

(2024) 03 J&K CK 0016

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 375 Of 2009

Rajni Bala

APPELLANT

Vs

State Of Jammu And Kashmir And Others

RESPONDENT

Date of Decision : 14-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 14, 15, 15(4), 16, 16(1), 16(2), 16(4), 16(4A), 226

Jammu And Kashmir Reservation Rules, 1994 — Rule 10, 14

Jammu And Kashmir Reservation Act, 2004 — Section 3, 3(1), 23

Citation : (2024) 03 J&K CK 0016

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Roop Lal, Monika Kohli, Sunil Khajuria

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

1 In this petition, invoking Article 226 of the Constitution of India, the petitioner prays for a writ, order or direction in the nature of writ of certiorari to quash the selection and appointment of private respondents as Junior Legislative Assistants made by the Jammu and Kashmir Legislative Assembly Secretariat, Jammu vide office order No.867-71/Adm/2009 dated 14.02.2009 ['impugned order']. The petitioner also prays for a direction in the nature of writ of mandamus to the official respondents to select and appoint him as Junior Legislative Assistant against the third post meant for Scheduled Caste category as per reservation roster.

2 The impugned order is assailed primarily on the ground that the third post of Junior Legislative Assistant meant for Schedule Caste category has been erroneously filled up by selecting and appointing a candidate from the general category and, therefore, the reservation roster as provided under the Jammu and Kashmir Reservation Rules, 1994 ['Rules of 1994'] has been violated. The

petitioner claims that she was the only eligible candidate under the Scheduled Caste category to fill up the third post notified for selection by the Jammu and Kashmir Legislative Assembly Secretariat.

3 Before dealing with the submissions of Mr. Roop Lal, learned counsel for the petitioner in support of his challenge to the impugned selection and appointments, it would be appropriate to notice few material facts.

(a) An advertisement notice was issued by the Under Secretary of Jammu and Kashmir Legislative Assembly on 05.05.2005 inviting applications for making selection and appointment against various vacant posts available in the Assembly Secretariat which also included three vacant posts of Jr. Legislative Assistants in the then pay scale of Rs.5000-8000. The basic eligibility required was qualification of B.A L.L.B or above with more than 50% marks and two years practice at Bar. The petitioner as well as the private respondents also submitted their application forms for the aforesaid posts. The selection process was conducted by the Assembly Secretariat and vide order impugned, private respondents were selected and consequently appointed as Junior Legislative Assistants. Two persons, namely Syed Wasiq Ahmed and Mir Murtaza were placed in the waiting list.

(b) Feeling aggrieved of her exclusion and filling up of third post by a general category candidate, the petitioner approached this Court by way of SWP No. 1644/2005 which came to be dismissed by a learned Single Judge of this Court on 11.05.2007. Against this order of learned Single Judge, the petitioner filed LPA No. 107/2007 which was disposed of a Division Bench of this Court vide its order and judgment dated 12.11.2008. The order dated 11.05.2007 passed by the Writ Court was set aside and the petitioner was allowed to withdraw the writ petition itself with liberty to file fresh one for challenging the selection of selected candidates. The official respondents were also directed to furnish copies of the select list and appointment orders of the candidates appointed against the three posts of Jr. Legislative Assistants in the Assembly Secretariat.

4 In terms of order dated 12.11.2008 passed by the Division Bench, the petitioner was provided the requisites documents and this is how the instant petition was filed by the petitioners.

5 In support of his petition as also to bolster his challenge, Mr. Roop Lal learned counsel for the petitioner raised a solitary point for consideration. He would argue that since the Assembly Secretariat had notified only three posts, as such, as per the reservation roster provided under Rule 14 of Rules of 1994, the third post should have been earmarked for SC category. The official respondents by diverting the post meant for SC category to the general category have not only violated the roster point for direct recruitment fixed in Rule 14 of Rules of 1994, but have also deprived the petitioner of his constitutional right of reservation provided in favour of SC category. Learned counsel for the petitioner would place strong reliance upon a Constitution Bench judgment of the Supreme Court in

R.K. Sabharwal vs. State of Punjab, (1995) 2 SCC 745 to bolster his submission that the employer is duty bound to fill up the available posts in a cadre by strictly following the roster points earmarked for the purpose.

6 Per contra, Ms. Monika Kohli, learned Sr. AAG would submit that since Jr. Legislative Assistant is only a three posts cadre, as such, it was not permissible to give one post to backward area and one to the SC category as that would have raised the extent of reservation beyond 50% which is not permissible in law. She would submit that the official respondents followed Rule 10 of the Rules of 1994 and having regard to 8% reservation provided for SC category, came to the conclusion that out of three posts cadre, only a fraction of reservation was available to the category of SC. She would submit that, in these circumstances, the third post was offered to the general category candidate.

