

Arati Ray Choudhary

Vs

Union of India and Others

Writ Petition No. 459 of 1972

(CJI A. N. Ray, V. R. Krishna Iyer, Y. V. Chandrachud, P. N. Bhagwati, D. G. Palekar JJ)

11.10.1973

JUDGMENT

CHANDRACHUD, J. –

1. The petitioner, Shrimati Arati Ray Choudhary, is a permanent employee in the South Eastern Railway - A Government of India undertaking-which runs two higher secondary schools for girls : one at Agra and the other at Kharagpur. Broadly stated, the question which we have to decide in this petition under Art. 32 of the Constitution is whether the vacancy in the post of the headmistress of the Kharagpur school can be treated as being reserved for a scheduled caste candidate, a question which depends for its decision both on the interpretation and the validity of the 'carry forward' rule. The petitioner assails that rule and contends that the vacancy is open to all candidates while respondent No. 8, who belongs to scheduled Caste, contends for a contrary position.

2. In August 1966, a vacancy arose in the post of the headmistress of the Agra school and was filled up on the footing that it was unreserved. The headmistress of the Kharagpur school was due to retire with effect from January 1, 1969 and, therefore, on December 5, 1968 the Railway administration formed a panel of candidates for selection to that post and fixed December 18, 1968 as the date for holding interviews. The names of four assistant mistresses called for selection were arranged in the panel, seniority-wish, the petitioner occupying the top place and respondent No. 8 the third place. The meeting of the 18th was stayed by the Calcutta High Court in a Writ Petition (Civil Rule No. 2117 W of 1968) brought by respondent No. 8 for readjustment of her seniority. On December 28, 1969 the petitioner was asked to take over charge of the post and on January 4, 1969 she was promoted to officiate as a headmistress, "purely on local stop-gap basis", and on the express condition that the promotion will not confer upon her any right or title to the post.

3. Respondent No. 8 then filed another writ petition in the Calcutta High Court (Civil Rule No. 499 (W) of 1969) asking that the notice of December 5, 1968 be quashed as vacancy in the post of headmistress of the Kharagpur school ought, under the relevant rules, to be treated as being reserved for a scheduled caste candidate. In the meanwhile, the stay order issued in Writ Petition 2117 of 1968 was vacated by the High Court and, therefore, on April 15, 1969 the Railway administration issued a fresh notice fixing the interviews of the four candidates on April 29. This attempt also proved abortive as respondent No. 8 obtained in Writ Petition 499 of 1969 an injunction restraining the authorities from holding the interviews.

4. On December 24, 1970 a learned single Judge of the Calcutta High Court allowed Writ Petition 499 of 1969, holding that the post in question must be treated as being reserved for a scheduled caste

candidate and that, therefore, respondent No. 8 was "alone entitled to appear before the Selection Board for her appointment as - headmistress of the said Girls school". Neither the petitioner nor the two other candidates were impleaded to this petition. The Union of India was the first respondent and the Chief Personnel Officer of the S.E.R. Railway, respondents carried an appeal (No. 454 of 1971) from the judgment of the single Judge, but it was dismissed by a Division Bench on September 14, 1971.

5. Respondent No. 8 filed three contempt petitions, one after another, against the Railway administration for their failure to comply with the directions issued by the Calcutta High Court in Writ Petition No. 499 of 1969. In the first of these petitions (Civil Rule No. 401 W of 1971), a Division Bench of the High Court, by its Judgment of June 7, 1972, asked the Railway administration to comply within a period of three months with the directions issued earlier by the High Court, by making the petitioner to appear before the Selection Board which would be at liberty to consider the suitability of the petitioner. Whether such a clarification could be made in the contempt petition filed by respondent No. 8 is open to doubt, but nothing really turns on it. The course which the other two contempt petitions took is also not relevant for the purpose of the present petition.

6. On November 6, 1971 the Chief Personnel Officer of the S.E. Railway issued a memorandum stating that it was "decided to hold a selection to draw up a panel of 2 approved candidates to fill the post of headmistress", one post being reserved for the scheduled caste against the existing vacancy and another to cover unforeseen requirement - unreserved. The petitioner filed a Writ Petition (Civil Rule No. 1395 W of 1972) in the Calcutta High Court to challenge the memorandum and in the course of connected proceedings, she impleaded to her petition the Railway administration and the Union of India, but none of her three competitors who would be directly affected by any order passed in her favour. On February 11, 1972, a learned single Judge granted an injunction in that writ petition restraining the Railway administration from making any appointment on the basis of the memorandum of November 6, 1971. Later in August, 1972, the three other assistant mistresses, including respondent No. 8, were impleaded to the writ petition.

