

(1993) 02 GAU CK 0021
In the Gauhati High Court
Case No : Civil Rule No. 2006 of 1992

Ramen Das and Ranjit Bharali	Vs	APPELLANT
The Assam State Agricultural Marketing Board and Others		RESPONDENT

Date of Decision : 23-02-1993

Acts Referred:

Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 — Section 4
Constitution of India, 1950 — Article 12, 14, 16

Citation : (1994) 1 GLR 156

Hon'ble Judges : S.K. Hom Choudhury, J

Bench : Single Bench

Advocate : K.P. Pathak, M. Singh and D.K. Das, for the Appellant; S.A. Laskar, A. Hazarika, A.S. Choudhury, M. Dev and I. Hussain, for the Respondent

Final Decision : Allowed

Judgement

S.K. Homchaudhuri, J.—The Petitioner's case is that in response to the advertisement inviting applications for appointment to the post of Marketing Inspector in the Assam State Agricultural Marketing Board hereinafter referred to as the Board the Petitioners offered their candidature for appointment against the vacant posts. Thereafter, the Petitioners along with the oilier candidates, appeared in the selection lest and the result of the rest was published in the local English daily newspaper "The Sentinel" in its issue dated 29.2.92. Although in the news paper Roll numbers of the successful candidates were published in the order of merit, ultimately the Respondents prepared a list in order of merit of the selected candidates indicating whether the candidate belongs to the Scheduled Castes, Scheduled Tribes, Other Backward or More Other Backward Community. As per the select list, while the Petitioner No. 1 secured 73rd position, the Petitioner No. 2 secured 65th position. The Respondents No. 4 and 5 secured 74th and 69th position respectively in order of merit. The Petitioner No. 2 belongs to M.O.B.C. the Petitioner No. 1 and the Respondents No. 4 and 5 belong to general class. The Respondent Board, however, ignoring the fact that the

Petitioners had the right to be appointed in the posts of Marketing Inspector before the persons who secured position lower to them in the select list in order of merit, arbitrarily appointed the Respondents No. 4 and 5 to the post of Marketing Inspector and the Petitioners are not appointed against the vacant posts. According to the Petitioners appointment of Respondents No. 4 and 5 and other Incumbents who secured position below them in the select list, in order of merit, are ex facie arbitrary and discriminatory and is violative of the Petitioners' fundamental rights guaranteed under Article 14 and 16 of the Constitution.

2. This Court while issuing Rule on 21.9.92 passed ad interim order staying appointment of those candidates who secured lower position than the Petitioners in the select list in the order of merit. The Respondent Nos. 1 and 2, namely, the Assam State Agricultural Marketing Board and the Secretary of the Board have entered appearance through counsel and filed an application for modification/alteration of the interim order passed by this Court on 21.9.92. The Respondents No. 4 and 5 have also entered appearance and filed affidavit-in-opposition, In the affidavit-in-opposition, none of the Respondents have denied the contentions of the Petitioners that while the Petitioner Nos. 1 & 2 secured 73rd and 65th position in the select list in the order of merit, the Respondents No. 4 & 5 secured 69th and 74th position respectively in the select list. The Respondents have also not denied that the Petitioner No. 2 belongs to M.O.B.C community and is entitled to be appointed against the reserved quota.

3. The Respondents No. 1 and 2 in their application have stated that the Board in its meeting made the policy decisions to fill up the vacant posts by classifying and/or categorising the selected candidates into several categories and arranging the position in order of merit of the candidates of each such category.

The Board made the following categories of the selected candidates for appointment from each category as per the quota fixed by it-

- (i) Category - Scheduled Castes
- (ii) Category - Scheduled Tribes (Plains)
- (iii) Category - Scheduled Tribes (Hills)
- (iv) Category - other Backward Class
- (v) Category - M.O.B.C (More other Backward class)
- (vi) Category - Prime Minister's Fifteen Point; Minority Community
- (vii) Category - Overaged and Political sufferer.
- (viii) Category - High Court Case C.R. No. 419/89.
- (ix) Category - Economically Backward and having no employed member in the family.
- (x) Category General.

