
(2006) 04 GAU CK 0051
In the Gauhati High Court

W.Thapa Maring

APPELLANT

Vs

State of Manipur and Ors.

RESPONDENT

Date of Decision : 19-04-2006

Acts Referred:

Citation : (2006) 04 GAU CK 0051

Hon'ble Judges : M.B.K.Singh, J

Bench : Single Bench

Advocate : R.S.Reisang, R.K.Banna, Kh.Tarun kumar Singh, Advocates
appearing for Parties

Judgement

1. Heard Mr. Tarunkumar, learned counsel appearing on behalf of the petitioner, Mr. R.K.Banna, learned counsel appearing on behalf of the respondent No.3 as well as Mr. RS Reisang, learned Addl.G.A. appearing on behalf of the respondents1 and 2.

2. There is no dispute in respect of the following material facts: the petitioner is a member of S.T. community of the State of Manipur. He has been serving as an Assistant Sub Inspector (Enf.) of the Department of Transport, Govt. of Manipur on regular basis since 1987. Being a graduate, he became eligible for promotion to the next higher post of SubInspector (Enf) on completion of 2 years of regular service as Assistant SubInspector (Enf) under the relevant recruitment rule. On 10.9.2002, the Director of Transport, Govt. of Manipur issued an order whereby Shri L.Ibobi, respondent No.3 was promoted to the post of SubInspector(Enf) against resultant vacancy caused due to the expiry of Shri J.C. Thangeo on the recommendation of DPC held on 22.6.02 and the approval of the Govt. Conveyed vide letter dated 24.8.02. The said vacancy caused due to expiry of Shri JC Thangeo was one at roster No.16, which was reserved for S.T., as per 100 point roster, maintained by the Directorate.

3. In this writ petition, the petitioner is challenging the legality of the said promotion dated 10.9.02 on the ground that though he was eligible for

consideration for promotion to the said vacant post of SubInspector (Enf), which was reserved for S.T. as per roster, he was only considered for giving promotion to the post and that the private respondent, who is an S.T., was given promotion. The petitioner is praying for quashing the impugned promotion order and also for an appropriate consequential order.

4. As per affidavit in opposition filed on behalf of the respondents1 and 2, even though as per 100 point roster maintained by the Directorate, the said vacant post of SubInspector (Enf) fell at roster No.16 which was reserved for S.T. since there was only one vacancy in the relevant recruitment year and having regards to the qualifications received vide DPC's letter No.23/8/91DP dated 15.6.02, the said vacant post was treated as an unreserved vacancy. The above said letter, a copy of which is at AnnexureR/1 of the affidavit in opposition, is reproduced below:

?No.23/8/91DP

GOVERNMENT OF MANIPUR

DEPARTMENT OF PERSONNEL & ADMINISTRATIVE REFORMS

(PERSONNEL DIVISION)

Imphal, the 15th June, 2002.

To

The Director (Transport)

Manipur, Imphal.

Subject: 100 point Roster & Clarification

thereof.

Sir,

I am directed to refer to your letter No.1/16/EstIII dated 29.4.2002 on the above subject and to say that the Reservation Roster for SC/S.T issued under Govt. of Manipur, Secretariat: Appointment & Services Department O.M. No.9/1/63S dated 6.4.1974 read with O.M. of even number dated 27.5.1974 is still in force and so far there has been no amendment of the roster. However, as per the law declared by the Supreme Court of India, not more than 50% of the vacancies occurring in a recruitment year can be treated as reserved. Accordingly, if there is only one vacancy in a particular recruitment year, it has to be treated as an unreserved vacancy even if it falls at a reserved point.

Yours faithfully,

Sd/N.Angou Singh

Joint Secy (DP), Govt. of Manipur.?

5. The relevant case reference before the Supreme Court, on the basis of the decision of it, the advice of the Department of Personnel, Govt. of Manipur was apparently based, was not disclosed.

6. According to the respondents¹ and 2, the recommendation of the DPC in favour of the private respondent was based on the existing rule as clarified by the Department of Personnel, Govt. of Manipur. The relevant portion of the proceedings of the DPC held on 22.6.02, a copy of which is at Annexure R/2 is reproduced below:

?Proceeding of the Class III DPC held on 22.6.02 in the office Chamber of the Director of Transport, Govt. of Manipur for filling up 1(one) post of Sister Tutor(Tax) & 3(three) post of ASI in the Department.

Members Present.

1. T.Sitlhou, Director of Transport Chairman

2. Th. Gopen Meitei,

Jt.Secy. (AGRI) Third Member.

3. Smt. Kholia Lorho, Dy.

Director (Tpt) Member.

1. The DPC has been informed that there is presently 1(one) vacant post of SubInspector (Enf) vacated due to demise of (L) JC Thangeo, Ex. S.I. (Enf). As per the R/R, the said post is to be filled up from amongst the eligible ASI (Enf) of the Motor Vehicle Department with 2(two) years regular service in the grade in case of graduate and 3(three) years regular service in the grade in the case of Matriculate and 7(seven) years regular service in the grade in case of under matric.

