

Dr. Mrs. Perminder Kaur v. The State of Punjab, etc.
(Sandhawalia, J.)

made in case of promotion to Class I and Class II services, for Scheduled Castes/Scheduled Tribes and Backward Classes. If the contention of Mr. D. N. Rampal is accepted, then it would result in nullifying the decision of the Government by which reservation for the members of the Backward Classes has been made to posts to be filled by promotion, e.g., with the present pay, even a Clerk's income admittedly is more than Rs. 1,800 per annum and if it is held that conditions laid down in annexure 'G' are applicable, then a person belonging to a Backward Class would not be ever entitled to promotion to a higher post on the basis of reservation with the result that in the case of Backward Classes, the object of giving benefit of reservation for promotion would be completely frustrated and nullified. This, to my mind, could never be the intention of the Government while issuing the instructions contained in the circular letter, copy Annexure 'G' to the petition. As earlier observed, this circular letter embodies an additional guideline for declaring a class of persons as backward who may satisfy those conditions. In this view of the matter, I find that the petitioner is entitled to the benefit of reservation for promotion to the higher posts and the conditions mentioned in the circular letter, copy Annexure 'G', in no way adversely affect his right to promotion.

(11) No other point was urged.

(12) For the reasons recorded above, I allow this writ petition with costs, quash the order of the Excise and Taxation Commissioner, Punjab, dated 22nd July, 1970, copy annexure 'F', and direct the authorities to consider the case of the petitioner for promotion in the light of the observations made above.

S. S. Sandhawalia, J.—I agree.

N. K. S.

MISCELLANEOUS CIVIL

Before S. S. Sandhawalia and Prem Chand Jain, JJ.

DR. MRS. PERMINDER KAUR,—Petitioner.

versus

THE STATE OF PUNJAB, ETC.,—Respondents.

Civil Writ No. 4659 of 1974.

March 19, 1975.

Constitution of India (1950)—Article 16(1)—Executive Instructions providing for treating the first vacancy in a lot of hundred

occurring from time to time to be filled in by promotion to be a reserved one for members of Scheduled Castes—Effect of the application of such instruction on a single vacancy arising in a year—Stated—State Government treating the only vacancy arising in a cadre in a year to be a reserved one—Such action of the State Government—Whether hit by Article 16(1)—Two sets of executive instructions, one general and the other specific—Specific one—Whether over-rides the general.

Held, that where by executive instructions it is provided that in a lot of hundred vacancies occurring from time to time to be filled in by promotion, the first vacancy is to be treated as reserved one for members of the Scheduled Castes, the concrete and practical result of the application of such instruction would be that in the case of a single vacancy arising in one year, there would be a hundred per cent reservation of the posts for the Scheduled Castes to the total exclusion of others. In a small cadre, where at best one vacancy is likely to fall vacant in one year, the end result would be that every year that single vacancy would have to go necessarily to the Scheduled Castes; so that the prospect in the future could well be a total exclusion of others to the cadre and virtually a hundred per cent reservation in favour of the Scheduled Castes in regard to a selection post by way of promotion. Such a result would be directly and patently in conflict with Article 16(1) of the Constitution of India. Hence the action of the State Government in treating the only vacancy arising in a cadre in a year as a reserved one is hit by Article 16 of the Constitution.

Held, that where there are two sets of executive instructions, one being a general one providing for treating first vacancy as a reserved one applicable in the context of a large number of vacancies up to hundred and the other a specific one intended to apply in the special case of a single vacancy arising in a year, the specific one over-rides the general one.

Petition under Articles 226/227 of the Constitution of India, praying that:—

- (a) a writ in the nature of certiorari, quashing the decision of respondents 1 and 2, reserving the only post of Assistant Professor in the Dental Wing of the Government Medical College, Patiala, to be filled by way of promotion for the scheduled castes, be issued; the appointment of respondent 3 as Assistant Professor be quashed by issuing a writ in the nature of certiorari;*
- (b) a writ in the nature of certiorari quashing the impugned instructions contained in letter No. 1434-SWI-74/8105 dated May 4, 1974 of respondent No. 2 (Annexure 'P-1'), be issued;*

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- (c) *a writ in the nature of mandamus directing respondents to treat the post in question as unreserved and fill the same from amongst general candidates including petitioner on the basis of merit-cum-seniority, be issued;*
- (d) *the cost of the petition be awarded to the petitioner;*
- (e) *the record of the case be ordered to be sent for.*

Kuldip Singh, Advocate, for the petitioner.

