
(2015) 08 GAU CK 0019
In the Gauhati High Court
Case No : WP(C) No. 337 of 2008

Ranjan Kanti Bhattacharjee and Others	APPELLANT
Vs	
State of Assam and Others	RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978 — Section 5
Constitution of India, 1950 — Article 16(4-A), 335

Citation : (2015) 08 GAU CK 0019

Hon'ble Judges : Hrishikesh Roy, J.

Bench : Single Bench

Advocate : U.K. Nair, B. Sarma, A. Chetry, S.P. Nair and G.Z. Ahmed, for the Appellant; P. Roy, Addl. A.G., J. Handique, G.A. and S. Chamaria, SC, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. U.K. Nair, the learned counsel appearing for the petitioners. The State authorities are presented by the learned Addl. Advocate General Mr. P. Roy, assisted by Mr. J. Handique as well as by the learned standing counsel for the Agriculture Department Mr. S. Chamaria.

2. The 2 (two) petitioners were serving in the cadre of Deputy Director in the Department of Agriculture and the writ petition was filed alleging wrongful promotion to the 11 vacancies in the cadre of Joint Director, by making excessive promotion from amongst the reserved category Deputy Directors. According to the petitioners, if the sanctioned cadre strength of Joint Director, which was 16 in number, are taken into account, only 4 (four) of the cadre strength vacancies could be filled up, under the reservation criteria prescribed by Section 5 of the Assam Scheduled Castes and Scheduled Tribes (Reservation of Posts in Services) Act, 1978 (hereinafter referred to as the "Reservation Act"). But in the instant case, the benefit of promotion was given to larger number of reserved category

promotees than what was envisaged under the amended Section 5A of the Reservation Act. It may be noted herein that both petitioners belong to the general category and had retired from service during the pendency of the case on 30.04.2009 and 31.05.2009 and in the event this case is decided in their favour, they will be entitled to consequential higher pension benefits through notional promotion.

3. Under the Assam Agricultural Service Rule, 1980 (hereinafter referred to as the "Service Rules"), the Government is required to assess the likely number of vacancies for each year under Rule 13, so that promotion to the available vacancies can be made in the next year. Thus, a year wise assessment of vacancy and consideration of promotion in that relevant year is required to be made, under the Service Rules governing the parties. The petitioners have furnished a chart to show the year wise vacancies as per the calendar year defined under Section 2(f) of the Service Rules. The chart reflects that in the year 2006, 6 (six) vacancies became available. Similarly in the year 2007, 1 (one) vacancy occurred through retirement in the cadre of Joint Director and 3 (three) by promotion to the higher cadre. On retirement of a Joint Director in 2008, 1 (one) more vacancy occurred in that year. Thus, at the relevant period, 11 vacancies in the 16 strong cadre of Joint Director became available through retirement/promotion/death etc.

4. The extent of reservation is prescribed for each category under Section 5A of the Reservation Act and when one takes into account the reservation of 10% for ST(P) category; 5% for ST(H) category and 7% for SC category, in all 22% is the maximum permissible reservation in the cadre of Joint Director. When the percentage is translated to figures by taking into account the cadre strength of 16, when 22% is the maximum permissible reservation, only 4 (four) posts from the total cadre strength of 16, can be filled up on the criteria of reservation prescribed under Section 5A of the Reservation Act.

5. The following chart will reflect how the figure of 4 (four) posts are reached by taking into account the 22% reservation for a cadre strength of 16 Joint Directors:-

6. From the counter affidavit filed by the State, it can be culled out that after the gradation list in the cadre of Joint Director was finalized on 30.05.2006, at that stage 3 (three) persons from the reserved category were already promoted to that cadre of Joint Director. Of the three one is of the SC category and two belonged to the ST(P) category. Thus, only the 4th post meant for the ST(H) category candidate was vacant in the year 2006.

7. Although year wise assessment of vacancy and promotion exercise was envisaged under the Service Rules, the 11 vacancies which became available from 01.01.2006 to 31.12.2008, were considered by single DPC and all the eligible persons in the feeder cadre were considered in the promotion exercise. According to the averments made in the counter affidavit, the DPC examined the

ACRs of all the eligible feeder cadre officers and recommended those who were considered eligible for promotion.

8. According to the chosen methodology for the above promotion exercise, 3 (three) more ST(P) category candidates were promoted although 2 (two) of this category were already serving in the cadre of Joint Director. Likewise, 2 (two) more SC category officers were promoted, while 1 (one) SC category officer was already serving as Joint Director. None from ST(H) category was promoted prior to 2006 and in the exercise undertaken for the 11 vacancies, the DPC recommended 2 (two) ST(H) category persons for promotion. The State's stand is that 7 (seven) reserved category persons deserved to be promoted to the 11 vacancies on the basis of the purported backlog vacancies at roster point 91, 32, 43, 7, 27, 111 and 121 respectively. But the petitioners contend that only one more person belonging to the ST(H) category could have been considered for those 11 vacancies, since the cap on permissible reservation was 4 in a cadre strength of 16, if the percentage of reservation under Section 5A of the Reservation Act is taken into account.

9. In the context of promotion for reserve category, the Apex Court in R.K. Sabharwal and others Vs. State of Punjab and others, had observed that:-

"5. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts ..." are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of

reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the "running account" must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. 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."

