
(2010) 08 CAL CK 0135
In the Calcutta High Court
Case No : Writ Petition 13489 (W) of 2010

Mukul Biswas

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(4), 32, 335
West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Teachers) Rules, 2007 — Rule 16, 16(2), 16(3), 16(4), 16(5)

Citation : (2010) 08 CAL CK 0135

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Kishore Datta and Binoy Kumar Panda, for the Appellant; Samiran Giri, B.R. Bhattacharya, Tapabrata Chakraborty and Abhijit Basu for respondents 4 to 7, for the Respondent

Final Decision : Allowed

Judgement

Dipankar Datta, J.—The West Bengal Central School Service Commission (hereafter the Central Commission) issued advertisement dated September 5, 2009 inviting eligible candidates to offer their candidature for recruitment to vacant posts of Assistant Teachers in different recognized nongovernment aided Junior High/High/Higher Secondary Schools in West Bengal. Insofar as posts of Assistant Teachers in Philosophy (Honours/P.G.) in schools under the jurisdiction of the Regional School Service Commission, Eastern Region (hereafter the Regional Commission) are concerned, 42 vacancies were notified. The districts of Burdwan, Hooghly and Birbhum are under the administrative jurisdiction of the Regional Commission. Out of these 42 vacancies, 31 were shown as unreserved while 9 and 2 vacancies were shown as reserved for Schedule Caste (hereafter SC) and Physically Handicapped (hereafter PH) candidates respectively.

2. The petitioner, who hails from Chandannagar in the district of Hooghly, is a candidate belonging to SC category as well as PH category. However, she offered

her candidature for consideration as SC category candidate. On the basis of her performance in the recruitment examination, she was selected and placed at Sl. No. 25 of the Combined Merit List (hereafter CML). Amongst SC category candidates, she secured the 1st position.

3. Since the petitioner outshone even general candidates, she was treated as a general candidate and thus was required to confine her choice amongst the 31 unreserved vacancies. From the list of unreserved vacancies it appears that vacancies were available in the following schools within Hooghly district.

1. Dwarhatta Rajeswari Institution, P.S. Haripal, Chandannagar sub-division;
2. Paltagarh Radharani Siksha Mandir, P.S. Singur, Chandannagar sub-division;
3. Mahesh Shri Ramkrishna Ashram Vidyalaya, P.S. Rishra, Serampore sub-division;
4. Inchura Rai Saheb HCA Vidyamandir, P.S. Balagarh, Chinsurah sub-division;
5. Kabura Panchpara High School, Balagarh, Chinsurah sub-division; and
6. Rajhati Bandor High School, P.S. Khanakul, Arambagh sub-division.

4. So far as the vacancies reserved for SC candidates in the district of Hooghly are concerned, one vacancy existed in Ilsoba Mondlai High School and one in Boinchee B.L. Mukherjee Free Institution, both within P.S. Pandua, Chinsurah sub-division.

5. The petitioner apprehended that if she is treated as a general candidate, she would stand deprived of the opportunity to choose a school in the district of Hooghly where vacancy exists, whereas other SC candidates, with inferior performance in the recruitment examination, would have the option of choosing either of the two schools within Pandua P.S., Chinsurah sub-division, District Hooghly, referred to above.

6. The petitioner consequently presented this petition voicing a grievance that the Regional Commission by treating her as general candidate has deprived her of a choice posting resulting in gross inequality.

7. On June 29, 2010, the writ petition was moved. It was also the day when the petitioner was scheduled to attend a counseling session before the Regional Commission. Being prima facie satisfied with the petitioner's claim, I had granted an interim order to the effect that the Regional Commission would be entitled to continue with the counselling process in respect of the posts of Assistant Teacher in Philosophy (Honours/Post Graduate) but it would remain restrained from considering the options exercised by the SC candidates in course of counselling to be final and that they shall not be recommended for appointments in any school in exercise of the options exercised by them until further orders are passed by the Court.

8. The apprehension of the petitioner became a reality when her turn for

counseling arrived. She intended to select a school in Hooghly district but all the unreserved vacancies in schools in that district had been chosen by the candidates above her in the merit list. Consequently, she refused to opt for being recommended to schools in the districts of Burdwan and Birbhum which were then available. In compliance with the order of Court, the Regional Commission has not recommended any candidate belonging to SC category acting on their options exercised in course of counseling.