7 Having heard learned counsel for the parties and perused the material on record, following question of seminal importance arises for adjudication in this petition :

“Whether there can be any reservation as per the reservation roster in a three posts cadre where such reservation has the effect of breaching reservation ceiling of 50% fixed by the Supreme Court in Indira Sawhney vs Union of India and ors, 1992 Supp.(3) SCC 217”.

8 The controversy raised by the petitioner and the relief prayed for in this petition would turn on answer to this question. The Recruitment and Conditions of Service of the Gazetted as well as the non-gazettes employees of the Assembly Secretariat is governed by the Jammu and Kashmir Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1959 [‘Rules of 1959’]. The post of Junior Legislative Assistant does not find mention in these Rules. However, from the reply affidavit filed by the then Secretary, Jammu and Kashmir Assembly, namely Sh.Mohd Iqbal Ganai, there were only three posts of Junior Legislative Assistants which were notified for selection and the reservation was provided strictly as per Rule 10 of Rules of 1994. It is submitted that, in terms of Rule 10, there is 20% reservation for residents of back area and, therefore, one out of the three notified vacancies of Jr. Legislative Assistant was filled up by a candidate from the RBA category.

9 The advertisement notification in question is dated 05.05.2005 by which time the Jammu and Kashmir Reservation Act, 2004 had come in force. To be exact, the Jammu and Kashmir Reservation Act, 2004 came into operation w.e.f 23.03.2005. As mandated by Section 23, the Government had to frame the reservation rules to give effect to the provisions of the said Act. These Rules, however, came to be promulgated by the Government vide SRO 294 dated 21.10.2005 w.e.f 21.10.2005. It means that when the selection process in question was initiated, the Jammu and Kashmir Reservation Rules, 2005 were not in operation and rather, as provided in Section 24(2)(ii) of the Act of 2004, the reservation in appointment or promotion against available vacancies as

stipulated under the repealed Rules i.e Rules of 1994, was provided to be continued till a notification framing rules under Section 23 of the Act of 2004 was issued.

10 This is how the selection impugned was governed by the Jammu and Kashmir Reservation Act, 2004 and the Reservation Rules 1994, permitted to be applied till the Reservations Rules under the Act of 2004 were framed. As per the Act of 2004, reservation for appointment by direct recruitment in favour of reserved categories including SCs and STs shall be to the extent as may be notified by the Government from time to time, provided the total percentage of reservation shall, in no case, exceed 50%. Section 3(1) which is relevant for our purpose is set out below:

"3. Reservation in appointment:

(1] Except as otherwise provided hereinafter, available vacancies to the extent as may be notified by the Government from time to time shall be reserved for appointment by direct recruitment from amongst the person belonging to:

(a) Scheduled Castes and the Scheduled Tribes which shall not exceed the ratio and proportion as the population of each such category bears to the total population of the State as per the latest available census ;

(b) socially and educationally backward classes; and,

(c) economically weaker sections

Provided that the total percentage of reservation provided in clauses (a) and (b) shall in no case exceed 50%

Provided further that the reservation in appointments in favour of the persons belonging to economically weaker sections shall be in addition to the existing reservation as provided in this sub-section and shall be subject to a maximum of ten percent of the posts in each category:

Provided also that the Government shall exclude the services and posts, which, on account of their nature and duties are such as call for highest level of intelligence, skill and excellence, from operation of the Act.

11 From a reading of Section 3 (supra), it would further transpire that the reservation to be notified by the Government in favour of SCs and STs shall not exceed the ratio and proportion as the population of each such category bears to the total population of the State as per the latest available census. As per Rules of 1994, such reservation is notified under Rule 10 which, for facility of reference, is reproduced hereunder:

"10. Except as otherwise provided in these rules, available vacancies shall be reserved for direct recruitment in each service, class , category and grant in favour of permanent residents of the State belonging to any of the below mentioned categories which shall, as nearly as possible, constitute the

percentage of available vacancies shown against each:-

a) Scheduled Castes- 8%

b) Scheduled Tribes- 10%

c) Socially and Educationally Backward Classes (other than Scheduled Castes and Scheduled Tribes):-

(i) Weak and under privileged class (social castes)—2%

(ii) Residents of areas adjoining line of Actual Control-3%

(iii) Residents of backward areas-20%

12 As per Rule 10, 8% reservation is earmarked for SCs, 10% for STs, 2% for social castes, 3% for ALC and 20% for RBA. With a view to giving effect to the reservation in appointment by direct recruitment provided under Rule 10 of Rules of 1994, 100% roster is prepared and given in Rule 14. While framing 100% roster, a meticulous care has been taken to provide reservation to various categories as per the percentage provided under Rule 10. If the vacancies are 100 or more, there would be no difficulty in applying the roster points given in Rule 14.

