
(2006) 09 AHC CK 0137
In the Allahabad High Court

Sangam Nath Pandey, Prakash Chandra Srivastava,
Raghwendra Prasad Singh and Sanjay Kumar Srivastava

APPELLANT

Vs

State of U.P. and U.P. Public Service Commission

RESPONDENT

Date of Decision : 05-09-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2006) 7 AWC 7747

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Judgement

A.P. Sahi, J.—These writ petitions raise a challenge to the selections on the post of Junior Engineer (Civil) in the Irrigation Department of the State of Uttar Pradesh. The selections have been held by the U.P. Public Service Commission under a requisition of the Irrigation Department pursuant where to the posts were advertised on 22.12.2000.

2. All the writ petitions have been heard together and are connected as they raise common questions of law and fact and the petitioners in the writ petitions are of the general category who are aggrieved by the results declared as they do not find themselves finally selected which they allege is a result of an arbitrary action on the part of the respondents for which several grounds have been urged on their behalf.

3. A requisition was made by the Irrigation Department, Government of U.P., on 20.10.1999 pursuant where to an advertisement was issued on 22.12.2000 and the last date for filling up the applications was 27.1.2001. The said advertisement which is Annexure-1 to the leading petition discloses the total number of posts vacant and available for selection as 954. The break up of the said posts disclosed in the Advertisement is 477 posts for the general category, 257 posts for the other backward category, 200 posts for the Schedule Caste category and 20 posts for the Schedule- Tribes category. The examinations were conducted on 22/23.12.2001 and the results of the written examinations was

declared on 6.10.2005. In between this period, it is to be noted that the Supreme Court on 21.1.2002 passed an interim order in a SLP restraining the issuance of any executive instructions pursuant to the amendment brought about in the Uttar Pradesh Public Services (Reservation for Schedule Castes, Schedule Tribes and other Backward Classes) Act, 1994 through U.P. Act No. 21 of 2001. In view of the aforesaid stay order granted by the Supreme Court, the Government of U.P. in its wisdom, proceeded to restore the position of the 1994 Act in consonance with the decision in the case of R.K. Sabharwal and others Vs. State of Punjab and others, and also amend the Act suitably in the light of the provisions of Article 16(4-B) of the Constitution of India. Consequently this took the shape of an Act namely U.P. Act No. 1 of 2002 and the issuance of 2 ordinances namely Ordinance No. 2 of 2002 promulgated on 6.6.2002 and U.P. Ordinance No. 7 of 2002 promulgated on 25.6.2002.

4. As a consequence of these developments between the issuance of the advertisement and the declaration of the results of the written examinations, the Chief Engineer of the Irrigation Department who had earlier sent the requisition for selections sent a letter on 6.11.2003 intimating the Secretary of the Public Service Commission that in view of the reorganization of the State of U.P. and the creation of the new State of Uttaranchal, 2 per cent reduction in the vacancies advertised for direct recruitment has to be made and further due to more vacancies available in the year 2003-04, the total number of posts against which selections were to be conducted was reduced to 887 against 954 earlier advertised. The break up of the said 887 posts was given as 260 posts for the general category, 391 for the other backward category, 223 for the Schedule Caste Category and 13 for the Schedule Tribes category. The said modification brought about a change in the number of posts available for each category as against the original advertisement of 954 posts. Two letters were issued by the Chief Engineer on 13.10.2005 and 25.10.2005 stating therein that the corrigendum dated 6.11.2003 should be understood as a request for 520 posts for general recruitment and 367 posts for special recruitment.

