

Comptroller and Auditor General of India and Others

Vs

Mohan Lal Mehrotra and Others

Civil Appeal No. 1518 of 1980

(K. Jagannatha Shetty, Yogeshwar Dayal JJ)

11.10.1991

JUDGMENT

YOGESHWAR DAYAL, J. –

1. This appeal by special leave is directed against the judgment of the Division Bench of the High Court of Allahabad dated August 21, 1979 whereby the High Court allowed the writ petition filed by the four petitioners therein and issued a writ of mandamus directing respondents 1, 2 and 3 (Comptroller & Auditor General of India, New Delhi, the Accountant General I, U.P. Allahabad and the Union of India) not to enforce the circular dated January 25, 1973 as a rule regarding reservation of Scheduled Caste and Scheduled Tribes in relation to filling up of posts by promotion on the basis of seniority subject to fitness. The aforesaid respondents were further restrained from promoting respondents 4, 5 and 6 in the writ petition to the post of Accounts Officers on the basis of the impugned circular dated January 25, 1973. We would continue to refer to the parties as per the cause title of the writ petition in the High Court.

2. The writ petition came to be filed by the petitioners, M. L. Mehrotra and three others. The petitioners said to be working as Section Officers in the office of the Accountant General I, II and III, Allahabad and they prayed for restraining respondents 1, 2 and 3 from promoting Yamuna Prasad Kureel, respondent 4, Ram Raj Ram, respondent 5 and Ram Dihal, respondent 6, in the writ petition, who were working as Section Officers and belonged to the Scheduled Caste, to the post of Accounts Officer.

3. The case of the writ petitioners was that they were senior to respondents 4, 5 and 6 and they cannot be promoted to the post of Accounts Officers through seniority quota before the writ petitioners. Their case was that the promotion to the post of Accounts Officers is regulated by the rules made by the President in exercise of the powers conferred by proviso to Article 309 and clause (5) of Article 148 of the Constitution after consultations with the Comptroller & Auditor General of India. These rules are known as "Indian Audit and Accounts Department (Administrative Officers, Assistant Accounts Officers and Assistant Audit Officers) Recruitment Rules, 1963" (hereinafter referred to as the Rules). In the counter-affidavit filed it was pleaded that the Assistant Accounts Officers and Assistant Audit Officers are now called Accounts Officers and Audit Officers. The aforesaid rules lay down the method of recruitment to the post of Administrative Officers, Assistant Accounts Officers and Assistant Audit Officers in the Indian Audit and Accounts Department. The method of recruitment laid down in these rules in respect of these posts is by promotion. They do not contain any specific provisions for reservation for Scheduled Casts and Scheduled Tribes.

4. The appellants herein relied upon the administrative instructions contained in the circular letter

dated January 25, 1973 issued by the Comptroller & Auditor General of India for the purpose of reservation for Scheduled Castes and Scheduled Tribes for these promotion posts. The writ petitioner challenged the validity of these administrative instructions contained in the circular dated January 25, 1973.

5. It was further pleaded that the lowest post in the office of the Accountant General U.P. I, II and III is of group 'D' employees who are selected directly on the basis of merit. There is a quota fixed for Scheduled Castes and Scheduled Tribes. Then there are posts of Clerks, a fixed quota percentage of which is filled in directly through examination and quota is fixed for Scheduled Castes and Scheduled Tribes. The remaining posts of clerks are filled in by selection from group 'D' employees by promotion on the basis of seniority. The next higher posts are the post of Auditors a fixed percentage whereof is filled in directly through examination and a quota is fixed for Scheduled Castes and Scheduled Tribes. The remaining posts of Auditors are filled in by promotion from clerks on the basis of seniority. The next higher post is of Section Officers in which the writ petitioners and respondent to the writ petition were working. These posts are filled in from the cadre of Auditors and clerks. The Auditors as well as clerks have to pass examination known as Subordinate Accounts Service. Normally more candidates pass this examination than the number of posts available for the Section Officers. Here also there is a quota fixed for Scheduled Tribes candidates.

6. The post of Accounts Officers (i.e. the posts in question) are filled in by promotion from Section Officers. 50 per cent of the vacancies are filled in on the basis of merit (called the merit quota) and the remaining 50 per cent are required to be filled in on the basis of seniority (called seniority quota). Normally the number of candidates available in the merit quota are less than 50 per cent of the posts available; hence the number of posts available in seniority quota is usually more than 50 per cent. It was pleaded in the counter-affidavit that the promotion will continue to be made in accordance with the existing rules and orders on the subject namely those referred to above including the circular dated January 25, 1973, validity of which had been challenged.

