

(2018) 11 UK CK 0262
In the Uttarakhand High Court
Case No : Special Appeal No. 920 Of 2018

State Of Uttarakhand And Others	Vs	APPELLANT
Amit Saini And Others		RESPONDENT

Date of Decision : 30-11-2018

Acts Referred:

Constitution of India, 1950 — Article 16, 16(2), 16(3)

Citation : (2018) 11 UK CK 0262

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Singh, J

Bench : Division Bench

Advocate : Vikas Pande, Tapan Singh

Final Decision : Disposed Off

Judgement

Ramesh Ranganathan, C.J.

1. The application to condone the delay (CLMA 17465 of 2018) is not opposed by Mr. Tapan Singh, learned Counsel for the respondents. The delay of 160 days in filing the present appeal is, therefore, condoned.
2. This appeal is preferred against the order passed by the learned Single Judge in Writ Petition (S/S) No.271 of 2015 dated 25.4.2018. The respondents-writ petitioners filed the said writ petition seeking a writ of mandamus directing the appellant-State to give appointment to them under the 5% quota reserved for the Home Guard category; and to direct the respondents not to fill up the 5% quota reserved for the Home Guards from other categories.
3. The petitioners' case, in short, is that an advertisement was issued on 4.2.2012 inviting applications for appointment to the post of Constables in the Police Department; the petitioners, who were all working as Home Guards in the office of the District Commandant, Home Guard, had obtained experience certificates, and had submitted the application forms; the advertisement dated 4.2.2012 prescribed vertical reservation for the scheduled castes, scheduled tribes and other backward classes; 5% of the posts in each category was

reserved for the Home Guards as a horizontal reservation; a corrigendum was issued whereby 1001 posts were advertised; the qualifications prescribed in the earlier advertisement were reiterated in the corrigendum advertisement issued later; admit cards were issued to the petitioners; they secured more than the cut-off marks in the physical and written examinations; while the advertisement stipulated that appointments should be made on the basis of State level merit, the rules of the game were changed midway and, instead, appointments were made treating each district as a separate unit of appointment; and candidates, who secured lesser marks, were appointed in such a manner.

4. While an advertisement was initially issued on 1.2.2014 inviting applications from eligible candidates for being appointed as Constables, and the said advertisement stipulated that appointments be made on a state-wide basis, a government order was issued on 4.2.2014 requiring appointments to be made treating the district as a unit; and a corrigendum was issued, to the earlier advertisement, on 4.3.2014 prescribing each "district" as a unit of appointment to the post of Constables.

5. While Mr. Tapan Singh, learned Counsel for the writ petitioners, would submit that admit cards were issued to the candidates on 22.2.2014, it is not in dispute that the written examination was held on 19.10.2014, more than seven months after a corrigendum was issued, to the earlier advertisement, on 4.3.2014; regular selections were held thereafter; the petitioners filed the present writ petition in February, 2015; and no interim orders were passed therein, resulting in the selection process being completed, several persons being appointed as Constables, and most, if not all, of the vacancies being filled up.

6. In the order under appeal, the learned Single Judge observed that the petitioners had participated in the selection process; advertisements were published in the daily edition of 'Amar Ujala' on 1.2.2014; a merit list was to be compiled at the State level, and appointments were to be made on the basis of a State level merit list; the contention of the respondents, that appointments should be made only at the district level, was not tenable; in case appointments are made, confining the selection process to a particular district, it would be contrary to merit; and the endeavour of the State should be to fill the posts on the basis of the merit.

7. Relying on the judgment of the Supreme Court in 'Kailash Chandra Sharma v. State of Rajasthan' reported in 2002(5) Supreme 425, the learned Single Judge observed that, in normal circumstances, the entire selection process was required to be set aside, since the appointments were made on the basis of the merit drawn at the district level, instead of the State level; however in the interest of justice, and since, according to petitioner, a few posts were still lying vacant, the State Government should consider the case of petitioners against the vacancies which are lying vacant on the basis of State level merit. The writ petition was disposed of accordingly.

