

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

[Special Original Jurisdiction]

WEDNESDAY THE FOURTEENTH DAY OF JUNE
TWO THOUSAND AND SEVENTEEN

PRESENT

HONOURABLE SRI JUSTICE SURESH KUMAR KAIT
AND
HONOURABLE DR. JUSTICE SHAMEEM AKTHER

WRIT PETITION No. 4646 OF 2008

Between:

The District Educational Officer,
Nalgonda,
Nalgonda district & Ors. ... Petitioners

V/s.

M. Shekar Redy & Anr. Respondents

Counsel for the Petitioners : Govt.Pleader for Services-I [5150]

Counsel for the Respondent : None appeared

The court made the following: : [order follows]

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
A N D
HON'BLE DR. JUSTICE SHAMEEM AKTHER**

WRIT PETITION No. 4646 OF 2008

ORDER : (*Oral, Per the Hon'ble Sri Justice Suresh Kumar Kait*)

This writ petition is filed by the petitioners invoking the inherent jurisdiction of this Court under Article 226 of the Constitution of India seeking writ of certiorari calling for the records relating to and connected with the order dated 12/09/2006 passed by the A.P. Administrative Tribunal, Hyderabad, in O.A.No. 4768 of 2005 alongwith VMA.No.862 of 2005 and VMA.No. 1154 of 2005 and to quash the same by holding as contrary to law and to pass such other suitable orders as this Court may deems fit and proper in the circumstances of the case.

2. Heard the learned Government Pleader for Services-I [TG] appearing on behalf of the petitioners and none appeared on behalf of the first respondents.

3. Vide the present writ petition, the petitioners has assailed the order dated 12/09/2006 passed by the A.P. Administrative Tribunal, Hyderabad, in O.A.No. 4768 of 2005 along with VMA.No.862 of 2005 and VMA.No. 1154 of 2005. As stated in the present writ petition that the respondents and other candidates were appointed on different dates i.e., 02/11/1996 to 16/12/1996 in

exercise of powers conferred under Rule 33 of A.P. State Subordinate Service Rules, 1996, the appointing authority while appointing the respondents and all other candidates, the petitioners have issued selection list showing the respective places of the respondents and other candidates about the seniority etc. The said list was displayed while issuing appointment orders, therefore, placement shown in respect of the respondents as well as other candidates appointed are in conformity with Rule 33 [b]. The respondents have accepted the appointment and their placements and having worked for nine years, have not raised any claim. While so, for taking up the process of counselling for effecting promotion for the post of School Assistants, the seniority list was updated from the list of original appointment showing the seniority. In the said list, the persons who died, retired, promoted already and resigned were excluded and when such updated list was prepared, the same was displayed for any objections to be made by the persons in the list. Thereafter, final seniority list was prepared.

4. The learned Government Pleader appearing on behalf of the petitioners has vehemently argued on the sole ground that at the time of promotion the petitioners used to publish the seniority list, however, the respondents never challenged the same, however, challenged the same in the

year 2005 belatedly. Thus, the learned Tribunal ought to have dismissed their O.A. on delay and latches alone.

5. Having heard the learned counsel for the parties, the issue to be determined by the Tribunal was that whether the seniority has to be fixed as per the ranking given by the selection agency i.e., DSC in the present case or seniority has to be fixed, duly following the roster points for reserved categories by placing the appointees belonging to the reserved categories in the slots meant for them as per roster point, while preparing the seniority list, thus interspersing the reserved candidates as per roster points among the OCs.

Rule 22 of the AP State and Subordinate Service Rules reads as under:

“Rule 22 [1] : Reservations may be made for appointments to a service, class or category in favour of Scheduled Castes, Scheduled Tribes, Backward Classes, Women, Physically Handicapped, Meritorious Sportsman, Ex-Servicemen and such other categories, as may be prescribed by the Government from time to time, to the extent and in the manner specified hereinafter in these rules or as the case may be, in the special rules. The principle of reservation as hereinafter provided shall apply to all appointments to a service, class or category –

- (i) *by direct recruitment, except where the Government by a General or special order made in this behalf, exempt such service, class or category;*
- (ii) *Otherwise, than by direct recruitment where the special rules lay down specifically that the principle of reservation in so far as it relates to Scheduled Castes and Scheduled Tribes only shall apply to such services, class or category to the extent specified therein.*

2. (a) The unit of appointments for the purpose of this rule shall be one hundred vacancies, of which fifteen shall be reserved for Scheduled Castes, six shall be reserved for Scheduled Tribes, twenty five shall be reserved for the Backward Classes and the

remaining fifty four appointments shall be made on the basis of open competition and subject to Rule-22-A of these rules.