7. The High Court took the view (1) that there is no reservations for the Scheduled Castes and Scheduled Tribes made under the rules; (2) that the administrative instructions contained in the circular No. 172-NGE-II/56-72-I dated January 25, 1973 issued from the office of Comptroller & Auditor General of India, New Delhi, inter alia, to all the Accountants General and the offices subordinate to them, on its own did not make a provision for the proposed reservation in pursuance to the policy decision. (3) It also took the view that the statutory rules were not silent on the subject of promotion to the post of Assistant Accounts Officer (now called Accounts Officers). This being so, it was not open to the government to supplement the statutory rules to fill up the gaps. This could be done by only amending the statutory rules in compliance with the provisions of Article 148(5) of the Constitution. The High Court drew support from an Division Bench of the Madras High court in *Accountant General, Tamil Nadu v. S. Doraiswami* (1974 Lab IC 384 : (1973) 2 MLJ 465 : 86 Mad LW 730) and the decision of the Orissa High Court in the Original Jurisdiction Cases No. 357 and 359 of 1977, *P. Prabhakar Rao v. Union of India* (Original Jurisdiction Cases Nos. 357 and 359 of 1977, decided on July 31, 1978) decided on July 31, 1978. The High Court took the view that the administrative instructions contained in the circular letter dated January 25, 1973 cannot help respondents and no reservations for Scheduled Castes and Scheduled Tribes can be made on that basis. The High Court accordingly allowed the writ petition as stated earlier.

8. Before the High Court the counsel for the Writ petitioners also submitted that the administrative instructions contained in the circular dated January 25, 1973 could not be said to be the rules made

by the President after consultations with the Comptroller & Auditor General of India as contemplated by Article 148(5) of the Constitution and referred to the language of the circular letter dated January 25, 1973. A supplementary counter-affidavit of Shri P. P. Dhir, Accountant General I had also been filed where it was stated that the language used in the circular in substance, are the orders of the President. The High Court took the view that no other material has been referred to in the counter-affidavit filed, which will show that the instructions contained in the circular dated January 25, 1973 were based on the decision of the President of India. However, the High Court held that they considered it unnecessary to go into this question any further since they had already held that the administrative instructions contained in the circular were of no avail to the respondents in the writ petition as they could not alter the statutory rules in force.

9. It appears the Department of Personnel issued a memorandum No. 27/2/71. Estt.(SCT) dated November 27, 1972 to all ministries. The subject of this memorandum was reservation for Scheduled Castes and Scheduled Tribes in posts filled by promotion on the basis of seniority subject to fitness. This memorandum noted in paragraph 2 thereof that the policy in regard to reservation for Scheduled Castes and Scheduled Tribes Officers in posts to be filled by promotion on the basis of seniority subject to fitness now has been reviewed and it has been decided, in supersession of the orders contained in the aforesaid para 2-C of the O.M. dated July 11, 1968, that there will be reservation at 15 per cent for Scheduled Castes and 7 1/2 per cent for Scheduled Tribes in promotions made on the basis of seniority subject to fitness, in grades or services in which the element of direct recruitment, if any, does not exceed 50 per cent and gave detailed procedure how promotions have to be made on the basis of seniority subject to fitness in the light of the aforesaid reservations. It was stated in the memorandum that the Ministry of Finance etc. are requested kindly to bring the above decisions to the notice of all attached and subordinate offices under them and semi-government and autonomous bodies. This memorandum also stated in paragraph 6 thereof as under :

"Insofar as officers serving under Indian Audit and Accounts Department are concerned, separate orders will issue in due course."

10. Thereafter, Shri S. Krishnan, Deputy Secretary, Department of Personnel, Cabinet Secretariat, New Delhi wrote a D.O. No. 27/2/71-Est(SCT) dated January 1, 1973 to Shri R. Hariharan, Assistant Comptroller & Auditor General of India, New Delhi, In this letter the Deputy Secretary of the Department of Personnel wrote as under :

Dear Shri Hariharan

Please refer to your do letter No. 2859/NGE II/56-72 dated November 24, 1972 regarding reservations for Scheduled Castes and Scheduled Tribes in posts filled by promotion on the basis of seniority subject to fitness.

2. A copy of the orders issued in this department's O.M. No. 27/2/71-Est (SCT) dated November 27, 1972 has already been endorsed to the C & AG. A copy of the said O.M. is enclosed for ready reference. We shall be grateful to know whether separate instructions which are proposed to be issued by C & AG in this regard in respect of persons serving under the Indian Audit and Accounts Department have since been finalised. The draft of the instructions may please be shown to us, if since finalised. I need hardly emphasise that it is desirable to expedite issue of such orders.

