

(2012) 09 AHC CK 0052

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14991 of 2008

Naresh Kumar Verma

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 1 ADJ 17 : (2013) 1 UPLBEC 78

Hon'ble Judges : P.K.S. Baghel, J

Bench : Single Bench

Advocate : Amit Saxena, for the Appellant;

Final Decision : Allowed

Judgement

P.K.S. Baghel, J.—Petitioner has preferred this writ petition under Article 226 of the Constitution for issuance of writ of certiorari to quash the advertisement dated 29.2.2008 and consequential proceeding for filling up Class-IV posts in Jatan Swaroop Post Graduate College, Sikandrabad, Buland Shahar. A brief reference to the factual aspect would suffice: The Jatan Swaroop Post Graduate College is a post graduate college affiliated to Chaudhary Charan Singh University, Meerut (hereinafter referred to as "University"). The affairs of the college is managed by a Committee of Management. The provisions of the Uttar Pradesh State Universities Act, 1973 and the first statute made thereunder for Chaudhary Charan Singh University are applicable in the institution.

2. A vacancy in Class-IV post occurred on account of promotion of one Smt. Munni Rani who was promoted to Class-III post on 10.11.2006. The Principal of the College sought permission of the Regional Higher Education Officer to fill the vacant post. The respondent No. 3 on 11.1.2007 granted the permission to fill the post. A copy of the said order is on record as Annexure-2 to the writ petition. Pursuant thereto an advertisement was issued by the respondent No. 4 in two national newspapers i.e. Dainik Jagran and Amar Ujala on 18/19.5.2007 respectively. The petitioner in response to the said advertisement made

application for appointment on Class-IV post. The petitioner faced Selection Committee and he was found suitable. The Principal of the College sent the papers to the respondent No. 3, Regional Higher Education Officer who is the appropriate authority under the first statute of the Act, 1973 for approval of petitioner's appointment.

3. The Regional Higher Education Officer vide order dated 20.7.2007 made some query with regard to the number of posts and applicability of reservation under the provisions of U.P. Act No. 4 of 1994 and the said query was replied by the Principal on 2.8.2007. The respondent No. 3 on 20.8.2007 rejected the approval of the petitioner on the ground that in the institution there are 10 sanctioned posts of Class-IV employees and only two Scheduled Caste candidates are currently working in the institution. It is further recorded in the order that these two posts are posts of Daftari and Sweeper which are separate and single cadre posts and as such for the application of the reservation these two posts shall be excluded from the rest of Class-IV posts. A direction was issued to the Principal to make a fresh recruitment.

4. Feeling aggrieved by the said order, the petitioner filed the present writ petition and this Court granted an interim order on 7.4.2008. It is stated at the bar that in compliance of the said interim order, no recruitment has been made to date.

5. Learned counsel for the petitioner Sri. P.N. Sexena, Senior Advocate assisted by Sri Bhupendra Kumar Singh submitted that the order of the regional Higher Education Officer is illegal as the provisions of the Act 1994 have wrongly been applied by the respondent No. 3. He urged that there are 10 sanctioned posts of Class-IV employees including Daftari and Sweeper. Posts of Sweeper and Daftari cannot be treated as a single cadre post for the application of the reservation. Those two posts are Class-IV posts as there is no difference of the pay scale of Sweeper and Daftari and other posts of Class-IV employees. In fact for the purposes of distribution of work those posts have been treated to be different, administratively.

6. Sri Saxena alternatively submitted that if the plea of the respondents are accepted then the post of Chaukidar/Watchman will also fall under the same category alongwith Sweeper and Daftari. Therefore, there would be only seven posts, therefore, only one post can be reserved for the Scheduled Caste as the percentage of reservation is only 21% In any event, one Scheduled Caste candidate is still working against those seven posts and as such quota of the Scheduled Caste candidate is already complete.

7. Sri Saxena strenuously submitted that for the promotion from Class-IV to Class-III employee, a common seniority list is maintained for the purpose of promotion. This fact alone goes to show that the post of Sweeper, Daftari and Chaukidar is not a single cadre post.

8. Learned Standing Counsel submitted that the post of Sweeper is a separate

cadre post and as such the Scheduled Caste candidate who is working as Sweeper cannot be treated for the purpose of reservation alongwith other posts. He has drawn attention of the Court to paragraph No. 3 of the counter-affidavit where the same fact has been mentioned.

