

(2007) 03 AHC CK 0221
In the Allahabad High Court

Smt. Rajani Dubey

APPELLANT

Vs

State of U.P., The Excise Commissioner and The Deputy
Excise Commissioner, Meerut Region

RESPONDENT

Date of Decision : 29-03-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 226, 309

Citation : (2007) 03 AHC CK 0221

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Radha Kant Ojha, learned Counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner has filed this writ petition under Article 226 of the Constitution of India challenging the advertisement No. 177/47/Recruitment/Peon/Date/Meerut dated 20.2.2002 issued by Deputy Excise Commissioner, Meerut Region, Meerut notifying 12 vacancies of Chaprasi/Chowkidar on the ground that in the aforesaid advertisement 20% reservation admissible for women pursuant to the Government Order No. 18/1/99/Ka-2/99 dated 26.2.1999 (hereinafter referred to as "G.O. Dated 26.2.1999") has not been applied and therefore the aforesaid recruitment is illegal. The petitioner has further sought a writ of mandamus commanding the respondents to make recruitment and appointment on the aforesaid post of Chapsari/Chowkidar by providing reservation for women as admissible in law.

3. The facts not much in dispute between the parties are that the State Government has issued a G.O. dated 26.2.1999 providing 20% reservation for women in public services and post against the vacancies liable to be filled in by direct recruitment. The said reservation is not applicable to the posts which are to be filled in by promotion. The G.O. further provides that the reservation for women shall be horizontal in nature and if any women candidate is selected on

merit she will also be counted against the reserved vacancy meant for women. Further the vacancies for women reserved under the G.O. dated 26.2.1999 shall not be carried forward and in case of non-availability of suitable female candidate, the vacancy may be filled in by male candidate. However, for recruitment the eligibility and other qualification shall be same as provided under the Rules and there shall be no alteration. The respondent No. 3 published an advertisement on 28.2.2002 for recruitment on 12 vacancies of class-IV on the post of Chapsari/Chowkidar out of which six are for general candidates, three reserved for other backward caste and three for scheduled caste. The eligibility condition provided that the candidate must be between the age of 18 to 35 years as on 1.7.2002, and for the candidates belonging to other backward caste and scheduled caste the maximum age is relaxable by five years. The education qualification is 5th class pass having knowledge of cycling and certain relaxation in respect to ex-serviceman, dependents of freedom fighters etc. as provided under the rules are also admissible. The petitioner claims to have applied pursuant to the aforesaid advertisement but has not been selected since there was no reservation provided for women candidates in the said advertisement, hence this writ petition.

4. The respondents have filed a counter affidavit wherein it is not disputed that by G.O. dated 26.2.1999, 20% reservation has been prescribed for women candidates, but it is said that in the present recruitment the said reservation has not been applied for the reason that the incumbents sought to be recruited are to be posted on check posts situated on the borders of the State and involves security risk. It is also said that the selection has been finalized and appointments have also been made. Further it is said that non providing reservation to women candidates on the check posts situated at remote places is neither violative of Article 14 and 16 of the Constitution nor is otherwise arbitrary. In other words, the said check posts in Meerut Region lie at the places like Kairana, Bidona, Sarswan and Gauripur which are at remote areas dominated by criminal activities and even in day light women are not safe in those areas. Therefore, on account of security reasons reservation for women candidates has not been provided in the post in question which is neither illegal nor arbitrary. A supplementary counter affidavit has also been filed by the respondents stating that the government took a policy decision not to provide reservation for women candidates as communicated by letter dated 3.6.2003 filed as Annexure-11 to the writ petition, therefore, there is no illegality in not providing reservation for women candidates. However, it is stated that since a similar issue was raised in Writ Petition No. 55340 of 2002, pursuant to interim order passed therein, the appointment letters have been issued to the selected candidates mentioning that the same is subject to the decision of the Writ Petition No. 55340 of 2002.