G. S. Chawla, Advocate, for Advocate-General, Anand Swarup Advocate with M/s. R. S. Mittal and K. G. Chaudhry, Advocates for respondent No. 3.

JUDGMENT

Sandhawalia, J.—The sole contention raised on behalf of the petitioners in these connected Civil Writ Petitions No. 4659 of 1974 and Civil Writ Petition No. 4597 of 1974, is of substantial merit. We are firmly of the view that the only legal issue arising herein is identical and, therefore, we propose to dispose of these two cases by this single judgment. It suffices, therefore, to advert to the facts in Civil Writ Petition No. 4659 of 1974 only.

Dr. Mrs. Parminder Kaur, petitioner, secured her Degree in Dental Surgery in the year 1961 and joined Government service as an Assistant Dental Surgeon on 17th May, 1963, at Nabha. She was later promoted to the post of Senior Lecturer by an order dated 8th October, 1973, but joined as such on the 13th November, 1973.

Respondent No. 3, Dr. O. P. Nar obtained his Degree in Dental Surgery in the year 1967 and was first selected as a Demonstrator against a post reserved for the Scheduled Castes. Thereafter, he was promoted as a Senior Lecturer on the 8th October, 1973.

The petitioner claims that in the cadre of Senior Lecturers she now ranks far senior to respondent No. 3. The next promotion in rank is to the post of an Assistant Professor and in this department the cadre consists of only five posts—three being in the Dental wing of the Government Medical College, Patiala, and the other two in a similar Institution at Amritsar. On the 16th January, 1974, one post of Assistant Professor fell vacant and the petitioner being the Senior-most with satisfactory service record, was entitled to be considered and promoted against that vacancy as an Assistant Professor.

It has been categorically averred that only one vacancy in the cadre of Assistant Professor had fallen vacant in the year 1974 and none else was likely or in fact fell vacant within the said year. The next vacancy, if at all, was only likely to arise in April, 1975. By Annexure P-1, dated 4th May, 1974, the Punjab Government issued instructions providing that 16 per cent of the posts to be filled by the promotion to or within Class I and II services under the State Government should be reserved for members of the Scheduled Castes and Backward Classes in the ratio of 14 per cent for members of Scheduled Castes and 2 per cent for the members of the Backward Classes. This reservation was of course subject to the condition that the persons to be considered must possess the minimum necessary qualifications and should have a satisfactory record of service. The above said instructions have been made operative from 6th March, 1974, and when they came into force, the post of Assistant Professor was still lying vacant on that date. In fact, in this department, the first vacancy which arose subsequent to the coming into force of these instructions is the present one and none was likely to arise at all within the relevant year 1974. Purporting to act under the instructions, Annexure P-1, the respondent-State of Punjab treated the vacancy as a reserved vacancy which could be filled by way of promotion only from amongst the Scheduled Caste Senior Lecturers. Respondent No. 3 being the only Scheduled Castes candidate in the cadre of Senior lecturers, was, therefore, likely to be promoted to the post of Assistant Professor in supersession of the petitioner who was senior to him. It is the petitioner's case that the reservation of only one post of an Assistant Professor which would fall vacant in the year 1974 as a reserved vacancy, would amount to a reservation of 100 per cent in favour of the Scheduled Castes and would thus be contrary to the decision in—*T. Devadasan v. Union of India* (1), and hence would be void. This apart, it is the petitioner's case that the respondent-State has itself issued the instructions, Annexure P-2, dated the 23rd August, 1966, wherein para 2(4)(b) provides, that where there is only one vacancy in a year, it should be treated as an unreserved vacancy. It is, therefore, averred that the action of the respondent-State in treating the only vacancy arising in 1974 as reserved, is against the instructions of the Government itself and also violative of Article 16(1) of the Constitution. The petitioner has also invoked other provisions for challenging the impugned action of the respondent-State.