(b) Out of fifty four appointments to be made on the basis of open competition, three appointments shall be reserved for direct recruitment of the physically handicapped persons.

(c) In the case of appointments to clerical posts including the posts of typists, i.e., in Group-II and Group-IV services and in the case of posts in the Andhra Pradesh Police Subordinate Service, to which the principle of reservation of appointment applies, out of fifty four, as the case may be, fifty one appointments to be made on the basis of open competition, two appointments shall be reserved for direct recruitment of Ex-servicemen.

(d) In the case of appointments to the posts of Senior Assistants, Junior Assistants, Junior Stenographers, Typists and Record Assistants in the Offices of Heads of Departments, Assistant Section Officers, Typist-cum-Assistants, Junior Stenographers and Record Assistants in the Secretariat to which the principle of reservation of appointments applies, out of fifty four, as the case may be, forty nine appointments to be made on the basis of open competition, one appointment shall be reserved for direct recruitment of meritorious sportsmen:

Provided that the claims of members of the Scheduled Castes, Scheduled Tribes, Backward Classes, Women and the Physically Handicapped persons or the Ex-servicemen as the case may be, shall also be considered for the remaining appointments which shall be filled on the basis of open competition, the number of appointments reserved for that category shall in no way be affected during the period the reservation for that category is in force.”

6. The respondents were selected by the D.S.C. from 1996 onwards till 2002 in different selections. They belong to OC and party/respondents in O.A. belong to the reserved categories of SC/ST/BCs. The respondents herein belongs to OC and the respondents in O.A. belongs to reserved categories of Scheduled Castes/Scheduled Tribes.

7. In view of the above rule position, the learned Tribunal observed that unit of appointments for the purpose of aforesaid rule 100 vacancies, of which fifteen shall be reserved for SCs, six shall be reserved for STs, twenty five shall be reserved for Backward classes and the remaining fifty four appointments shall be made on the basis of open competition and subject to Rule 22 [A]. Rule-22 [A] relates to the reservation for women in appointments.

Rule-33 [a] of the State and Subordinate Service Rules reads as under:

“The seniority of a person in a service, class, category or grade, shall unless he had been reduced to a lower rank as a first appointment, to which service, class, category or grade.”

Rule-33 [b] of the State and Subordinate Service Rules, reads as under :

“The appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service, fix either for purpose of satisfying the rule of reservation or appointments or for any other person the order of preference among them; and where such order has been fixed, seniority shall be determined in accordance with it’

Provided further that the order of merit or order of preference indicated in a list of selected candidates prepared by the Public Service Commission or other selecting authority, shall not be disturbed inter se with reference to the candidates position in such list or panel while determining the seniority in accordance with this rule and notional dates of commencement of probation to the extent necessary, shall be assigned to the persons concerned, with reference to assigned to them in the said list.”

Rule-33 [c] of the State and Subordinate Service Rules reads as under :

“Whenever notional date of promotion is assigned, such date of notional promotion shall be taken into consideration for computing the qualifying length of service in the feeder category for promotion to the next higher category and that the notional service shall be counted for the purpose of declaration of probation also in the feeder category.”

8. In view of the Rule-33 (b), the learned Tribunal observed that the appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service, fix either for the purpose of

satisfying the rule of reservation of appointments or for any other reason the order of preference among them and where such order has been fixed, seniority has to be determined in accordance with it. However, proviso to this rule, put a rider that the order of merit or order of preference indicated in the list of selected candidates prepared by the Public Service Commission or DSCs shall not be disturbed inter se with reference to the candidates position in such list or panel while determining the seniority in accordance with this rule and notional dates of commencement of probation, if any, need be given with reference to the order¹ of merit or order of preference assigned to them in the said list.

