

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.13000/2009**

% **Date of Decision: 24th February, 2010**

SUBHASH CHANDER Petitioner
Through: Mr. R.K. Shukla, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Ms. Raman Oberoi, Advocate for
respondent nos.1 to 3

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : Yes
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported in the Digest? : Yes

% **JUDGMENT (Oral)**

GITA MITTAL, J.

1. By this writ petition the petitioner assails the action of respondents in denying him consideration and promotion to the post of Assistant Commandant with the Indo Tibetan Border Police. There is no dispute to the material facts giving rise to the present petition. The petitioner was appointed as a Sub-Inspector/Stenographer with the respondents in the year 1989. He was promoted to the post of Inspector/Stenographer in the year 1995 and thereafter in August,

2007 he was granted a special appointment in view of the fact that he was senior most in the grade of Inspector/Stenographer and also fit for appointment. Consequently, he was appointed as a Subedar Major/ Stenographer.

2. It is contended that as per the applicable and relevant recruitment rules, an Inspector/Steno (General) with five years continuous service in the grade of Inspector is rendered eligible for consideration for the post of Assistant Commandant (Staff Officer). The petitioner has further submitted that in case an Inspector/Stenographer (General) has been appointed to the post of Subedar Major, there is no requirement of total number of years of service to render him eligible for promotion to the post of Assistant Commandant.

3. The present case is concerned with the appointment to the single vacancy in the year 2007 of the post of Assistant Commandant which was in the reserved category. It is not disputed that there was only a single vacancy in the reserved category which was available for promotion and appointment to the post of Assistant Commandant in the year 2007.

4. It is further admitted position that as per the combined seniority list of general and reserved category candidates for the post of Assistant Commandant (Staff Officer) the petitioner was at serial no.7 of the same. However, so far as the seniority vis-à-vis the

reserved category candidates are concerned, the petitioner was admittedly placed at the top of the list at serial no.1.

5. The only issue urged before us relates to the question as to whether there has to be a separate zone of consideration for reserved SC/ST categories. Learned counsel for the petitioner has contended that the respondents failed to prepare a separate seniority list of the SC/ST candidates as against the general category candidates. He submits that the respondents have prepared a combined list for the zone of consideration of all eligible candidates; that thereby they have consequently treated the petitioner as falling at serial No.7 and thereby denied him consideration for promotion to the post of Assistant Commandant (Staff Officer) even against the vacancy for the reserved category.

6. Appearing for the respondents Ms. Oberoi, learned counsel for the respondents has vehemently contended that as per the applicable rules and regulations, the respondents are required to prepare a combined seniority list for the purposes of consideration for promotion even to a vacancy of a reserved post which is to be placed before the Departmental Promotion Committee (DPC) for consideration. It has been contended that the petitioner being at serial no.7 of such list did not fall within the zone of consideration of eligible candidates, which was being considered by the DPC held on 02nd November, 2007 for the vacancy to the reserved post of Assistant Commandant (Staff Officer).

7. We have heard learned counsels for the parties. Our attention has been drawn to the response which was filed by the respondents to the complaint made by the petitioner before the National Commission for Scheduled Castes and Scheduled Tribes. In the response dated 25.04.2008, the respondents had stated that two DPCs were held separately i.e. for the years 2006-07 and 2007-08. The respondents have clearly admitted that one vacancy of Assistant Commandant (Staff Officer) which fell at point no.7 of the 01st cycle was reserved for the Scheduled Castes category and that the same was required to be filled from within the normal/extended zone of 05 incumbents in the feeder grade as per DoP&T instructions contained in their O.M. No.22011/1/90-Estt (D) dated 22-04-1992 as normal as well as extended zone of consideration for SC/ST category is 05 only. The respondents have taken a further stand that no SC/ST candidate was available in the normal/extended zone of consideration. It was also stated before the commission that consequently the respondents had no option but to seek de-reservation of the single reserved vacancy to fill up the same by a general category candidate.

8. Mr. Shukla, learned counsel for the petitioner, however, has drawn our attention to the OM dated 25.04.1989 which provides the procedure to be followed where promotions are to be made on the basis of seniority subject to fitness in respect of reserved categories of candidates. This office memorandum has been relied upon by the respondents and stands placed by them along with their reply. The

relevant portion of this office memorandum dated 25.04.1989 reads as follows:

“C. Promotions on the basis of seniority subject to fitness:

There will be reservation at 15 per cent for Scheduled Castes and 7½ per cent for Scheduled Tribes in promotions made on the basis of seniority subject to fitness, in appointments to all Class I, Class II and Class IV posts in grades or services in which the element of direct recruitment, if any, does not exceed 75 per cent.

