

Makhanlal Waza and Others

Vs

State Of Jammu and Kashmir and Others

Writ Petition No. 108 of 1969

(G. K. Mitter, K. S. Hegde, A. N. Grover JJ)

23.02.1971

JUDGMENT

GROVER, J. -

1. This petition under Article 32 of the Constitution illustrates how an attempt has been made to circumvent the law declared by this Court in Triloki Nath and Another v. State of Jammu and Kashmir and Others ((1969) 1 SCR 103.) by which the State policy of reserving 50% of the vacancies among the teachers in the employment of the respondent State for the Muslims of Kashmir and out of the remaining 50%, 4% for the Jamvi Hindus and 10% for others including Kashmiri Pandits was struck down as contrary to the constitutional guarantee under Article 16.

2. The petitioners, who are ten in number, are in the service of the Education Department of the State of Jammu and Kashmir. According to the petition, petitioner No. 1 joined service in 1952 as a teacher in the Government High School, Poonch. He had passed the Bachelor of Teaching Examination and was given the Grade of Rs. 80-8-200. This grade which was of a non-gazetted post was later revised sometime before 1964 to Rs. 150-500. The gazetted post carried a grade of Rs. 300-600. Petitioner No. 2 entered service of the erstwhile State of Jammu and Kashmir in 1943 as teacher in the Government School, Tergham. He later on passed the examinations of Bachelor of Teaching and the Master of Arts and was selected in July 1968, for teaching in the Higher Secondary School. Petitioners 3 to 10 were trained graduates holding degrees of Bachelor of Education. Petitioners 3, 4, 6, 7, 9 and 10 has also passed the Master of Arts examination and with the exception of petitioner No. 10 were selected for teaching in Higher Secondary Schools in July, 1968.

3. All the teachers and other officers of the Education Department of the State were governed by the Jammu and Kashmir Civil Services (Classification, Control and Appeals) Rules, 1956, which were promulgated on June 14, 1956. Rule 9 relates to first appointment to a service or class. According to Rule 19 in making the appointment to a service or class reservation may be made in favour of any backward class which, in the opinion of the Government, is not adequately represented in the services. Rule 24 dealt with seniority. Rule 25 to the extent it is material reads :

"Promotions : (1) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of any test that Government may prescribed in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any test or special qualifications prescribed by Government unless -

(a) the promotion of a member has been withheld as a penalty; or

(b) a member is given special promotion for conspicuous merit and ability."

Articles 14 and 16 of the Constitution were made applicable to the State of Jammu and Kashmir in 1954. Rule 19 is stated to have been abrogated in the year 1958. But in giving promotions to the teachers in the gazetted cadre Respondents 1 and 2 adopted the following basis, which will be called the communal policy hereafter :

(1) 50% of the vacancies were filled from among the Muslims of the entire State;

(2) 40% out of the remaining 50% vacancies were filled by Jamvi Hindus (Hindus from the Jammu Province of the State majority of whom are Dogras), and

(3) the remaining 10% of the posts were given to others including Kashmiri Pandits.

This is purported to be done on the ground that Muslims of the entire State and the Hindus of Jammu Province constituted "backward classes" for the purpose of employment.

4. In December, 1965, Triloki Nath and Shambu Nath, the present Petitioners 2 and 4 find a writ petition in this Court. In all 81 respondents were impleaded which included the present respondents Nos. 38 to 107. In that petition it was alleged that the communal policy of promoting teachers to the gazetted cadre was not disclosed in any order made by the State but has been arrived at one the footing of the recruitment by promotion made to the gazetted post of teachers from time to time. The promotions had been made not on the basis of merit and seniority but purely on the ground of religion, caste and place of birth. This Court called for a report from the High Court on the question whether the Muslims of the entire State of Jammu and Kashmir and the Hindus of the Jammu Province constituted backward class in the sense explained in *M. R. Balaji and Others v. The State of Mysore* ((1963) Supp 1 SCR 439 : AIR 1963 SC 649 : (1963) 2 SCA 1 : (1962) Ker LT (SC) 145.) Mysore and also whether they were not adequately represented in the services of the State. (See *Triloki Nath Tiku and Another v. State of Jammu and Kashmir and Others*). ((1967) 2 SCR 265 : AIR 1967 SC 1283 : (1967) 2 SCJ 187 : (1967) 2 Lab LJ 271 : 14 Fac LR 282.) After the report was received it was found that the High Court did not record its opinion on the evidence. But this Court proceeded to give its decision on the material before it. This is what was observed at page 105 [(1969) 1 SCR 103], by Shah, J. :