The Respondents No. 1 and 2 further contended that according to the classification or categorisation made by the Board for the purpose of appointment of candidates from each category, the Respondent No. 4 secured first position amongst the Minority Community while the Respondent No. 5 secured second position in the category of economically Backward community and consequently they have been appointed to the post of Marketing Inspector. Respondent No. 1 and 2 also contended that the Petitioner No. 1 who has been categorised as the candidates of general class and the Petitioner No. 2 who has fallen in the category of M.O.B.C. could not be appointed as their position in the respective category or class of candidates were much below in order of merit.

4. The Respondent No. 4 and 5 in their affidavit-in-opposition have contended that they were appointed after being selected for the post of Marketing Inspector by the Board according to its policy decision on probation and they have been working for more than 6 months in the post. As such, for the ends of justice they may not be dislodged from their service.

5. I have heard Mr. K.P. Pathak, learned Counsel for the Petitioner, Mr. S.A. Laskar, learned Counsel for the Respondent No. 1 and 2 and also Mr. A.S. Choudhury learned Counsel for the Respondents No. 4 and 5. Admittedly, the Board is a statutory body constituted under the provision of the Act and is a State within the meaning of Article 12 of the Constitution.

6. Mr. Pathak submits that the categorisation made by the Board in giving preference in appointment was not published and consequently he could not challenge it, but on the face of it, such categorisation is not tenable. Mr. Pathak submits that the members of the Scheduled Caste/Scheduled Tribe community in the State of Assam who are backward classes of citizen having not been adequately represented in the service and posts within Assam, the Assam Scheduled Caste and Scheduled Tribes (Reservation of Vacancies in Services and posts) Act, 1978, hereinafter referred to as the Act of 1978, was enacted. Section A of the said Act of 1978 provides that in an establishment, 7% of the vacancies shall be reserved for the candidates belonging to Scheduled Caste and 10% for Scheduled Tribes (Plains) and 5% for Scheduled Tribes (Hills), in the manner set out in the Schedule. Subsequently, the Govt. found that other backward communities in the State who are not members of Scheduled Castes/Scheduled Tribes, termed as Other Backward Class, in short OBC, and More Other Backward Class, in short MOBC, were not adequately represented in the services under the State, made law for reservation of 15% of the vacancies for the candidates belonging to OBC and MOBC communities. Mr. Pathak further submits that reservation for appointment or posts is only possible in respect of backward class of citizens and not others and that the members of Scheduled Caste, Scheduled Tribes (Plains), Scheduled Tribes (Hills), Other Backward Class and More Other Backward Class being backward classes of citizens, the Govt. by law had already made reservation for those classes of citizens. Neither the State nor the statutory Body can make reservation for any class of citizen who does not

belong to backward class and such reservation would be ex facie violative of Article 16 of the Constitution. As such, the categorisation made by the Respondents in respect of filling up of vacant posts including the class of citizens who does not belong to backward class namely, minority community, overaged and political sufferers, High Court case and economically backward community in respect of their position in the select list in order of merit, is ex facie violative of Article 14 and 16 of the Constitution. Earned Counsel for the Petitioner also submits that as per provision of Section 4 of the Act of 1978 candidates belonging to Scheduled Castes/Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota. However, the Respondents ignoring the mandates of law have not included the candidates belonging to Scheduled Castes/Scheduled Tribes/OBC/MOBC community who have qualified for selection on merit, in the H.M of general class. As per advertisement there are 72 vacant posts of Marketing Inspector and out of that 72 posts, 50 posts have already been filled up and 22 vacancies are yet to be filled up. Due to arbitrary categorisation of the candidates into different classes which is not recognised by law, and for not including the candidates belonging to OBC and MOBC community who qualified for selection on merit in the general list, position of the Petitioner No. 2 namely Shri Ranjit Bharali who belongs to MOBC community, has been put much lower than what should have been. Amongst, the 15% of the posts reserved for OBC/MOBC candidates, the Petitioner No. 2's position would have been 4th in respect of the posts reserved for appointment from amongst these communities. 15% of posts being reserved for candidates belonging to OBC and MOBC class of citizens, out of 50 posts minimum 7 posts ought to have been filled by appointing members of these classes of citizens (Iron) amongst the selected candidates and the Petitioner No. 2 would normally be appointed while filling up the 50 vacant posts, if the Respondents would not have violated the law in that regard.