5. The Commission in view of the aforesaid changes had also asked for option from the reserved category candidates as to their choice to be considered against 520 posts of general recruitment or against the 367 posts of special recruitment meant exclusively for reserved category. The reserved category candidates appear to have given their option for the special recruitment category of 367 posts referred to herein above. The interview was held thereafter between 21.11.2005 to 12.1.2006 whereafter the final results were declared on 12.3.2006. The petitioners in all the writ petitions who belong to the general category did not find themselves selected and, as such, aggrieved they filed the present writ petitions. This Court, in the leading writ petition, passed an interim order restraining the respondents from making any appointment against the 367 posts the results whereof were declared under the heading of special recruitment posts. What is to be noted is that there were only 4 petitioners in the leading writ petition, one petitioner in the second writ petition, 2 petitioners in the third writ

petition and one petitioner in the fourth writ petition. Thus, there were only 8 petitioners before this Court in all. Impleadment applications have been filed on behalf of some of the selected candidates from amongst those 367 against whom the interim order was passed. The impleadment applications have been accepted on record as the applicants are all affected parties and are entitled to be heard under the provisions of Chapter XXII Rule 5-A of the Allahabad High Court Rules.

6. A counter-affidavit has been filed on behalf of the Respondent Nos. 1, 2 and 3 by one Sri Har Prasad, Executive Engineer, and a supplementary-affidavit sworn by the same person which indicates the total cadre strength of the Junior Engineers in the concerned department for which the selections have been held. Another counter-affidavit has been filed on behalf of the U.P. Public Service Commission through Sri Radhey Lal and a short-counter-affidavit has been filed on behalf of the proposed respondents stating therein that the change brought about before the final selections for giving effect to reservation does not in any way affect the general category candidates as the 367 selected candidates in no way encroach upon the posts of the general category and none of the rights of the petitioners are prejudiced.

7. The facts stated in the counter-affidavit pertaining to the action taken by the respondents in proceeding to hold the selections have not been disputed by filing of any Affidavit in reply thereto. However, submissions have been raised on the legal issues on the basis of the existing facts and several authorities have been cited questioning the selections and the final results declared by the Respondents.

8. I have heard Sri Ashok Khare, learned senior counsel, who has led the arguments on behalf of the petitioners and learned Chief Standing Counsel Sri C.B. Yadav for the Respondent Nos. 1, 2 and 3. Sri P.S. Baghel has been heard for the proposed respondents namely the selected candidates and Sri M.A. Qadeer for the Public Service Commission.

9. Sri Ashok Khare, learned Senior Counsel, has urged that the alteration made by the respondents while proceeding to declare the results is in violation of the provisions of U.P. Act No. 4 of 1994 as amended from time to time; that the selections have proceeded by totally ignoring the roster points to be applied for achieving the object of reservation: that by altering the process of selection, the respondents have exceeded the 50 per cent outer limit of reserve category posts in the year of recruitment; that the respondent could not have proceeded to treat the 367 vacancies as backlog vacancies inasmuch as the said vacancies were never subject matter of any advertisement in any previous year of recruitment for the reserved category and, therefore, the said posts /vacancies could not have been subject matter of special recruitment by the Respondents. Sri Khare inviting the attention of the Court to the case of R.K. Sabharwal and others Vs. State of Punjab and others, has urged that the selections have proceeded contrary to the law laid down in the said Constitution Bench judgment as also the subsequent decision of the Constitution Bench in the case of Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association

and Others, The contention of Sri Khare is that the final selections are at variance to the advertisement which is impermissible in law and which violates the procedure prescribed under the U.P. Act No. 4 of 1994 for enforcing the Rule of reservation. He contends that out of the total number of 887 posts, 443.5 posts ought to have been offered to the general category and the rest 50 per cent ought to have been given to the reserved category. However, by the alteration made, 627 posts have gone to the reserved category and only 260 posts have been offered to the general category which clearly disturbs and violates the 50 per cent outer limit reservation which has to be maintained in a year of recruitment. He contends that in order to fill up the unfilled vacancies of the reserved category, such a method could not have been adopted and the only possible way to saturate the vacancies was to follow the roster point as provided under U.P. Act No. 4 of 1994. He submits that it is the year of recruitment as defined u/s 2(d) read with the provisions of Section 3 of the amending Act which has to be adopted for the purposes of calculating the 50 per cent limit and he urges that the vacancies occurring in the year of recruitment cannot be offered to the reserved category candidate more than 50 per cent of the vacancies so available in the year of recruitment. He contends that by offering appointment to more than 50 per cent candidates of the reserved category, the respondents have violated the aforesaid norms and, therefore, the declaration of results in excess to the 50 per cent of the said posts deserves to be struck down and the results deserve to be declared as per the advertisement dated 22.12.2000.