8. Mr. Vikas Pande, learned Standing Counsel for the appellants-State would submit that the corrigendum dated 4.3.2014 clearly stipulated that selections would be made treating the district as a unit; it is no doubt true that the earlier advertisement dated 1.2.2014 stipulated that recruitment should be at the state level; the government issued an order on 4.2.2014 directing that the selections should be made treating the district as a unit; and since the selection process (physical and written examination) were held long after the corrigendum was issued on 4.3.2014, it could not be said that the rules of the game have been changed midway.

9. Learned Standing Counsel for the appellants-State would further submit that while, initially, 350 posts were filled up, subsequently, as vacancies were still available, 1001 posts were filled up; thereafter, in the 2014 recruitment process, there were no posts available to be filled up; since the government order dated 4.2.2014, prescribing a "district" as a unit of appointment, has not been subjected to challenge, the learned Single Judge has erred in granting the petitioners the relief sought for; and, in any event, where there are several other candidates, (who were more meritorious than petitioners), who were entitled to be selected if a State-level merit list had been prepared the direction issued by the learned Single Judge to the respondent, to consider the case of petitioners alone, was wholly unjustified.

10. On the other hand Mr. Tapan Singh, learned counsel for the respondents-writ petitioners, would submit that appointment of candidates as Constables, treating the district as a unit, is in violation of Article 16(2) of the Constitution of India; despite this Court having earlier, in its order in Special Appeal No. 360 of 2012 dated 26.11.2013, directed the State Government not to resort to such district level selection process in future, the State Government had again resorted to such a procedure once again; candidates, who secured lesser marks than the petitioners, were appointed as Constables only on the ground that the petitioners belonged to other districts; while the percentage of seats reserved for Home Guards was 5%, not all eligible Home Guards were appointed under the 5% quota and, instead, 16 posts were filled up with general candidates.

11. Learned Counsel would submit that, since the initial advertisement issued on 4.2.2012 required a merit list to be prepared at the State level, the rules of the game cannot be changed mid-way, and selection made treating the district as a unit of appointment. He would rely on 'Anil Kumar Gupta v. State of U.P.' reported in (1995) 5 S.C.C. 173 in this regard. He would further submit that prescription of a district, as a unit of appointment, violates Article 16(2) of the Constitution of India and would rely on 'Rajesh Kumar Gupta v. State of U.P.' reported in (2005) 5 SCC 172 in this regard. He would also contend that, despite the directions issued by this Court earlier not to indulge in such a mode of appointment, the State Government continues to willfully and deliberately violate the orders of the Division Bench of this Court in Special Appeal No.360 of 2012 dated 26.11.2013.

12. Article 16(2) of the Constitution stipulates that no citizen shall, among others, on grounds only of residence, be ineligible for, or be discriminated against, in respect of any employment or office under the State. In the present case, residence in the district is prescribed as the criteria for selection and, since persons from other districts of the State are ineligible to compete for the posts earmarked for the said district, their fundamental right under Article 16(2) of the Constitution of India is violated, and they must be held to have been discriminated against in respect of employment in the State only on the basis of residence.

13. While the State Government, in prescribing a district as a unit of appointment, may have intended to protect or give preferential treatment to persons from the backward districts of the State, it is not open to them to prescribe "residence" in a district, as the criteria for appointment, as it would thereby violate Article 16(2) of the Constitution of India. The only course available to the State Government is to request the Government of India to introduce a Bill in Parliament, for Article 16(3) of the Constitution of India stipulates that nothing in Article 16 shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority, within a State, any requirement as to residence within that State prior to such employment or appointment.

14. In *Pradeep Jain v. Union of India* reported in (1984) 3 SCC 654, the Supreme Court emphasized that India is one nation, there is only one citizenship i.e. citizenship of India and every Indian has a right to reside and settle in any part of India, irrespective of the place he is born or the language he speaks or the religion which he professes. To quote:-

".....Thus, the entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it as if

it were a mere conglomeration of independent states....." (emphasis supplied).

