
(2016) 12 KL CK 0040

In the High Court Of Kerala

Case No : WP(C).Nos.5190 and 24730 of 2016

Nair Service Society

APPELLANT

Vs

University Grants Commission

RESPONDENT

Date of Decision : 16-12-2016

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2017) 1 ILRKerala 320 : (2017) 2 KerLJ 89

Hon'ble Judges : Mr. P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : Sri. K.R. Avinash (Kunnath), Sri. Abdul Raoof Pallipath and Sri.K.M. Aneesh, Advocate, for the Respondent No. 6; Sri. Baby Thomas, Government Pleader, for the Respondent Nos. 4 and 5; Sri. Nirmal. S, SC, CBSE, for the Respondent No. 3; Sri. N. Nagaresh, A

Final Decision : Allowed

Judgement

P.B. Suresh Kumar, J. - The criteria fixed by the University Grants Commission for qualifying the National Eligibility Test is under challenge in these writ petitions. Exhibits are referred to in this judgment as they appear in WP.(C).No.5190 of 2016. The National Eligibility Test ("the NET", for short) is provided for in the regulations issued by the University Grants Commission ("the UGC", for short) for appointment of teachers and academic staff in Universities and Colleges. The petitioner in WP.(C).No.5190 of 2016 is a body engaged in running various educational institutions including Arts and Science Colleges and the petitioner in WP.(C).No.24730 of 2016 is a candidate who failed to qualify in the last NET.

2. The short facts relevant for adjudication of the issues raised in the writ petitions are the following:

The UGC is a body constituted by virtue of the provisions contained in the University Grants Commission Act for coordination and determination of the standards in institutions for Higher Education. In exercise of the powers conferred under the said statute, the UGC issued Ext.P1 Regulations on minimum

qualifications for appointment of teachers and other academic staff in Universities and Colleges. As per Ext.P1 Regulations, only candidates who qualify the NET are eligible for appointment as Assistant Professor in Universities and Colleges. The criteria for qualifying the NET are being fixed by the UGC from time to time. Pass in the NET is the criterion for award of Junior Research Fellowship also. Ext.P2 is the notification issued by the third respondent on behalf of the UGC for the NET held during December 2015. In Ext.P2, it is provided that the minimum marks to be obtained in the NET for the award of Junior Research Fellowship and eligibility for appointment as Assistant professor are, 40% for papers I and II and 50% for paper III for general candidates and 35% for papers I and II and 40% for paper III for OBC (Other Backward Communities), PWD (Persons With Disability), SC (Scheduled Caste) and ST (Scheduled Tribe) candidates. It is also provided in Ext.P2 notification that the merit lists of the candidates who secure minimum marks will be prepared thereafter subject wise as also category wise based on the aggregate marks secured by the candidates in all the three papers and the top 15% candidates in all the categories will be declared NET qualified for each subject. The petitioners are aggrieved by the said criteria stipulated in Ext.P2 notification. According to them, in the light of the lower minimum marks prescribed for the candidates belonging to the reserved categories, the number of candidates securing minimum marks in the NET from the reserved categories is far above the number of candidates securing minimum marks in the NET from the general category, and therefore, when the top 15% of candidates from each category, subject wise, are qualified in the NET, the qualified candidates in the NET from the reserved categories far outnumber the qualified candidates from the general category, infringing the fundamental right of equal opportunity guaranteed under Article 16(1) of the Constitution to the candidates belonging to general category in matters relating to public employment. It is the specific case of the petitioner in WP.(C) No.5190 of 2016 that since candidates are qualified in the NET in the aforesaid manner, there is dearth of sufficient number of candidates for appointment against open vacancies and consequently, less meritorious candidates belonging to reserved categories are usurping the open vacancies. According to the petitioners, the said mode of selection is deteriorating the quality of higher education in the country. The petitioners, therefore, seek a declaration that Clause 8 of Ext.P2 notification is unconstitutional, being violative of Articles 14 and 16 of the Constitution. They also seek directions to the UGC to maintain uniform minimum marks for candidates for qualification in the NET irrespective of the fact whether they belong to reserved or general categories.

3. A counter affidavit has been filed by the UGC in WP.(C) No.5190 of 2016, supporting the criteria laid down for qualification in the NET as per Ext.P2 notification. The stand taken by the UGC in the counter affidavit is that there is no illegality in prescribing lower minimum marks for pass in the NET for reserved categories and since only the candidates who secure the minimum marks in the reserved categories are entitled to be qualified in the NET, there is no illegality in

qualifying the top 15% among them.

