

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OA) No.948 of 2013

In the matter of an application under Section 19 of the
Administrative Tribunal's Act, 1985.

.....

Pabitra Mohanty

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s. Sameer Kumar Das,
S.K. Mishra and R.K. Bisoi.

For Opp. Parties : Additional Standing Counsel
Mr. P. Bharadwaj

PRESENT:

THE HON'BLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing: 07.04.2022 and Date of Judgment: 20.04.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. Sameer Kumar Das, learned counsel for the Petitioner and Mr. P. Bharadwaj, learned standing counsel for the State-Opposite Parties.

3. The Petitioner in the present Writ Petition has prayed for the following relief:-

“ Under the circumstances, it is therefore humbly prayed therefore that this Hon’ble Tribunal be graciously pleased to set aside the order of appointment of the Respondent No.5 and 6 dtd.4.9.2012 under annexure-2 so also the proceeding under Annexure-3 with regard to the selection of Excise Constable in Berhampur Excise District.

And further the Hon’ble Tribunal be pleased to direct the respondents to engage the applicant as Excise Constable in Berhampur Excise District and grant him all consequential service and financial benefits.

And/or pass any other order/orders in the fac and circumstances of the case to give complete justice to the applicant.”

4. It is the submission of Mr. Das, learned counsel for the Petitioner that pursuant to the advertisement issued by the Opp. Party No.2 under Annexure-1, the Petitioner made his application for the post of Excise Constable in respect of Berhampur District as an unreserved candidate.

5. But the Petitioner challenges the process of selection undertaken for the said post of Excise Constable in respect of Berhampur District. It is submitted that without following the reservation policy in vogue, as against the total number of vacancy of 10 posts in respect of Berhampur District, reservation is provided for 7 posts and keeping 3 posts for UR category.

6. It is submitted that the said action of the Opp. Party No.2 in keeping more than 50% posts towards reservation is not in consonance with the decision of the Hon’ble Apex Court rendered in the case of **Indra Sawhney v. Union of India reported in AIR 1993 SC 477**. In Para 94(A) of the said decision, it is held as follows:-

“We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and

that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State Legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits - and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the Andhra Pradesh High Court in *Narayan Rao v. State* 1987 A.P. 53, striking down the enhancement of reservation from 25% to 44% for O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

It needs no emphasis to say that the principle aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself

contemplated reservation being "confined to a minority of seats" (See his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.

While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

7. In the aforesaid decision, Hon'ble apex Court held that reservation contemplated in Clause-4 of Art.16 should not exceed 50%. Mr. Das, learned counsel for the Petitioner also brought to the notice of this court the decision of this Court reported in the case of **State of Odisha Vrs. Kumari Harapriya Dash reported in 2007 Supp. I OLR 897**. In the said decision, this Court relying on the decision of the Hon'ble Apex Court

as cited (supra) as well as the subsequent decision in the case of **M. Nagraj & Ors. v. Union of India & Ors.** reported in **AIR (2007) SC-71** also held that reservation in any case should not exceed 50%.

8. Mr. Das also relied on the decision of the Hon'ble Apex Court reported in case of **Union of India & Ors. v. Dalbir Singh & Anr.** reported in **(2009) 7 SCC 251**. In the said decision Hon'ble Supreme Court in Para 13 of the Judgment held as follows:-

"From the pleadings it appears to us that the appellants had prepared two sets of lists. The first one being the list of those candidates who had staked their claim in the general merit and the second list contains those candidates who had opted for consideration of their case under OBC category. The respondent at no point of time had taken exception to the procedure adopted by the appellants in preparing the select list. In our opinion, having opted to consider his case only under OBC category, he cannot thereafter claim that his case requires to be considered in the general merit, only because he has scored better percentage of marks than the last selected candidate in the general merit."