9. These are the undisputed facts and since a pure question of law is involved, the Central Commission as well as the Regional Commission was not called upon to file counter affidavit.

10. Having regard to the aforesaid narrative of facts, the only question that requires a decision is should an applicant for a post be worse off for acquitting herself creditably in a recruitment examination and thereby stand deprived of a choice posting which she otherwise would have been entitled to had she not been treated at par with general candidates.

11. I called upon Mr. Bhattacharya, learned senior counsel for the Central Commission and the Regional Commission to address me first.

12. It was contended by him that once the petitioner by virtue of her performance outshone even the general candidates and secured a place as high as 25 in the CML, she cannot be treated as a SC candidate and in terms of the existing Government Orders the Regional Commission did not commit any illegality in treating her as a general candidate. Consequently, she cannot claim the benefit of being a SC candidate anymore and thereby choose any one of the vacancies reserved for such candidates; she must rest content with available unreserved vacancies and select any one of them.

13. According to him, the object behind treating candidates like the petitioner as general candidates is to ensure upliftment of another SC candidate who, in ordinary circumstances, would not have been empanelled if candidates like the petitioner had been treated as SC candidates and, thereby, ensure adequate representation of such category. Orders dated April 19, 2001 issued by the Joint Commissioner for Reservation and ex-officio Joint Secretary to the Government of West Bengal, Backward Classes Welfare Department and dated June 21, 2001 issued by the Principal Secretary to the Government of West Bengal, Backward Classes Welfare Department, the terms of the advertisement dated September 5, 2009 issued by the Central Commission and various decisions of the Supreme Court, to be referred hereafter, were relied on by him to buttress his contention that the Central Commission and the Regional Commission not having acted in contravention of law, the petitioner is not entitled to any relief on this petition.

14. Mr. Dutta, learned Counsel appearing in support of the petition relied on some of the very decisions cited by Mr. Bhattacharya himself in support of his contention that the declaration of law made by the Supreme Court would support the petitioner's claim. The orders dated April 19, 2001 and June 21, 2001 as well

as the advertisement dated September 5, 2009, according to him, refer to and end at the stage of preparation of panel and do not cover any stage beyond that and, therefore, are not relevant for taking care of the present problem. He, thus, urged the Court to allow the petitioner to exercise option in respect of anyone of the vacancies reserved for SC candidates and not to treat her candidature as cancelled for having refused to exercise option in respect of the available unreserved vacancies.

15. I have heard learned Counsel for the parties. Considering the decisions of the Supreme Court referred to by the parties, I am *ad idem* with Mr. Dutta that the writ petition deserves to be allowed.

16. The scheme of the West Bengal School Service Commission Act, 1997 and the rules framed thereunder [West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Teachers) Rules, 2007] is the manifestation of the well-recognized principle that merit would be the test for choosing the best in respect of public employment. It is true that in terms of constitutional principles a candidate belonging to the reserved category would be treated at par with general candidates if his/her performance is comparable with general category candidates. But, if in the process of treating a SC candidate as a general candidate he or she is found disentitled to secure a preferred posting which he or she otherwise might have been entitled to had the benefit of reservation been extended to him or her, and consequently he or she is not able to secure his or her preferred posting, that would amount to contravening the inter-se merit amongst the reserved candidates and put such meritorious SC candidate at a disadvantageous position.

17. I may demonstrate the inequality that might ensue by an illustration. Take the case of three vacant posts in a State service, two unreserved, one in Kolkata and the other in Cooch Behar, while the reserved post is in Howrah. A candidate belonging to reserved category and stationed in Kolkata and willing to exercise option in respect of the vacant post in Howrah by dint of merit is treated as general candidate and secures the 2nd position in the merit list. If he is not to be given the benefit of reservation and the first candidate in the merit list chooses the post in Kolkata, the reserved category candidate would have to choose the post in Cooch Behar and the reserved category candidate, next below him, would have the option to choose the post in Howrah, if Mr. Bhattacharya's contention is to be accepted. In my view, that would breed inequality amongst a category which the Constitution itself abhors.

18. I accept the contention of Mr. Dutta that the orders and the advertisement referred to above do not lay down the manner how a reserved category candidate, after being placed in the merit list at par with general candidates, would be treated. The Rules of 2007 do not also stipulate that a reserved category candidate on being treated as a general candidate would not be entitled to the benefits of reservation in the sense that the reserved vacancies pertaining to his or her category would not be open for exercise of option by him or her in

respect thereof.

