

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

MONDAY, THE 5TH DAY OF JANUARY 2015/15TH POUSHA, 1936

WA.No. 2631 of 2002 ()

OP 15747/1995 of THIS HONOURABLE COURT

APPELLANTS/RESPONDENTS 1 AND 2 IN THE O. :

- 1. THE STATE OF KERALA, REP. BY THE
SECRETARY TO GOVERNMENT, HOME DEPARTMENT
THIRUVANANTHAPURAM.**
- 2. THE DIRECTOR GENERAL OF POLICE,
THIRUVANANTHAPURAM.**

BY GOVERNMENT PLEADER

RESPONDENTS/PETITIONERS & RESPONDENTS 3,4,5 & 6 IN THE O.P. :

- 1. K.V.THOMAS, JUNIOR SUPERINTENDENT,
CITY POLICE OFFICE, KOCHI.**
- 2. P.DIVAKARAN, STORE ACCOUNTANT,
KAP 5TH BATTALIAN, THRISSUR.**

DELETED AS :

- *3. K.SAVITHRY, STORE ACCOUNTANT, KAP 4TH
BATTALION, KANNUR.**

***DELETED FROM THE PARTY ARRAY AS PER ORDER DT 2/7/2007 IN
IA 561/2007 IN WA 2631/02.**

- 4. K.A.SASI, CASHIER, DISTRICT POLICE
OFFICE, WAYANAD.**
- 5. SUKUMARI, U.D.CLERK, CITY POLICE OFFICE,
TRIVANDRUM.**

WA.No. 2631 of 2002 ()

**6. S.KOMALAVALLY, AGED 38 YEARS,
W/O.K.SATHYADEVAN, PULIKKATHU,
VEEDU P.O.PARAKULAM, KOLLAM DISTRICT.**

**R1 & R2 BY ADV. SRI.N.SUGATHAN
BY ADV. SRI.K.V.KUMARAN
BY ADV. SRI.A.V.RAMAKRISHNA PANICKER**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

bp

**ASHOK BHUSHAN, Ag.CJ
& A.M.SHAFFIQUE, J.**

W.A.No.2631 of 2002

Dated this the 5th day of January 2015

J U D G M E N T

Ashok Bhushan, Ag.CJ

Heard learned counsel for the appellant. This writ appeal has been filed by the respondents against the judgment dated 04/01/2002 in O.P.No.15747 of 1995 by which the original petition was allowed setting aside Ext.P6.

2. The facts involved in this writ appeal is that the writ petitioners entered into ministerial service of the Police Department as Lower Division Clerk and subsequently was promoted as Upper Division Clerk. Petitioners were promoted to the cadre of Junior Superintendent and posted at different places. It is pleaded that, in the case of ministerial staff in the Police Department, there is no general transfer on completion of three years and transfers become necessary only when one is promoted to UDC or Supervisory cadre. Order dated 11/10/1983 was issued prescribing

procedure to be adopted in the case of transfers. General guidelines/norms for transfer or posting was issued by the Government on 01/06/1987. Revised guidelines were also issued thereafter which were modified from time to time. Government order Ext.P5 dated 03/01/1980 was issued pertaining to transfer and posting to Government employees belonging to Scheduled Castes and Scheduled Tribes. However, the said Government Order was not applicable to the Police Department. An order dated 27/06/1995 (Ext.P6) was issued by which Clause 19 was added, which was subject to challenge in the writ petition. Petitioners' case in the writ petition is that the Government Order dated 27/06/1985 violated Article 16 of the Constitution of India. It was pleaded that other employees have also a right to get posting to the place of their choice and the said right cannot be confined only to the members of Scheduled Castes and Scheduled Tribes. It is pleaded that in the matter of transfer and posting, protection under Article 16(4) cannot be

claimed.

3. The learned Single Judge, by the impugned judgment, held that Clause 19 inserted by Ext.P6 is discriminatory and arbitrary. It has further been noted that such preference as was extended by Ext.P6 was not even available to the members of Scheduled Castes and Scheduled Tribes of other departments.

4. The State, aggrieved by the judgment of the learned Single Judge, has come up in this writ appeal. Sri.P.I.Davis, learned senior Government Pleader appearing for the State contended that the members of Scheduled Castes and Scheduled Tribes have to be given posting of their choice taking into consideration the mandate of Article 335 of the Constitution of India. He submits that a special treatment can always be given to the members of Scheduled Castes and Scheduled Tribes and there was no error in issuing Ext.P6 order. He submits that the right of giving choice of posting cannot be said to be causing any

interference in the administrative exigency.

5. We have considered the submission of the learned counsel for the appellants and perused the records.

6. Ext.P6, by which Clause 19 was inserted, was to the following effect:

“19. Scheduled Castes/Scheduled Tribes employees in the non-Gazetted Cadre may be posted to their District of choice on their promotion. Wherever such posting is not possible on administrative reasons and posted to another place or District, they may be given transfer to their District of choice as and when vacancy arises.”