10. Sri C.B. Yadav, learned Chief Standing Counsel, replying to the aforesaid contentions has invited the attention of the court to the figures indicated in the supplementary-counter-affidavit of the Respondent Nos. 1, 2 and 3 which encloses the letter dated 4.7.2006 indicating the total number of posts in the department i.e. the total cadre strength of Junior Engineers (Civil). The letter dated 4.7.2006 from the Chief Engineer addressed to the Chief Standing Counsel discloses that there are a total number of 4217 posts sanctioned for direct recruitment. The said letter also reflects the category wise break up of the working strength of the Junior Engineers and the vacancies available in each category. The counter-affidavit on behalf of the respondent encloses there with the letters dated 13.10.2005 and 25.10.2005 sent by the Chief Engineer to the Public Service Commission which has brought about the change in the final selections on the posts in question. Sri C.B. Yadav relying on the following judgments has urged that the contentions advanced on behalf of the petitioners are absolutely untenable and the petition, therefore, deserves to be rejected. The decisions relied upon by Sri Yadav are in the case of J.C. Malik and Ors. v. Union of India and Ors. 1978 (1) SLR 844 R.K. Sabharwal v. State of Punjab (supra), Union of India and others etc. Vs. Virpal Singh Chauhan etc., and Rani Laxmibai Kshetriya Vs. Chand Behari Kapoor and Others, . He has further invited the attention of the Court to the same provisions of U.P. Act No. 4 of 1994 as amended in 2002 to urge that the mode of calculation for achieving the object of reservation would be the total cadre strength and not the vacancies of a

particular year of recruitment.

11. Sri P.S. Baghel, for the proposed respondent, has urged that in view of the options exercised by the reserved category candidates against the special recruitment posts, no prejudice is caused to the general category candidates as no posts of the general category is being encroached upon in excess of 50 per cent by the reserved category candidates. Sri Baghel has relied on 3 other decisions apart from the aforesaid decisions reported in Ajit Singh and Others Vs. The State of Punjab and Others, to support his submissions.

12. Before delving into the rival submissions advanced, it would be...appropriate to refer to the provisions of Section 2-(d) and Section 3 as amended up to date by U.P. Act No. 1 of 2002 of U.P. Act No. 4 of 1994.

2 (d) "year of recruitment" in relation to a vacancy means a period of twelve months commencing on the first of July of a year within which the process of direct recruitment against such vacancy is initiated.

3. Amendment of Section 3.-- In Section 3 of the principal Act.-

(a) for sub-sections (I), (2) and (3) the following sub-section shall be substituted, namely:

(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in Sub-section (5) in favour of the persons belonging to Scheduled Castes, Schedule Tribes and Other Backward Classes of citizens,-

(a in the case of Scheduled Castes - Twenty-one percent;

(b) in the case of Schedule Tribes - Two per cent;

(c) in case of other Backward Classes of citizens - Twenty-seven per cent:

Provided that the reservation under Clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II:

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made;

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in subsection.(1);

(3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three special recruitments made under Sub-section (2), such vacancy may be filled from amongst the persons belonging to the Scheduled Castes";

(&) (/) sub-sections (3-A), (3-13) shall be omitted:

(Y) Sub-section (4) shall be omitted:

(c) for Sub-section (5), the following sub-section shall be substituted, namely:

(5) The State Government shall for applying the reservation under Sub-section (I), by a notified order, issue a roster comprising the total cadre strength of the public service or post indicating therein the reserve points and the roster so issued shall be implemented in the form of a running account from year to year until the reservation for various categories of person mentioned in Sub-section (1) is achieved and the operation of the roster and the running account shall, thereafter, come, to an end, and when a vacancy arises thereafter in public service or post the same shall be filled from amongst the persons belonging to the category to which the post belongs in the roster.

