

(2013) 11 UK CK 0013
In the Uttarakhand High Court
Case No : Special Appeal No. 360 of 2012

Triveni Chandra Pandey

APPELLANT

Vs

State of Uttarakhand

RESPONDENT

Date of Decision : 26-11-2013

Acts Referred:

Citation : (2014) LabIC 2268

Hon'ble Judges : Sudhanshu Dhulia, J;Brahma Singh Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—This Special Appeal, which has had a long journey and has finally reached before us. It is against the judgment and order dated 8-5-2012, passed by learned single Judge in Writ Petition No. 1898 of 2011 (S/S). In a bunch of writ petitions filed before this court, the petitioners have challenged the selection as well as appointment of Primary School Teacher in the State of Uttarakhand. The challenge was on various grounds, such as--

- (a) the qualification being asked was not being in accordance with law,
- (b) the age relaxation being given in such case was not in accordance with law, and,
- (c) the mandatory requirement in the G.O. dated 14.12.2011 and the advertisement given in daily Newspaper on 15.12.2011 clearly gave a condition that only such candidates will be eligible for the posts in a District who have permanent residence in that particular District, in other words their home District.

2. Learned single Judge dismissed the writ petition holding that the procedure adopted by the Government is in accordance with law. One of the petitioners, the present appellant, whose petition was also dismissed had filed a Special Appeal before this Court on grounds that his contention regarding the criteria of residence being, violative of Articles 16(2) and 16(3) of the Constitution of India,

has not been considered by the learned single Judge. The Special Appeal was, however, dismissed by the Division Bench vide order dated 10-6-2013, holding that the petitioner/appellant has not challenged the vires of the Rule 14 of U.P. Basic Education (Teachers) Service Rules, 1981. Further it was held that the petitioner has already participated in the selection process and having failed therein he now cannot challenge the selection, following the principle of law laid down in Dhananjay Malik and Others Vs. State of Uttaranchal and Others,

3. After dismissal of the Special Appeal, petitioner moved a review application, wherein whether the judgment of the Division Bench could at all be reviewed became a preliminary issue on which there was a difference of opinion between the two Hon'ble Judges. Hence the matter was referred to a third Judge. The learned third Judge, gave opinion that the order passed by Division Bench in Special Appeal is liable to be reviewed and accordingly the same was recalled.

4. This Special appeal is now being heard again on merits.

5. Learned Advocate General raised his submission regarding the very maintainability of the petition and submitted that the petitioner participated in the selection process and when not successful in that he has filed writ petition. He has invited our attention towards various decisions of Apex Court. In the case of Dhananjay Malik and Others Vs. State of Uttaranchal and Others, it has been held that the writ petitioners participated in the selection process without any demur, they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process.

6. In the present case, the facts as to petitioner's participation are somewhat different. The petitioner has applied for the post of "Primary School Teacher" and he had prayed that his candidature be considered for selection on the post from other districts as well, besides his home district. Therefore, the contention of learned Advocate General has no substance and the law laid down & the Hon'ble Apex Court is not applicable to the facts of the present case. Moreover, the petitioner here has raised a matter which is extremely important wherein he has alleged violation of his Fundamental Rights. He applied as a candidate from District Udham Singh Nagar where he indeed participated but his claim to participate in other districts cannot be denied is what he argues relying upon Articles 16(1), 16(2) and 16(3) of the Constitution of India.

7. The only point for determination now before this court is as to whether the condition imposed by the State Government in its order dated 14.12.2011 and advertisement dated 15.12.2011, is in accordance with law, or whether it is violative of Constitution of India, particularly Articles 16(2) and 16(3).

8. It is undoubtedly true that the State Government had advertised various posts of Assistant Teachers of Primary Schools, which are spread out in each of the 13

districts of Uttarakhand. It is admitted position that a candidate who has undertaken training from his home district, should be permitted only to apply for the post falling vacant in his home district and not from any other district. This condition is violative of Articles 16(2) and 16(3) of the Constitution of India, is the contention of the petitioner/appellant before this Court.