(1) A.I.R. 1964 S.C. 179.

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Shri Joginder Singh, I.A.S., Secretary to Government, Health and Family Planning and Welfare of Scheduled Castes and Backward Classes Department has filed the affidavit by way of reply. Paras Nos. 1 to 10 have been in terms admitted therein with a clarification to the effect that respondent No. 3 joined as Senior Lecturer on the 9th October, 1973 (A.N.), and that the petitioner, Dr. Parminder Kaur is the Senior-most Lecturer in the cadre. In reply to para No. 13, it is admitted that by virtue of the instructions (Annexure P. 2) read with an earlier circular dated the 5th of August, 1967, in cadres of less than five posts, if there is only one vacancy on a particular occasion, it is not to be treated as 'reserved'. Reliance in fact has been placed on *Arati Ray Choudhury v. Union of India and others* (2) to aver that in regard to a solitary vacancy of this kind, which is treated as unreserved, the same has to be carried forward and should be given effect to on the occasion next arising in the same cadre. It is claimed that the instructions, annexure P. 1, are in consonance with Article 16 and further that the State Government had duly applied its mind before issuing this and the other relevant instructions. It is claimed that the instructions issued by the State Government for the welfare of the Scheduled Castes and the Backward Classes apply equally to all Government Departments and are binding.

In the return filed by the private respondent No. 3 also paras 1 to 5 stand admitted but in reply to para 7 it is merely stated that the next vacancy in the class of Assistant Professors might fall vacant at any time and that there was no adequate basis for the assertion that no other vacancy is likely to occur till April, 1975. It is admitted that the present vacancy in issue is the first one after coming into force of the instructions, annexure P. 1, but it is asserted that in compliance with the statutory instructions the vacancy should and ought to be treated as a reserved vacancy and, therefore, the respondent being only Scheduled Caste person in the class of Senior Lecturers, was entitled to be promoted to the post. The legality of the respondent State's action is sought to be upheld and the violation of Article 16 of the Constitution of India is denied.

The factual position here does not admit of any doubt. In view of the unreserved admissions of the respondent-State, it is manifest

(2) 1974 (1) S.L.R. 659.

that the vacancy in question is the only vacancy which had arisen in the relevant year in the cadre of Assistant Professors. In fact it has been forcefully asserted at the bar that no other vacancy has arisen till the time of the hearing. On these premises, Mr. Kuldip Singh forcefully contends that the treating of a solitary vacancy within the relevant year as a reserved one would amount to a reservation of hundred per cent, which cannot possibly be countenanced in view of the plain provisions of Article 16 of the Constitution of India and particularly because of the decision in *T. Devadasan's case* (supra).

Two salient features in the present case stand out. The admitted position (both on the part of the respondent State and the private respondent) is that here the cadre of the Assistant Professors consists only of a limited number of five posts. What is then of even more particular significance is the fact that the present vacancy is the only one which has and was likely to fall vacant within the year 1974. It is patent that no other vacancy did arise in that year or even thereafter upto now. A reference to Exhibit P. 1 would show that it directs that in a lot of hundred vacancies occurring from time to time, the first vacancy (apart from the 7th, 15th, 22nd and so on) is to be treated as reserved for members of the Scheduled Castes. The concrete and practical result of the application of this instruction, therefore, would be that in the case of a single vacancy arising in one year, there would be a hundred per cent reservation of the posts for the Scheduled Castes to the total exclusion of others. Not only this, in a small cadre of five, where at best one vacancy is likely to fall vacant in one year and perhaps it may be so after the lapse of a number of years, the end-result would be that every year if a single vacancy arises, the same would necessarily have to go to the Scheduled Castes. So that the prospect in the future could well be a total exclusion of others to the cadre and a virtually hundred per cent reservation in favour of the Scheduled Castes in regard to a selection post by way of promotion. This, to our mind, would be directly and patently in conflict with Article 16(1) of the Constitution of India. Therefore, the action of the respondent-State in treating the present vacancy as a reserved one, cannot be sustained firstly on principle.