"Article 16 in the first instance by clause (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression 'backward class' is not used as synonymous with 'backward caste' or backward community'. The members of an entire caste or community may in the social, economic and educational scale of values at a given time by backward and may on that account be treated as a backward class but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression 'class' means a homogeneous section of the people grouped together because of certain likeness or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in

a locality, race, religion and the like. But for the purposes of Article 16(4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted because it would directly offend the Constitution".

5. It was pointed out that no formal order making a provision for reservation of appointment to posts in favour of any backward class of citizens had been produced. There were a number of Government Orders by which the promotions had been made according to the communal policy. There was no reference in any of the orders to selection of officers on the basis that they belonged to backward classes. It was held that in effect the communal policy was not of reservation of some posts; it was a scheme of distribution of all the posts community-wise. Such distribution made in implementation of the so-called policy was contrary to the constitutional guarantee under Article 16(1) and (2) and was not saved by clause (4). The promotions granted to Respondents 3 to 83 in that petition were declared void. It was left open to the State to devise a scheme consistent with the constitutional guarantee for reservation of appointments of posts or promotions in favour of any backward class of citizens which, in the opinion of the State, was not adequately represented in the services.

6. It is common ground that no such scheme as was envisaged was devised. It has, however, been stated in the present return that certain rules has been promulgated by a notification No. S. R. O. 460, dated August 19, 1969. In the meantime the officers concerned of the Education Department of the State though of an ingenious device of giving ostensible effect to the decision of this Court. Those teachers who were respondents in the previous writ petition and whose promotions became illegal in view of the pronouncement of this Court were ordered to be adjusted in non-gazetted cadre of which the grade was Rs. 150 - 500. They were "allowed to work against the posts they were holding prior to their reversion" on temporary basis. Numerous copies of the orders which have been annexed to the petition shows that this was the common pattern that was followed. A new nomenclature was evolved for the post of Head Masters. They were called Teachers-in-charge. They were to get the same salary which they were getting when they were in the gazetted cadre of Rs. 300 - 600. For instance, if A was working as Head Master in the gazetted post and was drawing a salary of Rs. 300/- per month according to the scale of Rs. 360-600, he was stated to have been adjusted in his own grade and on his own pay, i.e., in the grade of Rs. 150 - 500. He was still to get a salary of Rs. 350/- which he would not have got if he had originally not been promoted to the gazetted cadre. In other words although such a teacher was brought into the non-gazetted cadre from the gazetted grade his emoluments and his posting as Head of an institution were not affected. It is not disputed that ordinarily he could not have been appointed to that post being far junior to the petitioners according to the seniority list of the non-gazetted cadre to which originally he had the petitioners belonged. It has been stated somewhat timely in the return of Respondents 1 and 2 that when then teachers who were affected by the decision of this Court had been promoted to the gazetted cadre not only seniority but merit had also been taken into consideration. But it has not been denied and this fact was been admitted before us in the course of arguments that but for the so-called communal policy these teachers would not have been promoted to the gazetted cadre even though merit and other factors had entered into their promotion inter se. As regards the other respondent teachers who did not figure in the earlier petition, they were all promoted to the gazetted cadre period and subsequent to the previous decision in complete defiance of law laid down by this Court. Such a course has been sought to be justified on the tenuous ground that they were not parties to the previous petition and therefore their cases would not be governed by the decision given in that petition. It may be observed immediately that such a position is wholly untenable and misconceived. The judgment which was delivered did not merely declare the promotions granted to the

respondents in the writ petition filed at the previous stage as unconstitutional but also laid down in clear and unequivocal terms that the distribution of appointments, posts or promotions made in implementation of the communal policy was contrary to the Constitutional guarantee of Article 16. The law so declared by this Court has binding on the respondent State and its officers and they were bound to follow it whether a majority of the present respondents were parties or not to the previous petition.