Even the vacancies less than 100 available for direct recruitment in a particular recruitment year may not pose any difficulty in applying the roster strictly as laid down in Rule 14. The difficulty would definitely arise if there is either a single post in a cadre or it is a three posts cadre. In the former case, providing any reservation would be tantamount to providing 100% reservation in a particular recruitment year and, therefore, would not be permissible.

13 The issue, as to whether there can be any reservation in a single post cadre, was long back set at rest by the Supreme Court in a Constitution Bench judgment in *Post Graduate Institute of Medical Education and Research vs Faculty Association and others*, (1998) 4 SCC 1. The Supreme Court, after surveying the entire case law on the subject and the two conflicting opinion emerging therefrom came to the conclusion that there cannot be any reservation in a single post cadre even by rotating the roster as was suggested by those in favour of reservation even in a single post cadre. What was held by the Supreme Court in paragraphs 31 to 37 read thus:

"31. There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and other backward classes and such reservation is not confined to the initial appointment in a cadre but also to the appointment in promotional post. It cannot however be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such single post cent per cent reservation for the reserved categories to the exclusion of other members of the community even when such member is

senior in service and is otherwise more meritorious.

32. Articles 14, 15 and 16 including Article 16(4), 16(4A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decisions of this Court in Balaji's case, Devadasan's case and Sabharwal's case. Even in Indra Sawhney's case, the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes the State cannot ignore the fundamental rights of the rest of citizens. The special provision under Article 15(4) must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this court in *The State of Andhra Pradesh and Ors. Vs. U.S.V. Balaram and C.A. Rajendran Vs. Union of India* (AIR 1972 SC 1375 and AIR 1968 SC 507). It has been indicated in Indra Sawhney's case (supra) that clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by clause (1). It has also been indicated in the said decision that clause (4) of Article 16 does not cover the entire field covered by clauses (1) and (2) of Article 16. In Indra Sawhney's case, this court has also indicated that in the interests of the backward classes of citizens, the State can not reserve all the appointment under the State or even majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward classes under clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

33. In *Triloknath Vs. State of Jammu and Kashmir* (AIR 1967 SC 1283), it has been held by this Court that where the percentage of reservations is not reasonable, having regard to employment opportunities of the general public to the cadre of service in question, the population of the entire State, the extent of their backwardness and the like, the interference by Court against unreasonable reservation is called for.

34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent percent reservation for the backward classes is not permissible within the constitutional frame work. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre the question of reservation will not arise because any attempt of reservation by whatever means and even with device of rotation of roster in a single post cadre is bound to create 100%

reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bound to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society.

36 Mr. Kapil Sibal has contended that in some higher echelon of service in educational and technical institution where special expertise is necessary to hold superior posts, like Professors and Readers there should not be reservation even if there are plurality of posts in such cadre as indicated in the majority view in Indra Sawhney's case. It is, however, not necessary for us to decide the said contention for the purpose of disposal of these matters, where the question of reservation in single cadre post calls for decision.

37. We, therefore, approve the view taken in Chakradhar's case that there can not be any reservation in a single post cadre and we do not approve the reasonings in Madhav's case, Brij Lal Thakur's case and Bageswari Prasad's case upholding reservation in a single post cadre either directly or by device of rotation of roster point. Accordingly, the impugned decision in the case of Post Graduate Institute of Medical Education Research can not also sustained. The Review Petition made in civil appeal No. 3175 of 1997 in the case of Post Graduate Institute of Medical Education Research, Chandigarh, is therefore allowed and the judgment dated May 2, 1997 passed in civil Appeal No. 3175 of 1997 is set aside".

(emphasis supplied)

14 However, the situation which this Court is confronted with in this case is perhaps not dealt with by the Supreme Court in any case. In the instant case, the cadre consists of only three posts and if we have to go by the reservation roster provided under Rule 14 of the Rules of 1994, the first post goes to open competition, second to RBA and third to the SC. If, out of these three posts, only one is to be kept for open competition and two are to be earmarked for reserved categories, it would amount to reservation to the extent of 67 per cent which is way beyond 50% as envisaged under section 3(1) of the Act of 2004. Apart from breaching the statutory provisions of section 3(1) of the Act of 2004, it would also be in violation of the law laid down by the Supreme Court in Indira Sawhney's case (supra). What was held by the Supreme Court in the said case with respect to 50% ceiling limit of reservation was sought to be reexamined and reviewed in the case of Jaishri Laxmanrao Patil vs The Chief Minister and others. (2021) 8 Supreme Court Cases 1, 2021 SCC OnLine SC 362.