The case of the petitioner is equally well covered by authoritative precedent. Though the learned counsel for the respondent attempted some finical distinctions, we are unable to see how the

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ratio in *T. Devadasan's case* would not squarely cover the case in favour of the petitioner. It was observed therein in no uncertain terms as follows:—

“* * * *. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and 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.

* * * * *

* * * *. Even if the Government had provided for the reservation of posts for Scheduled Castes and Tribes a cent per cent reservation of vacancies to be filled in a particular year or reservation of vacancies in excess of 50 per cent would, according to the decision in *Balaji's case* (3), not to be constitutional.”

Their Lordships of the Supreme Court have reiterated the ratio in *T. Devadasan's case* in the recent case of *Arati Ray Choudhry v. Union of India* (supra), with the following observations:—

“* * * *. Thus, in the first place each year of recruitment is directed to be considered separately and by itself as laid down in *Devadasan's case*, 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

(3) A.I.R. 1963 S.C. 649.

that the reservation exceeds 50 per cent 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 per cent but is in fact cent per cent."

In view of the above-noticed two binding precedents, the petitioner is entitled to succeed on the basis of authority.

Lastly, it deserves mention that on the basis of the Government's own instructions also, the petitioner's case is on a strong footing as well. The relevant part of annexure P. 2, being paragraph 2(4) (b) thereof is in these terms:—

"2(4) (b) 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 point is treated as unreserved, the reservation may be carried forward to the subsequent two recruitment years. Thus where the cadre strength is small say less than 5 and there is one post to be filled by promotion, it need not be treated as reserved but if on this account a reserved point is treated as unreserved the reservation may be carried forward to the subsequent two recruitment years."

It is manifest that this instruction, in terms, requires that if there is only one vacancy, it should be treated as unreserved. This provision is specific and is intended to apply in the special case of a single vacancy arising within the same recruitment year. The direction in Exhibit P. 1 on the point of treating the first vacancy as reserved is a general one applicable in the context of large number of vacancies up to one hundred. Therefore, the special rule laid in para 2(4) (b) of Exhibit P. 2 must be attracted and override the general one in Exhibit P. 1. That being so, the only vacancy in the present case must, according to the instructions of the Government itself, be treated as an unreserved vacancy. The respondent-State, therefore, was violating even its own instructions (which must be deemed as binding on itself) by treating the present single vacancy in the same year as a reserved one. On this score also the impugned action of the respondent-State must be set aside.

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In view of the above, we set aside the selection of respondent No. 3 in Civil Writ No. 4659 of 1974, and direct the respondent-State to treat the vacancy as an unreserved one and then proceed to fill it in accordance with law.

In Civil Writ No. 4597, annexure P. 3 appointing respondent No. 4 Dr. Charanjit Lal as an Assistant Professor, Ophthalmology, is hereby quashed and the respondent-State is directed to treat the vacancy as an unreserved one and proceed to fill the same in accordance with law.

Both the petitions are allowed, as above, with costs. Counsel's fee Rs. 100 in each case.

B.S.G.

MISCELLANEOUS CIVIL
FULL BENCH

Before S. S. Sandhawalia, M. S. Gujral and R. N. Mittal, JJ.

AMAR SINGH, CLERK OF COURT,—Petitioner.

versus

THE CHIEF JUSTICE, PUNJAB and HARYANA HIGH COURT
AND OTHERS,—Respondents.

Civil Writ No. 1075 of 1971.

February 17, 1976.

Constitution of India 1950—Articles 16(4), 229 and 235—Clerks of Courts (now Superintendents) to the District and Sessions Judges (Appointment and Conditions of Service) Rules 1940—Rules 3 and 4—Control of High Court over District Courts and Courts Subordinate thereto—Whether extends to all the functionaries attached to such Courts—Promotion of such functionaries—Whether exclusively within the ambit of control of the High Court—Government instructions requiring reservation of higher posts to be filled up by promotion from amongst the members of Scheduled Castes—Whether equally applicable to the ministerial staff of subordinate Courts—Appointment to the post of Superintendent in the establishment of District and Sessions Judge—Whether by way of promotion—Governor—Whether has power to make rules regarding appointment and conditions of service of ministerial staff of subordinate Courts.