

State of U. P.

Vs

Dr. Dina Nath Shukla and Another

Civil Appeal No. 732 of 1997

(K. Ramaswamy, G. T. Nanavati JJ)

31.01.1997

ORDER

1. Leave granted. We have heard the counsel on both sides.
2. This appeal by special leave arises from the judgment of the Allahabad High Court made on 3-5-1996 in CMWP No. 12592 of 1995. The Legislature of Uttar Pradesh enacted the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (for short "the Act"). Advertisement was issued by the University of Allahabad on 30-1-1995 inviting applications from all eligible persons for posts of Professors, Readers and Lecturers including the posts reserved for Scheduled Castes (for short "the Dalits"), Scheduled Tribes (for short "the Tribes") and Other Backward Classes (for short "the OBCs"). A clarification was issued by the Government on 19-4-1995 stating that for a recruitment to the posts of Professors, Readers and Lecturers, University or College is treated as a unit and the recruitment would be made applying the rule of reservation for the Dalits, Tribes and OBCs in respect of all the posts. That came to be questioned in the writ petition. The Division Bench has held that the said notification was bad in law. Thus, this appeal by special leave.
3. Shri Rakesh Dwivedi, learned Addl. Advocate General, has contended that the view of the High Court is not correct in law. As for most of the subjects there are single posts of Professors, Readers or Lecturers in the University/College, if recruitment is made to each single post, there would be total prohibition on application of rule of reservation for the Dalits, Tribes and OBCs, therefore, for making appointment by direct recruitment to the posts/services, the instructions came to be issued. The Government, therefore, had clarified that entire University/College should be taken as a unit for the purpose of to the posts of Professors, Readers and Lecturers and the posts should be fused as three separate categories for application of the rule of reservation. The clarification issued by the Government is, therefore, consistent with the provisions of the Act. He, in particular, makes reference to Section 2(c)(iv) read with Section 3(5) of the Act.
4. Shri P. P. Rao, learned Senior Counsel appearing for the respondents, on the other hand, contended that the advertisement was issued for subject wise recruitment in the University and applying the rule of reservation the subjects in which the posts would be reserved for Dalits, Tribes and OBCs were specified. The government instructions, on the other hand, would create ambiguity as to which of the posts are to be reserved for Dalits, Tribes, OBCs and which are meant for general candidates. If the subject-wise reservation is provided for, everyone would know which vacancy is available to the general candidate or to Dalits, Tribes and OBCs. If there is only one post available for recruitment in a given faculty/cadre, then rule of rotation as provided in Section 3(5) of the Act would be applied so that rule of reservation would be effectuated, properly implemented and what is

more, candidates would be in a position to know to which post he/she would be entitled to apply for and seek recruitment in accordance with the qualifications prescribed for and possessed by the respective candidates.

5. We think that the stand taken and the contention raised by Shri P. P. Rao, learned Senior Counsel, is correct and merits acceptance. It is seen that Section 2(c) of the Act defines "Public Services and Posts" to mean service in connection with the affairs of the State and includes services and posts in any educational institution owned and controlled by the State Government or which receives grants-in-aid from the State Government, including a University established by or under an Uttar Pradesh Act, except in an educational institution established and administered by minorities referred to in clause (1) of Article 30 of the Constitution. Section 3 postulates application of the rule of reservation and reads thus :

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. - (1) In public services and posts, there shall be reserved at the state of direct recruitment, the following percentages of vacancies to which recruitment are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens, -

##(a) in the case of Scheduled Castes twenty-one per cent;(b) in the case of Scheduled Tribes two per cent;(c) in the case of Other Backward twenty-seven per cent : Classes of citizens##

Provided that the reservation under clause (c) shall not apply to the category of other backward classes of citizens specified in Schedule II.

##(2) to (4) \* \* \*##

(5) The State Government shall, for applying the reservation under sub-section (1), by a notified order, issue a roster which shall be continuously 3 applied till it is exhausted."

Rest of the sub-sections of Section 3 are not relevant; hence omitted.

