
(1997) 08 AP CK 0035

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 874 of 1997

Project Officer, I.T.D.A.

APPELLANT

Vs

Ch. Srinivas and Another

RESPONDENT

Date of Decision : 20-08-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1)

Citation : (1997) 6 ALT 374

Hon'ble Judges : P.S. Mishra, C.J.;P. Ramakrishnam Raju, J

Bench : Division Bench

Advocate : G.P. for Social Welfare, for the Appellant; Vedula Venkataramana, for the Respondent

Judgement

P.S. Mishra, C.J.—This appeal under Clause 15 of the Letters Patent is preferred against the judgment of the learned single judge in a proceeding under Article 226 of the Constitution of India.

2. Three writ petitions which are disposed of by a common judgment involved common issues and were based on almost similar facts. Pursuant to an advertisement allegedly published in a news paper petitioner- respondents applied for appointment as teachers, admittedly reserved specially for Scheduled Tribes only. Petitioners, it appears, were called for interview for, sufficient number of Scheduled Tribe candidates were not available, selected and appointed in various schools in the Agency Area of the State in the year 1990. One of the conditions, however, mentioned in the advertisement itself, to which advertisement petitioners-respondents had responded, was to the effect that the appointment of non-tribal candidates would be ad hoc for 89 days and the non-tribal candidates would not have any right over their appointment. The above conditions were introduced as per the powers conferred upon the Governor of the State under sub-para (1), Paragraph 5 of the V-Schedule of the Constitution of India.

3. G.O.Ms.No. 73 dated 25-4-1987 issued pursuant to the Presidential Order in

this behalf in the name of the Governor of the State added a proviso to the original notification reserving the posts of teachers in the schools in the Agency Area which reads as follows:-

"Provided that the posts of teachers such as B.Ed., Assistants, Telugu Pandits, Craft Assistants and Hindi Pandits may be filled in by the members of non-tribals having requisite qualifications on temporary basis till the qualified local tribals are available: Provided further that the persons so appointed shall be replaced by the qualified local tribals as and when such tribals are available."

It is duly noted in the impugned judgment by the learned single judge that the above notification enables the Governor to appoint non-tribals having requisite qualifications on temporary basis in various posts of teachers in the tribal area until the local tribal candidates are available for appointment as teachers. Learned single judge has, however, commented, since the intention of the Governor is to replace the non-tribals by tribal candidates as and when they are available, the power of appointment is confined till such time a qualified local tribal candidate is available. Pursuant to the notification, the condition in the advertisement was incorporated calling appointment of teachers who are non-tribals in the tribal area. Learned single judge, however, has found that the conditions restricting the appointment of teachers for a period of 89 days and the replacement of non-tribal teachers as soon as qualified tribal candidates are available, which are subject matters of challenge in the writ petitions are wholly arbitrary and suffer from the vice of discrimination. For the above conclusion reliance is placed upon the judgments of the Supreme Court in *Rabinarayan Mohapatra v. State of Orissa*, 1991 Labour and Industrial Cases 1102; *Sushil Kumar Yadunath Jha Vs. Union of India (UOI) and Others*, and *Central Inland Water Transport Corporation v. Brojonath Ganguly*. (1996) 3 SCC 156.

4. *Rabinarayan Mohapatra's* case¹ is one in which although regular work was available, the State resorted to the practice of giving to the teachers a so-called contract of service of 89 days only with one day break followed by summer vacation and thus managed to deprive such a teacher salary for the period of summer vacation and other service benefits. The Supreme Court said, it was an act wholly arbitrary and it suffered from the vice of discrimination.

5. In *Sushil Kumar's* case (2 supra) the Supreme Court noticed that a person seeking appointment was in no position to bargain for a better deal and accepted such conditions only in the straitened circumstances in which he found himself and held, having regard to the interests of justice and in the circumstances of the case break in service deserved to be condoned and once break in service was condoned the employment was deemed to be continuous.

6. In *Central Inland Water Transport* case (3 supra), the Supreme Court found fault with a rule which empowered the appointing authority to terminate the services by giving three months' notice as it potentially bred gross inequality of bargaining policy and affected large section of public and thus was harmful

and injurious to the public interest.

7. The above salutary principles, however, in our view, are not attracted to the case of the petitioner-respondents for reasons inter alia that the provision, introduced vide G.O.Ms.No. 73 dated 25-4-1987 by amending the earlier notification-G.O.Ms.No. 275, dated 5-11-1986-issued under the Presidential Order as in sub-para (1), Paragraph 5 of the Fifth Schedule of the Constitution of India, is a special provision and is in the nature of an exception to the general rule that there would be no special preference to any caste or tribe or to inhabitants of any region. G.O.Ms.No. 275 dated 5-11-1986 reads as follows:-

"In exercise of the powers conferred under sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Andhra Pradesh is hereby directs that the posts of teachers in the educational institutions in the Scheduled areas of the State shall be filled in only by the local members of the Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force."

Since, however, in some areas it was found that posts of teachers remained vacant for want of sufficient number of the Scheduled Tribe candidates in the Scheduled Areas of the State, the above modification as in G.O.Ms. No. 73, dated 25-4-1987 has been issued. Any appointments of non-tribals thus under the proviso aforementioned have to be temporary till the qualified local tribal is available to replace him. Such temporary appointment of a non-tribal to the posts of teachers which are specially reserved for the Scheduled Tribes would not give to them any right to claim either regularisation or substantive appointment.

