B. N. Tiwari

Vs

Union of India & Others

Writ Petition No. 110 of 1964

(CJI P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, N. Rajgopala Ayyangar, S. M. Sikri JJ)

10.12.1964

JUDGMENT

WANCHOO, J. -

This petition under Art. 32 of the Constitution is a sequel to the judgment of this Court in T. Devadasan v. Union of India (A.I.R. 1964 S.C. 179.). The petitioner was Assistant in Grade IV of the Central Secretariat Service. The next post which the petitioner could expect to get was of Section Officer (Assistance Superintendent). Recruitment to the post of Section Officer is made in the following manner :-

> (i) 50% by direct recruitment from those who obtain lower ranks in the Indian Administrative Service etc., examinations.
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> (ii) 25% by promotion from Grade IV on the basis of a departmental examination held at intervals by the Union Public Service Commission, and
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> (iii) 25% by promotion from Grade IV on the basis of seniority-cum-fitness.

In February 1960 the Union Public Service Commission issued a notification to the effect that a limited competitive examination for promotion to the post of Section Officers would be held in June 1960. The notification further stated that reservation of 12 1/2% of the available vacancies would be made for members of scheduled castes and 5% for the members of scheduled tribes. The number of vacancies to be filled was to be announced later. The petitioner sat for this examination and he is said to have secured the 37th position in order of merit. Later, a press communique was issued by the Union Public Service Commission in the which it was stated that the number of vacancies expected to be filled was 48 out of which 32 were reserved for schedule castes and scheduled tribes and 16 were unreserved. Eventually however the Union Public Service Commission recommended 45 names for appointment, 16 of which were unreserved and 29 were reserved against vacancies for scheduled castes and scheduled tribes. Finally, however, the Government made only 43 appointments, 15 in the unreserved quota and 28 in the reserved quota. This heavy reservation for scheduled castes and scheduled tribes was made on the basic of the "carry forward" rule which was put into force from 1955.

According to the resolution of the Ministry of Home Affairs dated September 13, 1950 reservation for scheduled castes and scheduled tribes was fixed at 12 1/2% and 5% respectively without anything like the "carry forward" rule. In 1952 however supplementary instructions were issued in this connection in the following terms :-

"5(3). If a sufficient number of candidates of the communities for whom the reservations are made, who are eligible for appointment to the post in question and are considered by the recruiting authorities as suitable in all respects for appointment to the reserved quota of vacancies, are not available the vacancies that remain unfilled will be treated as unreserved and filled by the best available candidates; but a corresponding number of vacancies will be reserved in the following year for the communities whose vacancies are thus filled up in addition to such number as would originally be reserved for them under the orders contained in the Resolution.

"5(4). If suitably qualified candidates of the communities for whom the reservations have been made are again not available to fill the vacancies carried forward from the previous year under clause (3) above, the vacancies not filled by them will be treated as unreserved and the reservations made in those vacancies will lapse."

As a result of these instructions reserved vacancies for scheduled castes and scheduled tribes which could not be filled in one examination would be carried forward to the next examination. But if sufficient number of scheduled caste and and scheduled tribe candidates were not available to fill the vacancies carried forward plus vacancies of the next year the vacancies were to be treated as unreserved and the reservation made in those vacancies would lapse. Thus according to 1952 instructions the carry forward was only for two years and thereafter there was no carry forward. In 1955 however, Government made further change in the carry forward rule and paras. 5(3) and 5(4) of the instructions of 1952 were substituted thus :

'5(3)(a). If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year.

"Thus the number of reserved vacancies of 1954 which were treated as unreserved for want of suitable candidates in that year will be added to the normal number of reserved vacancies in 1955. Any recruitment against these vacancies in 1955 will first be counted against the additional quota carried forward from 1954. If however suitable are not available in 1955 also and a certain number of vacancies are treated accordingly as 'unreserved' in that year, the total number of vacancies to be reserved in 1956 will be un-utilised balance of the quota carried forward from 1954 and 1955 plus the normal percentage of vacancies to be reserved in 1956. The un-utilised quota will not, however, be carried forward in this manner for more than two years.

"An annual report of reserved vacancies which were treated as unreserved for want of suitable candidates from scheduled castes or scheduled tribes as the case may be should be forwarded to the Ministry of Home Affairs in the form enclosed as Annexure I along with the annual communal returns already prescribed. In addition Ministries themselves will take adequate steps to ensure that any lapse on the part of subordinate authorities in observing the reservation rules cannot go unnoticed by a reviewing authority within the Ministry itself at a sufficiently early date.

"(b) In the event of a suitable scheduled caste candidate not being available, a schedule tribe candidates can be appointed to the reserved vacancy and vice versa subject to adjustment in the subsequent points of the roster."

The result of this change was to carry forward the unfilled vacancies for two years and thus in the third year the vacancies to be filed by scheduled caste and scheduled tribe candidates would be the un-utilised balance from the previous two years plus the normal percentage of the vacancies reserved in the third year. Unlike the rule of 1952, this rule did not provide for any lapse but said that the un-utilised quota will not however be carried forward in this manner for more than two years. The result of the substitution of the 1955 rule was that paras. 5(3) and 5(4) of the 1952-rule ceased to exist and it was in pursuance of the 1955-rule that the Union Public Service Commission announced as already indicated that out of 48 expected vacancies, 16 would be unreserved and 32 would be reserved for scheduled caste and scheduled tribe candidates. This reservation was attacked in the case of Devadasan (A.I.R. 1964 S.C. 179.) and this Court struck down the carry forward rule of 1955 (in place of paras 5(3) and 5(4) of the 1952-rule) on the ground that the carry forward rule as modified in 1955 was unconstitutional. No other relief besides the declaration that the 1955 carry-forward rule was unconstitutional was granted in Devadasan's case (A.I.R. 1964 S.C. 179.). It was however hoped that the department concerned would implement the decision of this Court in an appropriated manner.