6. Article 46 of the Constitution enjoins that educational and economic interest of the Dalits, Tribes and other weaker sections shall be promoted by the State with special care of the Dalits and Tribes. They shall be protected from social injustice and all forms of exploitation. Article 38 envisages that the State shall strive to promote welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life in particular, to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The Preamble of the Constitution which derives source of power from "We the people of India", i.e. Bharat, envisions an egalitarian social order to integrate all the people with equality of status, dignity of person and fraternity as a united Bharat and providing them socio-economic justice, equality of opportunity and status and dignity of person. It is a well settled legal position that the Preamble is a part of the Constitution and is the basic structure of the Constitution. Every citizen is born equal but gets chained within impregnable walls of social, sectional and religious barriers and is made a victim of

discrimination and denuded of human rights. Articles 14, 15(1) and 16(1) banish all barriers of discrimination on grounds of religion, race, sex, sect, caste, place of birth or any of them.

7. When there is a clash of interests and competing claims there is a craving for equality of opportunity amongst the people and for emancipation from the pangs of absolute prohibition, Articles 15(2) to (4), 16(4) & (4-A) read with the Directive Principles, poured forth practical content, softened the rigour of legal equality and gave practical content of equality in opportunity resulting through distributive justice in favour of unequals to hold an office or post under the State in the democratic governance. These articles give power to the State to make positive discrimination in favour of the disadvantaged, in particular the Dalits and Tribes. Socio-economic empowerment secures them dignity of person and equality of status. Appointment to an office or post gives opportunity to have equality of status and dignity of person. The object thereby is to provide socio-economic equality. Social equality gets realised through facilities and opportunities given to them to live with dignity and equal status in the society. Economic equality also gives socio-economic empowerment as a measure to improve excellence in every walk of life. Article 51-A(h) enjoins on every citizen to develop scientific temper, humanism and the spirit of inquiry and reform, and charges the citizens to promote harmony, spirit of common brotherhood transcending all social, religious, regional and linguistic barriers; Article 51- A(i) enjoins the citizens to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher level of endeavour and achievement. Equal opportunity of appointment to a post or office is available to all citizens and legitimately and constitutionally entitles them to consider their claims for employment/appointment to an office or post. There are many aspirants for a few posts/offices which generates spirit of competition. Article 335 mandates the State that in the field of competition, the claims of the Dalits and Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

8. Thus Article 335 read with Articles 46, 38 and 16 would give the socio-economic empowerment to the Dalits and Tribes and rule of reservation in the matter of appointment to a service or post under the State is a part of the constitutional scheme as a positive facility and opportunity available to them and where it is extended to OBCs, they too get opportunity to strive to improve excellence in a service or a post in which he or she gets appointment. In a democracy governed by rule of law, every segment of the society is entitled to a share in the governance of the country. Permanent bureaucracy is a facet of our democratic governance and an integral scheme of the Constitution. Recruitment to a post or an office under the State is governed by the Constitution, law and the rules made under proviso to Article 309 of the Constitution or administrative instructions in the absence of statutory rules. Protective discrimination has been upheld by this Court. It connotes mitigating absolute equality to achieve equality in favour of the disadvantaged segments of the society. The Act gives practical content to implement the constitutional mandate of equality of opportunity and status to the Delhi, Tribes and OBCs in the matter of appointment to a public service or a post under the State of U.P. including an appointment in a university or educational institution. 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 had considered and held reservation in promotion as per the roster as valid and consistent with Articles 16(1) and 14 of the Constitution. It was also held that the promotion in accordance with the roster is valid. The reserved candidates promoted on merit should not be put in the roster points reserved for them but be treated as general candidates. Only candidates selected under the reserved quota should be appointed as per the roster point to the post earmarked for the reserved candidates. In *Union of India v. Madhav* ((1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320) a Bench of three Judges had held (in SCC p. 338, para 9) that the

reservation could be provided even to the isolated post on the basis of rule of rotation. Extension of reservation in such cases is not unconstitutional. On the other hand, such scheme provides for and facilitates the Dalits and Tribes being considered for promotion to hold a single post consistent with equality of opportunity on a par with others. Therefore, it was held that the rule of rotation and the roster point in filling up the vacancy that has arisen in the single post sought to be filled up with the reserved candidates, is not violative of Article 16(1) or Article 14 of the Constitution.