The procedure to be followed where promotions are made on the basis of seniority subject to fitness has been laid down in Paragraph 1B of Ministry of Home Affairs, O.M. No.1/9/58-R.P.S., dated the 16th May, 1959, which provides that in such cases a decision has to be taken on the suitability of each individual officer for such promotion although there is no need for a comparative evaluation of their respective merits and that decision on the fitness or the unfitness of any officer for promotion should be taken by the Departmental Promotion Committee instead of by an individual officer. While, therefore, referring proposals to the Departmental Promotion Committee for promotion on the basis of seniority subject to fitness in respect of vacancies expected to arise during a year, the following procedures may be followed to give effect to the decision mentioned in paragraph above: -

- (i) ***
- (ii) Wherever according to the points in the roster there are any vacancies reserved for Scheduled Castes and Scheduled Tribes, separate lists should be drawn up of the eligible Scheduled Castes or the Scheduled Tribes Officers, as the case may be, arranged in order of their *inter se* seniority in the main list.

- (iii) The Scheduled Castes and Scheduled Tribes Officers should be adjudged by the Departmental Promotion Committee separately in regard to their fitness.
- (iv) When the Select Lists of officers in the general category and those belonging to Scheduled Castes and Scheduled Tribes have been prepared by the Departmental Promotion Committee, these should be merged into a combined Select List in which the names of all the selected officers, general as well as those belonging to Scheduled Castes and Scheduled Tribes, are arranged in the order of their *inter se* seniority in the original seniority list of the category or grade from which the promotion is being made. This combined select list should thereafter be followed for making promotions in vacancies as and when they arise during the year.
- (v) The select list thus prepared would normally be operative for a period of one year, but this period may be extended by six months to enable such of the officers included therein, as could not be appointed to the higher posts during the normal period of one year, to be appointed during the extended period.
- (vi) (Not Printed)."

9. It is admitted before us that so far the single vacant post in 2007 of Assistant Commandant, which was admittedly in the reserved category was concerned, the respondents did not prepare separate list of eligible Scheduled Castes officers for consideration by the Departmental Promotion Committee, which was to consider and recommend selection of candidates was prepared in terms of the said

OM dated 25.04.1989. No such list was placed before the DPC which held its proceedings on 02nd November, 2007. On the contrary the respondents have admittedly considered eligibility of Scheduled Castes candidates as per the seniority in the combined seniority list and have thereby violated the specific requirement stipulated by the office memorandum dated 25.04.1989.

10. A similar issue as has been raised before us as well as an identical stand of the respondents arose for consideration before this Court in **W.P.(C) No.356/2008** entitled “**Union of India & Ors. v. Gopal Meena & Ors.**”. This writ petition was filed by the Union of India assailing adjudication by the Central Administrative Tribunal dated 19th October, 2005. The Tribunal had placed reliance on judgments of the Supreme Court and opined that the mandate of the Supreme Court was that there has to be a separate zone of consideration for SC/ST candidates and clubbing these categories with the general category for the purposes of preparation of zone of consideration was not permissible and it was anti-thesis to the very object of reservation. This Court had, by a detailed judgment and pronouncement on 23rd April, 2009, upheld the afore-noticed views of the Tribunal and had rejected the challenge to the decision by the judgment of the Division Bench pronounced on 23.04.2009.

11. Our attention is drawn to a decision dated 23rd November, 1994 passed by the Apex Court in C.A. No.4026/1998 “**U.P. Rajya Vidyut Parishad SC/ST Karamchari Kalyan Sangh v. U.P. State**

Electricity Board & Ors.”, wherein the Apex Court has held as follows:

“7. First judgment is in the case of ***U.P. Rajya Vidyut Parishad SC/ST Karamchari Kalyan Sangh v. U.P. State Electricity Board & Ors. CA No.4026 of 1998 decided on 23.11.1994.*** The operative portion of the said judgment is as under:

“We concluded the arguments in this case on November 18, 1994 and passed the following order:

“We have concluded the hearing of argument. We are prima facie in agreement with the contention of the learned counsel for the appellant that there has to be a separate zone for consideration so far as SC/ST candidates are concerned. Clubbing in the same zone of consideration would defeat the very purpose of reservation. Mr. M.D. Sen, learned senior counsel appearing for the Board, states that he would like to place the matter before the Board and seek further instructions from the Board.””