5. The learned Counsel for the petitioner contented that there is no exception providing in the G.O. dated 26.2.1999 enabling the respondents to exclude any public post or service from applying women reservation and therefore non providing the said is illegal and arbitrary and violative of G.O. dated 26.2.1999

read with Article 15(3) of the Constitution. Learned Counsel for the petitioner also submitted that the G.O. dated 26.2.1999 amounts to legislation making special provisions for women referable to Article 15(3) of the Constitution of India and therefore, cannot be ignored in recruitment by the respondents unless by suitable legislation such power is conferred upon the respondents. Since, there is no such exception or relaxation provided in the G.O. dated 26.2.1999, the respondents have no authority or power or jurisdiction to decide on their own as to whether a particular post or service should be reserved for women candidates or not and therefore, the advertisement published by the respondents by not providing 20% reservation for women is illegal.

6. Learned Standing Counsel on the contrary vehemently opposed the writ petition and advanced his submission reiterating his stand taken in the counter affidavit.

7. It is not disputed by the parties that no separate rules pertaining to recruitment on the post in question have been framed in exercise of power under proviso to Article 309 of the Constitution of India and the recruitment in question, therefore, is governed by the statutory provisions contained in Group-D Employees Service (U.P.) Rules 1985 (hereinafter referred to as "1985 Rules"). Rule 6(a) provides sources of recruitment to Group-D post and on the post of Chapsari/Chowkidar etc., the recruitment is confined to be made by direct recruitment. For the case in hand we are concerned only with the matter pertaining to reservation. Rule 7 of 1985 Rules make provision for reservation and reads as under:

7. Reservation-Reservation for the candidates belonging to Scheduled Castes, Scheduled Tribes, and other categories shall be in accordance with the orders of the Government in force at the time of recruitment.

8. Thus a perusal of Rule 7 makes it clear that the reservation applicable to various categories shall be in accordance with the orders of the government enforced at the time of the recruitment. It is not disputed that the G.O. dated 26.2.1999 was in force at the time of recruitment in question and therefore, it cannot be said that the same would not be covered by Rule 7 of 1985 Rules. Ex facie, therefore, in my view under 1985 Rules, reservation for women has to be provided in respect to recruitment of Group-D post under 1985 Rule when the vacancies are to be filled in by direct recruitment. There is no provision under 1985 Rules permitting the authority concerned to ignore or omit any provision made by the government providing reservation for any category in view of the clear provision under Rule 7. Learned Standing Counsel sought to refer Rule 32 of 1985 Rules in order to contend that the State Government has power of relaxation by dispensing or relaxing requirement of any Rule and since in the case in hand the nature of job justifies non recruitment of women candidates, therefore, it shall be deemed that the State Government has exercised its discretion under Rule 32 of 1985 Rules though no specific order has been passed under the said provision. It is further submitted that the letter dated 3.6.2003

(Annexure-11 to the writ petition) in any case may be read as a Government Order deciding to relax the provision pertaining to women reservation in the present recruitment and therefore there is no error or illegality in the recruitment in question.

9. However, I do not find any force in the aforesaid submission. Firstly, Rule 32 of 1985 Rules does not empower the government to relax any rule pertaining to recruitment but it provides that any rule regulating conditions of service of persons appointed to the Establishment if causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner. The application of Rule 32, therefore, commences after appointment of an incumbent as a Group-D employee and it does not empower the State Government to relax any rule which pertains to recruitment. For example, Rule 6 which provides source of recruitment and Rule 8 to 14 which provides qualification and other eligibility conditions for recruitment and appointment to Group-D post cannot be relaxed being rules relating to recruitment. The distinction between rules pertaining to recruitment and condition of service came up for consideration before the Apex Court in the case of Keshav Chandra Joshi and Ors. v. Union of India and Ors. 1992 (Supp) I SCC 272 where the rule permitted relaxation of conditions of service and it was held that the rule did not permit relaxation of recruitment rules. It was reiterated in Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, wherein it was held:

Conditions of recruitment and conditions of service are distinct and the latter is precedent by an appointment according to Rules. Former cannot be relaxed.