7. Despite the order of injunction, the Railway administration issued a letter on August 19, 1972 asking respondent No. 8 to appear before a Selection Board on August 30. It is patent that in doing this the Railway administration acted contrary to the terms of the injunction dated February 11, 1972. But, they were truly between Scylla and Charybdis. On the one hand, they had to comply with the orders passed in Writ Petition No. 499 of 1969 under which they were directed to treat the vacancy as being reserved for the scheduled caste and to interview respondent No. 8 only for the post. On the other hand, they were faced with the injunction of February 11, 1972 by which they were restrained from making any appointment to the post on the basis that the vacancy was reserved for the scheduled caste. We suppose that they escaped through the horns of the dilemma by making a breach of the order which was later in point of time. But this is not one. Shrimati Lila Bhattacharyya, respondent No. 9 before us, who was one of the other contenders for the headmistress's post had also obtained injunction in a writ petition filed by her in the Calcutta High Court (Civil Rule No. 5680 W of 1970), restraining the administration from making appointment to the post of the headmistress of the Kharagpur school, without considering her claim to the post. Finally, the petitioner approached the High Court once again and on September 18, 1972 obtained an injunction once again in terms of the earlier injunction of February 11, 1972. The Railway administration had to find their way through this network of injunctions.

8. Writ Petition No. 1395 of 1972 filed by the petitioner came for hearing before a learned single

Judge on October 3, 1972 when he felt "no rule should have been issued and, in any case, no interim order should have been granted contrary to the direction of the Appeal Court by me and I did so only because I was entirely kept in the dark regarding the earlier proceeding", namely. Writ Petition 499 of 1969, filed by respondent No. 8 in which the Railway administration was asked to treat the vacancy as reserved vacancy. The learned Judge, therefore, recalled the Rule and dismissed the petition.

9. The petitioner did not appeal from this judgment but on October 11, 1972 she filed the present petition under Art. 32 of the Constitution impleading thereto, fortunately, all the necessary parties. Respondent I to the petition is the Union of India, respondents 2 to 5 are officers of the Railway administration, respondent 6 is the Union Public Service Commission while respondents 7 to 9 are the 3 rival claimants to the post of the headmistress. The petitioner prays for a mandamus asking respondents 1 to 5, (i) not to give effect to the rules relating to reservation of posts for candidates belonging to scheduled castes and scheduled tribes, particularly the carry forward rule; (ii) to withdraw the order dated November 6, 1971; (iii) to allow her, the petitioner, to continue in her post as a headmistress of the Kharagpur school, and (iv) to allow her to continue in the revised scales of pay of Rs. 700-1,100. Rule Nisi was issued on this petition on October 23, 1972 and it was directed that status quo be maintained pending the hearing of the notice of motion for stay. The interim order directing the maintenance of status quo was vacated on February 27, 1973 after hearing the respondents. The Chief Personnel Officer, thereafter, passed an order on March 21, 1973 that respondent No. 8 be posted immediately as the headmistress of the Kharagpur school, subject to certain conditions.

10. The learned Additional Solicitor-General appearing for the Union of India and respondent No. 8 appearing in person have raised a preliminary objection to the maintainability of this petition. They contend that the petitioner ought to have pursued her remedies against the judgment dated October 3, 1972 dismissing her Writ Petition (1395 W of 1972) and since she has acquiesced in that judgment it is not open to her to bring this petition under Art. 32 of the Constitution, for the same reliefs. We are not disposed to accept this objection and would prefer to deal with the petition on its merits.