The petitioner contends that the effect of this Court's judgment in Devadasan's case (A.I.R. 1964 S.C. 179.) is that there is no carry forward rule in existence as the 1955 carry forward rule was struck down by this Court and the 1952-rule had ceased to exist by the substitution made by the Government of India in 1955. The petitioner further contends that in view of there being no carry forward rule either of 1952 or of 1955 after the judgment of this Court in Devadasan's case (A.I.R. 1964 S.C. 179.) all that the Government of India could do in the matter of reservation for the examination conducted in 1960 was to reserve 12 1/2% of the vacancies for scheduled castes and 5% for scheduled tribes. In the alternative it is submitted that if the carry forward rule of 1952 is still deemed to exist that rule is also bad being violation of Art. 16 of the Constitution. The petitioner finally contends that the carry forward rules of 1952 and 1955 being out of his way and the only reservation that was possible in the examination of 1960 being 12 1/2% for scheduled castes and 5% for scheduled tribes, he was entitled to be appointed on that basis. He therefore prays that a direction should be issued setting aside appointments of certain candidates belonging to scheduled castes and scheduled tribes over and above the reserved quota of 17 1/2% and the Union Public Service Commission should be directed to announce the result of the said examination afresh reserving 12 1/2% of the vacancies for scheduled castes and 5% for scheduled tribes.

The application is opposed on behalf of the Union of India and the main contention urged is that even if the carry forward rule of 1952 is deemed to be non-existence because it was substituted by the carry forward rule of 1955, the petitioner would not be entitled to be appointed in any case in view of the position he had secured in the examination.

The first question therefore that arises is whether the carry-forward rule of 1952 can still be said to exist. The next question is whether the carry forward rule of 1952, if it still exists is bad for the same reasons as the carry forward rule of 1955, as held by this Court in Devadasan's case (A.I.R. 1964 S.C. 179.). The last question is whether the petitioner would be entitled to appointment even if the carry forward rule of 1952 does not exist.

We shall first consider the question whether the carry forward rule of 1952 still exists. It is true that

in Devadasan's case (A.I.R. 1964 S.C. 179.), the final order of this Court was in these terms :-

> "In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid."

That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952 clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive. We are therefore of opinion that after the judgment of this Court in Devadasan's case (A.I.R. 1964 S.C. 179.) there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place. But it must be made clear that the judgment of this Court in Devadasan's case (A.I.R. 1964 S.C. 179.) is only concerned with that part of the instructions of the Government of India which deal with the carry forward rule; it does not in any way touch the reservation for scheduled castes and scheduled tribes at 12 1/2% and 5% respectively; nor does it touch the filing up of schedule tribes vacancies by scheduled caste candidates where sufficient number of scheduled tribes are not available in a particular year or vice versa. The effect of the judgment in Devadasan's case (A.I.R. 1964 S.C. 179.) therefore is only to strike down the carry forward rule and it does not affect the year to year reservation for scheduled castes and scheduled tribes or filling up of scheduled tribe vacancies by a member of scheduled castes in a particular year if a sufficient number of scheduled tribe candidates are not available in that year of vice versa. This adjustment in the reservation between scheduled castes and tribes and nothing to do with the carry forward rule from year to year either of 1952 which had ceased to exist or of 1955 which was struck down by this Court. In this view of the matter it is unnecessary to consider whether the carry forward rule of 1952 would be unconstitutional, for that rule no longer exists.

This brings us to the last questions whether the petitioner would be entitled to appointment on the basis that there was no carry forward rule in existence in 1960. Originally it was notified that the number of vacancies expected were 48. On that basis the reservation for scheduled castes would be 6 and for scheduled tribes would be 2.4. But as it is impossible to get 2.4 individuals and the reservation for scheduled tribes is a minimum of 5%, they would be entitled to three vacancies. Thus out of 48 expected vacancies, 9 would be reserved vacancies and 39 would be unreserved. Actually however the Public Service Commission recommended only 45 names. On the basis of 45, scheduled castes would be entitled to 5.625 vacancies (i.e. 6 vacancies) while scheduled tribes would be entitled to 2.25 vacancies (i.e. 3 vacancies). In actual effect however because one of the candidates recommended in the reserved quota died and one of the candidates out of the unreserved quota was appointed to another service, the Government of India made only 43 appointments. On this basis, the scheduled castes would be entitled to 5.375 vacancies (i.e. 6 vacancies) and the scheduled tribes to 2.15 vacancies (i.e. 3 vacancies). Thus on the actual appointments made the total reservation for scheduled castes and scheduled tribes would be 9 while 34 would be available for the unreserved quota. The petitioner secured 37th place in the unreserved quota. Out of these 37, one unreserved candidate was recruited to another service and thus the petitioner's position may conceivably be said to have bettered and become 36th. According to the calculation which we have

already indicated, 9 out of 43 vacancies actually filled will go to scheduled castes and scheduled tribes together and 34 would go to the unreserved quota. The petitioner however was 36th on the unreserved quota and therefore even on the basis of there being no carry forward rule only 34 candidates would be appointed from the unreserved quota and the petitioner being 36th on his own showing cannot claim appointment. The petition therefore fails. In the circumstances we make no order as to costs.

Petition dismissed.

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