
(2007) 10 GAU CK 0013
In the Gauhati High Court

State of Arunachal Pradesh and Another	APPELLANT
Vs	
Soilen Phukan and Others	RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Constitution of India, 1950 — Article 16(4)

Citation : (2007) 4 GLT 321

Hon'ble Judges : Jasti Chelameswar, C.J;Ranjan Gogoi, J;Hrishikesh Roy, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—The two appeals under consideration were earlier heard by a Division Bench of this Court. By judgment and order dated 9.8.2005 the appeals were allowed. Aggrieved, some of the respondents in the appeals moved the Hon''ble Supreme Court. The Hon''ble Supreme Court noticed a conflict between the judgment and order dated 9.8.2005 and an earlier judgment of the Division Bench rendered on identical facts in State of Arunachal Pradesh v. Ashok Kumar Yadav and Ors. reported in 2002(1) GLT 223. Consequently, the judgment and order dated 9.8.2005 was set aside and the matter remanded to this Court for consideration by a larger Bench. This is how the appeals have been posted before us.

2. The facts, in brief, may be noticed at the outset.

An advertisement dated 8.6.2001 was issued by the Arunachal Pradesh Public Service Commission (hereinafter referred to as the Commission) for recruitment to 63 posts in Group-A & B. In the advertisement issued it was clearly mentioned that as per the reservation policy in force in the State of Arunachal Pradesh 80% of the posts are reserved for APST candidates and the remaining 20% are unreserved (open competition).

3. The petitioners, who are non-APST candidates, applied pursuant to the advertisement issued and took part in the selection held. On 26.5.2003 a merit

list of 98 candidates (the number of posts available in the meantime increased to 98) was published wherein the names of the petitioners appeared. According to the petitioners, they were awaiting their appointment orders. However, on 5.11.2003 the Commission published a fresh select list containing 84 names which did not include the petitioners. In the select list dated 5.11.2003 only two non-APST candidates were included at Serial Nos. 11 and 12. It must be noticed at this stage that upon publication of the select list dated 5.11.2003, the earlier select list dated 26.6.2003 was cancelled.

4. Aggrieved by the publication of the subsequent select list dated 5.11.2003 the writ petitions out of which these appeals have arisen were filed, essentially, contending that the 20% of the posts were exclusively earmarked for non-APST candidates and further that APST candidates were not eligible for selection against the said posts. The petitioners also contended that open competition in respect of the 20% of the posts is required to be understood to be confined amongst only non-APST candidates in view of the fact that 80% of the posts were earmarked for APST candidates. The reservation policy of the State was, however, not under challenge in the writ petitions filed.

5. The State respondents impleaded in the writ petitions i.e. appellants before us, contested the claims made by the writ petitioners by contending that in terms of the relevant notifications in force, details of which are being noticed later, while 80% of the posts reserved for APST candidates were to be exclusively filled up by such candidates on the basis of their inter se merit, the remaining 20% of the posts, being required to be filled up by open competition, even APST candidates were eligible to be selected against the said 20% posts on the basis of their merit as against the non-APST candidates. The respondent State specifically contended that the exclusion of the petitioners from the select list and the inclusion of the APST candidates in place of the petitioners was by virtue of the better merit of such APST candidates.

6. The learned Single Judge hearing the writ petitions took the view that in view of the earlier decision of the Division Bench in Ashok Kumar Yadav (supra) the selection of APST candidates against the posts earmarked under the 20% category was not correct and therefore the subsequent select list dated 5.11.2003 was not legally tenable. Accordingly, directions were issued for operation of the first select list dated 26.6.2003. Aggrieved by the aforesaid judgment the present appeals have been filed by the State.

7. The above recitation makes it amply clear that the present adjudication will call for a detailed consideration of the correctness of the view expressed by the Division Bench in Ashok Kumar Yadav (supra). However, before proceeding to consider the facts of the said case and the reasons for the decision arrived at together with the correctness thereof it will be necessary for the Court to notice the various Govt. notifications in force providing for reservation in respect of Group-A & B posts and also providing for a 100 point roster wherein the roster points for reserved and unreserved categories have been clearly indicated. The

relevant extracts of the Office Memorandums dated 24.9.90, 26.3.91 and 5.4.2001 are set out below:

24.9.90:

In exercise of powers conferred by Clause (4) of Article 16 of the Constitution of India, the Governor of Arunachal Pradesh is pleased to order that 80% (eighty percent) of the Group "B" posts which are filled by direct recruitment shall be reserved for Arunachal Pradesh Scheduled Tribe candidates.

This notification shall come into force with immediate effect.