13. A perusal of the aforesaid amended provision would indicate that the reservation has to be provided at the stage of direct recruitment, The stage of direct recruitment would be the stage of final selection and, as such, the reservation has to be applied while making final selections. The proviso in Sub-section (1) of Section 3 states that reservation of vacancies for all categories of persons shall not exceed, in any year of recruitment, 50 per cent of the total vacancies of that year as also 50 per cent of the cadre strength of the service to which the recruitment is to be made.

14. The said proviso, therefore, envisages twin conditions namely that the reservation shall not exceed 50 per cent of the vacancies of that year and also 50 per cent of the cadre strength of the service to which the recruitment is to be made. This provision has to be interpreted in a manner that it sub-serves the purpose of reservation and advances the cause of the object sought to be achieved. Read conjointly, it reflects that reservation cannot exceed 50 per cent of the cadre strength by any means. Conversely it restricts offering more than 50 per cent posts to the general category if the reserve category has not been saturated. In order to fulfil this object, which still remained unachieved, in spite of the existing Laws, the amendments in Section 3 of the U.P. Act No. 4 of 1994 were brought about stipulating steps to be undertaken for special recruitment for the reserve category. Sub-section 2 of Section 3 further provides that any vacancy reserved for any category of persons under sub-section 1 if remains unfilled, then such vacancies shall be carried forward and filled through a special recruitment in that very year or in succeeding years or years of recruitment as a separate class of vacancies and such class of vacancies shall not be considered together with the vacancies of the year of recruitment in which it is filled and also further for the purpose of determining the ceiling of 50 per cent reservation of the total vacancies of that year. Sub-section (5) of Section 3 further provides

that for applying reservation under Sub-section (1) the roster shall be notified comprising the total cadre strength of the posts indicating the reserved points and the roster shall be implemented in the form of a running account from year to year till the reservation target of 50 per cent is achieved.

15. The aforesaid provisions contained in sub-section 2 of Section 3, therefore, indicates the manner of filling of reserved vacancies, which were not filled up earlier, through a special recruitment either in the same year or in the succeeding year or years of recruitment.

16. Sri Khare, pointing out the aforesaid provisions, has urged that 50 per cent ceiling has to be determined on the basis of the vacancies that were advertised and according to which the opposite parties could not have proceeded to reduce the same in the manner in which it has been done as the same violates the aforesaid provisions. He has heavily relied on the observations made in R.K. Sabharwal's case in paragraph No. 7 of the said judgment and has urged that the opposite parties could not have proceeded to alter the number of posts offered to the reserved category as that violates the roster point system and also the 50 per cent ceiling limit.

17. The figures of the total strength of the cadre of 4217 posts as per calculation indicate that the total strength of general category i.e. 50 per cent of the total strength of the cadre undisputedly is 2066, out of which 1808 posts are already occupied. Therefore, only 260 posts are available for general category. The advertisement, therefore, travelled beyond the said figure in excess of the General Category posts. If that is permitted, then the Reserved Category posts stand reduced.

18. The result of the advertisement of 2000 is that General Category candidates would get more than 50 per cent of the cadre strength thereby reducing the number of reserve category. This would run counter to the object of reservation as no reserve category posts can be filled up by offering it to the general category.

19. The figures indicate that the General Category is still being offered its full capacity and there is no choking of the said category as apprehended in Indira Sawhney's case. This protects the reserve category as well as the general category and the balance has been struck as understood in the light of the observations of the Apex Court in paras 7 and 8 of R.K. Sabharwal's case.

