

Union of India and Another

Vs

Madhav S/o Gajanan Chaubal and Another

Civil Appeal No. 12871 of 1996

(K. Ramaswamy, Faizanuddin JJ)

18.09.1996

ORDER

1. Delay condoned.

2. Leave granted.

3. On the last occasion when the matter had come up after notice, since the respondents were not represented either in person or through counsel and when the counsel had pointed out the decision followed by the Tribunal, namely, Chakradhar Paswan (Dr.) v. State of Bihar [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104], this Court had referred the matter to a three-Judge Bench. Thus, the matter has come up today. Even now, none is appearing for the respondent; not are they appearing in person. We have taken the assistance of Shri Goswami, learned Senior Counsel. We requested him to place on record the decisions for or against him. He has fairly argued the case.

4. The admitted facts are that in National Savings Scheme Service, the Government had created various posts up to the post of Superintendent; there are a number of posts but there is only one post of Secretary. This post is a feeder post for promotion as Regional Deputy Director in which category there are several posts. The Government applied the rule of reservation by rotation to the vacancies in the post of Secretary. 40-point roster is also being applied to these vacancies. In the past of Secretary, point No. 4 vacancy was reserved for Scheduled Tribes. When that vacancy was sought to be filled up by promotion from the Superintendents in Group A category from Scheduled Tribe candidates, the respondent filed OA in the Central Administrative Tribunal at Bombay. The Tribunal, following the decision of this Court in Paswan case [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104], by order dated 11-3-1992 in Madhav Gajanan Chaubal v. Union of India [(1993) 23 ATC 465 : (1992) 3 SLJ (CAT) 35 (Bom)], set aside the promotion holding that since the post of Secretary is a single point post, no reservation could be granted to the reserved candidates as it would amount to 100% reservation; therefore, it is unconstitutional. Thus, this appeal by special leave.

5. The question is whether the application of 40-point roster to the successive vacancies in the post of Secretary violates Article 16(1) of the Constitution ? Shri Goswami has contented that in Paswan case [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104], that question was left open since the controversy did not arise therein on those facts. Since the Government have decided that when in a single post vacancy arises as per roster point and when candidates belonging to Scheduled Castes or Scheduled Tribes are available, then the vacancy reserved for respective Scheduled Caste

or Scheduled Tribe could be considered as per rules for appointment by promotion to the post of Secretary. In the absence of their availability, the vacancy would be and is being carried forward. Therefore, the principle of rotation applied to a single post is not violative of Article 16(1) of the Constitution. He has taken us through various judgments of this Court concerning the question.

6. In *G.M., Southern Rly. v. Rangachari* [(1962) 2 SCR 586 : AIR 1962 SC 36], the Constitution Bench, per majority, had held that appointment by reservation to the selection post was not violative of Article 16(1) of the Constitution. The same principle was followed in the case of promotion in *State of Kerala v. N. M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906]. In *State of Punjab v. Hira Lal* [(1970) 3 SCC 567] and *Akhil Bhartiya Soshit Karmchari Sangh (Rly.) v. Union of India* [(1981) 1 SCC 246 : 1981 SCC (L&S) 50 : (1981) 2 SCR 185] and *Comptroller & Auditor General of India v. K. S. Jagannathan* [(1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : (1986) 2 SCR 17], the matters were referred to a larger Bench. In *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385], per majority, the Bench of nine Judges of this Court had held that Articles 16(1) and 16(4) do not apply to appointment by promotion. They would be applicable only to initial appointments. By Section 2 of the Constitution (77th Amendment) Act, 1995, Article 16(4-A) was introduced which envisages that nothing in this Article shall prevent the State from making any provision in reservation in matter of promotion to any class or classes of posts in the service under the State. It is well-settled legal position that Preamble to the Constitution is part of the Constitution. In *S. R. Bommani v. Union of India* [(1994) 3 SCC 1], this Court had held that Preamble to the Constitution is a part of its basic structure. Socio-economic justice, equality of opportunity and of status, dignity of persons are the arch of the Constitution. Social Justice is a fundamental right as held in *LIC v. Consumer Education and Research Centre* [(1995) 5 SCC 482]. Economic empowerment to the poor was held to be a fundamental right in *H. B. Usha v. D. S. Ramachandra* [1995 Supp (2) SCC 49]. Article 335 mandates the State to take into consideration the claims of the Dalits and Scheduled Tribes for appointment to a post or office under the State, consistent with efficiency of administration. Article 46 enjoins upon the State to provide socio-economic and educational facilities and opportunities. Government evolved reservation in posts or offices under the State as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in a service under the State is one of the means to render socio-economic justice. The Constitution (77th Amendment) Act, 1995 has resuscitated the above objective to enable the Dalit and Scheduled Tribe employees to improve excellence in higher echelons of service and a source of equality of opportunity in the matter of social and economic status guaranteed by the Preamble to the Constitution. As a consequence, Parliament has removed the lacuna pointed out by this Court in *Indra Sawhney* case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. Thus, it would be seen that the legal position held by this Court in *Rangachari* case [(1962) 2 SCR 586 : AIR 1962 SC 36] and followed in other cases has been restored and reservation of appointment by promotion would be available to the members of the Scheduled Castes and Scheduled Tribes as per 50% quota as is maintained by this Court in *Indra Sawhney* case [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. The carry forward principle has also been upheld in *Indra Sawhney* case. [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]. In *Commr. of Commercial Taxes v. G. Sethumadhava Rao* [(1996) 7 SCC 512 : 1996 SCC (L&S) 630 : (1996) 33 ATC 320] a Bench of three Judges and in *M. Venkateswarlu v. Govt. of A.P.* [(1996) 5 SCC 167] a Bench of two Judges have held that right to reservation in promotion stands restored by the Constitution (77th Amendment) Act which introduced clause (4-A) to Article 16.