9. Thus, it could be seen that even in the services and posts in connection with the affairs of the State including services and posts in all educational institutions, owned, controlled/maintained by the State or which receive grants-in-aid from the Government including a University if established by or under the U. P. Act, the Act is applicable and when advertisement for direct recruitment to any of the posts or services in the University is issued, the rule of reservation should be applied for recruitment in each service, post, grade or cadre as per the percentage prescribed in subsection (1) of Section 3 in compliance with sub-sections (2) to (4) and (6) to (7); so also rule of rotation as per the roster adumbrated in sub-section (5) of Section 3 of the Act. Thereby, it would be clear that while issuing any advertisement for direct recruitment to fill up any post or service in any grade or cadre in the University/educational institution established under the U. P. Act, the University/educational institution should work out the posts beforehand and to make recruitment accordingly. It is seen that in the present case the advertisement specified various posts subject-wise and the vacancies were reserved for general candidates, Dalits, Tribes and OBCs. Of course, it is not clear whether it is as per roster. It is true, as contended by the learned Addl. Advocate General (sic) that if there is only one post in a cadre/faculty, be it a post of Professor, Reader or Lecturer, necessarily, all such single posts carrying the same scale of pay are required to be clubbed and the roster applied to such single post in terms of Section 3(5) of the Act. When such a fusion is and in fact should be worked out, and the roster is applied, necessarily advertisement should be issued inviting applications for recruitment to the posts. The University is required to earmark the posts in the roster meant for general category or Dalits, Tribes or OBCs so that every qualified candidate would apply for and seek selection in accordance with law. In this behalf, sub-section (6) of Section amplifies the general law that the candidates who had applied for recruitment for the posts earmarked as a per Section 3(1), if selected on merit in open competition with general candidates, then they shall not be adjusted against reserved vacancies. Subsection (6) of Section 3 reads as under :

"3. (6) If a person belonging to any of the categories mentioned in subsection (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1)."

10. In a case where there are more than one post available in the same faculty in the cadre of Professor, Reader or Lecturer, as the case may be, necessarily and perforce, the advertisement should also be made subject-wise applying Section 3(1) and (5) of the Act. On selection, the candidates appointed should be fitted in that behalf as per the roster maintained by the University/educational institution. Thus, all eligible candidates, be they general or reserved, would get equal opportunity to apply for and seek selection and recruitment in accordance with law and the Rules. In adjudging the constitutionality of the scheme or the rule of reservation, what is required to be kept at the back of the mind is the equality and adequacy of representation as per the percentage prescribed by the rules/administrative instructions. The enforcement of the Act hinges upon logistic interpretation and not on legalistic orientation; pragmatic and not pedantic approach so that all candidates get equality of opportunity to hold an office or post under the State. Care should also be

taken to ensure that equal opportunity for selection and appointment is available to all candidates in all faculties, discipline, speciality and super speciality and in each cadre/grade/service so that equality is spread out and no one category gains monopoly or is pushed into one category, grade or service.

11. In *Suresh Chandra Verma (Dr.) v. Chancellor Nagpur University* ((1990) 4 SCC 55 : 1991 SCC (L&S) 194 : (1991) 16 ATC 439), instead of making subject-wise recruitment, an advertisement in respect of total of 77 posts including 13 posts of Professors, 29 posts of Readers and 35 posts of Lecturers was issued and recruitment was sought to be made. When it was questioned, this Court tested the principle on the anvil of equality and fairness of procedure posing the question thus : (SCC P. 60, para 8)

"Is non-reserving the posts of University teachers subject-wise in the employment notice a breach of letter and spirit of reservation policy contained in Section 77-C read with Section 57 of the Act ?"