11. It is true that long back in 1955 this Court had held in *M. K. Gopalan and Another v. The State of Madhya Pradesh*, that, except for good reasons the practice of approaching the Supreme Court directly under Art. 32 in matters which have been taken to the High Court and found against, without obtaining leave to appeal therefrom, is not to be encouraged. Recently in *Tilokchand Motichand and Others v. Mumshi and Another*, it was observed that this Court refrains from acting under Art. 32 if the petitioner had already moved the High Court under Art. 226. In the words of Hidayathullah, C.J., "this constitutes a comity between the Supreme Court and the High Court" and since the motivating factor is the existence of parallel jurisdiction in another Court, if that Court has been moved this Court insists on bringing the decision of that Court before it for review. But the distinguishing feature of the instant case is that the High Court dismissed the writ petition not on merits, though by a speaking order. The learned Judge thought that it was not "Just and proper" for him to entertain the petition under Art. 226 because if he were to grant any relief therein, it would clash with the judgment rendered by the Division Bench on September 14, 1971 in Appeal No. 455 of 1971 confirming the judgment of the single Judge dated December 24, 1970, holding that the vacancy must be treated as a reserved vacancy for the scheduled caste and that respondent No. 8 was alone entitled to be considered for the post from amongst the 4 candidates. The learned Judge, therefore, "recalled" the Rule and dismissed the petition without considering the merits of the contentions raised before him by the petitioner. As the petition filed in the High Court under Art.

226 was not dismissed on merits, the present petition cannot be barred by res judicata or by the application of any principle analogous to it. (See Daryao and Others v. The State of U.P. and Others and its true application as explained in the judgment of Sikri, J., Bachawat, J., Mitter, J. and Hegde, J. in Tilokchand's case at pp. 833, 839, 855 and 856 of the report).

12. Nor do we see any substance in the other preliminary objection that as in Mirajkar's case, the true grievance of the petitioner is that the judgment of the High Court has infringed her right to equal opportunity and such a grievance cannot be made. The petitioner was not a party to the proceedings in which the judgment was rendered by the High Court and her contention now is that the various rules and notifications including the carry forward rule are violative of her rights and, therefore, the memorandum of November 6, 1971 should be struck down as unconstitutional. No relief is sought by her directly or indirectly, either as a matter of substance or of form, against the judgment rendered by the High Court in the writ petition filed by respondent No. 8.

13. That takes us to the merits of the challenge made by the petitioner to the Rules providing for reservation of posts for scheduled castes and tribes. The contention is that on a true interpretation of the Rules, the vacancy in the post of the headmistress of the Kharagpur school ought to be treated as an unreserved vacancy and secondly that the carry forward provision of the rules is violative of Arts. 14 and 16 of the Constitution.

14. In *M. R. Balajir and others v. State of Mysore*, this Court struck down as unconstitutional an order by which 68 per cent of the seats in educational institutions were reserved for scheduled castes, scheduled tribes and the other educationally and socially backward classes. The Court was reluctant to suggest a proper percentage to reservation but bearing in mind that "the interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole", it observed that "speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case".

15. Following this decision, the majority observed in *Devadasan's case*, that in order to effectuate the guarantee contained in Art. 16(1), each year of recruitment has to be considered separately by itself for, "the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities". The rule which fell for consideration in that case was contained in a memorandum dated January 28, 1952 of the Ministry of Home Affairs, as modified by the memorandum of May 7, 1955. The memorandum provided : "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, 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 the year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year". However, the unutilised quota was not to be carried forward for more than two years. As a result of the carry forward Rule 29 out of 45 vacancies were filled from amongst the members of scheduled castes and scheduled tribes, the percentage of reservation coming to 64.4. The rule was struck down as reservation of vacancies in excess of 50 per cent was deemed unconstitutional.

16. The decision in *Devadasan's case* (supra) was rendered on August 29, 1963 and on December 4, 1963 the Ministry of Home Affairs issued a memorandum modifying the carry forward rule so as to

comply with the decision. By Para 2 of the memorandum (as amended by the memorandum of September 2, 1964), the carry forward rule was amended by providing that "in any recruitment year, the number of normal reserved vacancies and the 'carried forward' reserved vacancies together shall not exceed 45 per cent of the total number of vacancies". Nevertheless, "if there be only two vacancies, one of them may be treated as a reserved vacancy. But if there be only one vacancy, it shall be treated as unreserved..... The surplus above 45% shall be carried forward to the subsequent year of recruitment, subject, however, to the condition that the particular vacancies carried forward do not become time barred due to their becoming more than two years old". The note appended to the Rule defines a 'Recruitment Year' as a 'calendar year' and says that for purposes of the two year limit for the carry forward of reserved vacancies, recruitment year shall mean the year in which recruitment is actually made.

