

State of Punjab

Vs

Hira Lal and Others

Civil Appeal No. 1218 of 1968

(CJI J. C. Shah, K. S. Hegde, A. N. Grover JJ)

18.12.1970

JUDGMENT

HEGDE, J. -

1. On September 12, 1963, the Government of Punjab passed the following order :

"Subject : Reservation for the members of Scheduled Castes, Scheduled Tribes and Backward Classes in promotion cases.

Sir,

I am directed to refer you to the subject noted above and to say that at present reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes is applicable to new appointments and not to promotions which are governed by consideration of merit and seniority alone. Since those castes/classes are poorly represented in various services in the upper grades under the State Government it has been under the active consideration of Government that some reservation in higher grade posts as well should be made for them. It has now been decided that except in the case of All India Services 10 per cent. of the higher posts to be filled by promotion should be reserved for the members of Scheduled Castes, Scheduled Tribes and Backward Classes (9 percent. for the members of Scheduled Castes and Scheduled Tribes and 1 percent. for the Backward Classes) subject to the following conditions :

(a) the persons to be considered must possess the minimum necessary qualification; and

(b) they should have at least a satisfactory record of service."

2. Up till that date reservation for Schedule Castes, Scheduled Tribes and Backward Classes was confined to initial recruitment. The first out of every five initial recruitments was reserved for Scheduled Castes, Scheduled Tribes or other Backward Classes.

3. On January 14, 1964, the Government clarified its order, dated September 12, 1963. In this case we are not concerned with the first paragraph of that clarification. The second paragraph of that clarification reads thus :

"Government have since then been receiving references from several quarters seeking

clarification in regard to the implementation of the said decision. After careful consideration of the matter, it has now been decided that :

(a) The said decision should be applied to all promotion posts already vacant on September 12th, 1963, or falling vacant thereafter.

(b) The reservation should not imply that 10 per cent. of the total posts reserved for promotion in any cadre have to be filled by Scheduled Castes personnel in the sense that all existing future vacancies will be filled up by Scheduled Castes/Tribes and other Backward Classes candidates until their share in higher services comes up to 10 percent.

(c) This provision of reservation applies to all State Services including Classes I, II, III and IV posts, the only exception being All India Services.

(d) This reservation should apply even in the case of short-term leave vacancies unless it is likely to involve unnecessary dislocation of work in different offices and avoidable expenditure and inconvenience due to mid-year transfers. etc.

(e) So, far as Scheduled Castes/Tribes are concerned, the very first vacancy existing on/arising after the september 12, 1963, should be treated as reserved for them and only if no such official is available for promotion against the vacancy reserved for them in the first block of 10 vacancies, a candidate belonging to other Backward Classes may be selected in preference to the remaining officials against one such post only out of one hundred, since the reservation for other Backward Classes may not exceed 1 percent. However, if Scheduled Castes/Tribes candidates are available to fill one out of every ten vacancies, the specific reservation in favour of other Backward Classes should be the 51st vacancy.

(f) One reserved vacancy should be carried over to the next block of ten vacancies in case it cannot be filled up within any block of ten posts. Thus if no Scheduled Castes/Tribes/Backward Classes candidate is promoted against any of the first 10 vacancies the number of vacancies available to such candidates in the following block will be two.

(g) In case an out of turn promotion has already been given to a candidate belonging to Scheduled castes/Tribes or Backward Classes against a reserved vacancy and then in the same block it happens to be the turn of a candidate belonging to the said castes/classes for promotion, such candidate should not be ignored on the ground that 10 per cent. reservation has already been exhausted."

4. Thereafter by another letter of March 18, 1964, the Government issued further clarification of their aforementioned communications. That clarification reads :

"To illustrate the above point if there is an official of the Scheduled Castes placed at position say 73rd in a list prepared for promotion to the higher posts and a vacancy arises therein, he would have precedence over the other 72 officials to benefit out of the first vacancy that occurs on or after September 12, 1963. His turn would not be withheld merely for the fact that his number on the select list is not in the first ten."

5. Respondents Nos. 1 and 3 to this appeal were both working in the Forest Department of the Government as Head Assistants. Respondent No. 1 was senior to Respondent No. 3. Respondent No. 3 belonged to a Scheduled Caste. Hence in view of the order of the Government, Respondent No. 3 was promoted temporarily as Superintendent ignoring the claim of Respondent No. 1. Aggrieved by that order Respondent No. 1 moved the High Court of Punjab to quash the promotion of Respondent No. 3 and direct the Government to promote him as Superintendent in the place of Respondent No. 3. The High court has quashed the promotion of Respondent No. 3. The State of Punjab (now substituted by the State of Haryana) has brought this appeal after obtaining a certificate from the High Court under Article 133(1)(c) of the Constitution.