4. Heard the learned counsel for the petitioners, the learned Standing Counsel for the UGC as also the learned Standing Counsel for the third respondent.

5. The learned counsel for the petitioners vehemently contended that in so far as lower minimum marks are prescribed for the candidates belonging to reserved categories for pass in the NET, a further classification among the candidates who have secured the minimum marks, other wise than on the basis of the aggregate marks secured by them, is arbitrary. According to the learned counsel, in so far as lower minimum pass marks are prescribed for candidates belonging to reserved categories, there cannot be any further preference to them as provided for in Step III. Per contra, the learned standing counsel for the UGC contended that the criteria fixed for qualification in the NET is perfectly in order.

6. I have anxiously considered the contentions raised by the learned counsel for the parties. Clause 8 of Ext.P2 notification, which is under challenge, reads thus:

"Procedure & Criteria For Declaration of Result: This will comprise of following steps:

Step I: Minimum marks to be obtained in NET for considering a candidate for the award of JRF and eligibility for Assistant Professor:

The candidates are required to obtain minimum marks separately in Paper-I, Paper-II and Paper-III as given below:

Category

Minimum Marks (%) to be obtained.

Paper-I

Paper-II

Paper-III

General

40 (40%)

40 (40%)

75 (50%)

OBC

(Non-creamy layer)

35 (45%)

35 (35%)

60 (40%)

PWD/SC/ST

Step II: Amongst those candidates who are cleared step I, a merit list will be prepared subject wise and category-wise using the aggregate marks of all the three papers secured by such candidates.

Step III: Top 15% candidates (for each subject and category), from the merit list mentioned under Step II, will be declared NET qualified for eligibility for Assistant Professor only.

Step IV: A separate merit list for the award of JRF will be prepared from amongst the NET qualified candidates figuring in the merit list prepared under step III."

It is beyond dispute that certain number of posts of Assistant Professor in the Universities and Colleges are reserved for candidates belonging to Backward Communities, Scheduled Castes, Scheduled Tribes and for persons with disability. The same is done by the appropriate Governments obviously in discharge of their obligation under Article 16(4) of the Constitution to protect the fundamental right of equality in public employment guaranteed to the candidates belonging to the said categories under Article 16(1) of the Constitution. It is also beyond dispute that only candidates who are NET qualified are entitled to participate in the selection process for appointment to the post of Assistant Professor in Universities and Colleges irrespective of the fact as to whether they belong to the reserved categories or the general category. As such, there cannot be any dispute to the fact that if the candidates belonging to the reserved categories do not qualify the NET, the State will not be in a position to protect the fundamental right of equality in public employment guaranteed to them under Article 16(1) of the Constitution. It is, therefore, evident that the very purpose of prescribing lower minimum marks for pass in the NET for the candidates belonging to the reserved categories is to make available sufficient number of candidates from those categories for selection for appointment in the vacancies earmarked for them. So long as certain number of vacancies of Assistant Professor in Universities and Colleges are reserved for backward and other classes who are not adequately represented in the services, it cannot be said that the prescription of lower minimum marks for candidates belonging to the said classes, as provided for under Step I of Ext.P2 notification, is illegal in any manner.

7. As noted above, Step II of the procedure only provides for the preparation of merit lists of the candidates who have cleared Step I subject wise and category wise based on their aggregate marks. Step III, however, provides that only the top 15% of the candidates in the merit lists subject and category wise, will be declared NET qualified. The question, therefore, is whether the said criterion is valid. The case of the petitioners is that since lower minimum marks are prescribed for the candidates belonging to reserved categories, the number of candidates securing minimum marks in the NET from the reserved categories is far above the number of candidates securing minimum marks in the NET from the general category and that therefore, when the top 15% of candidates from

each category are qualified in the NET from the merit lists prepared based on the aggregate marks, sufficient number of candidates in proportion to open vacancies are not NET qualified from the general category. In order to substantiate the case that only less number of candidates are NET qualified from general category on account of the impugned criteria, the petitioners rely on Ext.P4 tabulation indicating the number of candidates qualified in the NET held during June, 2015 in the reserved as also the general categories. Going by the data furnished in Ext.P4, which is not disputed by the UGC in the counter affidavit filed in this matter, the number of candidates qualified in the last NET from reserved categories varies from 38.92% to 91.8%, the average being 62.17%. According to the petitioners, on account of the said reason, candidates belonging to reserved categories are getting selected for appointment to both open and reserved vacancies, thereby infringing the fundamental rights guaranteed to the candidates belonging to general category under Article 16(1) of the Constitution. In other words, the case of the petitioners is that a qualifying examination which would not ensure sufficient number of qualified hands for appointment against open vacancies is violative of the fundamental right guaranteed to the general candidates under Article 16(1) of the Constitution.