7. Mr. S.A. Laskar, learned Counsel for the Respondent No. 1 and 2 submits that classification/categorisation of different classes of candidates has been made for giving representation to all classes of candidates in the matter of appointment has been made on the basis of the policy decision of the Board in its meeting and all appointments are made as per such categorisation or classification. The Petitioners having not challenged these classification or categorisation, cannot challenge the appointment made on the basis thereof. As already observed, Mr. Pathak has submitted that such classification or categorisation of candidates made by the Board for the purpose of appointment which is ex facie contrary law and violative of Article 16 of the Constitution, was not published for which the Petitioner could not challenge the classification.

8. Mr. A.S. Choudhury, learned Counsel for the Respondent Nos. 4 and 5 submits that the Respondent No. 4 & 5 were appointed on the basis of the classification or categorisation and their services cannot be terminated, inasmuch as, the Respondents No. 4 & 5 were selected and they are appointed against the vacant posts on probation and they have rendered more than 6 months service. If at

this stage their appointments are set aside it would cause great hardship and injustice to the Respondents No. 4 & 5. In support of his contention Mr. Choudhury has placed reliance in the decision of the Punjab & Haryana High Court in the case of Ramkaran v. State of Haryana reported in 1972 SLR page 790. In that case, although it was found that the appointment of the private Respondents were not in accordance with law, the Court did not disturb the appointment in view of the fact that setting aside of order of appointment of the private Respondents would cause sufferings to them, for no fault of them.

9. I have considered the submissions made on behalf of the Petitioner as well as on behalf of the Respondents and have perused the materials on record. Undisputedly, the provisions of the Act of 1978 squarely applied in respect of appointment in a local or statutory authority constituted under the State Act for the time being in force. The Board is a statutory authority constituted under the Act and is a State. As such, the provision of the Act of 1978 applied in respect of appointments by the Respondent-Board. However, the Respondent-Board in total disregard to the provisions of the Act of 1978 has arbitrarily by its policy decision made altogether a different classification or categorisation of candidates into different groups for the purpose of appointment irrespective of the position of candidates secured in the merit list. Article 16 of the Constitution provides that-

16. Equality of opportunity in matters of Public employment: (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making a law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory) prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts; in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

It is apparent from the provision of Article 16 of the Constitution that reservation for appointment is only permissible in favour of backward classes of citizens,

which in the opinion of the State is not adequately represented in the service under the State. As such, the classification of backward classes of citizens in the State of Assam in whose favour reservation in appointment or posts is made are members of Scheduled Castes, Scheduled Tribes, Other Backward Class and More Other Backward Class and none else. The reservation of posts should be confined to them as per the percentage laid down by law, namely, 7% for Scheduled Castes 10% for Scheduled Tribes (Plains), 5% for Scheduled Tribes (Hills) and 15% for OBC and MOBC, As such, the classification/categorisation of the selected candidates and/or making the vacancies to be filled by each such category or class of candidates made by the Board for the purpose of filling up the vacant posts of Marketing Inspector, is ex facie illegal and without jurisdiction and violative of Articles 14 and 16 of the Constitution and is void. Consequently, the appointment made on the basis thereof which adversely affected the right to be appointed of the other selected candidates to be appointed earlier in order of merit can not be sustained. Admittedly, the Respondent No. 4 and 5 were appointed by order No. MB/AD/1043 (Pt)/92-93/2249 dated 23-6-92 and order No. MB/AD/1043 (Pt)/92-93/2277 dated 23.6.92 respectively. The Respondents No. 4 and 5 who admittedly belong to General Class of citizen and who secured 69th and 74th position in the select list in order of merit could not have been found bearth amongst the 50 appointees in the post of Marketing Inspector. As such, their appointment to the posts of Marketing Inspector before the appointment of the candidates who secured position higher than them in order of merit, are arbitrary, illegal and discriminatory and are liable to set aside.

