

(2013) 11 BOM CK 0049
In the Bombay High Court
Case No : Writ Petition No. 9544 of 2011

Savankumar

APPELLANT

Vs

The State of Maharashtra and Chief Executive Officer

RESPONDENT

Date of Decision : 20-11-2013

Acts Referred:

Citation : (2014) 2 ABR 755 : (2014) 1 ALLMR 569 : (2014) 2 MhLj 574

Hon'ble Judges : R.M. Borde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : Santosh S. Jadhavar, for the Appellant; S.G. Sangle, A.G.P. for Respondent No. 1 and Smt. Preeti Diggikar Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—Rule. Rule made returnable forthwith and heard finally with the consent of the parties. This Petition by Petitioner is an effort to hop to the category of Open-physically handicapped, after having been appointed in the category of Other Backward Classes (O.B.C.)-handicapped and terminated after a couple of years as the O.B.C. certificate got invalidated.

2. According to the Petitioner, he has been terminated by order dated 10th May 2010, by Zilla Parishad, Hingoli as his caste claim was invalidated by caste scrutiny committee, ignoring the fact that he was selected and appointed for the post reserved for physically disabled person. He had been selected as Shikshan Sevak and appointed on 14th September 2006. He had the requisite qualification for the post of Assistant Teacher in Primary School and he belongs to "Shimpi" caste which is included in Other Backward Class (O.B.C.) and is also physically disabled having 45% orthopedic disability. He belongs to O.B.C. category and is entitled for the reservation of O.B.C. category. Respondent No. 2 Zilla Parishad published advertisement in Newspaper dated 4th February 2006 to fill up posts of Assistant Teachers in Primary Schools run by Zilla Parishad, Hingoli. Apart from constitutional reservation, social reservations were also provided in the said advertisement and it was specifically stated that 3% reservation of the total

posts would be reserved for physically disabled persons. Petitioner submitted two applications. In one application, he claimed reservation of O.B.C. category as well as physically disabled person and in another application he claimed reservation for physically disabled person (Open). As per the law laid down by the Hon'ble the Supreme Court in the matter of Indra Sawhney Vs. Union of India (UOI) and Others, , social reservations run across the constitutional reservations. The constitutional reservations of scheduled caste, scheduled tribe, O.B.C. etc. are vertical reservations, whereas reservations for physically handicapped persons, ex-serviceman etc. are horizontal reservations.

3. As per the Petitioner, separate 3% reservation was provided for physically disabled persons and therefore there was no question of providing reservation of physically disabled persons against different categories of constitutional reservation. He claims that he was selected to the post reserved for physically disabled persons and was placed against the post reserved for physically disabled person-O.B.C. category. According to him, there was no such type of reservation.

4. According to the Petitioner, as he was accommodated against seat reserved for O.B.C. category, his caste claim was referred to caste scrutiny committee, Latur. The same got invalidated as he is not resident of Maharashtra State since prior to 1967. Being aggrieved and dissatisfied by the invalidation of his caste claim, he approached this Court in Writ Petition No. 4589 of 2010. Vide order dated 25th May 2010, this Court directed that no adverse action may be taken against the Petitioner solely on the ground that his caste claim has been invalidated. However, back dated order, dated 10th May 2010, of terminating the services of Petitioner was served on him on 14th June 2010. According to him, he was selected as physically disabled person and so even if the caste claim has been invalidated, he could not have been terminated.

? According to Petitioner, in all 175 posts were advertised. As per 3% reservation, 5 posts ought to have been provided to physically disabled persons. Although 175 posts were advertised, 187 candidates were selected and appointed to the post of Shikshan Sevak and as such 6 posts ought to have been reserved for physically disabled persons. However, Respondent No. 2 selected only 5 physically disabled persons, as mentioned in the Petition. The Petitioner sought amendment in Writ Petition No. 4589 of 2010, to incorporate challenge to the termination order dated 10th May 2010. However, vide orders dated 29th November 2011, he was granted liberty to restrict the challenge in that Petition limited to the extent of order of caste scrutiny committee and was permitted to resort to appropriate legal remedies in respect of termination of his service. Hence, this Petition.

58. Respondent No. 2 has filed affidavit in reply. It is the case of this Respondent that as per the advertisement dated 2nd February 2006, only one post was reserved for physically disabled person belonging to O.B.C. category. The Petitioner had applied from O.B.C. category and after interview he was appointed as Assistant Teacher against the post reserved for O.B.C.-physically disabled

person. It is clearly mentioned in the appointment order that in case the caste claim of the Petitioner is invalidated by the caste verification committee, his services would be terminated. The caste claim of the Petitioner to be O.B.C. (Shimpi) was sent for verification to the caste/tribe scrutiny committee, Aurangabad Division, Latur and after due verification the claim was invalidated vide orders dated 31st March 2010/19th April 2010. Therefore, as per the terms of the appointment letter, his services came to be terminated vide orders dated 10th May 2010. Before the orders dated 25th May 2010 were passed in Writ Petition No. 4589 of 2010 (that no adverse action be taken solely on the ground of invalidation of the caste claim) this Respondent had already terminated the services of the Petitioner. This Respondent denies that back dated order was issued. According to the Respondent, Petitioner is not entitle to reliefs as claimed.

6. We have heard learned counsel for both the sides and perused the record.

7. Learned counsel for the Petitioner argued in favour of the Petition as mentioned above and has submitted that all the posts reserved for physically disabled persons will have to be filled in, on the basis of merit amongst the candidates from that category and after the selection, they have to be placed in the respective categories as per the constitutional reservation. Petitioner was 4th in the physically disabled persons and was adjusted against seat reserved for O.B.C. category as he had claimed benefit of reservation of O.B.C. category also. Had he not been O.B.C., he would have been accommodated on unreserved open seat irrespective of his position in the general merit list. According to the counsel, these aspects were ignored by the Respondent Zilla Parishad and the Petitioner came to be terminated, which is bad in law.