2. As per 100 Point Roster maintained by this office, the roster point falls at Roster No.16 (Reserved S.T.)as per Roster issued in 1974. In the course of the DPC, some members raised the question relating to the validity of the 100 Point Roster maintained by the Department. Accordingly, advice was sought from the DP vide this office letter No.1/16/EstIII dated 29.4.2002 to which it has been clarified vide DP's letter No.23/8/91DP dated 15.6.2002 (copy enclosed). That ? so far there has been no amendment of the roster. However, as per the law declared by the Supreme Court of India, not more than 50% of the vacancies occurring in a recruitment year can be treated as reserved. Accordingly, if there is only one vacancy in a particular recruitment year, it has to be treated as an unreserved vacancy even if it falls at a reserved point.?

2. The eligible candidates falling within the zone of consideration for DPC as furnished by the Department are as given below:

Sl. Name of incumbent Dt.of appt. Remarks

(1) (2) (3) (4)

1. Shri L.Ibobi Singh 1. 6.81

2. Shri R.K.Marjit Singh 16. 1.85

3. Shri P.Kunjabi Singh 16.12.86

4. Shri Th.Kamini Kumar

Singh 16.12.86

5. Shri W. Thapa Maring 15. 1.87

4. Hence, taking into consideration the eligibility of the A.S.I. all other aspects and views of the DP, the following ASI (Enforcement) is hereby recommended for filling up the post of SubInspector(Enf) in the Transport Department.

5. The DPC has been informed that there are 3(three) posts of ASI(Enf) arising due to the demise of (L) Md. Heishamuddin, Ex. ASI (Enf),(L) Kh. Robinchandra Singh, Ex. ASI (Enf) & subsequent vacancy on the promotion of Shri L. Ibobi Singh to S.I. (Enf). As per the existing R.R. the posts are to be filled up from amongst the eligible checkers of the Department having minimum 3(three) years of regular service in case of Matriculate and 5(five) years regular service in case of Undermatric vide notification no.I/58/77/RR/DP dated 18.1.83.

6. According to the 100 point roster, the vacancy falls at roster point 22(Reserved S.T) point 23 (General) & 24 (General).

7. There are 10(ten) checkers falling within the zone of consideration in order of seniority as per the record furnished by the Department.

1. L.Mohendro Singh

2. W.Tomba Singh

3. O.Shamungou Singh

4. Md.Siraj Ahmed

5. N.Kanta Singh

6. Ch.Nongthon Singh

7. W.Mangle Singh

8. S.Khomdon Singh

9. Ngurshanglur

10. Khoho Daile

7. The DPC examined the eligibility of the Checkers with reference to ACE for the last 5(five) years integrity, R.R., seniority etc. Since, there has been no reports against any of them the Head of Department has certified the integrity of the

checkers.

8. After considering with aspects, the DPC recommends the following 3(three) checkers who are found equal to or more than the bench mark of good in the ACR for the last 5(five) years taking into account their seniority position.

1. L. Mohendro Singh

2. W. Tomba Singh

3. Ngurshanglur

Sd/ (T. Sitlhou) Sd/Th.Gopen Meetei

Chairman Third Member

Sd/Smt.Kholia

Member.?

7. An affidavit inopposition is filed on behalf of the private respondent and it supports the case of the respondent Nos 1 and 2.

8. The stand taken by the respondents is that though the said roster position No.16 is a reserved post for S.T., it has not been taken as reserved one on the ground that single vacancy in a particular year is not to be taken as a reserved post in spite of its turn because that will amount to reservation of 100 point of the vacancies occurred in a particular year.

9. In connection with giving of promotion to the posts shown at the reserve points, in R.K.Sabharwal & Ors vs. State of Punjab and Ors.(1995) 2 SCC 745, the Supreme Court held at para 4:

? when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the post shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to general category are not entitled to be considered for the reserved post. When the State Govt. after doing the necessary exercise makes reservation and provides the extent of percentage of posts to be reserved for the said backward class then percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the backward classes have already been appointed/promoted against the general seats. As mentioned above, the roster point which is reserved for backward class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the reserved which is roster for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State service may be a relevant factor for the State Government to review the question of continuing reservation for the said class, but so long as the instructions/rules providing certain percentage of reservation for the backward classes are operative, the same have

to be followed.?

10. In the same case, Supreme Court held at para 5 (only the relevant portion): ? The percentage of reservation is the desired representation of the backward classes in the state services and is consistent with the demographic estimate based on the proportion worked out in relation to their population. The numerical quota of posts is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the backward class and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the running account must come to an end thereafter. The vacancies arising in the cadre after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post, the same has to be filled from amongst the category to which the post belongs in the roster. For example, the S.C. persons holding the post at roster point 1,7,15 retire then these slots are to be filled from amongst the persons belonging to the S.C. Similarly, if the persons holding the posts at 8 to 14 or 23 to 29 retire then these slots are to be filled from amongst the general category. By allowing this procedure, there shall be neither shortfall nor excess in the percentage of reservation.?