19. No decision has been brought to my notice by Mr. Bhattacharya which lays down the law that once a reserved category candidate by dint of his or her performance is treated at par with general candidates, he or she forfeits the benefits which would have otherwise been available to her as a reserved category candidate.

20. Mr. Bhattacharya has heavily relied on paragraph 12 of the decision in *K. Duraisamy and Another Vs. The State of Tamil Nadu and Others*, . It is quoted below:

12. The mere use of the word "reservation" per se does not have the consequence of ipso facto applying the entire mechanism underlying the constitutional concept of a protective reservation specially designed for the advancement of any socially-and-educationally-backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes, to enable them to enter and adequately represent in various fields. The meaning, content and purport of that expression will necessarily depend upon the purpose and object with which it is used. Since reservation has diverse natures and may be brought about in diverse ways with varied purposes and manifold objects, the peculiar principles of interpretation laid down by the courts for implementing reservations envisaged under the Constitution in order to ensure adequate and effective representation to the backward classes as a whole cannot be readily applied out of context and unmindful of the purpose of reservations as the one made in this case, more to safeguard the interest of candidates who were already in service to enable such in-service candidates to acquire higher and advanced education in specialised fields to improve their professional talents for the benefit of the patients to be treated in such medical institutions where the in-service candidates are expected to serve. That apart, where the scheme envisaged is not by way of a mere reservation but is one of classification of the sources from which admissions have to be accorded, fixation of respective quota for such classified groups, the principles at times applied in construing provisions relating to reservation simpliciter will have no relevance or application. Though the prescription of a quota may involve in a general sense reservation in favour of the particular class or category in whose favour a quota is fixed, the concepts of reservation and fixation of quota drastically differ in their purport and content as well as the object. Fixation of a quota in a given case cannot be said to be the same as a mere reservation and whenever a quota is fixed or provided for one or more of the classified group or category, the candidates falling in or answering the description of different classified groups in whose favour a respective quota is fixed have to confine their respective claims against the quota fixed for each of such category, with no one in one category having any right to stake a claim against the quota earmarked for the other class or category. Since we are of the view that the Full Bench has correctly come to the conclusion that the scheme adopted for selection of candidates for admissions in question provided for a

definite and fixed quota for the respective classified sources of admission and the reasons assigned therefore do not suffer from any infirmity whatsoever to call for any interference at our hands, these appeals fail and are dismissed.

21. I have failed to find the materiality of this decision to the facts of the present case. The Supreme Court was considering the impact of a Government Order dated February 9, 1999 in relation to the procedure for selection of candidates for admission to Post Graduate diploma, degree, MDS and higher speciality courses for the academic session 1999-2000. The Government Order envisaged reservation confined to 50% in favour of the in-service candidates on merit basis and also enumerated various categories of Medical Officers, who alone were to be treated as service candidates. For the remaining 50%, referred to as open quota, all other eligible Medical Officers, except those enumerated categories of Medical Officers, were stated to be eligible to apply. Certain unsuccessful in-service candidates approached the Madras High Court with the plea that on the basis of merit their cases ought to be considered against the open quota. Assuming that there was no category as "non-service candidates" and taking into consideration judicial decisions on reservation under Article 14, a Single Judge held that reservation of 50% of seats for non-service candidates have to be given effect to or worked out by selecting candidates from in-service and non-service category, on the basis of merit in the first instance and thereafter the 50% reserved for in-service candidates shall be filled up by the in-service candidates who could not gain selection on the basis of merit as against the other 50% earmarked as "open". Appeals by different parties against that decision came up before two different Division Benches. One of the Division Benches upheld the impugned decision but the subsequent Bench referred the matter to a Full Bench, which in turn reversed the decision of the Single Judge. The decision of the Full Bench was challenged in the appeals which were dismissed by the Supreme Court.

22. The Court was considering a scheme classifying the sources from which admissions were to be made; it was not a scheme envisaged for reservation of the nature referred to in Article 16 of the Constitution for the backward classes. The scheme had been evolved for safeguarding the interest of candidates who were already in service to enable such in-service candidates to acquire higher and advanced education in specialised fields to improve their professional talents for the benefit of the patients to be treated in such medical institutions where they were expected to serve. It was held that candidates falling in or answering the description of different classified groups in whose favour a respective quota is fixed have to confine their respective claims against the quota fixed for each of such category, with no one in one category having any right to stake a claim against the quota earmarked for the other class or category.

