

(1985) 02 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1796 of 1979

Theophilos Tigga

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-02-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 342
Government of India Act, 1935 — Section 241
Orissa Reservation of Vacancies in Post and Services (for Scheduled Castes and Scheduled Tribes) Rules, 1976 — Rule 13, 14A, 7
Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 — Section 10, 11, 11A, 11A(1), 3
Orissa Service of Engineers Rules, 1941 — Rule 5

Citation : (1985) 59 CLT 214

Hon'ble Judges : J.K. Mohanty, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : S.K. Dey and Y. Mohanty, for the Appellant; B.M. Patnaik, K.N. Jena and Pradeep Choudhury and N.C. Panigrahi, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—The Petitioner, Theophilos Tigga, an Executive Engineer under the Government of Orissa has filed this application under Articles 226 and 227 of the Constitution of India challenging the promotion of opposite parties 2 to 9 as Superintending Engineer, on the ground that though M a member of the Scheduled Tribe he was entitled to be considered for promotion against the reserved vacancy, the said opposite parties were promoted ignoring his claim. He has further prayed for a direction to the opposite party No. 1 to give him promotion in preference to the opposite parties 2 to 9 against the reserved vacancy.

2. The case made out in the writ application is that the Petitioner belongs to the tribe "Oraon" which is one of the tribes mentioned in the list of Scheduled Tribes

Order framed under Article 342 of the Constitution of India. The Petitioner is a member of the Orissa Service of Engineer (Irrigation Wing) and his conditions of service are governed under the set of rules, Orissa Service of Engineers Rules, 1941, framed u/s 241 of the Government of India Act 1935. According to the Petitioner, under the said rules the post of Superintending Engineer is to be filled up by promotion from amongst the Executive Engineers. It is the further case of the Petitioner that the Orissa Reservation or Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (Orissa Act 38 of 1975) (hereinafter referred to as "the Act") and the rules framed thereunder apply in the service of the Petitioner. According to the said statute the State Government was required to fix one post of Superintending Engineer as a reserved post to be filled up by the members of Scheduled Tribes candidates. The Petitioner being the only Executive Engineer in the service belonging to Scheduled Tribes and having satisfied the requisite eligibility qualification should have been promoted to the post of Superintending Engineer against the reserved vacancy. It is the case of the Petitioner that the State Government ignoring the provisions of the statute did not reserve any vacancy for the Scheduled Tribe and ignoring the claim of the Petitioner promoted the opposite parties 2 to 9 as Superintending Engineer.

3. The State Government, opposite party No. 1, in its counter affidavit has taken the stand that there were 37 Superintending Engineers and 158 Executive Engineers in the Irrigation Wing under the State Government. It is further contended that Section 11 of the Act and the Rules 7(a)(1) of the Orissa Reservation or Vacancy in Posts and Service (Scheduled Castes and Scheduled Tribes) Rules, 1976 (hereinafter referred to as "the rules") are the appropriate provisions applicable to the present case. Taking into consideration the strength of the service and the fact that the Petitioner was the only scheduled Tribe candidate in the service, the percentage comes to less than 1 and hence the percentage of reservation as per the provision of the Act would be nil. It is further stated in the counter affidavit of the State Government that the Petitioner was not available to be considered for promotion to the post of Superintending Engineer since he did not come within the normal zone of consideration numbering four times the estimated number of vacancies. Since the Petitioner was much junior in the cadre of Executive Engineers, the opposite parties 2 to 9 who occupy places much above that of the Petitioner in the gradation list were duly considered and found suitable for the post and accordingly, were promoted as Superintending Engineers. According to the opposite party No. 1, there is no illegality or impropriety in the promotion given to the opposite parties 2 to 9. Some of the opposite parties (Nos. 3, 4, 7, 8 and 9) have filed a separate counter affidavit taking a substantially similar stand as the State government.