9. The aforesaid provision of Articles 16(2) and 16(3) of the Constitution of India come up for determination before the Hon'ble Apex Court in a catena of decisions.

10. Article 14 of the Constitution of India declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

11. Article 16 of the Constitution of India, which pertains to equality of opportunity in matters of public employment, reads as under:--

16. Equality of opportunity in matters of public employment.--(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article 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 or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) of Clause (4A) as a separate class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides

that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

12. We are presently concerned with Clauses (2) and (3) of Article 16 of the Constitution of India. As per Clause (2) no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Therefore, there can be no discrimination against a citizen on ground of his place of birth or residence. Articles 16(1) & (2) of the Constitution of India makes it very clear that our Constitution makes every office and employment open to all its citizens. It does not discriminate them on place of birth or residence. Clause (3) makes an exception as there may a given situation where the consideration of residence or place of birth may be justified and therefore for abundant precaution the Constitution has given this power only to the Parliament and that too for a very limited purposes under Clause (3) of Article 16, where Parliament has been given power for making any law prescribing, in regard to a class or classes of employment or appointment to an officer under the Government or, or any local or other authority "within a State or Union Territory" prior to such employment or reappointment. In Clause (3) the necessary phrase would be "as to residence within the State or Union territory". Therefore, even Parliament has got a limited power as in a given situation it can prescribe a qualification of residence "within a State or Union territory". In other words, even the Parliament does not have power under the Constitution of India to prescribe a residence of a village, Tahseel of a District as presently has been done by the State Government. A Constitution Bench of Hon"ble Apex Court in the case of A. V. S. Narasimha Rao and Others Vs. The State of Andhra Pradesh and Another, has declared that the law enacted by Parliament in pursuance of Clause (3) of Article 16 making a special provision for domicile within Telengana (a region of the State of Andhra Pradesh) for the purpose of public employment within that region and the rules made there under is ultra vires the Constitution. The Hon"ble Apex Court has stated as under:

The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union Territory prior to employment or appointment to an office in that State or Union Territory. Two questions arise here. Firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State; and, secondly, whether Parliament can delegate this function by making a declaration and leaving the details to be filled by the rule-making power of the Central or State Governments.

13. The Hon"ble Apex Court went on to elaborate the provisions of Clauses (1), (2) and (3) of Article 16, as under:--

By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be presented, and a residential qualification may, therefore, have to be prescribed, the exception in Clause (3) was made. Even so that clause spoke of residence within the State. The claim of Mr. Setalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose its meaning. The words "any requirement" cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in districts, taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate.

14. In *State of Orissa and Others Vs. Sudhir Kumar Biswal and Others*, the challenge before the Apex Court was order of Orissa Administrative Tribunal. The Tribunal had held that the rule framed by the State Government asking applications for public employment from on the residence of that district is in violation of Article 16(2) of the Constitution of India and this view of the Tribunal was affirmed by the Hon"ble Apex Court, as indeed it was violation of Article 16(2) of the Constitution of India.

15. We are of the view that the State cannot discriminate among its citizens, inter alia, on the basis of residence or place of birth. This power has been given to the Parliament to make any special law prescribing any criteria of residence in a State. Further even the Parliament has been given power only to fix the residence in a State meaning thereby even the Parliament does not have power to fix the criteria of a District or a Tahseel or Panchayat or Village of that area. In the present case the State has fixed the residence as a criteria for appointment, which fixed residence in a district, is clearly in violative of Article 16(2) of the Constitution of India.

16. The argument of the State as well as some of the respondents is that residence is a valid criteria here as a person residing in a particular area would be well versed in the area and would be in a position to communicate in the dialect spoken in that area. The requirement of residing is hence being justified on these grounds. Such arguments are nothing short of parochial in nature and run counter to our constitutional principles and constitutional morality. Hon"ble Apex Court in the case of *Kailash Chand Sharma Vs. State of Rajasthan and Others*, had to say on this aspect which is as under:--

Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some of the parties. 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 Article 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. At this juncture it is appropriate to undertake a brief analysis of Article 16.