9. Accordingly, the learned Tribunal opined that though the appointing authority, at the time of making appointments can fix the order of preference among the selected candidates either to satisfy the rule of reservation or for other reason where two or more persons are simultaneously appointed and where such order has been fixed, seniority has to be determined accordingly. But Rule 33 (b) is subject to the proviso which states that the order of merit or order of preference cannot be disturbed inter se with reference to the candidates position in the merit list or while determining the seniority in accordance with Rule-33.

1] 2003 AIR SCW-1508

10. It is argued by the respondents before the Tribunal that the proviso to Rule 33 (b) stating that even though the appointing authority can fix the position while making appointments of two or more persons simultaneously, yet, no power lies in the appointing authority to change the inter-se ranking given by the selecting agency, in terms of the proviso to Rule 33 (b) of A.P. State and Subordinate Service Rules.

11. To strengthen their arguments the respondents relied upon the judgment of the Hon'ble Supreme Court in the case of **BIMLESH TANWAR V/s. STATE OF HARYANA AND ORS-1** [reported in 1995 [5] SCC-625. In the aforesaid case, one of the questions that arose before the Hon'ble Supreme Court was whether the seniority has to be fixed according to the merit/ranking given by the selecting agency or can be fixed with reference to the roster points.

12. We note in the aforesaid judgment, the Hon'ble Supreme Court, while dealing with its various judgments, at para No.34 discussed about the view taken by the Supreme Court in the case of **P.S. GHALAUT V/s. STATE OF HARAYNANA AND ORS** .,² which reads as under:.

“P.S. Ghalaut V/s. State of Haryanana and Ors., (1995 [5] SCC 625 relied upon by Dr. Chauhan, is a decision rendered by a two Judge bench. In that case, Rule 13 of the Rules envisaged that the seniority inter se of members of the service shall be determined by the length of continuous service on any post in the service, provided further than in the case of two or more members appointed by direct recruitment, as

the order of merit determined by the Commission shall not be disturbed in fixing the seniority". Despite the said Rule, it was held :

"Take for instance vacancies Nos. 1 and 6 as pointed out in the Chief Secretary's letter have admittedly been reserved for Scheduled Castes, suppose recruitment was made to fill up ten vacancies, three candidates from Scheduled Castes were selected on the basis of reservation quota. The question is whether the first candidate will be put in the quota allotted to the Scheduled Castes in the roster. Having been selected as a general candidate, though he is more meritorious than the second and third candidates, he will not get the placement in the roster, reserved for Scheduled Castes i.e., Nos. 1 and 6 points. Consequently, candidates Nos. 2 and 3 will get the placement at Nos. 1 and 6 points and the first candidate will get the placement in the order of merit along with the general candidates according to the order of merit maintained by the Selection Committee or the Public Service Commission. He cannot complain that having been selected in the merit, he must be placed in the placement reserved for Scheduled Castes at Point No.1 in the roster. Equally, though general candidate is more meritorious in the order of merit prepared by the Public Service Commission or the Selection Committee, when the appointments are made and the vacancies are filled according to the roster, necessarily and inevitably the reserved candidates though less meritorious in the order of merit maintained by the Public Service Commission would occupy the respective places assigned in the roster. Thereby, they steal a march over some of the general candidates and get seniority over the general candidates. This scheme is, therefore, constitutional, valid and is not arbitrary."

13. It is pertinent to mention here that in the above referred judgment at para Nos. 36, 36 and 37, the Hon'ble Supreme Court has observed as under :

35. "In A.I.I.M.S. Students Union V/s. A.I.I.M.S. & Ors. [2202

(1) SCC-428], this Court observed:

“Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped – the reservation geared upto getting over the handicap. The rationale of reservation in the case of medical students must be removal of disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher, the level of the specialty the lesser the role of reservation.

Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the Nation constantly rising to higher levels. In the era of globalization, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties, though not enforceable by a writ of the Court, yet provide a valuable guide and aid to interpretation of Constitutional and legal issues. In case of doubt or choice, people’s wish as manifested through Article 51-A can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the Courts.”