8. In B. Sambasiva Rao v. The Project Officer, Integrated Tribal Development Agency (W.P.No. 16918/88 dated 4th July, 1989), the validity of G.O.Ms. No. 275, dated 5-11-1986 has been tested and a learned judge of this court has stated as follows:-

"It will be noticed that Clause 5 (I) of the V-Schedule to the constitution permits a notification to be issued stating that any particular Act of Parliament or of the Legislature of the State shall not apply to Scheduled Areas or any part thereof. The said notification has been issued under Article 244 of the Constitution of India which provides that the provisions of the V-Schedule shall apply to the Administration and Control of the Scheduled Areas and Scheduled Tribes in any States other than the States of Assam and Meghalaya.....By virtue of the legislative power, the Governor of Andhra Pradesh had directed under the notification contained in G.O.Ms.No. 275, dated 5-11-1986 that the posts of teachers in the educational institutions in the scheduled areas shall be filled in only by the local members of the Scheduled Tribes notwithstanding anything contained in any other order or rule or law in force".

9. The issue whether there can be total reservation of seats in certain mandals in scheduled areas in favour of Scheduled Tribes has fallen for consideration by a Full Bench of this Court in Satyanamyana Reddy v. State of Andhra Pradesh 1987

(1) ALT 665.in which it is observed:

" Having regard to the peculiar situation obtaining therein, this reservation may be quite justified."

The said Full Bench, with reference to Clause-5 of Fifth Schedule of the Constitution and fundamental rights in Part III, observed:

"Indeed holding Part-III inapplicable would be counter-productive and not conducive to good administration of Scheduled areas".

After referring to the above in the judgment in W.P.No. 16918/88 it is said,

".....the Full Bench is again an authority for holding that in certain cases the reservation of all posts in Scheduled Areas, in favour of Scheduled Tribes is not bad even if Part-III overrides Clause-5 of Schedule-V. If according to the Full Bench reservation of all the mandals situated within the Scheduled Areas in favour of Scheduled Tribes is" not bad,"

it is observed in the said judgment it would be difficult to see,

".....why the reservation of all posts in "Scheduled areas in favour of Scheduled Tribes should be bad."

10. Once it is accepted that the posts to which the petitioners are appointed are reserved for Scheduled Tribes and they, thus, have no right to be absorbed in the posts in which they are appointed, since their initial entry in the service is conditional, they cannot seek confirmation or regularisation of their services as any such confirmation or regularisation would be against the special provision aforementioned.

11. In *Ashwani Kumar v. State of Bihar* 1997 (6) SC 66. The Supreme Court has stated that question of confirmation or regularisation of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility.

12. Extending the above principle to a situation where appointments are given under a special law which forbids any regular or substantive appointment of a non-tribal into a post which is exclusively reserved for a tribal, we have no hesitation in holding that it would be against the provisions in Para 5 of Schedule-V of the Constitution of India. It is also not possible to see any discrimination or arbitrariness so as to attract Article 16(1) of the Constitution of India or Article 14 thereof for a plea on behalf of the petitioner-respondents that they have been subjected to hostile discrimination or any arbitrary act of the State.

13. It is one thing, however, to find that petitioner-respondents are not entitled

to confirmation or regularisation of their services and another to say that since they are not entitled to be confirmed or regularised there is justification for giving to them appointments for a fixed period of 89 days and after a break again appointing them for another 89 days, so as to continue until suitable tribal candidates become available. Ad hoc/temporary appointments are also of various kinds. Such temporary or ad hoc appointments are given sometimes for temporary work, sometimes when a regular employee is not available, sometimes to meet the exigency until regular appointments are made and for various other reasons. Petitioner-respondents are appointed because suitable Scheduled Tribe candidates are not available. Notification in G.O.Ms.No. 73, dated 25-4-1988 (sic. 1987) mentions particularly that the persons appointed on temporary basis till the qualified local tribals are available would be replaced by the qualified local tribals as and when such tribals are available. Until such tribal candidates are available, it is obvious, non-tribals can be continued. It would be quite temporary but continuous appointment until a suitable Scheduled Tribe candidate becomes available to replace any of the or every petitioners-respondents. There is, thus, no understandable reason why appellant has chosen to give to the petitionersrespondents 89 days ad hoc appointments when they can legitimately be appointed for period or periods of non-availability of a suitable candidate. While appellant on the one hand is right in contending that petitionersspondents cannot be confirmed or regularised in the respective posts which are reserved for Scheduled Tribe candidates as they, in terms of the above notification, will have to be removed once a suitable Scheduled Trube candidate is available, petitioners-respondents have a point in making a grievance that instead of giving to them appointment on temporary basis and a conditional appointment that when a suitable tribal candidate would be available they would be removed from service, appellant is making temporary appointments for 89 days and such irregular appointments for 89 days only are against the rules of equity and enter and enter to the limited extent , as indicated above, into the rule of equality under rticle 16(1) of the Constitution of india read with Article 14 thereof.

14. On the facts of the instant case, we are satisfied that the impugned judgment cannot be sustained but the writ petitions also, inour view, shall not completely fail and petitioners respondents shall be entitled to continuance in their respective posts without andy brteak as temporary employees provided they woould be replaced by the qualified local tribals as and when suh tribals are available.

15. in the result, the appeal is allowed . The impugned judgment is set aside. The writ petition is ordered as indicated above. The appellant, however, continuous service on condition aforementation with effect from such date whioch would reasonably be fixed by setting a scheme for non tribal teachers in the Agency Area who are appointed in the vacancies which are exclusively reserved for the tribals until a qualified tribal teacer is availbale.