7. In Para 20 of the petition instances have been given which show that in spite of the judgment of this Court certain teachers who had been promoted to the post of Head Masters are still Head Masters though they are very much below Kashmiri Pandit teachers in the list of seniority. For instance, Mohd. Yusuf Masoodi, who was respondent No. 52 in the previous writ petition had been promoted to the post of Head Master, Nowhatta. Even after the judgment he was continuing as Head Master although he was placed at No. 243 in the seniority list of 1961. Messrs. Deva Kaul and Dwarika Nath who were 68 and 76 respectively in the seniority list were working as teachers under him in the same school. Masoodi was drawing a salary above Rs. 350/- per month whereas the two Kashmiri Pandit teachers were drawing only Rs. 300/- though both of them were senior to him and were not in the same grade of Rs. 150 - to which Masoodi is stated to have reverted. Similarly those teachers who were given promotions after the appointments on communal basis had been struck down had been promoted following the same rule. In Para 22 an instance is given of Ghulam Mohiuddin Wani who had been promoted as Teacher-in-Charge High School Shogapore. It is stated that his name did not appear in the seniority list whereas Triloki Nath Kaul was much senior to him but was working as a teacher under him although the salary which Kaul was getting was Rs. 250/- per month and the salary which Wani was drawing was only Rs. 210/- per month. In the return Respondents 1 and 2 have not contradicted the facts stated in Para 20 of the petition but have taken certain pleas of general nature and of legal character. Similarly with regard to Para 22 it has been stated inter alia in the return :

"As regards the individual cases referred to in Para 22 of the writ petition the averments and submissions made therein are misconceived and unwarranted and misleading."

8. Our attention has, however, not been invited to any facts or particulars relating to the aforesaid instances in the return which would throw doubt on the correctness of the instances given in the petition in Paras 20 and 22.

9. According to the petitioners the present Respondents 3 to 27 were not parties to the previous proceedings but they were promoted to the gazetted grade in an officiating capacity though they were junior to petitioner No. 1. Respondents 38 to 107 were parties to the previous petition and their promotions were expressly quashed by this Court. Respondents 108 to 218 were promoted during the pendency of the writ petition and Respondents 219 to 251, were promoted after the decision of this Court in an officiating capacity. It is abundantly clear and this position has not been controverted that all the promotions which were made of the respondents who were not parties to the previous petition were based not purely on merit but were made on account of the communal policy which had been struck down by this Court as unconstitutional. Respondents 38 to 107 who were parties to the previous petition were reverted to the non-gazetted grade but they were still retained in the posts which they were holding when they had been promoted to the gazetted grade although in some cases the nomenclature was changed from Head Master to Teacher-in-Charge. In the absence of any rules lawfully promulgated for employment of backward classes promotions could be made only in accordance with Rule 25 and there can be no manner of doubt that there was

absolute non-compliance with the provisions of that rule. The promotions thus made of all the respondent-teachers were illegal and unconstitutional being violative of Article 16 of the Constitution. They have, therefore, to be set aside. All the promotions made to the higher posts or the higher grade pursuant to the communal policy would have to be revised and reconsidered and appropriate orders must be passed by Respondents 1 and 2 with regard to them as also the petitioners in accordance with law. The new rules stated to have been framed have not been shown to us and we wish to express no opinion on their applicability.

10. The present petition shall stated allowed in the manner indicated above. The petitioners shall be entitled to their costs in this Court.

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