20. It would be purposeful to note the observations of the Apex Court in the case of Ajit Singh and Others Vs. The State of Punjab and Others, . Sri Baghel has invited the attention to the observations made in paras 5 and 17 to 19 of the said decision. The Apex Court observed therein that the case of Indra Sawhney and R.K. Sabharwal laid down the manner in which the rights of general category and reserved candidates ought to be balanced. In the case of Ajit Singh Januja and others Vs. State of Punjab and others, the Apex Court observed that the balance has to be maintained in such a manner that there was no reservation in

excess of the limit of reservation. Such an interpretation would advance the objective of reservation and which should be applied. The aforesaid principles if kept in mind would leave no room for doubt that the State Government while proceeding to make appointments on the facts of the present case has attempted to strike the aforesaid balance and has undisputedly advanced the cause of reservation as desired by the Apex Court in the decisions referred to herein above without encroaching on the rights of the general category candidates.

21. The argument, therefore, of the learned Counsel for the petitioners that Rule 3 of the 1994 Rules has been violated cannot be accepted as the measure undertaken by the State Government in this case tends to maintain the 50 per cent balance in favour of the reserved category and it is also evident that the State Government has not offered more than 50 per cent of the seats to the reserved category to, in any way, disturb the aforesaid balance and affect or prejudice the rights of the general category candidates.

22. Sri Khare contends that in order to achieve the aforesaid object of reservation, the State Government has failed to adopt the roster point strictly and, therefore, the procedure adopted violates Article 14 of the Constitution of India as well as the directions of the Apex Court in the case of R.K. Sabharwal. He contends that the State Government has not been commanded not to enforce the roster. It is submitted that by not adopting the procedure of roster point system in the running account of the posts available, the State Government has over stepped in its jurisdiction in reducing the number of posts offered to the general category candidates as per the advertisement. What Shri Khare contends is that the objective of reservation can only be achieved through the roster point system and not by any other method. A perusal of Section 3 as amended up to date of U.P. Act No. 4 of 1994, nowhere prohibits the State Government from adjusting the appointments against the reserved category posts. The application of roster has to be implemented with a view to compel the State to fulfil the objective. The objective can also be fulfilled by adjusting the number of posts in accordance with the availability of the posts and the candidates in the concerned category. What the State has been prohibited from doing is not to proceed in a manner which would bring about any discrepancy in the implementation of the reservation policy. The judgments in Indra Sawhney's case as explained later on in the other cases directs the State not to annihilate the prospects of the general category candidates. In the instant case as is evident from the facts, there has been a reduction in the number of posts to be offered to the general category candidates and which does not amount to either choking the opportunities offered to the general category candidates or in any way bringing about a prohibition which may prejudice the general category candidates. As already explained herein above, the facts indicate that by adopting the method according to the facts and figures reflected in the letter dated 4.7.2006, the State has endeavoured to achieve the object of reservation without prejudicing the claim of the general category candidates. The contention, therefore, that non-applicability of roster has resulted in any discrimination on the basis of the facts on record

requires an in depth calculation according to the roster points as envisaged under U.P. Act No. 4 of 1994 which exercise has not been disclosed before the Court.