This Court had laid down in paras 10 to 12 thus : (SCC pp. 60-62)

"As regards the first question, we have narrated earlier the method which was adopted by the University for reserving the posts. It announced the posts category-wise as Professors, Readers and Lecturers in different subjects and made a blanket declaration that 6 of the posts of Professors, 12 of the posts of Readers and 16 of the posts of Lecturers would be reserved for backward castes. Neither the University nor the candidates knew at that time as to for which of the subjects and in what number the said posts were reserved. The result was that the candidates belonging to the reserved category in particular, who wanted to apply for the reserved posts did not know for which of the posts they could apply and whether they could apply at all for the posts in the subjects in which they were qualified. That this could be the expected consequence of such an employment notice can legitimately be inferred and need not be and indeed cannot be, demonstrated by evidence of what actually happened, for there may be a number of candidates who on account of the said uncertainty might have refrained from applying for the posts as against those who applied to take a chance. What is further, the selection committees which were appointed to interview the candidates for the respective posts did not also know whether they were interviewing the candidates for reserved posts or not, and to assess merits of the candidates from the reserved category as such candidates. The contention advanced on behalf of the appellants that the selection committees even without knowing whether the posts concerned were reserved or not, had given weightage to the candidates from the reserved category and, therefore, it cannot be said that any injustice had resulted to them is without merit. In the first instance, the contention proceeds on the footing that all those belonging to the reserved category who wanted to apply for all the said posts had done so even without knowing that the concerned posts were reserved. Secondly, it also presumes that all eligible candidates from unreserved category had applied for the posts without knowing whether the posts were reserved or not. The possibility that many eligible candidates belonging to both reserved and unreserved categories might not have taken the risk and chosen to gamble cannot be ruled out. This argument further ignores the fact that the suitability of a candidate from a reserved category to the particular post has to be adjudged by taking into consideration various factors and the desired result cannot be obtained by

merely giving uniform weightage marks to the candidates concerned which was the only method followed by the selection committees while selecting the candidates. Further, there is nothing on record to show that this method of giving weightage to the candidate was not followed in respect of reserved category candidates even if they had not applied for the post in the reserved seats. What is more, there is also nothing on record to show whether any candidate belonging to the reserved category had applied for a particular post in a reserved seat, without the prior knowledge that the post was reserved. It is, therefore, difficult to understand as to how the selection committees proceeded to give weightage to the candidates without knowing whether they had applied for reserved or non-reserved seats. What is more objectionable in the procedure was that its Executive Council proceeded to classify the posts in different subjects between reserved and non-reserved posts after the lists of selected candidates were received from different selection committees. This method was open to an obvious objection since it gave a scope to eliminate unwanted selected candidates at that stage. Whether it occurred in the present case or not is immaterial for testing the validity and the propriety of the method followed by the University. As has been stated earlier, in fact, after the receipt of the list of selected candidates not only the Executive Council constituted yet another committee to decide which of the subject-wise posts should be reserved or not but the Executive Council also decided that although candidates for 47 posts were selected only 30 of them should be appointed permanently. The latter included some backward class candidates for reserved posts so categorised later. But 17 of the posts were set apart although the candidates were selected for them, and they were so set apart for being filled in afresh by candidates belonging to the reserved category. Interestingly, however, the employment notice issued subsequently for these 17 posts mentioned reservations post-wise (subject-wise).

According to us, the word 'post' used in the context has a relation to the faculty, discipline, or the subject for which it is created. When, therefore, reservations are required to be made on posts', the reservations have to be post-wise, i.e., subject-wise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised. When, therefore, Section 57(4)(a) requires that the advertisement or the employment notice would indicate the number of reserved posts, if any, it implies that the employment notice cannot be vague and has to indicate the specific post, i.e. the subject in which the post is vacant and for which the applications are invited from the candidates belonging to the reserved class. A non-indication of the post in this manner itself defeats the purpose for which the applications are invited from the reserved category candidates and consequently negates the object of the reservation policy. That this is also the intention of the legislature is made clear by Section 57(4)(d) which requires the selection committees to interview and adjudge the merits of each candidate and recommend him or her for appointment to 'the general posts' and 'the reserved posts', if any, advertised.

