sentiments and ceremonies. It is probably with this background that the State of Gujarat as well as the Respondent U.T. have recognized Dhodia tribe as a S.T. with the presidential order bearing No.CO 65 issued as early as in the year 1962.

36. In so far as the contention of the Respondent U.T. that the Administration may have committed a mistake in wrongly wording its advertisement is concerned, we find an answer in the judgment of the learned Full Bench of Delhi High Court in the Deepak Kumar case (supra) below paragraphs 45, 46 and 47 which read as under:

" 45. It was submitted that having treated the petitioners like scheduled caste candidates eligible to compete as such, after conclusion of the entire recruitment process, and declaration of results, of the written test, it was not open to the District Judge to impose further conditions, disqualifying them and treating them as belonging to another, or general category.

46. The respondents in the writ petition and the Govt of NCT of Delhi argued that after the decision in Subhash Chandra, it became necessary to restrict the benefit of reservation for scheduled castes in relation to the Union Territory of Delhi to only members of those castes who found mention in the Presidential Notification in relation to Delhi. The withholding of appointment cannot be characterized as arbitrary, since no selected candidate has a vested right in appointment. For this proposition, W.P.(C) 5390/10, 7717/10, 7878/10, 8368/10, 816/11, 1205/11, 1513/2011, 1713/11, 3278/11, & 3223/11 Page 58 reliance was placed on the decision reported as Sankersan Dash v. Union of India, AIR 1991 SC 1612. It was also argued that the candidates had to be called for retyping test in view of the decision of a Division Bench of this Court in Anupam Garg v District and Sessions Judge, LPA No. 417/2010. The candidates who had secured between 22 and 29.5 marks in the typing test were called for such retyping test. The petitioners were not treated as SC/ST but as General category candidates; they did not get the necessary cut off marks in that category.

47. The view which this Court expressed, about the binding nature of the Supreme Court's ruling in Pushpa prevailing, would apply in this case. There is

no doubt that the advertisement in the present case was issued in December, 2009. At that time, the judgment in Subhash Chandra had already been delivered (it was pronounced on 4th August, 2009). Yet, the fact remains that being a larger Bench ruling of three judges, Pushpa had to prevail. This is highlighted by the view of the Supreme Court in State Of U.P vs Ram Chandra Trivedi AIR 1976 SC 2547:

"It is also to be borne in mind that even in cases where a High Court finds any conflict between the views expressed by larger and smaller benches of this Court, it cannot disregard or skirt the views expressed by the larger benches."

37. In the light of the above, the said contention needs to be rejected as the Respondent U.T., similar to the case before the learned Full bench of the Delhi High Court, has treated the Petitioner as belonging to the S.T. category, found him eligible to apply for the said post, issued him a call letter to participate in the entire selection process and after declaring the results, the Petitioner has turned out to be at serial No.1 even in the combined merit list of the open as well as S .T. categories and yet is denied an appointment while other appointments are made. It is in the above background and peculiar facts of this case that we have entertained the claim of the Petitioner for seeking an appointment to the post to which he has applied for.

38. In the light of the above, this Petition is partly allowed. The respondent U.T. is directed to appoint the Petitioner as an Assistant Motor Vehicle Inspector in the Transport Department of the said Union Territory on the post reserved for the S.T. category. Needless to state, in the event of there being any policy of validation of the claim of S.C. S.T. candidates, the same would be applicable to the Petitioner as he is being appointed to the post reserved for S.T.

39. Learned senior counsel for the Petitioner submits that the conduct of the Respondent U.T. as is projected as being an innocent stand or bonafide approach is concerned, the Petitioner has been specifically deprived of the appointment only because his birth/origin was in Gujarat. He was otherwise eligible for appointment in the light of the conclusion drawn by this Court in this judgment. A statement was also made before the N.C.S.T. that he would be appointed within a period of about seven days which statement is not said to be either wrongly made or as having never been made before the N.C.S.T., and has not been withdraw. Therefore, it has rendered the Petitioner entitled to atleast the deemed date of appointment from the date on which the candidate from the open category was so appointed.

40. Learned counsel for the Respondent U.T. has strenuously opposed the said contention on the ground that it was a bonafide belief of the Respondent U.T. that the Petitioner was not eligible. Malafides cannot be attributed to the conduct of the Respondent Administration. Without having worked from the day the open candidate was appointed, disentitles the Petitioner from any benefits by applying the principle law "no work no wages". At this juncture, the learned senior

Advocate for the Petitioner submits on instructions from the Petitioner who is present in the Court that the Petitioner is giving up all monetary benefits from the date the candidate from the open category was appointed and mainly for the purposes of reckoning his service and for allowing a deemed date for the purpose of his seniority, he is willing to give up all monetary benefits.

41. We are convinced of the said statement made on instructions and in order to maintain equity and parity in between the other candidates appointed from the same selection process, we therefore direct the Respondent U.T. to issue the appointment order forthwith to the Petitioner by giving him the same date of appointment as was given to the other candidates from the same selection process, as the deemed date of appointment.

42. Rule is made partly absolute accordingly in the above terms.

43. At this juncture, learned counsel for the Respondent U.T. prays for staying of this judgment. We have heard the counsel for the respective sides on this request. Considering that the Respondent U.T. has acted against its own policy in the light of the Office Memorandum of 2013, the advertisement which has not been withdrawn and in the light of the judgment of the Hon"ble Apex Court in the S. Pushpa case (supra) and Puducherry case (supra) by which the Petitioner stands entitled for the benefits of the presidential order No.CO 65, we find that the Petitioner has been tired out over the last two years and is made to run from pillar to post for his employment. In this background we are rejecting the request made by the learned counsel for the Respondent.