11. The Supreme Court further held at para 6 of the judgment: ? The expressions "post" and "vacancy" have been used in the executive instructions providing for reservations, are rather problematical. The words, "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be post in existence to enable the "vacancy" to occur. The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of "vacancy" has no relevance in operating the percentage of reservation.?

12. Supreme Court, however, directed that interpretation given by it about the working of the roster should be operative prospectively. It is to be noted that this decision of the Constitution Bench has proceeded on the footing that reservation in roster can operate provided in the cadre there is plurality of post. It has also been indicated that the post in a cadre is different from vacancies.

13. In *Post Graduate Institute of Medical Education & Research, Chandigarh Vs Faculty Association & Ors. etc.* (1998)4 SCC 1, the question before the Constitution Bench was whether in a single cadre post, reservation for SC, STs and OBCs can be applied either directly or through the roster in which vacancies are amongst the general category and reserved category candidates. Allowing the Review Petition against the 3 Judges Bench judgment dated 2.5.1997 in Civil Appeal No.3175 of 1997(which was one of the batch matters, reported in (1997)

6 SCC 283) held at paras 34 and 35:

¶34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of general members of the public and cent percent reservation for the backward classes is not permissible within the constitutional framework. The decision of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of post in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bound to the members of a large segment of the Community who do not belong to any reserve class, but on some occasions the post will be available for open competition when, in fact, all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the Society.?

In *Mangat Ram Vs State of Punjab & Ors.* (2005)9 SCC 323 the Supreme Court held at para 4: ¶the reservation has to be worked out in relation to the post and the concept of vacancy has no relevancy.?

In the same case, Supreme Court held at para 7: ¶It is evident from the above that the High Court erred in going by the vacancy and not the post. The decision in the case of *R.K.Subharwal, Arati Roy Choudhury* and the Circular dated 11.10.74 make it clear that the post that fell vacant on retirement of Mr. Singla in 1996 could be filled by appointment of a candidate from reserved category. It cannot be disputed that the appellant was available from that category to be considered for being promoted to the post which fell vacant on retirement of Mr. Singla on 31.10.96. In that view, that the post could not be filled by promotion of a candidate from general category, i.e. respondent No.3.?

14. Keeping in view of the above said decision, it was not legal on the part of the authorities not to treat the said roster position No.16 as a reserve post for S.T. The case before the DPC was not a case of single post cadre. It is already seen that as per decision of the Supreme Court, reservation has to be worked out in relation to the post and that concept of vacancy has no relevance. Since the said post of SubInspector (Enf) required to be filled up was one at Sl.No.16, which is admittedly a post reserved for S.T., since the said post not being a solitary post of its kind, even if vacancy be solitary. Vacancy in the particular recruitment year, appointment of an eligible reserved category candidate to the said post would have been warranted by law. It is not the case of the respondents that no eligible reserved category candidate was available at the relevant time. It was not legal

on the part of the authorities to treat the said post as an unreserved one. The failure on the part of the DPC to consider the case of the S.T. candidate, who did not suffer from any disqualification for consideration for promotion to the said post, was illegal and improper. Wrong advice given by the department of Personnel, Govt. of Manipur could not have validated the recommendation of the DPC and the consequent promotion given in favour of the private respondent by accepting the said recommendation in clear violation of the existing law.

15. Mr. R.K. Banna, learned counsel appearing on behalf of the respondent No.3 draws this Court's attention to the decision of the Supreme Court in *University of Cochin Vs NS Konjoonjummo* and the AIR 1997 SC 2083 as well as the decision of this Court in *Rajkumar Poddar Vs North Eastern Hill University* (1998) 2 GT 236 and *Pradyut Sarma Vs APSC*, (1998) 2 GLT 410 and submits that since the petitioner having participated in the selection process, he, being an unsuccessful candidate cannot challenge a selection process. The facts and circumstances of the said case are different from the facts and circumstances of the present case. In the present case, it cannot be said that the petitioner challenged the selection process after having faced it. The principles of law laid down in the said case will not be applicable in the present case wherein the petitioner, who was eligible S.T. candidate at the relevant time, is challenging the legality of the impugned promotion order by which the private respondent, who was a general category candidate, was promoted against a post reserved for S.T. candidate in violation of the existing law.

16. In the light of the above considerations, I am of the opinion that the impugned promotion order dated 10.9.2002 is not sustainable in the eye of law. Accordingly, it is hereby set aside. A review DPC in respect of the DPC held on 22.6.02 is to be held in accordance with provisions of the relevant Acts and Rules in force on the said date as expeditiously as possible. Eligible S.T. candidate found suitable under the relevant law is to be given promotion w.e.f. the date on which the private respondent was given promotion. The seniority of the said S.T. candidate shall be considered w.e.f the date. The S.T.candidate so promoted shall also be entitled to all consequential benefits under the relevant law. So far as the case of the private respondent is concerned, if there is a vacant post meant for general category candidate to which he may be accommodated under the relevant rules, concerned respondent may do so.

17. With the above said direction and order, this Writ petition stands disposed of.