23. In my humble understanding of the decision, law declared is that fixation of a quota in a given case cannot be equated with reservation and the principles applied in construing provisions relating to reservation simpliciter will have no

relevance or application in respect of quotas of the nature that came up for consideration. The decision in K. Duraisamy (supra) is thus of no assistance to Mr. Bhattacharya.

24. The decisions in Ritesh R. Sah Vs. Dr. Y.L. Yamul and others, , Anurag Patel Vs. U.P. Public Service Commission and Others, and Union of India (UOI) and Another Vs. Satya Prakash and Others, have been relied on by the rival parties. Mr. Bhattacharya's submission that these decisions support his contention has left me unimpressed.

25. The Supreme Court in Ritesh R. Sah (supra) was dealing with a writ petition under Article 32 of the Constitution concerning a dispute regarding admission in a medical college. The issue was whether a candidate belonging to the SC or any other reserved category, even if he is entitled to be selected for admission in the open competition on the basis of his own merit, yet, can he be counted against the quota meant for reserved category or will he be treated as an open competition candidate. Portion of paragraph 17 of the decision, relied on by Mr. Dutta, furnishes the answer to the issue and is reproduced hereunder:

17. ***** In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against seats reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.*****

(underlining for emphasis by me for the present case)

26. In Anurag Patel (supra), while considering a dispute arising out of a selection made by the Public Service Commission, the Supreme Court had the occasion to come to a finding that candidates with higher inter- se merit were appointed to lower posts and held as follows:

The authorities should have compared the candidates who are to be appointed on general merit as also candidates who are to be appointed as against the reserved

vacancies and while making appointments the inter se merit of the reserved candidates should have been considered and they must have been given the option treating each service separately. As this exercise was not followed, less meritorious candidates got appointment to higher posts whereas more meritorious candidates had to be satisfied with posts of lower category.

27. In *Satya Prakash* (supra), the Supreme Court after considering *Ritesh R. Sah* (supra) had the occasion to observe as follows:

17. This position has been made crystal clear in *Ritesh R. Sah* as referred to above that while a reserved category candidate entitled to admission on the basis of his merit, will have the option (preference) of taking admission in the college where specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate.

18. By way of illustration, a reserved category candidate, recommended by the Commission without resorting to relaxed standard (i.e. on merit) did not get his own preference "say IAS" in the merit/open category. For that, he may opt a preference from the reserved category. But simply because he opted a preference from the reserved category does not exhaust the quota of OBC category candidate selected under the relaxed standard. Such preference opted by OBC candidate who has been recommended by the Commission without resorting to the relaxed standard (i.e. on merit) shall not be adjusted against the vacancies reserved for the Scheduled Castes, Scheduled Tribes and Other Backward Classes. This is the mandate of the proviso to sub-rule (2) of Rule 16.

19. In other words, while a reserved category candidate recommended by the Commission without resorting to the relaxed standard will have the option of preference from the reserved category recommended by the Commission by resorting to relaxed standard, but while computing the quota/percentage of reservation he/she will be deemed to have been allotted seat as an open category candidate (i.e. on merit) and not as a reserved category candidate recommended by the Commission by resorting to the relaxed standard.

20. If a candidate of the Scheduled Caste, the Scheduled Tribe and Other Backward Class, who has been recommended by the Commission without resorting to the relaxed standard could not get his/her own preference in the merit list, he/she can opt a preference from the reserved category and in such process the choice of preference of the reserved category recommended by resorting to the relaxed standard will be pushed further down but shall be allotted to any of the remaining services/posts in which there are vacancies after allocation of all the candidates who can be allocated to a service/post in accordance with their preference.

(underlining for emphasis by me for the present case)

28. If at all a reserved candidate by reason of being treated at par with general candidates on the basis of his or her performance is to lose the benefits of reservation, as contended by Mr. Bhattacharya, there would have been no occasion for the Supreme Court to make the observations quoted supra which have been underlined for emphasis.

29. The petitioner is thus entitled to have the cake and eat it too.

30. The icing on the cake, if I may use the expression, is provided by the recent Constitution Bench decision of the Supreme Court in Union of India v. Ramesh Ram and Ors. 2010 (4) Supreme 675. Therein, the Supreme Court was considering the constitutional validity of Rule 16(2), (3), (4) & (5) of the Civil Service Examination Rules relating to Civil Services Examinations held by the Union Public Service Commission.