23. The argument of Sri Khare that these vacancies that were advertised did not indicate the filling up of any backlog vacancies. He contends that special recruitment could not have been held unless and until the posts had been earlier advertised and the vacancies of the reserved category had remained unfilled. He contends that in the absence of any such contingency the attempt of the State Government to fill up the vacancies at the time of appointment as special Recruitment vacancies is against the provisions of 19941 Act. The distinction which has to be seen is as to whether the aforesaid procedure has been in reality violated or not. A perusal of Section 3 of the Act indicates that it is not necessary for any vacancy having been advertised on an earlier occasion in order to carry out the special recruitment. The special recruitment has to be made with the sole objective of achieving the target of unfilled vacancies of the reserve category after applying the roster. The State Government, in the opinion of the Court, has segregated the 367 posts as posts for special recruitment in view of the fact that these posts exclusively belong to the reserved category. The aforesaid fact that these 367 posts belong to the reserved category remains undisputed. The petitioner, who belongs to, the general category, therefore, cannot have any right or claim against the said posts, even if, they have been advertised by the State Government. The posts, which are meant to be filled up by the reserved category, cannot be offered to the general category candidates. In this view of the matter, the State Government, has to apply the roster in order to achieve the target. The question as to whether they are backlog vacancies or not need not to be probed any further in view of the fact that the applicability of the roster against he said posts has to be determined. The aforesaid discussions, herefore, leave to only one conclusion that the State Government has lot over stepped the 50 per cent reservation quota but the selections have to be finalized after applying the roster.

24. The insistence of Sri Khare was mainly on the ground that the vacancies have to be calculated in the same year of recruitment for the purpose of 50 per cent limit fixed for reservation as this would be in consonance with the provisions contained in the U.P. Act No. 4 of 1994 as amended up to date. The aforesaid argument has to be judged in the light of the twin conditions imposed in the said provisions namely that the quota of 50 per cent has to be balanced according to what was intended in Indra Sawhney's case and R.K. Sabharwal's case as followed later on. If the ultimate object is to fulfill the criteria of reservation in order to achieve 50 per cent quota, then keeping in view the aforesaid object, the purposeful interpretation of Section 3 of U.P. Act No. 4 of 1994 would be that the State Government can proceed to adjust the number of vacancies but it cannot travel beyond the 50 per cent limit of the total cadre strength. The petitioners have not placed any material on record about the number of vacancies occurring in each year of recruitment in order to appreciate this argument. Sri Khare contends that the State Government should have taken care

of the situation, in the absence of any pleadings of facts and figures of the previous year of recruitment, the aforesaid issue deserves to be probed by the State Government and the Commission before finalising the selections. The very premise of calculating vacancies in a year of recruitment has been explained in the pronouncement of the Apex Court in para 6 of R.K. Sabharwal's case, which is quoted herein below;

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.

25. This has been further explained in para 8 of the said judgment which is also quoted herein below in support of the conclusions drawn herein above:

8. The quoted observations clearly illustrate that the rule of 50% a year as a unit and not the entire strength of the cadre has been adopted to protect the rights of the general category under Clause (1) of Article 16 of the Constitution of India. These observations in Indra Sawhney case are only in relation to posts which are filled initially in a cadre. The operation of a roster, for filling the cadre-strength, by itself ensures that the reservation remains within the 50 % limit. Indra Sawhney case, is not the authority for the point that the roster survives after the cadre-strength is full and the percentage of reservation is achieved.

26. The conclusion, therefore, is that the State Government and the Commission have calculated the number of posts to be offered to the reserve category candidates correctly as contained in the letter dated 4.7.2006 but whether the same can be finally offered to the 367 candidates should be done only after applying the roster points as contemplated under U.P. Act No. 4 of 1994 in respect of all the posts that came to be filled up or were vacant after the said Act was applied. This would be in consonance with the principles laid down in Indira Sawhney's case as explained in the later decisions of R.K. Sabharwal (supra) and Ajit Singh (II) (supra) which require that if the roster is applied then that would automatically bring about the desired fulfillment of the object of reservation and would at the same time not block the prospects of those general category candidates who would

27. Accordingly, the respondent - State Government and its Officers of the concerned department and the U.P. Public Service Commission are directed to undertake the exercise of carrying out the calculation after applying the roster as

provided under U.P. Act No. 4 of 1994 and then finalize the selections. The said exercise may be completed preferably within six weeks and till such decision is taken the declared results impugned in these petitions shall not be given effect to and shall ultimately abide by the final decision to be taken by the respondents as directed herein above. All the petitions stand disposed off, accordingly, with no orders as to costs.