Clause 19, as quoted above, contemplates giving posting on promotion to members of the Scheduled Caste and Scheduled Tribe in a Non-Gazetted Cadre to the place of his choice. The guidelines clearly gives a right of choice of District in which such member wants to be posted on promotion and in the event such posting is not possible, due to administrative reason, they may be given transfer to the District of their choice as and when vacancy arises. Thus

right to choice of place of posting has been given by the guidelines and in the event, for the time being, there may not be any vacancy, as and when such vacancy arises. Submission of the learned counsel for the appellants is that such right flows from the constitutional provisions and especially the provisions of Articles 335 of the Constitution of India. Article 335 of the Constitution of India provides as follows:

“335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.- *The claims of the members of the Scheduled Castes and the Scheduled 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;*

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the

Union or of a State.”

7. Article 16(4) of the Constitution of India provides for reservation in public employment to the members of the backward class of citizens. Article 16 is extracted below:

“16. Equality of opportunity in matters of public employment.-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not

adequately represented in the services under the State.

(4A) Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Casts and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Xxxxxxxxxx”

8. Article 16 is a species of Article 14. Article 16 provides for equality of opportunity in the matter of public employment. Reservation of posts to the members of backward classes on deputation has been provided to bring them into the main stream of the society. Right under Article 16(4) can be read as a right of reservation to posts or appointments for the members. There may also be cases where rules or circulars provide for giving reservation at the time of promotion also. But the said right cannot be read as a right of giving a choice of the place of posting. Reservation of appointments or posts is a well known

concept and the said concept cannot embrace in itself the choice of place of posting.

9. It is true that the Government has affirmative responsibility for elimination of inequalities social, economic or otherwise. It is also well settled that Article 16(4) is wide enough to include not only reservation but also relaxation of standard at competitive examination for members of backward classes or exemptions which may be regarded as ancillary to reservation, but once a member of backward class is promoted along with other candidates, they form part of a common stream and no further distinction can be made thereafter. Justice B.P.Jeevan Reddy, speaking for majority in **Indra Sawhney and Others v. Union of India and Others** [1992 Supp (3) SCC 217] laid down the following in paragraphs 828 and 831.

“828.xxxx

At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too

compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres.

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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 and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in Karamchari Sangh 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.”

Justice Dr.T.K.Thommen, in the same case, while delivering concurring opinion regarding promotion, has held that once appointed in service, no further discrimination can be made in matters relating to condition of service. Following was laid down in paragraph 307.

“307. *The initial appointments may be made at various levels or grades of the hierarchy in the service. There is no warrant in Article 16(4) to conclude from the expression ‘reservation of appointments or posts’ that reservation extends not merely to the initial appointment, but to every stage of promotion. Once appointed in a service, any further discrimination in matters relating to conditions of service, such as salary, increments, promotions, retirement benefits, etc. is constitutionally impermissible, it being the very negation of equality, fairness and justice.”*

10. The choice given under Clause 19 of the place of posting cannot be treated to be a concession for the purpose of appointment to post. The concession and relaxation which are contemplated under Article 16(4) have to be concession and relaxation in relation to appointment to post, as noted above. After promotion is granted to a reserved category candidate as well as to a general category candidate to a higher post, they all are members of one stream/cadre and with regard to condition of service and the benefit which are attached to service, there cannot be any discrimination except those which flow from statutory provisions or have been accepted as incidents of reservation. We thus are of the view that clause 19, as quoted above, cannot be claimed under Article 16(4) of the Constitution of India.

11. Article 335 provides that claim of members of Scheduled Castes and Scheduled 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. The object and purpose of Article 335 is entirely different. The said Article has been provided to ensure that the claim of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration. The idea is that the claim shall not be given undue preference so as to affect the maintenance of efficiency of administration. Thus the claim has to be balanced with the efficiency of administration. However, Article 335 again applies in the making of appointment of service and posts. The said Article has nothing to do with the choice of posting as has now been inserted by Ext.P6.

12. We are fully in agreement with the view taken by the learned Single Judge that Ext.P6 violates Articles 14 and 16. There is no nexus between the basis of classification

and the object sought to be achieved in providing the said choice of place of posting. It is true that the rational classification can be made but the said rational classification has to bear a nexus with the object sought to be achieved. After promotion, the employees belonging to reserved category as well as general category come in the same stream and giving choice of place of posting to one category and denying the said benefit to the other category clearly makes a discrimination between two similarly situated streams who have been promoted.

We thus do not find any error in the judgment of the learned Single Judge and hence the writ appeal is dismissed.

(sd/-)
**(ASHOK BHUSHAN,
ACTING CHIEF JUSTICE)**

(sd/-)
(A.M.SHAFFIQUE, JUDGE)

jsr