36. In *K. Duraisamy & Anr. V/s. State of T.N. & Ors.* [2001] 2 SCC 538, this Court held :

“The mere use of the word ‘reservation’ per se does not have the consequence of ipso facto applying the constitutional concept of a protective reservation specially designed for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, to enable them to enter and adequately represent in various fields. The meaning, content and purport of the expression will necessarily depend upon the purpose and object with which it is used.”

37. An affirmative action in terms of Article 16 [4] of the Constitution meant for providing a representation of class of citizenry who are socially or economically backward. Article 16 of the Constitution of India is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority

is, thus, not to be fixed in terms of the roster points. If that is done, the rule of affirmative action would be extended which would strictly not be in consonance of the constitutional schemes. We are of the opinion that the decision in P.S. Ghalauth does not lay down a good law.

14. A perusal of para No.37 of the order in O.A., it shows that the fixation of seniority on the basis of roster is not contemplated in the Constitution and the Supreme Court has held that the decision in P.S. Ghalaut does not lay down a good law. A perusal of proviso to Rule-33 (b), it is seen that order of merit or order of preference indicated in a list of selected candidates prepared by the Public Service Commission or other selecting authority has to be maintained by preparing the seniority list. In the judgment referred to above also, in the case of **BIMLESH TANWAR v/s. STATE OF HARYANA AND ORS.**, reported in 2003 AIR SCW-1508, the Hon'ble Supreme Court has held that seniority cannot be fixed with reference to the roster point and it has to be according to the ranking given by the selecting authority. In various judgments of the various courts and the Hon'ble Supreme Court, it has been held that rota quota is for the purpose of calculation of the number of vacancies they have to be reserved for various categories for direct recruitment and that cannot be the ground for giving seniority as per the roster. Seniority lists have to be prepared with reference to the merit list or order of preference given by the respective DSCs and not with reference to the roster points.

Seniority list of SGTs contrary to the above findings cannot be sustained and deserves to be set aside and accordingly, set aside.

15. In view of the above discussion and the rule position, at this stage the issue raised by the learned counsel for the petitioners has no bearing, as it was not raised before the Tribunal at any point of time. Accordingly, the issue raised by the counsel for the petitioners cannot be dealt with in the present writ petition.

16. Finding no merit, this writ petition is accordingly dismissed. No order as to costs.

17. As a sequel, miscellaneous petitions if any, pending in this writ petition shall stand closed.



JUSTICE SURESH KUMAR KAIT

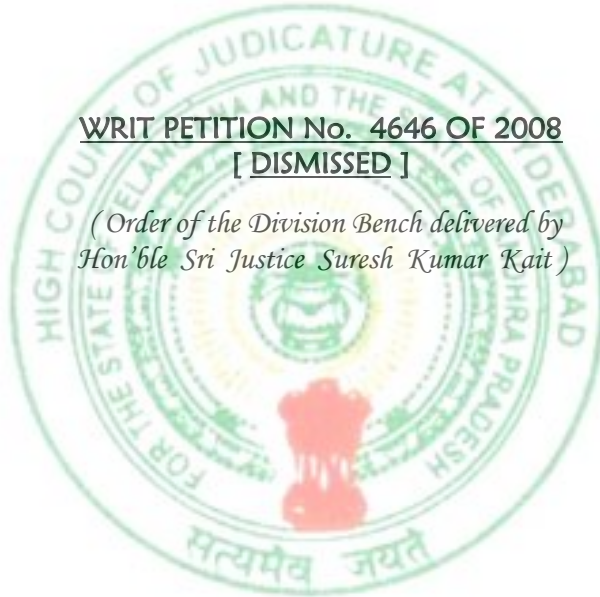
Dr. JUSTICE SHAMEEM AKTHER

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE DR. JUSTICE SHAMEEM AKTHER**

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WRIT PETITION No. 4646 OF 2008
[DISMISSED]

*(Order of the Division Bench delivered by
Hon'ble Sri Justice Suresh Kumar Kait)*



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