12. This very issue again arose before the Apex Court in SLP (C) No.14568-69/1995 entitled ***C.D. Bhatia v. Union of India***, which was decided on 20th October, 2005 by the Apex Court in the following terms:

“We have heard learned counsel for the parties. Learned counsel for the petitioners has raised only one contention to the effect that there has to be separate zone for consideration so far as SC/ST candidates are concerned. According to him, clubbing the schedule caste with the general category in the case of zone of consideration would

defeat the very purpose of reservations. He relies of this Court's Judgment in U.P. Rajya Vidyut Parishad SC/ST Karamchari Kalyan Sangh vs. U.P. State Electricity Board & Ors. (CA No.4026/88) decided on November 23, 1994. This precise point was not raised before the Tribunal. The point was sought to be raised in a review petition but the Tribunal did not permit the same to be raised at that stage. We see no ground to interfere with the impugned judgment of the Tribunal.

We are, however, of the view that the law laid down by this Court in U.P. Rajya Vidyut Parishad's case is binding on all the authorities including the Union of India. The petitioner may, if so advised, approach the Government seeking enforcement of the law laid down by this Court. Special Leave petitions are disposed of."

13. We find that in para 13 of the **Gopal Meena's** case (supra) the Court has relied also on a decision dated 07th September, 2000 passed in C.A. No.1194/1992 "**Basudeo Anil v. Union of India**", wherein the Apex Court has categorically maintained that a separate zone of consideration has to be prepared for SC/ST and general category candidates. It is noteworthy that all these pronouncements have been relied upon by the Division Bench while deciding **Union of India v. Gopal Meena's** case (supra).

14. In view of the clear enunciation of law by the Apex Court followed by this court in **Union of India v. G.S. Meena** (supra) and the unambiguous stipulations made in the O.M. dated 25th April, 1989, which is relied upon by the respondents before us, we have no manner of doubt that the respondents were bound to maintain a

separate zone of consideration so far as the eligibility and consideration of Scheduled Castes candidates for promotion to the reserved post of Assistant Commandant were concerned. It was such Scheduled Castes candidates who fell in such zone of consideration alone who could have been considered by the Departmental Promotion Committee which considered eligible candidates for promotion to the single vacant reserved post of the Assistant Commandant in the year 2007. In the light of the above discussion, the petitioner was clearly at the top of such list and was entitled to consideration for promotion.

15. The respondents have placed the original minutes of the Group 'A' DPC meeting held on 02nd November, 2007 to consider promotion of Subedar Major/Inspector (Stenographer) to the rank of Assistant Commandant (Staff Officer). In para 3 of its proceedings the DPC has noted as follows:

“3. As this is promotion from Group-‘B’ (Non-Gazetted) to Group-“A” (Gazetted) post, reservation order are applicable. As per post based Roster vacancy is reserved for SC category falling at point No.7 of 1st cycle. As per DoP&T instruction on the subject normal zone and extend zone (for SC/ST) is five only. However, there is no SC candidate available in this zone of consideration. Accordingly, the vacancy has been got de-reserved for filling up the same from General Category candidate.”

16. The petitioner has pointed out that after treating the post as unreserved post, the respondents proceeded to appointment of respondent No.4, Sh. F.S. Rana to the post of Assistant Commandant

(Staff Officer) pertaining to the recommendations of the DPC held on 02nd November, 2007. The petitioner has assailed the promotion of the respondent no.4 to such post and for this reason we had issued notice to show cause to the respondent no.4 as well. A statement has been made before us that respondent no.4, Sh. F.S. Rana, has superannuated from service on 31st December, 2009.

17. The respondents failure to prepare such separate select list is legally unsustainable and untenable.

18. Based on such omission, it appears from the minutes of the DPC, which have been placed before us that no Scheduled Caste candidate has been considered for promotion to the post of Assistant Commandant despite the vacancy being for a reserved category even though candidate were eligible and available for consideration.

19. The action of the respondents is totally opposed to the spirit and ethos of reservations which applies to the promotion and appointment which are to be made by the respondents to the post of Assistant Commandant.

20. In view of the clear enunciation of the applicable legal principles and the binding procedure which the respondents were bound to follow as has been laid down in the office memorandum afore-stated, this writ petition has to be allowed.

21. Accordingly, it is directed that the respondents shall hold a review DPC for consideration of the petitioner for promotion to the

rank of Assistant Commandant (Staff Officer) for the vacancy which arose in 2007 within a period of four weeks from today. If the DPC finds the petitioner fit for promotion, he shall be entitled to seniority in the rank of Assistant Commandant (Staff Officer) and financial benefits w.e.f. the date on which he would have been selected to the post of Assistant Commandant (Staff Officer), if he had been considered by the DPC held on 02nd November, 2007. The petitioner shall also be entitled to costs of Rs.15,000/-.

22. This writ petition is allowed in the above terms.

GITA MITTAL, J.

VIPIN SANGHI, J.

FEBRUARY 24, 2010

rsk