31. Sub-rule (2) of Rule 16 being relevant is quoted below:

(2) While making service allocation, the candidates belonging to the Schedule Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies may be adjusted against reserved vacancies by the Govt. if by this process they get a service of higher choice in the order of their preference.

32. The validity of the said sub-rule was upheld in the following words:

39. Article 16(4) of the Constitution provides that nothing in Article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 16(4) empowers the State to initiate measures in order to protect and promote the interests of backward classes (OBC, SC & ST). The impugned measures in no way offend the equality clause since this particular clause was inserted to safeguard the concerns of certain classes and shield their legitimate claims in the domain of public employment, On behalf of the respondents in the appeals, it was submitted Rules 16(2), (3), (4) & (5) infringes Article 16(4). We do not accept this proposition since Rule 16(2) and the subsequent sub-rules merely recognize and advance inter se merit among the Reserved Category candidates in the manner that has been demonstrated before us by Learned Solicitor General.

40. Therefore, Rule 16 protects the interests of a Reserved Category candidate selected in the general (unreserved) category by giving him the option either to retain his position in the open merit category or to be considered for a vacancy in the Reserved Category, if it is more advantageous to him/her. The need for incorporating such a provision is to arrest arbitrariness and to protect the interests of the Meritorious Reserved Category candidates. If such rule is declared redundant and unconstitutional vis-a-vis Article 14, 16 and 335 then the whole object of equality clause in the Constitution would be frustrated and the

MRC candidates selected as per the general qualifying standard would be disadvantaged since the candidate of his/her category who is below him/her in the merit list, may by availing the benefits of reservation attain a better service when allocation of services is made. Rule 16 in essence and spirit protects the pledge outlined in the Preamble of the Constitution which conceives of equality of status and opportunity.

33. Mr. Bhattacharya's contention that the decision relates to service and not posting and, therefore, would have no application here is unacceptable. It is seldom found that facts of two cases are similar. Undoubtedly a minor difference in facts may make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. But it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi [see : The Regional Manager and Another Vs. Pawan Kumar Dubey, . Rule 16(2) was conceived in the interest of the reserved category of candidates and to provide opportunity for their adjustment against reserved vacancies for a higher choice at the time of service allocation. The impugned rule has been declared constitutionally valid keeping in mind the disadvantages the Meritorious Reserved Category candidates, by dint of their inclusion in the general merit list, would be subjected to. There is no reason as to why the same principle of law should not guide me in holding in favour of the petitioner.

34. I am not oblivious of the fact that the Rules of 2007 do not provide any benefit to reserved category candidates similar to Rule 16(2) of the Civil Service Examination Rules. However, merely because the State has not framed appropriate rule in line with Rule 16(2) of the Rules under consideration in Ramesh Ram (supra) cannot by any stretch of imagination defeat the petitioner's right. I, therefore, find no ground to refuse relief to the petitioner because of absence of any such rule in the Rules of 2007.

35. Mr. Bhattacharya cited administrative inconvenience as an impediment for extending opportunity to the reserved category candidates even after being treated at par with the general candidates. I do not consider the inconvenience to be insurmountable. Even otherwise, no amount of administrative inconvenience can be allowed to supersede rights of parties accrued on the basis of merits.

36. The writ petition stands allowed. The petitioner shall be entitled to choose a place of posting from amongst the nine vacancies reserved for the SC candidates. Once the petitioner has exercised her option in respect of any particular school, the same shall be treated as final and recommendation issued in her favour expeditiously. Option in respect of the rest of the reserved vacancies shall then be allowed to be exercised by the other candidates strictly in order of merit.

37. Exercise in terms of this order shall be completed as early as possible, but

not later than 4 weeks from date of production of a copy of this judgment and order.

38. There shall be no order as to costs.

39. Constitutional validity of Rule 16(2) of the Civil Service Examination Rules having been upheld by the Supreme Court in Ramesh Ram (supra), the State Government may consider the desirability of amending the Rules of 2007 by incorporating similar rule to prevent inequality among a category. Equality of opportunity is one of the professed goals enshrined in the preamble of the Constitution and it is high time that the State addresses the problem in the light of the decisions of the Supreme Court referred to in this judgment.

40. Urgent photostat certified copy of the judgment and order shall be given to the applicants, if applied for, as early as possible.