9. Mr. Das relying on the aforesaid decisions of the Hon'ble Apex Court as well as of this Court argued that since prima facie as against 10 posts, 7 posts were kept reserved, the same being contrary to the decision of the Hon'ble Apex Court, the process of selection initiated by the Opp. Party No.2 is bad in the eye of law. Mr. Das further argued that even though Opp. Party No. 5 made his application in respect of Scheduled Caste category, but the Opp. Party without following the decision of the Hon'ble Apex Court reported in the case of **Union of India & Ors. v. Dalbir Singh & Anr.** as well as in the case of **Deepa E.V. v. Union of India & Ors., (2017) 1 ILR-CUT-917 (SC)** appointed the said Opp. Party No.5 as against the vacancy meant for UR category.

10. Mr. Das relying on the decision in the case of **Deepa E.V.** also argued that since Opp. Party No.5 has made his application in SC category, he

should not have been selected and appointed as against UR vacancies and that too, when as against 10 posts, only 3 posts were earmarked for UR category.

11. Mr. Das also brought to the notice of this Court the Order dtd.29.04.2013 passed by the learned Tribunal while issuing notice of the matter. In the said order learned Tribunal while issuing notice passed the following order:

“So far as the prayer for interim relief is concerned, it is directed that the Respondents may go ahead with the process of selection in issuing appointment orders on the basis of the select list, but they shall not fill up more than five posts by candidates belonging to the reserved category pursuant to Annexure-1, without the leave of this Tribunal.”

12. Mr. Das further argued that since in UR category, the Petitioner was placed at Serial No.2, he should have been selected and appointed as against UR vacancy. But the Opp. Party illegally selected Opp. Party No.5 in UR category and thereby depriving the Petitioner from the purview of selection.

13. Mr. Bharadwaj, learned counsel appearing for the State-Opp. Parties, while supporting the action of the department argued that in respect of Berhampur District 18 candidates appeared the written test and a list of 14 successful candidates was published. In the said list, the Petitioner was placed at Serial No.3 and in view of the appointment of O.P. No.5 as against UR category, the Petitioner was not provided with the appointment.

14. It was also argued by the learned counsel for the State that as against 10 vacancies, the Opp. Party No.2 approved the appointment of 8 candidates. Since Opp. Party No.5 was selected as against the vacancy in UR category having secured more marks than the Petitioner, no illegality has been committed by the Opp. Party No.2. Mr. Bharadwaj accordingly prayed that no interference is called for by this Court.

15. Having heard learned counsel for the Parties and placing reliance on the decisions as cited (supra), this Court is of the considered opinion that while issuing the advertisement under Annexure-1, the Department has not followed the reservation principle settled by the Hon'ble Apex Court in the case of **Indra Sawhney** as well as in the case of **M. Nagraj & Ors.** Not only that the Opp. Parties also do not follow the decision of the Hon'ble Apex Court in the case of **Dalbir Singh**. Since Opp. Party No.5 made his application in SC category, he should have been selected and appointed against the vacancy in SC category.

16. In view of the decision of the Hon'ble Apex Court as cited (supra), this Court is also of the considered view that since the Petitioner was placed at Serial No.3 of the merit list and his position was at Serial No.2 in UR category, by following the reservation policy so settled by the Hon'ble Apex Court, the Petitioner should have been provided with the appointment as against UR category. Not only the learned Tribunal while issuing notice of the matter vide order dtd.29.04.2013 also directed the Opp. Parties not to fill up more than 5 posts in reserve category. The said order was never assailed by the State-Opp. Parties and no modification was made to the said order at any point of time.

17. Taking everything into account and by following the ratio decided in the case of **Indra Sawhney** and other decisions of the Hon'ble Apex Court as cited (supra), this Court without disturbing the appointments already made in respect of Berhampur District, direct the Opp. Parties more particularly Opp. Party No.2 to provide appointment to the Petitioner as Excise Constable against UR category pursuant to the advertisement issued under Annexure-1. This Court further directs the Opp. Party No.2 to issue such order of appointment in favour of the Petitioner within a period of four weeks from the date of receipt of the order. Opp. Party No.2 is to act upon the order on being provided with the certified copy of this order by the Petitioner.

18. The writ Petition is accordingly allowed. There shall be no order as to costs.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 20th of April, 2022/Sneha