A support was also sought to be derived by the appellants to their contention from the policy of reservation as enunciated in Government Resolution dated 30-3-1981 wherein instructions are issued in the matter in exercise of the power conferred on the Government under Section 77(c) of the Act."

12. The instructions issued by the Government were extracted and to avoid confusion in understanding the provisions of the Act, the instructions were explained and stated thus : (SCC p.

63, para 12)

"... similarly, at any given time of recruitment to the teaching posts, only the total number of reserved vacancies and the sections from which they are to be filled in should be determined. It would be enough if the required percentage is fulfilled as a whole and not with reference to any particular post. If the reserved vacancies cannot be filled, then so many posts as cannot be filled in, may be kept vacant for six months and should be again advertised thrice. If, even after re-advertising the posts three times, suitable candidates belonging to the reserved category do not become available, they may be filled in by candidates belonging to the open category."

This Court had further held thus : (SCC p. 63, paras 12-13)

"It is common knowledge that the vacancies in posts in different subjects occur from time to time according to the exigencies of the circumstances and they arise unequally in different posts. There may not be vacancies in one or some posts whereas there may be a large number of vacancies in other posts. In such circumstances, it is not possible to comply with the minimum reservation percentage of 34 vis-a-vis each post. It is for this reason that the resolution states that although minimum percentage of reserved posts may not be filled in one or some posts, it will be enough if in that year it is filled in taking into consideration the total number of appointments in all the posts. This, however, does not absolve the appointing authority from advertising in advance the vacancies in each post and the number of posts in such vacancies meant for the reserved category, and inviting applications from the candidates belonging to the reserved and unreserved categories with a clear statement in that behalf. In fact, the overall minimum percentage has to be kept in mind, as stated in the resolution, at the time of issuing the employment notice or the advertisement as the case may be.

What is material from our point of view in this case is to point out that even the Karnataka Full Bench has taken the view that generally reservation has to be cadre-wise and subject-wise. It was also a case of the filling in of the vacancies in teaching posts in a University."

13. Thus, it could be seen that if the subject-wise recruitment is adopted in each service or post in each cadre in each faculty, discipline, speciality or super-speciality, it would not only be clear to the candidates who seek recruitment but also there would not be an overlapping in application of the rule of reservation to the service or posts as specified and made applicable by Section of the Act. On the other hand, if the total posts are advertised without subject-wise specifications, in every faculty, discipline, speciality or super- speciality, it would be difficult for the candidates to know as to which of the posts be available either to the general or reserved candidates or whether or not they fulfil or qualify the requirements so as to apply for a particular post and seek selection. As indicated earlier, if there is any single post of Professor, Reader or Lecturer in each faculty, discipline, speciality or super-speciality which cannot be reserved for reserved candidates, it should be clubbed, roster applied and be made available for the reserved candidates in terms of Section (5) of the Act. Even if there exists any isolated post, rule of rotation by application of roster should be adopted for appointment.

For achieving the said object, the Vice-Chancellor, who is the responsible authority under Section 4

to enforce the Act, would ensure that single posts in each category are clubbed since admittedly all the posts in each of the categories of Professors, Readers or Lecturers carry the same scale of pay. Therefore, their fusion is constitutional and permissible. The Vice-Chancellor should apply the rule of rotation and the roster as envisaged under sub-section (5) of Section 3. The advertisements are required to be issued so that the reserved and the general candidates would apply for consideration of their claims for recruitment in accordance therewith. This interpretation would subserve and elongate constitutional objective and public policy of socio-economic justice serving adequacy of representation in a service or post, grade or cadre as mandated and envisaged in Articles 335 and 16(4) read with Articles 14 and 16(1), Preamble, Article 38 and Article 46 of the Constitution and all other cognate provisions.

14. This ratio is consistent with the law laid down by this Court in Madhav case ((1997) 2 SCC 332 : 1997 SCC (L&S) 503 : JT (1996) 9 SC 320) as elaborated earlier.

15. The law is declared accordingly. The Vice-Chancellor should work out the details, make fresh advertisement and have the selection done in accordance with law and appointments made accordingly. The directions issued by the High Court are modified accordingly.

16. The appeal is accordingly disposed of. No costs.