10. Section 4 of the Act of 1978 provides:

4. At the commencement of this Act, all appointments to services and posts in the establishment which are to be filled up by direct recruitment shall be regulated in d\\e following manner, namely-

(a) subject to the other provisions of this Act, seven percent of the vacancies shall be reserved for the candidates belonging to Scheduled Castes and ten percent for Scheduled Tribes (Plain) and live percent for Scheduled Tribes (Hills), in the manner set out in the Scheduled;

Provided that the State Government may from lime to lime review the implementation of the reservation policy and take adequate measures including increase of percentage, mentioned in Clause 4(a) of this Act;

Provided further that the candidates belonging to Scheduled Castes and Scheduled Tribes who qualify for selection on merit shall be included in the general list and not against reserved quota;

It is apparent from Section 4 of the Act that candidates belonging to Backward Classes of citizens, for whom some percentage in the appointments are reserved, if qualify for selection on merit, such candidates of those classes shall be included-in the general list and not against reserved quota. As such, the submission of Mr. Pathak that candidates who are members of Scheduled Castes/

Scheduled Tribes and/or OBC/MOBC community who qualified for selection to be appointed on merit should have been included in the general list and not against reserved quota, has force.

11. For the reasons stated above, the petition is allowed. The impugned classification or categorisation made by the Board for the purpose of filling up of vacant posts of Agricultural Marketing Inspector on the basis of such classification/categorisation being *ex facie* arbitrary, illegal and without jurisdiction and violative of Article 16 of the Constitution, is quashed. All appointments made on such void classification adversely affecting the right of the candidates who would have otherwise been appointed in order of merit as per the select list are also equally bad in law and cannot be sustained. For the same reason orders dated 23.6.92 appointing the Respondent Nos. 4 & 5 to the post of Marketing Inspector being arbitrary, illegal and discriminatory are set aside. The order passed in the case of Ramkaran (*Supra*) cannot be applied on the facts of the present case.

12. With a view to steer clear of the anomalies created by arbitrary categorisation of the selected candidates into different categories by the Board and appointing candidates on that basis ignoring the relative position of the candidates in the select list in order of merit, the Respondents No. 1 and 2 are directed:

(i) To workout number of vacant posts of Marketing Inspector to be filled up from the general class of citizens and to prepare a list of those candidates strictly according to merit as per select list published in the local English newspaper "The Sentinel" in its issue dated 29.2.92 (Annexure -III) to the petition) irrespective of the fact whether candidates are members of Scheduled Castes/ Scheduled Tribes or Other Backward Class/More Other Backward Class.

(ii) To prepare a list of selected candidates in order of merit from amongst Scheduled Castes/Scheduled Tribe (Plains)/Scheduled Tribes (Hills)/OBC/MOBC for appointment against the quota fixed by the Govt. from amongst the selected candidates, who do not find place in the list of general class in order of merit:

(iii) To fill up the vacant posts by appointing candidates strictly according to their relative position in the select list in order of merit, and

(iv) to cancel appointments of all incumbents who as per the list to be prepared cannot be appointed in order of merit, after giving opportunity to show cause to each of such appointees against proposed cancellation of appointment within a reasonable time. In the show cause notice the reasons for proposed cancellation should be stated.

The Respondents No. 1 and 2 shall invariably carry out the aforesaid directions within a period of 2 months from the date of receipt of this Judgment and order.

I make no order to costs.