4. Shri S.K. Dey, learned Counsel for the Petitioner has contended that taking the strength of Executive Engineers in the Irrigation Wing at the relevant time as 115 and that of the Superintending Engineers at 32 as given in the counter affidavit filed by the State government, percentage comes to 0.87 and 0.63 respectively.

In either case, the percentage is more than 0.5 and hence should be taken as 1 and steps should have been taken in accordance with the statute and the rules to reserve one post. According to Shri Dey, Section 10 of the Act applies to the case of the Petitioner and not Section 11 as contended by the opposite parties. He further contends that plea of the opposite parties that the Petitioner did not come within the normal zone of consideration taking into account the strength of the entire service is devoid of force since he being the lone Scheduled Tribe candidate was alone to be considered for the reserved vacancy and should not have been mixed up with the general candidate while determining the zone of consideration.

Shri B.M. Patnaik, learned Counsel for the opposite parties 2 to 9 and the learned Additional Government Advocate for opposite party No. 1 raised contentions indicated in their counter affidavits as noticed above.

5. Before proceeding to consider the contentions raised by the learned Counsel for both the parties, it would be helpful to quote the relevant provisions of the Service rules and the statute providing for reservation of posts. As already noticed, Orissa Service of Engineers" Rules, 1941 governs the field so far as the Petitioner and opposite parties 2 to 9 are concerned. Rule 5 which provides for recruitment to the service reads as follows:

5. Recruitment to the Service - All first appointments to the Service shall ordinarily be made to the rank of Assistant Engineers, appointments to the rank of Chief Engineer, Superintending Engineer and Executive Engineer shall ordinarily be made by the Government after consultation with the Commission, by promotion from the rank of Superintending Engineer, Executive Engineer and Assistant Engineer respectively. Promotion will be made by selection on the basis of merit and seniority but seniority, of itself, will confer no claim to promotion.

Rule 14-A which was inserted by way of amendment under I. & P. Department Notification No. 3185 O.E. dated 7-12-1974 (S.R. Order 898/74) is quoted hereunder:

14-A. Reservation for candidates belonging to the Scheduled Casts and Scheduled Tribes - (1) such percentage of vacancies in any year as may be determined by the government from time to time by any general or special order shall be reserved for candidates belonging to the Scheduled Casts and Scheduled Tribes subject to the condition that such candidates satisfy the minimum standard of suitability fixed by the Commission for appointment to the Service.

Explanation - The method of filling up the reserved vacancies shall be as may be determined by the Government from time to time.

(2) In filling up the vacancies so reserved candidates who are members of the Scheduled Castes or Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list referred to in Rule 13 irrespective of

their relative ranks as compared with other candidates.

(3) If a sufficient number of candidates who are members of the Scheduled Castes or Scheduled tribes is not available for filling up the vacancies so reserved the remaining vacancies shall be filled up by other candidates in the list. The unfilled vacancies shall be carried forward to subsequent occasions of recruitment subject to the condition that on no such subsequent occasion shall the number of reserved vacancies together with the carried forward vacancies exceed fifty per centum of the total number of vacancies:

Provided that the unfilled vacancies of any year shall not be carried forward for more than three years:

Provided further that in the third year to which vacancies are carried forward, such of the vacancies as are reserved for candidates belonging either to the Scheduled Castes or the Scheduled Tribes shall be filled up by candidates belonging to the Scheduled Tribes and Scheduled Castes respectively in the event candidates belonging to the category for which the vacancies are reserved are not available.

Coming to the Act, Section 3 of the Act which deals with its applicability provides as follows:

3. This Act shall apply to all appointments to the posts and Services under the State except-

- (a) those meant for conducting or guiding or directing research;
- (b) those classified as scientific posts;
- (e) tenure posts;
- (d) those filled up on the basis of any contract;
- (e) ex-cadre posts;
- (f) those which are filled up by transfer or deputation;
- (g) those in purely temporary establishments, such as, work-charged staff including daily-rated and monthly-rated staff and such staff the duration of whose appointment does not extend beyond the terms of office of the persons making the appointment;
- (h) temporary appointments of less than forty-five days duration;
- (i) those in respect of which recruitment is made in accordance with any provision contained in the Constitution; and
- (j) such other posts as the State Government may, from time to time, by order, specify:

Provided that all orders made under Clause (j) shall, as soon as after they are

made, be laid before the State Legislature for a total period of fourteen days which may be comprised in one or more sessions.