10. Mr. U.K. Nair, the learned counsel submits that reservation in matters of promotion is permitted under Article 16(4-A) , but a constitutional rider is attached. The inadequacy of representation in service of the concerned reserved category is a factor to be taken into account, when promotion under Article 16(4-A) is given.

11. While interpreting Article 16(4-A) , the Constitutional Bench in M. Nagaraj and Others Vs. Union of India (UOI) and Others, , indicated the permissible extent of reservation for promotion in the following words:-

"123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of

promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335 . It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

12. Following the Apex Court's decision on reservation for SC/ST in matters of promotion, in U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, , the Court observed that when the provisions of the constitution are treated valid with certain riders, it becomes incumbent for the State to apply the same in accordance with constitutional mandate only. Thus a fresh exercise in light of M. Nagaraj (supra) was declared to be of "categorical imperative."

13. In view of the above ratio in M. Nagaraj (supra) and Uttar Pradesh Power Corporation Limited (supra), the State was obliged to collect quantifiable data to justify reservation in promotion by taking into account the backwardness of the class, inadequacy of representation of that class in public employment and its overall impact on administrative efficiency in service.

14. The learned Addl. Advocate General Mr. P. Roy has fairly stated that the quantifiable data for the State of Assam became available only on 10.03.2014 through a report of the one man commission and before that such data as contemplated under Article 16(4-A) and M. Nagaraj (supra), was not available to the State authorities. The recommendation made by the one man commission on the quantifiable data, was accepted by the Cabinet on 02.11.2014 and thereafter the Govt. O.M. was issued on 29.12.2014 notifying the guidelines for implementation of the post based roster reservation.

15. But even before the quantifiable data was prepared in Assam, amendments were made in the Reservation Act to implement the Constitution Bench ratio of M. Nagaraj (supra) by adding Section 5A w.e.f. 21.08.2012. In fact, the Government O.M. issued on 29.12.2014 is a follow up of Section 5A of the Reservation Act. The important facet of the prescribed procedure for application of the reservation law in matter of promotion is that a post based roster register is required to be maintained with reference to the cadre strength of that post or in other words, with the change of cadre strength the roster shall correspondingly expand or contract. The other salient feature of the amended provision is that roster is to be operated on the principle of replacement and not as a running account. To put it differently, the roster points meant for different categories remain fixed and when vacancies are caused by retirement etc., those points shall be filled up by appointment of only that category person. But the law doesn't allow expansion of the reservation roster beyond the cadre strength, prescribed under the Service Rules.

16. If we take into account the change of law brought about by the amendment

following the ratio of in M. Nagaraj (supra), it becomes clear that the number of vacancies where reserved category candidates can be posted, cannot exceed 22% of the cadre strength and each reserved category is entitled to be represented to the extent of their permissible percentage of quota, as detailed in Section 5 of the Reservation Act.

17. When the maximum permissible quota for promotion of reserved category is only 4 in the 16 strong cadre of Joint Directors, it becomes clear that promotion exercise undertaken by the respondents started in the year 2007 was illegal as the law didn't permit promotion being given to 7 (seven) reserved category persons to the 11 available vacancies. This is because 3 (three) reserved category persons were already serving as Joint Directors and only the quota for ST(H) category remained vacant. Therefore, the exercise undertaken by the Government to promote 7 (seven) reserved category persons is legally impermissible under the Reservation Act as explained in R.K. Sabharwal (supra) and M. Nagaraj (supra) since the prescribed percentage of posts and its numerical equivalent was limited to only 4 and the roster could be operated only till the respective promotee occupy the posts meant for them in the roster.

18. Moreover, since promotion was not considered year wise to the available vacancies as is mandated by Rule 13 of the Service Rules, the clubbed exercise undertaken by the State authorities is found to be inconsistent with the legal provision. But at the same time, the Court is conscious of the fact that promotions were given to the incumbents about 8/9 years back and some of the promotees may have retired from service and therefore in my considered opinion, disturbance to those promotions should not be made at this stage, particularly when, the beneficiaries are not arrayed in this proceeding.

19. Nevertheless, it is apparent that promotions were given by considering all the available vacancies of 3 years (2006, 2007 and 2008) through one DPC and the reserved category cap was exceeded well beyond the permissible 4 (four) vacancies for a cadre strength of 16. Therefore it is found that the petitioners who belong to the general category, were not considered appropriately to the extent of legally available open category vacancies, which in my view has resulted in deprivation of their right to promotion at the appropriate stage. When this case was filed in the year 2008, the two petitioners were at seniority position 7 and 8 in the feeder cadre of Deputy Directors. If we take into account that 11 vacancies were available at the relevant time, the promotion of the petitioners was a distinct possibility. But because of their retirement in April/May 2009, the 2 general category petitioners could not secure the benefit of retiring from the higher post.

20. In the above circumstances and considering that the reservation quota was exceeded and because the promotions was not considered in accordance with the procedure prescribed by Rule 13 of the Service Rules, I feel that consideration of notional promotion and higher pension benefits should be ordered for the 2 (two) petitioners. Therefore, the respondents are directed to consider the promotion of

the petitioners from the date when their juniors were promoted. But the consequential benefits to the petitioners may be confined to notional promotion to the cadre of Joint Director and resultant higher pension benefits. The matter should be considered by review DPC as on the date of earlier exercise and it should be carried out within 3 (three) months from today. It is ordered accordingly.

21. With the above direction, this case stands allowed without any order on cost.