8. Against this, the learned counsel for the Respondents submitted that the Petitioner is wrongly interpreting the Judgment of the Hon'ble Supreme Court in the matter of Indra Sawhney (supra). The documents from the selection process are referred to claim that the advertisement clearly mentions in column No. 8 that provision has been made of reservation for the reserved classes and while making such reservation, provision has been kept for women, disabled persons etc. as per the system of reservation. The advertisement gave percentages for ex-servicemen, women, handicapped persons etc. and the number of seats reserved for N.T. (B), N.T. (C), O.B.C., Open etc. It was mentioned that 175 posts have to be filled up, however, there is likelihood of change in the number of posts and the reservation. In the process, against O.B.C. from disabled persons, one post was shown. This can be seen from the copy of Advertisement kept with the documents of the selection process tendered on record by Respondent. It is argued that the selection process got completed and appointments made and after change in situation, grievance is being made.

9. From record we find that the Petitioner responded to the advertisement and went through the whole process and had no problem when he got selected against a seat reserved for O.B.C.-disabled person. He accepted the appointment order dated 14th September 2006 and has worked till 10th May 2010. His caste

claim got invalidated in March/April, 2010 and so he came to be terminated. After having reaped the benefits and after the selection process has been completed and appointments have been made accordingly, only because Petitioner's caste claim got invalidated, now the Petitioner is trying to turn around and criticize the selection process and is making effort to jump to the category of Open-handicapped.

10. According to us, this cannot be allowed. The selection process came to an end in the year 2006 and after candidates have been appointed in consequence of the selection process, the Petitioner cannot be permitted to shift from one category to another. In any case, he has not made party any of the candidates selected, down the line who would get affected, in case he is permitted to shift from one category to another.

11. In the case of Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others, , the Hon"ble Supreme Court observed in Para 7 as under:-

7. In case the respondent No. 1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by Constitution Bench of this Court in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, , wherein the Court has explained the distinction between necessary party, proper party and proforma party and further held that if a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice.

? According to us, at such belated stage, neither such shifting is permissible nor the same could be allowed in the absence of party likely to be affected.

12. The Petitioner has relied on the case of Indra Sawhney Vs. Union of India (UOI) and Others, . In that matter, principle of horizontal reservation was explained thus, in Para 812:

812..... all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservations" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations-what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments.

Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains-and should remain-the same.

13. A special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by the Hon''ble Supreme Court in *Anil Kumar Gupta and Others Vs. State of U.P. and Others*, thus:

... The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C.; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied-in case it is an overall horizontal reservation-no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.)

(Emphasis supplied)

14. The above Judgments were referred by the Hon''ble Supreme Court in the case of *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and Others*, . In the matter of *Rajesh Kumar Daria*, Rajasthan Public Service Commission had issued advertisement for selection of candidates for the posts of Munsiff-Magistrate and although rules provided for horizontal reservation of 20% for women category-wise, the number of candidates to be selected under general category (open) competition were 59, out of which 11 were earmarked for women. When the first 59 from amongst 261 candidates were taken up and listed as per merit, it contained 11 women candidates which was equal to the quota of general category-women.

? In this regard, observations of the Hon''ble Supreme Court as found in Para 7-8 are material, which read as under:

7-8. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit,

their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category."..... "But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Castes-Women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that "SC-women" have been selected in excess of the prescribed internal quota of four.]

Emphasis supplied.

7? In Para 9 the Hon''ble Supreme Court after referring to the facts of that matter, observed as under:

9..... There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl. Nos. 2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41

of the Selection List) and another eleven (candidates at Sl. Nos. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 80 of the Selection List) included under reservation quota for "General Category-Women". This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

Emphasis supplied.

15. It is quite clear from above observations of the Hon'ble Supreme Court that it found the action of the Public Service Commission as amounting to treating the 20% reservation for woman as vertical reservation instead of being horizontal reservation within the vertical reservation. Keeping this in view, the arguments that Petitioner was selected as a disabled person cannot be accepted as the same would amount to saying that there was 3% reservation as vertical reservation. It is also clear from portion emphasized that the special reservation is within the social reservation.

16. Learned counsel for the Petitioner relied on the case of Mahesh Gupta and Others Vs. Yashwant Kumar Ahirwar and Others, . Referring to observations in Para 12 of that Judgment, it has been argued that a disabled is a disabled and question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. The facts of that matter were different and that was a case where a special drive was taken up to fill up posts for handicapped persons and while doing so, the Commissioner of Chambal Division, committed error while issuing the advertisement. The context in that matter was different. The Constitution Bench Judgment in the case of Indra Sawhney and Full Bench Judgment in the case of Rajesh Kumar Daria (supra) clearly show how the horizontal and vertical reservation is to be dealt with.

17. The advertisement issued by the Respondent No. 2 showed different reservations for 175 posts in the categories of scheduled tribes, O.B.C., Open etc. and mentioned that there would be reservations within the categories to the extent indicated. The Petitioner fails to show, as it could not be, that there was special and independent reservation as handicapped person. He had applied to be accommodated against O.B.C.-physically handicapped, and also as a candidate from Open-handicapped. After having taken advantage in the earlier category, now he cannot be permitted to shift category. There is no substance in the Writ Petition. The Writ Petition is dismissed. Rule is discharged. There shall be no order as to the costs.