9. I have heard the learned counsel for the parties and considered the respective submissions and perused the record.

10. It is not disputed that there are 10 sanctioned posts of Class-IV employees in the college. Indisputably, the first statute of the University governs the service condition of the teachers and employees of the college. The college is affiliated to Chaudhary Charan Singh University, Meerut. Chapter-XXII of the first statute deals with the qualification and conditions of service of non teaching staff of the affiliated college. The first statute 23.01 provides that appointment on Class-III employees shall be made by the management of the College and appointment of Class-IV employees shall be made by the Principal. The statute 24.06(2) deals with the Constitution of Selection Committee. The statute 25 enjoins that the reservation shall be made for Scheduled Tribe and Scheduled Caste Candidates and the percentage of such reservation shall be "equal to the percentage prescribed for appointment in Government services. Therefore, the provisions of U.P. Reservation, Act No. 1994 is applicable to the colleges. The statute 27.01 lays down the educational qualification for Sweeper. It is provided that no educational qualification shall be required for the Sweeper. For the sake of convenience the statute 27.01 (viii) is extracted here in below:

27.01 (viii) "Other Posts-for any other post not covered by the preceding clauses, such minimum qualification as may be specified by the State Government by general or special orders.

Provided that no educational qualification shall be required for the post of sweeper but preference will be given to a person who is educated or is at least able to read and write Hindi in Devnagri script.

11. From the perusal of the said statute, it is evident that nowhere it is provided that sweeper shall be separate cadre. No contrary provision or Government Order has been brought to the notice of the Court. It appears that the Regional Director of Education has misdirected himself by considering the provisions of the regulation contained in Chapter-III of Intermediate Education Act which deals with the appointment and qualification for Class-IV employees in the intermediate colleges. For this reason alone, the order of Regional Higher Education Officer is venerable and is liable to be set aside. Even otherwise the view of the Regional Higher Officer with regard to the applicability of reservation is erroneous. Indisputably, out of 10 Class--IV employees two Scheduled Caste, four Other Backward Classes and only two employees belonging to General category are working.

12. The Supreme Court had occasion to deal with what is cadre strength.

13. In R.K. Sabharwal and others Vs. State of Punjab and others, . Paragraph 6 is quoted herein below.

The expressions "posts" and "Vacancies" often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a "post" in existence to enable the Vacancy" to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of "vacancy" has no relevance in operating the percentage of reservation.

14. A Division Bench of this Court in the case of Smt. Pholpati Devi Vs. Smt. Asha Jaisawal and Others, , has considered the issue and held that there should be more than five posts for promotion/appointment for scheduled castes as their reservation is only 21%. Relevant paragraphs of the judgment are quoted here in below:

7. In the case in hand, there were only seven sanctioned posts of Lecturers wherein 50% were to be filled in by direct recruitment and 50% by promotion. Therefore, at the best four posts would have been available for one source of recruitment, i.e., direct recruitment or promotion. The reservation for scheduled castes is 21%. If we treat one of the vacancies in either of the source of recruitment in the institution as reserved for scheduled caste, it would be more than 21%. The Apex Court in R.S. Garg Vs. State of U.P. and Others, , has held as under:

40. We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements.

8. Thus, it is clear that in no manner a vacancy can be filled in which would exceed the prescribed limit of reservation as the extent of reservation is maximum and it cannot be exceeded thereto. In the case in hand, one of the vacancy if treated to be reserved for scheduled caste candidate out of four vacancies, the reservation would come to 25%, which would exceed the maximum extent of reservation prescribed for scheduled caste candidates under the Statute. That being so, such reservation could not have been upheld and the appointment and promotion of respondent No. 1 treating one post of lecturer.

15. The view taken by the Division Bench met the approval of Full Bench of this Court in *Heera Lal v. State of U.P. and others*, 2010 (6) ADJ 1.

28. The rule of roster and the concept of a running account of the roster therefore would commence only if there are five or more posts for extending the benefit of 21% reservation in favour of the scheduled caste category. A numerically less strength figure, below the required number, would therefore not allow the roster to be operated, as a roster is there to implement the rule of reservation and not a tool to create reservation. As noticed in the judgments of the Apex Court that in the event of any conflict between the percentage of reservation and the applicability of the roster, the former would prevail. Thus, in no event can the percentage of reservation be inflated or enhanced by the illusory or imaginative application of the rule of roster. If such interpretation as suggested by the State is given then the same would amount to a non-constructive existence of a miscalculated proof in the words of the famous German Mathematician Leopold Kronecker (1823-91). In legal terms this would violate the mandate of the constitution and in cases of promotion it would not be in conformity with the same.

16. After careful consideration of the material on the record, it is evident that the advertisement made by the Principal was illegal. The Regional Director of Education was labouring under the impression that provisions of Chapter-III of regulations of Intermediate Education Act would be applicable. Obviously Chapter--XXII of the first statute of the University completely escaped from his notice.

17. The upshot of the above discussion is that the order of Regional Higher Education Officer is liable to be set aside. Accordingly it is set aside. The matter is remitted back to the Regional Higher Education Office, respondent No. 3 herein to consider the matter afresh after affording opportunity to the petitioner and pass a fresh order as expeditiously as possibly preferably within a period of six weeks from the date of communication of this order. The writ petition is allowed. The parties shall bear their own costs.