8. Though the impugned criteria do not provide for any reservation, since the same are attacked on the ground that the provision made therein, to ensure the right to equal opportunity in public employment guaranteed to backward and other classes of citizens under Article 16(4) of the Constitution, results in infringement of the fundamental right guaranteed to the candidates belonging to general category under Article 16(1) of the Constitution, it is necessary to refer to the principles on which the State should harmonise the fundamental right to equal opportunity in public employment guaranteed to the citizens under Article 16 of the Constitution. It is settled that no provision of reservation or preference can be so vigorously pursued as to destroy the very concept of equality. Equality is the rule and protection is the exception. Exception cannot exhaust the rule. The purpose of Articles 14 and 16 of the Constitution is equality and equality of opportunity respectively, and Article 16(4) is only a means of achieving the very same objective. Both the provisions have, therefore, to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) conceived in the interest of certain sections of society should be balanced against the guarantee of equality enshrined in Article 16 (1) which is a guarantee held out to every citizen and to the entire society. Neither should be allowed to eclipse the other. If the extent of reservation goes beyond the desirable limit, it is settled that it would result in reverse discrimination. [See *Indra Sawhney v. Union of India* (AIR 1993 SC 477)]. It is on the basis of the aforesaid principles, the Apex Court held in *Indra Sawhney* (supra) that reservation of a majority of the seats was never envisaged by the founding fathers of our Constitution and that the same at any rate should not exceed 50%. Relying on the decisions of the Apex Court in *M.R. Balaji and others v. The State of Mysore and others* (AIR 1963 SC 649), T.

Devadasan v. Union of India and another (AIR 1964 SC 179) and Indra Sawhney's case (supra), the Apex Court has held in P.G.Institute of Medical Education and Research, Chandigarh v. Faculty Association (AIR 1998 SC 1767) that Articles 14, 15 and 16 including Article 16(4) must be applied in such a manner so that a balance is struck in the manner of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the society who do not belong to reserved classes. It was also held by the Apex Court in the said case that while providing for preferences in favour of backward classes, the State shall not ignore the fundamental rights of the rest of the citizens, indicating that while serving the cause of backward classes, the State shall not unreasonably encroach upon the field of equality. It is worth referring in this context, to a passage from the judgment of the Apex Court in M.Nagaraj v. Union of India [(2006) 8 SCC 212], which reads thus:

"Word of caution against excess reservation was first pointed out in G.M., S.Rly. v. Rangachari. Gajendragadkar, J. giving the majority judgment said that reservation under Article 16 (4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims of Backward Classes and claims of other employees as well as the requirement of efficiency of administration."

It was also emphasised by the Apex Court in M. Nagaraj (supra) that in matters like this, a stable equilibrium shall be found out between justice to the backwards, equity for the forwards and efficiency for the entire system. The contention raised by the petitioners as aforesaid needs to be examined in the light of the principles referred to above.

9. It is seen that by securing the minimum marks, one does not get qualified in the NET. In order to qualify the NET, the candidates should come within the first 15% of the merit lists prepared on the basis of aggregate marks category wise. The benefit of lower minimum marks prescribed for pass in the NET for candidates belonging to the reserved categories will enure to their benefit only if they come within the top 15% of the candidates in the respective categories. In other words, as indicated above, lower minimum marks are prescribed for candidates belonging to reserved categories only to ensure that sufficient number of candidates are available for selection from those categories. As such, it cannot be contended that there cannot be any further classification after the pass in the NET and that the qualification in the NET shall thereafter be solely on the basis of the aggregate marks secured by the candidates, for, if the said course is adopted, selection thereafter will be virtually on the basis of merit and sufficient number of candidates from reserved categories cannot be ensured for selection. It has, therefore, to be conceded that a further classification of the candidates securing minimum marks in the NET is necessary to ensure the right to equal opportunity guaranteed to the candidates belonging to the reserved