10. Recently in Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, it was held that some relaxation rules permit relaxation of Rules in any particular case and some permit relaxation in favour of a person or a class. However, the recent trend of cases is that the recruitment rules cannot be relaxed, and, in para 30, the Court observed:

The decisions of this Court have recently been requiring the strict conformity with the recruitment rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules or recruitment.

11. Secondly, even otherwise there does not appear to be any cautious decision taken by the State Government for exercising its power under Rule 32 of 1985 Rules inasmuch as the alleged letter dated 3.6.2003, as such, is not a decision of the Government but appears to be a communication to the Excise Commissioner, U.P. at Allahabad in respect to the stand to be taken by it in the writ petition involving reservation of women for recruitment of Chowkidars and 29 check posts and to inform the Court about the said stand. So far as the G.O. dated 26.2.1999, it does not talk of any exception or leave any public service or post

from its purview. Therefore, unless in a proper manner, the rigour of G.O. dated 26.2.1999 is modified, the same has to be applied by the respondents without any alteration or modification at their individual level since neither they possess any such power nor otherwise authorized to do so. At this stage it may be reminded that provision for reservation under Article 15(3) of the Constitution can be made by the State either by legislation or by executive order. The said provisions shall be binding and would have to be observed strictly by all subordinate authorities so long as they are not amended by the appropriate authority in accordance with law. A Division Bench of this Court (in which I was also a member) in Special Appeal No. 910 of 2005 Sanjeev Kumar Singh and Ors. v. State of U.P. and Ors. decided on 22.12.2006 after referring to the law laid down by the Apex Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., held that reservation under Article 16(4) can be provided by executive order also and the same is equally applicable for making reservation under Article 15(3) of the Constitution of the India. The relevant observations are as under:

In our case also provision for reservation has been made vide G.O. dated 26.2.1999 and therefore it is not a case where the provision is lacking. Thus the aforesaid judgment lends no support to the petitioner-appellants. A feeble attempt has been made by learned Counsel for the petitioner-appellants to contend that provision can be made by statutory rules and not by the G.O. However the same has to be rejected outright since this aspect is no more res Integra. In Indra Sawhney (Supra) the Apex Court while considering the issue as to how reservation can be made under Article 16(4) of the Constitution, held that it is permissible to make provision by executive order or rule or Legislature Enactment, as the case may be. In para 55 and 56 (AIR) of the judgment the Court discussed the issue and held that the use of the word "provision" under Article 16(4) shows that the reservation can be provided by executive order also.

12. At this stage the learned Standing Counsel submits that since the selection has been finalized and appointments have been made, it would not be appropriate to quash the advertisement and consequential selection for the reason that even if the reservation would have been applied for women candidates, out of 12 vacancies, only 2 would have been available for women candidates and therefore, appointment of 10 candidates already made by the respondents cannot be faulted. I gave my anxious thoughts to the aforesaid submission but find serious difficulty in accepting it. The women reservation is horizontal and therefore, the women candidate selected would be general or other backward caste or scheduled caste, and the same would be adjusted against the vacancy meant for respective category. Since it is not known as to in which category the women candidate could have been selected, it would be a wild guess to quash only two appointments and allow the respondents to continue with 10 appointments. Therefore, I do not find any reason to restrict the relief sought by the petitioner in the case in hand for the aforesaid reasons.

13. In the result the writ petition succeeds and is allowed. The advertisement dated 28.2.2002 (Annexure-1 to the writ petition) published by the respondent No. 3 for recruitment of 12 posts of Chaprasi/Chaowkidar is hereby quashed and the respondents are directed to make recruitment on the aforesaid posts afresh by making a fresh advertisement providing reservation for women in accordance with G.O. dated 26.2.1999 so long as it is not amended by the competent authority in accordance with law. There shall be no order as to costs.