17. By a letter dated October 6, 1964 of the Railway Board, this note was modified in its application to the Railway Services to the extent that 'recruitment year' was to be the financial year and not the calendar year.

18. Acting in pursuance of the Home Ministry's Memorandum dated December 4, 1963 as modified from time to time, the Railway Board by its letter of January 16, 1964 prepared a new "Model Roster" signifying the turns of reserved and unreserved vacancies. Under this Roster 12.5 per cent of the vacancies were reserved for scheduled castes and 5 per cent for the scheduled tribes. The Roster runs thus :

"Point on the Roster Whether unreserved or Reserved for 1 Scheduled Caste 2-3
Unreserved 4 Scheduled Tribes 5-8 Unreserved 9 Scheduled Castes 10-16
Unreserved 17 Scheduled Castes 18-20 Unreserved 21 Scheduled Tribes 22-24
Unreserved 25 Scheduled Castes 26-32 Unreserved 33 Scheduled Castes 34-40
Unreserved."##

The note appended to the Roster contains an important explanation : "If there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved. If on this account a reserved post is treated as unreserved, the reservation may be carried forward in the subsequent two recruitment years. " In order to remove a still surviving grievance of the scheduled castes and scheduled tribes that in spite of the model roster they were denied appointments whenever there was a single vacancy, such vacancies being invariably treated as unreserved irrespective of the point of the roster at which they occur, the Railway Board by their letter of August 23, 1971 "desired" that "if there is one post to be filled, selection should invariably be held for two posts, i.e., one actual and the other to cover unforeseen circumstances. " It was in pursuance of these instructions that on November 6, 1971 the Chief Personnel Officer of the S.E. Railway issued the impugned order stating that it was "decided to hold a selection to draw up a panel of 2 approved candidates to fill the post of headmistress..... (i) One post (reserved for scheduled caste) against an existing vacancy; (ii) One post to cover unforeseen requirement-unreserved".

19. We have set out the rules leading to the final order in some fullness with a view to showing how, from time to time, the rules were adapted to meet the requirements of the law declared by this Court. The vice of rules impugned in Devadasan's case was that though the unutilised reserved quota could not be carried forward for more than 2 years, the carry forward mechanism envisaged by the rules could almost completely swamp recruitment to open general seats. The Court illustrated the "startling effect of the carry forward rule" contained in the memorandum of January 28, 1952 as

modified in 1955 by taking a hypothetical example. If in each of the first 2 years of recruitment, the total number of seats to be filled in was 100, 18 vacancies would have to be treated as reserved in each year. If suitable candidates were not available to fill these reserved vacancies the reservation would have to be carried forward to the third year, though not beyond it. If the total number of seats for recruitment in the third year was 50, the backlog of 36 seats with the addition of 9 reserved seats for the current year would cover 45 out of 50 vacancies, leaving only 5 vacancies for open recruitment. This vice was effectively rectified soon after the judgment in Devadasan's case, by the issuance of the memorandum of December 4, 1963 as amended on September 2, 1964. It was specifically directed by these curative prescriptions that "in any recruitment year, the number of normal reserved vacancies and the 'carried forward' reserved vacancies together shall not exceed 45 per cent of the total number of vacancies". The rules thus are no longer open to the objection that the reservation is so excessive as to create in Government employment a monopoly in favour of backward classes or to disturb unduly the legitimate claims of other communities.

20. The model roster accompanying the letter of the Railway Board dated January 16, 1964 is designed to meet the requirements of the new situation arising out of the rules framed in deference to the judgment in Devadasan's case. Both the letter and the note appended to the roster state expressly that if "there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved." The words "on a particular occasion" were substituted on September 2, 1964 by the words "year of recruitment". Thus, in the first place, if each year of recruitment is directed to be considered separately and by itself as laid down in Devadasan's case (*supra*) so that if there are only two vacancies to be filled in a particular year of recruitment, not more than one vacancy can be treated as reserved Secondly, and that is directly relevant for our purpose, if there be only one vacancy to be filled in a given year of recruitment, it has to be treated as unreserved irrespective of whether it occurs in the model roster at a reserved point. The appointment then is not open to the charge that the reservation exceeds 50% for, if the very first vacancy in the first year of recruitment is in practice treated as a reserved vacancy, the system may be open to the objection that the reservation not only exceeds 50% but is in fact cent per cent. But if "on this account", that is to say, if on account of the requirement that the first vacancy must in practice be treated as unreserved even if it occurs in the model roster at a served point, "a reserved point is treated as unreserved", the reservation can be carried forward to not more than two subsequent years of recruitment. Thus, if two vacancies occur, say, within an initial span of three years, the first vacancy has to be treated as an unreserved vacancy and the second as reserved.