7. The question, therefore, arises whether the Government would be justified in law to provide

reservation in promotion in a single post by rotating the vacancy as per the roster point prepared by the Government ? It is true that in Paswan case [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104], with a view to provide reservation to the Scheduled Castes to the post of Director which is a single post, was fused with two posts of Deputy Directors which do not carry the same scale of pay. Therefore, this Court had pointed out that the cadre would mean the cadre carrying the same scale of pay. Since the Deputy Directors are not carrying the same scale of pay they cannot be fused together for applying the principle of reservation. By implication, this Court had accepted that two or more single posts carrying the same scale of pay would be fused to elongate the constitutional objective of providing reservation to a post in the service or office of the State. It was then held that a single post cannot be reserved which amounts to 100% reservation and, therefore, it is violative of Article 16(1) of the Constitution. The further question whether in the same single point post, reservation by rotation could be granted and whether it will be violative of Article 16(1) was left open in that case. The Constitution Bench of this Court in Arati Ray Choudhary v. Union of India [(1974) 1 SCC 87 : 1974 SCC (L&S) 73 : (1974) 2 SCR 1] considered the question of the single post and applied the rule of reservation by rotation to the carried forward post and filled the post when reserved candidates were available on the carried forward posts. In this regard, this Court had laid down this : (SCC p. 94, para 21)

"That is precisely what happened here. The S.E. Railway runs only two Secondary Schools for girls, one at Adra and the other at Kharagpur. The vacancy at Adra was filled on 16-8-1966 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 Adra vacancy was strictly a reserved vacancy. But there being only one vacancy in the particular year of recruitment, it has 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 purposes of Services under the Railway administration 'recruitment year' means the 'financial year' and the Adra 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 31-12-1968. This vacancy, indubitably, had to be treated as a reserved vacancy and since from amongst the 4 Assistant Mistresses, Respondent 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 8 would seem to have a long tenure in their respective offices."

8. Accordingly, it was held that in carried forward post in a single post, reservation would be applied and the vacancies, after carrying forward, would be filled up by promotion from the members of the Scheduled Castes. This principal would apply in a single post carried forward by applying rotation and it would be consistent with the principal of equality envisaged under Articles 14 and 16(1) of the Constitution. Articles 14 and 16(1) equally apply to Scheduled Castes and Scheduled Tribes and they too are entitled to seek equal opportunity to hold the single post by

promotion. Otherwise, it would amount to total prohibition of opportunity to hold the single point post which also violates Articles 14 and 16(1). A three-Judge Bench was to consider the same question in *Sou. Vidyulata Arvind Kakade v. Digambar Gyanba Surwase* [CA No. 242 of 1992 decided on 17-1-1992 [Coram : M. H. Kania, C.J., T. K. Thommen, J. and A. S. Anand, J.] in a short judgment. This Court stated thus :

"We have also perused the judgment of the Constitution Bench and the Division Bench of this Court in *Arati Ray Choudhary v. Union of India* [(1974) 1 SCC 87 : 1974 SCC (L&S) 73 : (1974) 2 SCR 1] and *Dr. Chakradhar Paswan v. State of Bihar* [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104] respectively. No copy of the writ petition has been filed in this Court. There is no material on record to show that the Resolution providing for reservation provides that the reservation has not be applied in isolated posts which is the basis of the challenge in this petition."