# Yours sincerely, sd/- (S. Krishnan)###

11. Thereafter, the Assistant comptroller & Auditor General (P) also met the said Deputy Secretary of the Department of Personnel and also sent a draft of instructions proposed to be issued to the offices under the Comptroller & Auditor General of India to Deputy Secretary, Department of Personnel vide a D.O. letter No. 20-NGE-II/56-72-I dated January 5, 1973 by Shri R. Hariharan, Assistant Comptroller & Auditor General, Office of Comptroller & Auditor General of India, New Delhi. Alongwith this letter a draft of instructions proposed to be issued to the offices under the Comptroller & Auditor General was for-warded. The Deputy Secretary, Department of Personal Shri S. Krishnan vide their communication dated January 22, 1973 informed Shri R. Hariharan aforesaid, that the draft of instructions proposed to be issued were in order and it was requested that a copy of the instructions when issued may be sent to their department. It was in pursuance of these consultations that the impugned circular dated January 25, 1973 was issued from the officer of the Comptroller & Auditor General of India, New Delhi. For facility of understanding the relevant part of the circular dated January 25, 1973 issued from the office of the comptroller & Auditor general of India, New Delhi is reproduced hereunder :

##No. 172-NGE-II/56-72-IOffice of the Comptroller& Auditor General of India, New Delhi-1.Dated the January 25, 1973.ToAll Accountants General and offices subordinate to them.All chief Auditors of Rlys. and offices subordinate tothem.All Regional Directors of Commercial Audit, Chief Auditorsof Commercial Accounts and officers subordinate to them.The Director, IA & AS Staff College, Simla.The Director of Audit, Defence Services and officessubordinate to him.The Assistant Comptroller & Auditor General (P). (For GEI, GE II and OE & A Sections)Subject : Reservation for Scheduled Castes and Scheduled Tribes in posts filled by promotion - promotions on the basis ofseniority subject to fitness##

Sir

I am to invite a reference to para 3 (c) - of this officer circular letter No. 1989 NGE II/89-68 dated October 3, 1968 according to which there is no reservation for Scheduled Castes and Scheduled Tribes in appointment made by promotion on the basis of seniority subject to fitness although cases involving supersession of Scheduled Castes and Scheduled Tribe officers in class II appointments are required to be submitted for prior approval of the Comptroller & Auditor General of India and the cases involving supersession of Scheduled Caste and Scheduled Tribe officers in class III and class IV appointments have to be reported within a month to the Comptroller & Auditor General of India for information.

2. The policy in regard to reservations of Scheduled Caste and Scheduled Tribe officers in posts filled by promotion on the basis of seniority subject to fitness has now been reviewed by the Government of India in consultation with the Comptroller & Auditor General of India and it has been decided, in supersession of the orders contained in the aforesaid para 3(c) of our circular letter dated October 3, 1968 that there will be reservation at 15 per cent for Scheduled Castes and 7 1/2 per cent for Scheduled Tribes in promotions made on the basis of seniority subject to fitness in appointments to all class I, class II class III and IV posts in grades, of services in which the elements of direct recruitment, if any does not exceed 50 per cent.

3. The above orders will necessitate reservation for Scheduled Castes and Scheduled Tribes in promotions made on the basis of seniority subject to fitness to the following grades in the IA & AD.

Promotions from class III to class II

The existing procedure of promotions to AOs grade will not undergo any change, as far as the posts filled by selection is concerned. Reservation to the extent of 15 per cent for Scheduled Castes and 7 1/2 per cent for Scheduled Tribes will, however, have to be made with reference to the number of posts of Accounts Officers filled in a years on the basis of seniority subject to fitness and for this purpose, a roster maintained in respect of such promotions.

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4. The following procedure may be followed to go give effect to the decision mentioned in paragraph 2 above.

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4. The above instructions take effect from November 27, 1972 except where a Select List, if any, for promotion by seniority subject to fitness has already been prepared by a Departmental Promotion Committee and approved by the appropriate authority before issue of these orders (i.e. November 27, 1972).

The receipt of this circular letter may kindly be acknowledged.

# Yours faithfully, sd/- (R. Hariharan) Asstt. Comptr. & Ar. Genl. (N)##

12. The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact, it is silent on the subject of reservation. The government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory rules. (See : the observation in Sant Ram Sharma v. State of Rajasthan ((1968 1 SCR 111 : AIR 1967 SC 1910 : (1968) 2 LLJ 830)). In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway service both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India((1981) 1 SCC 246 : 1981 SCC (L&S) 50).

13. The High Court has also touched upon the validity of the impugned circular and stated that they were not issued by the President after consultation with the Comptroller & Auditor General. In the present case, the President has not issued the circular, but Comptroller & Auditor General has issued it. There was however, proper consultation between the government and the Comptroller & Auditor General for issuing the circular. The infirmity pointed out that it was not issued in the name of the President, therefore, relates only about the form and not with regard to the substance. The circular of course, ought to have been issued in the name of the President as required under Article 148(5) of the Constitution, as it affects the service conditions of persons in the Audit and Accounts Department. But since the government has approved the circular and the circular was in accordance with the declared policy of reservation, we do not want to restrain the Comptroller & Auditor General from enforcing it.

14. We are thus of the view that the impugned circular is valid and binding. The circular by its own provides for reservation. The authorities concerned must take that into account while effecting promotions under the rules. The result is that the impugned judgment of the High Court is set aside and appeal is allowed.

15. In the circumstances of the case, however, we make no order as to costs.

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