26.3.91:

Consequent upon reservation of 80% of the Group "B" posts to be filled up by Direct Recruitment, as notified vide Govt. notification of even No. of 24.9.90, the ratio of reservation of Direct recruitment of Group "B" post shall be 4:1. To facilitate proper implementation of the Government decision in this respect, a Model 100 Point Roster indicating the point of reservation is appended herewith for strict compliance by all concerned.

A new roster in the similar manner shall be drawn up on exhausting of all the points of the old roster.

The roster system shall come into force w.e.f. the date of Government notification issued vide Govt. notification of even No. dated 24.9.90.

4.5.2001:

In exercise of powers conferred by Clause (4) of Article 16 of the Constitution of India and in supersession of Government notification issued vide No. OM-13/90 dated 20.3.95, the Governor of Arunachal Pradesh is pleased to order that 80% (eighty percent) of the posts in Group "A" under the Government of Arunachal Pradesh which are to be filled up by direct recruitment, shall be reserved for Arunachal Pradesh Scheduled Tribe candidates.

A model 100 point roster indicating the point of reservation in Group "A" post is appended as Annexure-I for strict compliance by all concerned.

The 100-point roster prescribed by the Office Memorandums dated 26.3.91 and 4.5.2001 in respect of Group-B and A posts respectively indicate that while the first 4 posts in the roster are reserved, the 5th post is treated as unreserved. The rest of the roster up to 100 points is to operate in the same manner.

8. The relevant part of the advertisement dated 8.6.2001 dealing with reservation in the matter of appointment to the posts advertised may also be extracted below:

As per Government of Arunachal Pradesh reservation policy of 80 : 20, 80% of the posts will be reserved for APST candidates and rest 20% will be unreserved (open competition).

9. The facts confronting the Court in Ashok Kumar Yadav (supra) were more or less identical to those arising in the present case. The recruitment process involved in Ashok Kumar Yadav (supra) was in respect of 22 Group-B posts of Assistant Engineer in the Irrigation and Flood Control Department of the State out of which 18 posts were earmarked for APST candidates. The petitioners in the aforesaid case i.e. Ashok Kumar Yadav and Sanjay Kumar Srivastava, who are non-APST candidates, were included in the merit list. However, subsequently, they were replaced by two APST candidates who had performed better in the selection held. The said action was questioned before this Court in the writ petition filed by Ashok Kumar Yadav and Sanjay Kumar Srivastava. The learned Single Judge decided in favour of the petitioners and being aggrieved the State had filed an appeal. The Division Bench hearing the writ appeal took the view that as under the 100-point roster in force every 5th vacancy was to be treated as unreserved, the law laid down in R.K. Sabharwal and others Vs. State of Punjab and others, , to the effect that reserved category candidates can compete against the unreserved posts though not vice-versa, had no application to the facts of the case before it so as to confer legitimacy to the governmental action in applying the said law. Rather, the Division Bench hearing Ashok Kumar Yadav (supra) found the facts of the case before it to be similar to those noticed by the Apex Court in State of Punjab and Others Vs. Dr. R.N. Bhatnagar and Another, , where the posts involved were to be filled up in a prescribed ratio amongst direct recruits and promotees. In fact, the view taken by the Division Bench in Ashok Kumar Yadav (supra) was that in the State of Arunachal Pradesh under the notification dated 24.9.90, 80% of the posts are meant for the APST candidates and the remaining 20% for non-APST candidates and both the aforesaid two categories were mutually exclusive. Therefore, the ratio of R.K. Sabarwal (supra), which operates in the context of reservation of posts, was wrongly applied by the State Government. It is, therefore, possible to cull out from the aforesaid decision of the Division Bench in Ashok Kumar Yadav (supra) that insofar as the State of Arunachal Pradesh is concerned it was held that the Govt. notification dated 24.9.90 did not provide for any reservation within the meaning of Article 16(4) of the Constitution. It is the correctness of the aforesaid view that we have been called upon to determine in the appeals before us.

10. The equality clause enshrined by Article 14 of the Constitution is vibrant and dynamic; not static or pedantic. Similarly, the fundamental right to equality of opportunity in public employment guaranteed by Article 16(1) of the Constitution does not contain any prescription of equality by a mechanical application of laws with arithmetical precision. The persistent endeavour discernible in the long line of judicial pronouncements has been to infuse life blood into the constitutional goal of equality and to bring about equality amongst unequals by approving affirmative and progressive State action leaning in favour of the socially and economically backward classes of citizens. Article 16(4) which enables such State action, therefore, permits protective discrimination to make the equality clause guaranteed by Articles Hand 16(1) of the Constitution real and meaningful.