15 Learned counsel appearing for the parties, who were in favour of taking the view that 50% ceiling limit provided for reservation in appointment could be

breached and there is nothing in Indira Sawhney's case provided to the contrary, argued that the reservation should not exceed 50% was not the majority opinion. The Constitution Bench in Jaishri Laxmanrao Patil's case (supra) referred to and analyzed the opinion in all the six judgments rendered in Indira Sawhney and concluded in paragraph 364 of the judgment as under:

"364. Thus greatest common measure of agreement in six separate judgments delivered in Indra Sawhney's case is that:

- (i) Reservation under Article 16(4) should not exceed 50%; and,
- (ii) For exceeding reservation beyond 50% extraordinary circumstance as indicated in para 810 of the judgment of Justice B.P. Jeevan Reddy should exist, for which extreme caution is to be exercised".

16 At this stage, it would be appropriate to find out as to what was stated by Justice B.P. Jivan Reddy in paragraph 810 of Indira Sawhney's judgment which, for ready reference, is set out below:

"810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out".

17 It is on the basis of aforesaid conclusions drawn in Jaishri Laxmanrao Patil's case (supra), the Constitution Bench did not agree to revisit the judgment in Indira Sawhney's case or to refer the same to a Larger Bench for determination of issue of ceiling limit. In this manner, the judgment of the Supreme Court in Indira Sawhney's case (supra) in respect of 50% ceiling in reservation was reaffirmed. It is true that despite aforesaid ceiling of 50% for reservation declared by the Supreme Court in its authoritative pronouncement in Indira Sawhney's case, some of the States have been attempting and some have even succeeded in providing reservation beyond 50%. The example is Tamil Nadu Government which has provided reservation in appointments and promotions beyond the ceiling limit of 50%, but, with a view to overcome the law declared by the Supreme Court in Indira Sawhney's case, the legislative enactment providing for reservation exceeding 50% has been placed in 9th Schedule of the Constitution. The placement of enactment in the 9th Schedule of the constitution is also subject matter of adjudication before the Supreme which is yet to be decided. Be that as it may, the law as it stands today is that the reservation beyond ceiling limit of 50% is arbitrary, excessive and violative of article 16(4) of the Constitution of India and, therefore, cannot sustain.

19 Having regard to the settled legal position discussed above, accepting the

contention of leaned counsel for the petitioner that the third post of Jr. Legislative Assistant ought to have been earmarked for SC category as is provided in 100% roster indicated in Rule 14 of Rules of 1994 would be permitting reservation beyond ceiling limit of 50%. In such situation, the Assembly Secretariat correctly relied upon Rule 10, rather than following the roster points as indicated in Rule 14. Needless to say that Rule 14 is in the nature of enabling provisions which provides 100% roster points with a view to giving effect to the reservation provided under Rule 10. Rule 14 only supplements and does not supplant Rule 10. A harmonious reading of Rule 10 and 14 would lead us to a conclusion that while 100% roster provided in Rule 14 is required to be mandatorily followed to give effect to the reservation provided under Rule 10, yet if the total number of posts in a cadre is one or three, then giving effect to the roster points given in Rule 14 would be tantamount to providing reservation in breach of ceiling limit of 50% fixed in Indira Sawney's case and reaffirmed in Jaishri Laxmanrao Patil's case (supra). The official respondents were, therefore, correct in relying upon Rule 10 of Rules 1994.

20 Having regard to the fact that only 8% reservation is provided for SC category, the share of SC category in three posts was only a fraction less than 0.5. Similarly, there is 20% reservation provided for RBA and 20% of 3 would be 0.6% i.e more than 0.5%. The official respondents, therefore, rightly rounded it off to one post and accordingly earmarked the same for RBA. Viewed from this angle, it cannot be said that there has been any breach of statutory or constitution rights of the petitioner. Regarding the applicability of the judgment in R.K.Sabharwal (supra), relied upon by Mr. Roop Lal, to the facts and circumstances of the instant case, suffice it to say that having carefully gone through the judgment and analysed the submissions made by learned counsel for the petitioner, I find nothing in the judgment which supports the petitioner. The judgment talks about preparation of 100% roster and the manner in which it is required to be given effect to. It clearly lays down that the available posts in a particular recruitment year should be filled up as per the roster points earmarked for each category and this would be in the form of running account which would operate only till the quota provided under the impugned instructions is reached and not thereafter. What is held in R.K.Sabharwal's case may hold good where the vacancies are 100 or more and may even be relevant in the cases where the vacancies are sufficient in number that by providing reservation at the roster points, there is no possibility of the ceiling limit of reservation of 50% being breached. The case on hand is distinguishable. Here the total number of posts in the cadre are three and in case the reservation roster provided under Rule 14 of the Rules of 1994 is strictly followed, it would amount to providing 67 per cent reservation in the cadre which is not permissible in law.

18 For the foregoing discussion, my answer to the question formulated above is in the negative. Accordingly, I find no merit in this petition and the same is dismissed.