15. In *Kailash Chand Sharma v. State of Rajasthan* reported in (2002) 6 SCC 562, the Supreme Court observed:

".....Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio- economic backwardness of the area for the purpose of admissions to professional colleges, it has been suggested that residence within a district or rural areas of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16(2) and in the light of Art. 16(3). An argument of this nature flies in the face of the peremptory language of Article 16 (2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past. We would like to reiterate that residence by itself be it be within a State, region, district or lesser area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16(3). It is not possible to compartmentalize the State into Districts with a view to offer employment to the residents of that District on a preferential basis....." (emphasis supplied)

16. In *Telangana Judges Association and another vs. Union of India and others* (WP(C) No. 85 of 2015 dated 03.10.2018) the Supreme Court held:-

"....the nativity for public employment runs counter to the fundamental right guaranteed under Article 16 (2) except when it is provided by a parliamentary Law as per exception carved out in Article 16(3) of the Constitution of India...." (emphasis supplied)

17. Admittedly, no such law has been made by Parliament, with respect to the State of Uttarakhand, under Article 16(3) of the Constitution of India. In the absence of any such law, prescription of "district", as a unit of appointment, is ultra vires Article 16(2) of the Constitution of India, and is illegal.

18. While we find considerable force in the submissions of Mr. Tapan Singh, learned Counsel for the respondents-writ petitioners that prescription of a district as a unit of appointment would violate Article 16(2) of the Constitution of India, the fact remains that the entire selection process has already been completed. The petitioners have not impleaded the selected candidates as respondents in the writ petition, or at least a few of them in a representative capacity and, consequently, appointment of those, who have already joined service, cannot be set aside as they have not been put on notice, and have not been given an opportunity of being heard.

19. In support of his submission that the rules of the game cannot be changed midway, reliance is placed by Sri Tapan Singh, learned Counsel, on '*Hemani Malhotra v. High Court of Delhi*' (2008) 7SCC 11. In the said case, the rules for

selection were changed, by prescribing minimum marks for viva voce, after the written test was conducted. It is in this context that the Supreme Court observed: -

"...There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and vive-voce, but if minimum marks are not prescribed for vive-voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva-voce, test was illegal....."(emphasis supplied)

20. In the present case, the corrigendum was issued on 4.3.2014 prior to the commencement of the selection process, on a physical and written examination being conducted in October, 2014. Reliance placed on Hemani Malhotra, to contend that the selection process is vitiated on this score, is therefore misplaced.

21. In our view, the learned Single Judge was not justified in directing the appellant-State to consider the case of the petitioners, as that would result in the possibility of candidates, who are far more meritorious than the petitioners, being ignored, and the petitioners alone being considered in the process. While the counter affidavit filed by the appellants herein in the writ petition, states that the recruitment process is completed, it is not clear whether all the posts have been filled up. If some posts still remain unfilled, the appellants-respondents shall then appoint candidates, in the remaining unfilled vacancies, after preparing a State level merit list; and fill up the posts complying with the rule of reservation as prescribed in the notification.

22. In 'Triveni Chandra Pandey v. State of Uttarakhand' judgment in Special Appeal No.360 of 2012 dated 26.11.2013, the Division Bench of this Court observed: -

"This Court has been informed that pursuant to the selections of the year 2011-2012, which have been challenged before this Court appointment has already been made and such appointed candidates are presently teaching as Primary School Teacher. Although the criteria fixed by the State authorities of residence was patently in violation of Article 16 (2) of the Constitution of India, the fact remains that such teachers who have been teaching, their appointment will not be disturbed, but in future, the State Authorities shall not fix residence or place of birth, as a criteria of appointment in any public job. To that extent this order is made applicable prospectively. However, since the challenge to the criteria of residence was primarily by the appellant- Triveni Chandra Pandey, it is hereby directed that subject to the marks, which he has received and vacancy, candidature of the petitioner shall also be considered for appointment as a Primary School Teacher, in any other district in Uttarakhand as well, where a

candidate having lower quality points then him has been given appointment. Needful be done within a reasonable time."

23. We cannot but express our concern that, despite this Court having held earlier that such prescription of residence as a qualification was illegal, and the State Government should desist from doing so in future, the State Government has again indulged in such a recruitment process, violating Article 16(2) of the Constitution of India. We consider it appropriate, therefore, to mark a copy of this order to the Chief Secretary, State of Uttarakhand. We hope and trust that the Chief Secretary will take necessary steps to ensure that recruitment selections/appointments in the State of Uttarakhand, shall, henceforth, not be undertaken treating "district" as a unit of appointment till a law in this regard is made by Parliament under Article 16(3) of the Constitution of India.

24. The appeal stands disposed of accordingly.