However, any positive action by the State, which seemingly may appear to be an instance of unequal treatment, has to be justified on the touchstone of the provisions contained in Articles 38, 46, 335, 338, 338A and 340 of the Constitution. Relevant data demonstrating the social and economic deprivation of the classes of citizens to whom protective discrimination is being offered must exist to justify such an exercise. Reservation of posts under Article 16(4) will not offend Article 16(1) so long the necessity to provide reservation can be justified by reference to relevant data demonstrating the backwardness of the particular classes which had prompted the exercise. Viewed from the above context any provision for reservation of posts in public service for general category candidates, who do not obviously suffer from any visible or discernible social or economic backwardness, would be a Constitutional antithesis. The Constitutional exercise of identification of the classes/group for the inclusion in the list of Scheduled Castes, Scheduled Tribes and Other Backward Classes is but on the basis of social, economic and educational backwardness thereby making "reservation" for general category candidates a Constitutional misnomer.

11. Reservation in public service has also to be understood to be transitory in nature and the attempt to change the social and economic backdrop which has made reservations essential as an ongoing process. It is in keeping with the aforesaid constitutional philosophy that the judicial verdict has repeatedly emphasised that while reserved category posts are not open for competition by general category candidates the converse is not true. There is no necessity of sacrificing absolute merit merely because relative or lesser merit is required to be taken into consideration in view of long history of social and economic oppression resulting in backwardness of a class of citizens in India. Of the numerous precedents available to demonstrate that a reserved category candidate is also entitled to compete against unreserved posts, specific reference may be made to two decisions of the Apex Court i.e. *Ritesh R. Sah Vs. Dr. Y.L. Yamul and others*, and *R.K. Sabharwal and others Vs. State of Punjab and others*, . In view of the virtually settled position of the law in this regard it will hardly be necessary to burden the present order with any further details of the above stated two authoritative pronouncements of the Apex Court.

12. Turning our attention to *Ashok Kumar Yadav (supra)* what stares at us is the virtual finding recorded in the opening part of the order of the Division Bench (paragraph 3) that under the notification dated 24.9.90, 80% of the posts are earmarked for APST candidates and the remaining 20% of the posts in favour of the non-APST candidates. To us it seems that the conclusion reached by the Division Bench with regard to the remaining 20% posts i.e. being earmarked for non-APST candidates exclusively, is not only a conclusion that does not reasonably follow from the notification in question as well as the notification dated 26.3.91 prescribing a 100 point roster but such a conclusion has the effect of overlooking the constitutional philosophy that reservations in public service can only be for socially and economically backward classes of citizens to which category of citizens general category candidates do not admittedly belong. The

5th point in the roster earmarked as unreserved, in our considered view, has to be treated as an open post inasmuch as the same cannot/could not have been treated as "reserved" for general category candidates for the same reason. It is the contrary conclusion of the Division Bench i.e. that every 5th vacancy in the roster is earmarked for general category candidates, which cannot appeal to us for obvious reasons, that had led the Division Bench to erroneously rely on the judgment of the Apex Court in *State of Punjab and Others Vs. Dr. R.N. Bhatnagar and Another*, which dealt with a case of filling up of posts in a certain ratio amongst direct recruits and promotees. It is our considered view that the provisions for reservation involved in the present cases have to be necessarily understood to be pursuant to the provisions contained in Article 16(4), as also expressly stated in the notifications in question as referred to earlier. Therefore, the law laid down in *R.K. Sabarwal (supra)* and *Ritesh R. Sah (supra)* will apply with full vigour to the selections in question. We, therefore, hold that the 20% of the posts cannot be understood to have been exclusively earmarked for the non-APST candidates and that the same were available to be filled up by all the candidates in the fray subject to their merit as determined in the selection held.

13. Before parting with the record we must observe that by the advertisement dated 8.6.2001, 63 posts were advertised though the select list dated 26.6.2003 was in respect of 98 posts. Even the select list dated 5.11.2003 was in respect of 84 posts. This is because certain additional posts became available between the two dates. Whether such additional posts could have been embraced by the selection process initiated pursuant to the advertisement issued is a matter of serious doubt. However, as no aggrieved person has laid the aforesaid challenge before the Court we are of the view that it will be inappropriate on our part to proceed any further in the matter. We, therefore, leave it open for the respondents to fill up all such posts as were available on the date of publication of the result of the selection on the basis of the select list dated 5.11.2003 and our conclusions as recorded hereinabove.

Consequently and in the light of the foregoing discussions, both the appeals are allowed. The judgment and order dated 27.4.2004 passed by the learned Single Judge is set aside.