21. That is precisely what happened here. The S.E. Railway runs only two Secondary Girls School, one at Agra and the other at Kharagpur. The vacancy at Agra was filled on August 16, 1966 by the appointment of the seniormost Assistant Mistress, Smt. Gita Biswas. In pursuance of the memorandum dated December 4, 1963 of the Ministry of Home Affairs, the Railway Board revised the model roster by their letter of January 16, 1964. The first point in this roster is a reserved point and, therefore, the Agra vacancy was strictly a reserved vacancy. But there being only one vacancy in the particular year of recruitment, it had to be treated as unreserved and therefore, the appointment went to Smt. Biswas, an open, not a reserved, candidate. This, however, had to be compensated for by carrying forward the reservation, though not over more than 2 subsequent recruitment years. For the purpose of services under the Railway administration 'recruitment year' means the 'financial year' and the Agra appointment having been made in the financial year 1966-67, it was permissible to carry forward the reservation till the close of the financial year 1968-69. There was no vacancy in 1967-68. The vacancy in the post of the headmistress of the Kharagpur school occurred in the financial year 1968-69 by the retirement of Smt. Bina Devi with effect from

December 31, 1968. This vacancy indubitably had to be treated as a reserved vacancy and since from amongst the 4 assistant mistresses, respondent No. 8 was the only candidate belonging to the scheduled caste, she was entitled to be considered for selection to the post of the headmistress, to the exclusion of the other 3. The claims, if any, of the petitioner who is not a reserved candidate have to be postponed, though in the normal course it may be quite some years before she gets her turn. The Adra Headmistress and respondent No. 8 would seem to have a long tenure in their respective office.

22. It is urged that only one vacancy occurred in 1968-69 and since the letter of the Railway Board dated January 16, 1964 says that "if there be only one vacancy, it should be treated as unreserved" the Kharagpur vacancy must be treated as unreserved. Such a construction would rob the rule of its prime significance and will render the carry forward provision illusory. Though each year of recruitment is to be treated separately and by itself, a reserved vacancy has to be carried forward over 2 years, if it is not filled in by the appointment of as reserved candidate. The open class reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved by the appointment of an open candidate, Smt. Gita Biswas. If the carry forward rule has to be given any meaning, the vacancy shall have to be carried forward for the benefit of scheduled castes and scheduled tribes until the close of the financial year 1968-69. The Kharagpur vacancy was to be filled in on January 1, 1969 and hence it cannot go to the petitioner who, admittedly, does not belong to the reserved class. The construction sought to be put on the rule by the petitioner would perpetuate a social injustice which has clouded the lives of a large section of humanity which is struggling to find its feet. Such a construction is contrary to the plain language of the letter of the Railway Board, the intendment of the rule and its legislative history.

23. We may mention before we close that the posts of Headmistresses of the Railway Higher Secondary schools were upgraded in 1969 as Class II posts and in 1970 as Class I posts. The reservation for scheduled castes and scheduled tribes in Class II posts was abolished with effect from October 4, 1962 and in regard to Class I posts, there never was any such reservation. Different considerations may, therefore, apply to future recruitment to these posts, but with that we are not concerned here. Nor are we concerned to consider the Indian Railways Higher Secondary School Recruitment Rules, 1972, which, now are said to govern recruitment to the posts of Headmistresses.

24. We hope that this judgment will finally ring down the curtain on the various proceedings pending in the Calcutta High Court together with various interim orders passed therein concerning the appointment to the headmistress's post in the Kharagpur school.

25. In the result the petition fails and the rule is discharged, but there will be no order as to costs.

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