9. It would thus be seen that this Court has accepted that reservation could be provided even to the isolated posts on the basis of the rule of rotation. Extension of reservation in such cases is not unconstitutional. On the other hand, such scheme provides opportunity and facilities so Scheduled Castes and Scheduled Tribes to be considered for promotion to hold single posts consistent with equality of opportunity on a par with others. In *R. K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] a Constitution Bench of this Court considered whether the reservation as per the roster in promotion could be valid and consistent with Article 16(1) of the Constitution. This Court had pointed out that the reservation to the post as per the roster for the purpose of promotion is valid in law. The same can be filled up applying the roster points prescribed by the Government. When a candidate belonging to the Backward Classes is appointed by promotion on merit, he cannot be considered to be reserved candidate; the candidate appointed on rule of reservation would be fitted into the post on the basis of roster point available to the reversed candidates. In *Chetana Dilip Motghare v. Bhide Girls' Education Society* [1995 Supp (1) SCC 157 : 1995 SCC (L&S) 312 : (1995) 29 ATC 107] a Bench of two Judges of this Court considered whether reservation to a single post could be valid in law. Though the decision in *Vidyulata Arvind Kakade* case [CA No. 242 of 1992 decided on 17-1-1992 [Coram : M. H. Kania, C.J., T. K. Thommen, J. and A. S. Anand, J.] was brought to the notice of the learned Judges, the learned Judges found that it did not lay down any contra principle to the one laid down by this Court in *Paswan* case [(1988) 2 SCC 214 : 1988 SCC 516 : (1988) 7 ATC 104] and, therefore, it was held that single point post could be not be reserved for promotion. With due respect, we hold that the learned Judges have not correctly appreciated the ratio laid down by this Court in *Vidyulata* case [CA No. 242 of 1992 decided on 17-1-1992 [Coram : M. H. Kania, C.J., T. K. Thommen, J. and A. S. Anand, J.] and *Arati Choudhary* case [(1974) 1 SCC 87 : 1974 SCC (L&S) 73 : (1974) 2 SCR 1]. In *State of Bihar v. Bageshwari Prasad* [1995 Supp (1) SCC 432 : 1995 SCC (L&S) 506 : (1995) 29 ATC 349], the Bihar Government had provided by way of a circular, the rule of rotation to a single post and applied the roster point for providing promotion to the vacancies that has arisen in accordance with roster point. This Court had upheld the rule of reservation and held that reservation to the single post by applying the rule of rotation is not violative of Articles 14 and 16(1) of the Constitution. The judgment in *Paswan* case [(1988) 2 SCC 214 : 1988 SCC (L&S) 516 : (1988) 7 ATC 104] was distinguished.

10. Thus, we hold that even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidates belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution.

11. In the case, it is seen that the post of Secretary is carrying the scale of pay of Rs. 2200-4000. The Government have decided to apply the 40-point roster maintained for the post of Secretary. The vacancy available at the time of point No. 4 of the roster was reserved for the Scheduled Tribes. When the Department had sought for the clarification from the Department of Personnel and Training, the Government of India stated thus :

"There is no change in the position. However, it may be stated that unless this Department changes the earlier instructions, the old order will remain in force. Thus the Supreme Court judgment cannot be made applicable to other cases automatically."

12. Thus, the Government have adhered to the rule of rotation to a single post and the 40-point roster to the single post was applied and the vacancy reserved for the Scheduled Castes and Scheduled Tribes as and when had arisen, was sought to be filled up, when the candidates were available. Thus, we hold that the roster point No. 4 in the vacancy of the Secretary reserved for the Scheduled Tribes was valid and constitutional. When the officer available was eligible to be considered, he was entitled to be considered in accordance with the rules and be promoted as Secretary. The Tribunal, therefore, was not right in directing that the rule of rotation to the single post could not be applied. It is brought to our notice that the original promotee died pending the proceedings and, therefore as and when vacancy arises as per rule of rotation as per roster the same would be filled up in accordance with law.

13. The appeal is accordingly allowed but in the circumstances, without costs. KUMUD LATA DAS, APPELLANT v. INDU PRASAD, RESPONDENT.

Civil Appeal No. 12729 of 1996 [From the Judgment and Order dated 16-4-1996 of the Delhi High Court in I.A. No. 8629 of 1995 in Suit No. 3781 of 1990], decided on September 19, 1996.

## ORDER

1. Leave granted.

2. This appeal by special leave arises from the order made on 16-4-1996 by the Delhi High Court in IA No. 8629 of 1995 in Suit No. 3781 of 1990. The suit was for possession of the property from the appellant. The plaintiff is the mother-in-law of the appellant. The appellant and her husband are not able to live amicably in matrimonial tie. The proceedings for divorce are pending. The appellant is in possession of the property and, therefore, the respondent-mother-in-law filed a suit for possession on the basis of her alleged title. The appellant was set ex parte and the application under Order 9 Rule 13 CPC is now pending before the High Court. The application for restoration of the decree has been disposed of with directions to deposit and to continue to deposit mesne profits at the rate of Rs 2000 per month from the date of ex parte decree. Hence, this appeal by special leave.

3. In view of the fact that the parties are closely related and the matter has been disposed of ex parte, we are of the view that it is not a fit case to impose costs or depositing mesne profits from the date of ex parte decree and to continue to deposit it as a condition to contest the application to set aside ex parte decree. Moreover, such onerous condition is not valid, though discretionary.

4. Under these circumstances, we think that the learned Single Judge was not right in imposing the condition of depositing the mesne profits as a condition precedent for execution of the ex parte decree. The impugned order of the High Court is accordingly set aside. There shall be stay of execution of the ex parte decree. The matter is remitted to the High Court for fresh consideration of the application for setting aside the decree on merits and in accordance with law.

5. The appeal is allowed. No costs.