categories. As noted above, the criterion to be adopted to ensure the said right of the reserved categories in a case like this shall be a criterion which would ensure justice to the candidates belonging to the reserved categories, equity for the candidates belonging to the general categories and would ensure standards of the higher education system. Does the present criteria contained in Step III of Ext.P2 prospectus satisfy the said Constitutional requirement is the question to be answered. While it is the Constitutional obligation of the instrumentalities of the State to ensure that sufficient number of candidates are NET qualified from reserved categories to stake claim for appointment against the seats reserved for them, the instrumentalities of the State are equally obliged to ensure that the provision made for protecting the rights of reserved categories does not affect the sufficiency of the candidates from general category to stake claim for appointment against open vacancies. If the candidates from general category are eliminated while ensuring the interests of the candidates from reserved categories, it is beyond dispute that the candidates belonging to reserved categories will be able to claim not only the seats reserved for them, but also the open seats, for, there is no interdiction for them to claim appointment against open vacancies on merit. Situation of that nature would certainly be a situation of reverse discrimination. As noted above, after Step II, five separate lists are prepared for the five categories viz, General, OBC, SC, ST and Persons with Disability, based on aggregate marks secured by the candidates. Assuming that only a very few candidates from the general category secure the higher minimum marks prescribed for pass in the NET in a particular year, 15% of the same will be very negligible. Likewise, if large number of candidates from the four reserved categories secure the lower minimum marks prescribed for pass in a particular year, 15% from each of the said categories will be substantially high. It is beyond dispute that candidates securing places in the merit lists would depend upon the number of candidates applied for the NET and their performance. As such, if almost equal number of candidates are securing places in all the five lists, the number of candidates qualifying the NET from among the candidates belonging to general category would only be 20%. In all the said situations, the number of NET qualified candidates from reserved categories would far outnumber the number of NET qualified candidates from general category. That does not mean that the same will be the position always for every subject. Depending upon the number of candidates applied for the NET and their performance, the reverse situation is also possible. But, the fact remains that if the impugned criteria is adopted, the number of NET qualified candidates from general category reaching to a skeleton percentage cannot be ruled out. As noted above, in the last selection process, the number of candidates qualified from the reserved categories for some subjects went up to 91.8% and the average was 62.17%. In other words, even in the last selection, the NET qualified candidates from general category were very minimal when compared to the NET qualified candidates from reserved categories for some subjects. There is no dispute to the fact that more than 50% of the vacancies in the post of Assistant Professor in Universities and Colleges are open vacancies. When more than 50% of the vacancies in the post

of Assistant Professor in Universities and Colleges are open vacancies and when NET qualification is mandatory for staking a claim for selection in the said vacancies, a criterion which is likely to eliminate more than 50% of the candidates from general category from acquiring the NET qualification cannot be said to be a valid one, especially when they, or at least a substantial number among them, are more meritorious than the candidates who are NET qualified from the reserved categories. For the aforesaid reasons, I have no hesitation to hold that the impugned criteria would infringe the fundamental right to equal opportunity guaranteed to the candidates belonging to the general category under Article 16(1) of the Constitution and hence unconstitutional.

10. The learned counsel for the third respondent in WP(C).No.24730 of 2016, the Central Board of Secondary Education, who have conducted the last NET on behalf of the UGC contended that the petitioner in WP(C).No.24730 of 2016 being a person who has not secured the minimum marks in the NET has no locus standi to challenge the criterion after the NET. There is force in this contention. But, neither the third respondent in the said writ petition nor the UGC has disputed the locus standi of the petitioner in WP(C).No.5190 of 2016 in instituting the writ petition. Further, it is seen that in *West Bengal Head Masters" v. Union of India and ors.* (AIR 1983 Calcutta 448), the Calcutta High Court took the view that any person interested in education may come to the High Court complaining about any illegality committed by the statutory body entrusted with education and seek relief against such illegality. In the light of the aforesaid decision, it cannot be said that the petitioner in WP (C) No.5190 of 2016 has no locus standi to prefer a writ petition of the said nature. The question whether the petitioner in WP (C).24730 of 2016 has the locus standi to institute the said writ petition is, therefore, irrelevant. At the same time, since none of the candidates belonging to general category who have secured more marks than the NET qualified candidates from reserved categories have approached this Court and since none of the candidates who are NET qualified in the last NET are made parties to the writ petitions, it may not be proper for this Court to interfere with the result of the last NET conducted on the basis of the criteria which is found to be unconstitutional. In the result, the writ petitions are allowed and the criterion prescribed by the UGC for qualifying the NET as contained in Step III of Clause 8 of Ext.P2 notification is declared unconstitutional. It is made clear that this judgment will not affect the result of the NET held pursuant to Ext.P2 notification. It is also made clear that the UGC is free to evolve a criterion which would not affect the sufficiency of meritorious candidates from the general category for selection to all open vacancies in future National Eligibility Tests.