17. In the above cited judgment, the Hon''ble Apex Court had held the action of the Government of Rajasthan as illegal and violate of the Article 16(2) of the Constitution of India which gave quality points based on residence in a particular district or village. It was held that awarding of such quality point marks runs counter to Article 16(2) of the Constitution of India.

18. The next question of the respondents is that under Article 350(A) of the Constitution, it is mandated by the Constitution that a State should provide adequate facilities for instruction in mother tongue at primary stage and therefore, if there is a criteria of a residence attached to the present employment by the State there is nothing wrong with it. This argument though was accepted by the Division Bench earlier (of which the order has now been reviewed), but we respectfully disagree with the proposition for the following reasons:--

(i) Article 350(A) of the Constitution of India reads as under:--

350A. Facilities or instruction in mother-tongue at primary stage.-- It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

19. Article 350A of the Constitution of India was inserted in the Constitution by way of 7th Amendment Act, 1956. It was done on the recommendation of the State Reorganization Commission as though States were reorganized primarily on the basis of "language", yet many of the States there were pockets where a

group of persons spoke a language different than the one spoken by the majority of the population in the State. In order to protect their language, Reorganization Commission recommended that the language of linguistic minority group be protected. Article 350A of the Constitution of India has no application in the State of Uttarakhand for the simple reason that the language being spoken by almost all in Uttarakhand is "Hindi". Hindi is also the official Language of the State of Uttarakhand. If there are variations of "Hindi" spoken in Uttarakhand such as "Garhwali" and "Kumauni" and irrespective of the facts whether these are dialects or variation of Hindi language or a different language, as there may be no universally acceptable criteria which distinguishes a language from a mere dialect, yet the fact remains that Article 350A of the Constitution of India has no application to the present controversy. Moreover, even when Uttarakhand was a part of the State of U.P., the medium for instruction in primary schools, particularly, in Government primary schools was "Hindi" and the instructions were in Hindi and so were the text books, which were in Hindi. Therefore, the reliance on Article 350A of the Constitution of India is wholly misconceived.

20. Lastly as far as Rule 14 of U.P. Basic Education (Teachers) Service Rules, 1981 are concerned and that the selections have been made by the State under these Rules, which is not under challenge, we only have to say that Rule 14 of U.P. Basic Education (Teachers) Service Rules, 1981 does not violate Article 16 of the Constitution of India. It nowhere states that person residing in one particular district can be given appointment only in that district. Rule 14 of the U.P. Basic Education (Teachers) Service Rules, 1981 reads as under:--

14. Determination of vacancies and preparation of list - (1) In respect of appointment by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under Clause (a) rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters and other categories under rule 9 and notify the vacancies to the Employment Exchange and in at least one newspaper having adequate circulation in the locality.

(2) The appointing authority shall scrutinize the applications received and the names of the candidates received from the Employment Exchange and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3) The Regional Assistant Director of Education (Basic) may, on the application of a candidate, and for reasons to be recorded, direct that his name be included at the bottom of the list prepared under sub-rule (2).

(4) The names of candidates in the list prepared under sub-rule (2) shall then be arranged in such manner that the candidates who have passed the required training course earlier in point of time shall be placed higher than those who

have passed the said training course later and the candidates who have passed the training course in a particular year shall be arranged in accordance with the quality points specified in the Appendix.

(5) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).

(6) The list prepared under sub-rule (2) and arranged in accordance with sub-rule (4) shall be forwarded by the appointing authority to the Selection Committee.

21. Consequently, merely if the petitioner has not challenged the above rules, it would not matter as far the merit of the petitioner's claim is concerned.

22. Hence the advertisement and the conditions so far as it imposes a restriction of "place of residence", is bad and is hereby declared to be violative of Article 16(2) of the Constitution of India.

23. However, the fact remains what relief can be granted to the petitioner/appellant.

24. 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 than him has been given appointment. Needful be done within a reasonable time.

25. The Special Appeal is accordingly allowed. The intervention application also stands rejected.