

S. Vinod Kumar and Another

Vs

Union of India and Others

Civil Appeal No. 12676 of 1996

(B. P. Jeevan Reddy, K. S. Paripoornan JJ)

01.10.1996

JUDGMENT

B. P. JEEVAN REDDY J. –

1. Leave granted. Heard the counsel for the parties.

2. In *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] this Court had, while declaring that Article 16(4) does not contemplate or permit reservation in the matter of promotions, declared that for the several reasons stated therein, the reservations already made shall continue for a period of five years from the date of the said judgment. In the majority judgment, it was directed that : (SCC p. 747, para 829)

"... our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations shall continue in operation for a period of five years from this day."

Then, in the next para, the majority judgment made the following observations : (SCC p. 748, para 831)

"We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. The relaxation concerned in *Thomas* [State of Kerala v. N. M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L & S) 227] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh* [Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India, (1981) 1 SCC 246 : 1981 SCC (L & S) 50] are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs - consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be

permissible in the matter of promotions for the reasons recorded hereinabove."

3. Sawant, J. expressed himself on this aspect in para 549, which reads : (SCC pp. 565-66)

"There is no doubt that the meaning of the various expressions used in Article 16, viz., 'matters relating to employment or appointment to any office', 'any employment or office' and 'appointments or posts' cannot be whittled down to mean only initial recruitment and hence the normal rule of the service jurisprudence of the loss of the birth marks cannot be applied to the appointments made under the article. However, as pointed out earlier, the exclusive quota is not the only form of reservation and where the resort to it such as in the promotions, results in the inefficiency of the administration, it is illegal. But that is not the end of the road nor is a backward class employee helpless on account of its absence. Once he gets an equal opportunity to show his talent by coming into the mainstream, all he needs is the facility to achieve equal results. The facilities can be and must be given to him in the form of concessions, exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc. along with the machinery for impartial assessment as stated above. Such facilities when given are also a part of the reservation programme and do not fall foul of the requirement of the efficiency of the administration. Such facilities, however, are imperative if, not only the equality of opportunity but also the equality of results is to be achieved which is the true meaning of the right to equality."

4. The question before the Administrative Tribunal was whether the saving of reservations provided in para 829 takes within its purview the provisions providing for lesser qualifying marks in the qualifying examination for promotion. The Tribunal held that inasmuch as the expression 'reservation' provided in Article 16(4) takes within its fold concessions and facilities including provision for lesser qualifying marks in the qualifying examination for promotion, such a provision is also saved by virtue of the declaration contained in para 829. The declaration made by the Tribunal reads thus :

"14. We therefore hold that the status quo in the matter of reservations in promotion required to be maintained by the Supreme Court for five years, would also include status quo being maintained in the matter of prescribing lesser qualifying marks in the qualifying examination for promotion, within which period the authorities could take the steps indicated in the judgment :

15. In view of what is stated above, we hold that the impugned Memorandum cannot be assailed and are legally sustainable."

5. The memorandum referred to in para 15 aforesaid is the Memorandum dated 21-1-1977 which provided that where the promotions are made on the basis of seniority subject to fitness and where a qualifying examination is held to determine the fitness of the candidates for such promotions, suitable relaxation in the qualifying standard in such examination should be made for Scheduled Castes/Scheduled Tribes to the extent of the relaxation to be decided on each occasion, whenever such examination was held, taking into account all relevant factors including the number of vacancies reserved, performance of Scheduled Caste/Scheduled Tribe candidates as well as the general candidates in that examination, the minimum standard of fitness for appointment to the post and the overall strength of the cadre and that of the Scheduled Castes/Scheduled Tribes in that cadre

(purport of the Office Memorandum taken from para 2 of the Tribunal's judgment). Pursuant to the said Office Memorandum, the Comptroller and Auditor General of India has been issuing orders from time to time providing lesser qualifying marks for passing the qualifying examination prescribed for promotion, in the case of Scheduled Castes/Scheduled Tribes.

6. The precise question raised before the Tribunal was whether the said provision is saved by the declaration contained in para 829 of this Court's judgment.

7. Having heard the counsel for the parties and considered the various opinions in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L & S) Supp 1 : (1992) 22 ATC 385] we are of the opinion that the very posing of the question as well as the answer given by the Tribunal are erroneous and unsustainable.

8. According to para 831, extracted hereinabove, while it is : (SCC p. 748)

"permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs - consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove".

At the same time, it is held that : (SCC p. 748, para 831)

"it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration. The relaxation concerned in *Thomas* [*State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L & S) 227] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh* [*Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246 : 1981 SCC (L & S) 50] are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration."

The relaxation concerned in *State of Kerala v. N. M. Thomas* [*State of Kerala v. N. M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L & S) 227] is also set out in para 713 of the majority judgment. The concession was providing : (SCC p. 672)

"temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years'. ... They were now required to pass the tests within the period of exemption".

So far as the concessions in *Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India* [*Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246 : 1981 SCC (L & S) 50] are concerned, they are specified in para 831 itself as referring to carrying forward vacancies and provisions for in-service coaching/training. It is thus clear from a reading of para 831 that so far as promotions are concerned, it is not permissible to provide lesser qualifying marks or evaluation in favour of OBCs/SCs/STs since that would compromise the efficiency of administration, while the same can be provided in the matter of direct recruitment. So far as

promotions are concerned, the only provision permitted other than the provision for reservation is providing the concessions and reservations, like the ones provided in Thomas [State of Kerala v. N. M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L & S) 227] and Karamchari Sangh [Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India, (1981) 1 SCC 246 : 1981 SCC (L & S) 50] which do not take in a provision for lower qualifying marks or a lesser level of evaluation.

9. To the same effect are the observations of Sawant, J. in para 549, which we have extracted hereinabove. The learned Judge also speaks of : (SCC p. 566)

"concessions/exemptions etc. such as relaxation of age, extra attempts for passing the examinations, extra training period etc.".

The other learned Judges in their separate opinions have merely held that reservation in the matter of promotions is not permissible under Article 16(4). They have not separately dealt with the concessions and facilities which can be extended to these reserved categories. [Of course, one of the learned Judges who constituted the majority, Ahmadi, J. (as the learned Chief Justice then was) was of the opinion that it was not necessary to consider in that case the question whether Article 16(4) permits reservation in the matter of promotions.] In the light of the fact that Pandian and Sawant, JJ. have agreed with the conclusions arrived at in the majority judgment and in the absence of any contrary proposition in the opinion of any other learned Judge, it must be held that the law on this question is the one declared in para 831. We are, therefore, of the opinion that so far as the provision for lower qualifying marks or lesser level of evaluation in the matter of promotion is concerned, it is not permissible under Article 16(4) in view of the command contained in Article 335 of the Constitution. In other words, even if it is assumed for the sake of argument that reservation is permitted by Article 16(4) in the matter of promotions, a provision for lower qualifying marks or lesser level of evaluation is not permissible in the matter of promotions, by virtue of Article 335. If so, there can be no question of such a provision or 'concession', as it is called by the Tribunal, being saved by the declaration in para 829 of the said judgment.

10. The learned counsel for the parties referred to certain decisions of this Court but, in our opinion, it is wholly unnecessary to refer to them since none of them deal with the question at issue.

11. The appeal is accordingly allowed with the above clarifications. The order of the Tribunal is set aside. No costs.