Section 4 of the Act contains the provisions regarding reservation and percentage thereof. The said section reads as follows:

4. (1) Except as otherwise provided in this Act, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes shall not be filled up by candidates not belonging to the Scheduled Castes and Scheduled Tribes.

(2) The reservation of vacancies in posts and Services shall be at such percentage of the total number of vacancies as the State Government may, from time to time, by order, determine:

Provided that the percentage so determined shall in no case be less than the percentage of the persons belonging to the scheduled castes or the scheduled Tribes as the case may be in the total population of the State:

Provided further that there shall be no reservation of vacancies to be filled up by promotion where-

(a) the element of direct recruitment in the grade or cadre in which the vacancies have occurred is more than sixty six and two third per cent;

(b) the vacancies have occurred in class-I posts and are to be filled up by promotion through limited department examination; or

(c) the vacancies have occurred in class-I posts which are above the lowest rung thereof, and are to be filled up on the basis of selection.

Explanation-The expression "population" means the population as ascertained at the last census for which the relevant figures have been published.

Sections 10 and 11 of the Act which are relevant for the purpose of the present case are quoted hereunder:

10.(1) Where, promotion is to be made on the basis of seniority subject to the fitness, the Scheduled Caste and Scheduled Tribe officers shall be promoted to the next higher post or grades against reserved vacancies provided they possess the minimum qualifications and experience required for such promotion.

(2) The number of reserved vacancies shall be determined on the basis of the removed points shown in the roster maintained u/s 5.

11. Where promotion is to be made on the basis of selection and the element of direct recruitment does not exceed fifty per cent, the procedure for filling up of the "reserved vacancies shall be as may be prescribed and the number of reserved, vacancies will be determined on the basis of the reserved points shown in the roster maintained u/s 5.

Section 11-A which is a new section introduced by amendment under Orissa Act

9 of 1982 makes the following provisions:.

11-A(1). There shall be no zone of consideration in respect of promotions based on seniority subject to fitness:

(2) subject to the provisions of Sub-section (1)-

(a) there shall be a separate zone of consideration for the scheduled castes and scheduled tribes candidates in respect of promotions to class III posts and within class III posts.

(b) there shall be a common zone of consideration in respect of promotions other than those specified in Clause (a).

(c) the extent of the zone of consideration, shall as may be prescribed.

6. From the provisions quoted above, it is clear that under the Service Rules the post of Superintending Engineer is to be filled up only by promotion from the rank of Executive Engineer. The mode of such promotion is by selection on the basis of merit and seniority but seniority of itself will confer no claim for promotion. There is no provision- under the service rules laying down any eligibility qualification for promotion to the post of Superintending Engineer.

The State Government in exercise of its powers conferred by Sub-section (2) of Section 4 of the Act as by notification dated 16th February, 1983 determined the reservation of vacancies in posts and services in the case of initial recruitment as well as promotion:

(i) For the Scheduled Castes shall be at 15 per cent; and

(ii) For the Scheduled Tribes shall be at 23 per cent of the total number of vacancies.

Section 3 enumerates services excepted from applicability of the Act. A bare reading of the said provision is sufficient to hold that the post of Executive Engineer or Superintending Engineer does not come within any of the categories mentioned in the section. Hence, the conclusion is irresistible that the Act applies to a case of promotion to the post of Superintending Engineer. Counter affidavit filed by the State government also proceeds on this basis.