6. In the opinion of the High court reservation made for the Scheduled Castes, Scheduled Tribes and Backward Classes is not impermissible under the Constitution in view of Article 16(4) of the Constitution as interpreted by this Court in *The General Manager, Southern Railway v. Rangachari*. ((1962) 2 SCR 586 : AIR 1962 SC 36 : (1961) 2 SCJ 424) But the Government has violated Article 16(1) by reserving the first out of a group of 10 posts for the Scheduled Castes, Scheduled Tribes and Backward Classes. The High Court was persuaded by the Counsel for the first respondent to visualise various hypothetical cases under which reservation of the type impugned in the present case could lead to various anomalies such as the person getting the benefit of the reservation may jump over the heads of several of his seniors not only in his own grade but even in the higher grades. They visualised the possibility of Head Assistant leaping over the heads of several seniors of his in the grade of Head Assistants and thereafter in the grade of Superintendent; subsequently in the grade of Under Secretaries, Deputy Secretaries and so on and so forth. It is not the finding of the High Court that in any of the grades to which the impugned orders apply, the possibilities visualised by the High Court are imminent or even likely.

Article 16(1) is an extension of Article 14. It provides :

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

But the equality contemplated by this clause is not an embodied equality. It is subject to several exceptions and one of the exceptions is that provided in Article 16(4) which says :

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

7. In *Rangachari's case* (supra) this court ruled that the reservation contemplated by Article 16(4) can be made not merely to initial recruitment but also to posts to which the promotions are to be made. This is what *Gajendragadkar, J.* (as he then was), speaking for the majority observed (at spl. pp. 604 and 605) :

"We must in this connection consider an alternative argument that the word "posts" must refer not to selection posts but to posts filled by initial appointments. On this argument reservation of appointments means reservation of certain percentage in the initial appointments and reservation of posts means reservation of initial post which may be adopted in order to expedite and make more effective the reservation of appointments themselves. On this construction the use of the word "posts" appears to

be wholly redundant. In our opinion, having regard to the fact that we are construing the relevant expression "reservation of appointments" in a constitutional provision it would be unreasonable to assume that the reservation of appointments would not include both the methods of reservation, namely reservation of appointments by fixing a certain percentage in that behalf as well as reservation of certain initial posts in order to make the reservation of appointments more effective. That being so, this alternative argument which confines the word "posts" to initial posts seems to us to be entirely unreasonable. On the other hand under the construction by which the word "posts" included selection posts the use of the word "posts" is not superfluous but serves a very important purpose. It shows that reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may fall to be filled by employees after their employment. This construction has the merit of interpreting the words "appointments" and "posts" in their broad and liberal sense and giving effect to the policy which is obviously the basis of the provisions of Article 16(4). Therefore, we are disposed to take the view that the power of reservation which is conferred on the State Under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. This construction, in our opinion, would serve to give effect to the intention of the Constitution makers to make adequate safeguard for the advancement of Backward classes and to secure for their adequate representation in the services."

8. The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the state is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Article 16(4) should not make the rule embodied in Article 16(1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive to Article 16(1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The length of the leap to be provided depends upon the gap to be covered. As observed by the majority in Rangachari's case (supra) :

"The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the State may well take the view that a certain percentage of selection

posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively."

9. It is true that every reservation under Article 16(4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection - as observed by this court in *Minor A. Peeriakaruppan, etc. v. State of Tamil Nadu* : (1971 (1) SCC 38)

"It cannot be denied that unaided many sections of this country cannot compete with the advanced section of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served taking a long range view - if the backward classes are helped to march forward and take their place in line with the advanced sections of the people."

10. There was no material before the High Court and there is no material before us from which we can conclude that the impugned order is violative of Article 16(1). Reservation of appointments under Article 16(4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who assails the reservation under that article must satisfactorily establish that there has been a violation of Article 16(1).

11. For the reasons mentioned above this appeal is allowed and the order of the High court set aside. Respondent No. 1 who was the petitioner before the High court is not represented before this court. In the circumstances of this case we make no order as to costs.

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