Section 49(1) of the Act contains prohibition that except as otherwise provided in this Act, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes shall not be filled up by candidates not belonging to the Scheduled Castes and Scheduled Tribes. The purpose of enactment, as stated in the Act, is to provide for adequate representation of Scheduled Castes and Scheduled Tribes in posts and services under the State. Section 10 of the Act applies to promotions to be made on the basis of seniority subject to fitness. While Section 11 applies to promotions to be made on the basis of selection and the element of direct recruitment does not exceed fifty per cent. Difference in the two sections is regarding the procedure to be followed. Whether Section 10 applies or Section

11 makes little difference regarding applicability of the statute to the present case. Keeping in view the intent and purpose of the enactment and the general policy in matters of reservation, that is, to give adequate representation to the under-privileged and the exploited class in society with a view to bring them at par with others, it would be fair to construe that Section 10 applies to the case. Under the Service Rules, post of Superintending Engineer is a promotional post and not a selection post. Of course, in wider sense every appointment by promotion inheres an element of selection in it. But u/s 11 what is meant to be included is "selection posts" and not "promotion posts" as that of Superintending Engineer.

Coming to the contention raised by the opposite parties regarding zone of consideration, if it is accepted that Section 10 applies to the case and promotion is to be made on the basis of seniority subject to fitness, then u/s 11-A(1) there shall be no zone of consideration for such promotions. Hence, this argument of the opposite parties is devoid of merits.

7. There remains for consideration the question, i.e. whether the Act contemplates a minimum percentage of 1 in order to give benefit to the Scheduled Castes and Scheduled Tribes candidates. While the Petitioner contends that in the present case percentage should be taken as 1 since it is more than $\frac{1}{2}$, it is the contention of the opposite parties that question of reservation arises only when the percentage of Scheduled Castes and Scheduled Tribes candidates exceeds 1. We have been taken through various provisions of the Act and the Rules framed thereunder. We find no support for the contention raised by the opposite parties. The statute and the rules neither make any provision prescribing a minimum percentage nor do they make any provision that a fraction of percentage is to be ignored. Again, keeping in view the purposes for enacting the statute, that is, to provide adequate representation of Scheduled Castes and Scheduled Tribes in posts and services under the State and that the statute is a beneficial piece of legislation, we would accept the contention raised on behalf of the Petitioner that in the facts and circumstances of this case, the percentage of reservation should be taken as 1 and benefits under the statute should be given to the Petitioner. In this regard, it would be worthwhile to refer to the notification issued by the State Government in the Tribal and Rural Welfare Department, dated 12th January, 1977 which clearly provides that in pursuance of Section 4(2)(b) of "The Orissa reservation of Vacancies in Posts and Services (for Scheduled Casts and Scheduled Tribe) Act, 1975" the percentage of reservation for Scheduled Caste and Scheduled Tribe employees in various Class III and Class IV posts of the Tribal and Rural Welfare Department is fixed as shown in the statement enclosed in proportion to their percentage in various grades to the total strength of employees of those grades as on 1-4-1975 subject to the maximum of 15.09% for Scheduled Castes and 23.11% for Scheduled Tribes in respect of the posts filled up by promotion.

From the schedule attached to the notification, it is clear that where the

percentage of Scheduled Tribes candidated above, in fact, has been accepted by the State Government.

8. From the aforesaid discussions, it is clear that the case of the Petitioner was not properly dealt with in accordance with the statute and the rules framed thereunder in the matter of promotion to the post of Superintending engineer. It is not in controversy that the case of the Petitioner was not considered while giving promotion to the opposite parties 2 to 9. We find that the said opposite parties were promoted in 1979 and have in the meanwhile been confirmed as Superintending Engineers. Upsetting their promotions after such a long period is likely to affect the work in the department. On such consideration we decline to quash the promotion of the opposite parties 2 to 9. Instead we direct the State Government to duly consider the case of the Petitioner in the light of the observations made above and in accordance with the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 and Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Rules, 1976 and give him all benefits thereunder within three months from today. Accordingly, the writ petition is allowed in part in the terms aforesaid. Hearing fee is assessed at Rs. 300/-.

J.K. Mohanty, J.

9. I agree.