

HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

S.B.: Hon. Mr. S. C. Sharma, J

WRIT PETITION NO. 43 / 2010 (S)

DR. ANAND BALE

Vs.

State of M.P. & ors.,

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[J U D G M E N T]
(16/11/2010)

The petitioner before this Court has filed this present petition being aggrieved by the action of the respondents in not reserving the vacancies in the cadre of Lecturer Prosthodontics for Scheduled Caste category. The contention of the petitioner is that he belongs to Scheduled Caste Category and holds a Bachelor's Degree in Dentistry as well as a Master's Degree. He has further stated that he was appointed as a Tutor in Prosthodontics Department and has joined the department in September 2009. The petitioner has further stated that an advertisement was issued as contained in Annexure P/2 on 8/9/09 inviting applications for the post of Lecturer and one solitary post advertised by the respondents was for General Category. The petitioner has categorically stated that in the department of Prosthodontics 3 posts of lecturer are sanctioned

and one post was occupied by Dr. Alka Gupta a candidate belonging to General Category, one post was occupied by Dr. Mukesh Soni belonging to OBC and one post was occupied by Dr. Subhash Sonkeshri who as a Member of Scheduled Tribe. The petitioner has placed heavy reliance on a roster prepared by the State Government for filling up the vacancies and his contention is that as per the roster endorsed along with the petition at page 43, in case of 3 posts, the first post has to be filled up by unreserved category, second post by a scheduled tribe candidate and the third post is to be filled up again by a candidate belonging to the unreserved category. He has further stated that as per para 2 of the roster the first available vacancy after filling up the posts as aforesaid has to be made available to a Scheduled Caste candidate and the second vacancy arising has to go to unreserved category and the third vacancy has to be filled by OBC candidate. He has further stated that Dr. Alka Gupta has been promoted to the post of Reader and therefore as per para 2 of the model roster the first available vacancy has to be filled up by appointing a scheduled caste candidate. The petitioner has prayed for issuance of an appropriate writ, order or direction directing the respondents to consider the candidature

of the petitioner and to appoint him being a candidate belonging to Scheduled Caste category. A reply has been filed by the State Government and the contention of the respondent – State is that Rules have been framed for providing reservation to Scheduled Caste, Scheduled Tribe and OBC candidates known as M P Public Service (Reservation of ST / SC and OBC) Rules, 1998. They have also stated that as per the aforesaid Rules a roster has been prepared and as per the roster posts have been reserved. It has also been stated that for Scheduled Caste category 16% posts are reserved, for ST 20% and for OBC 14% posts are reserved. It has also been stated that keeping in view the number of vacancies various rosters have been prepared and in the present case 3 posts are available in the department in question and as per the roster prepared by the State Government the first post has to be filled up by unreserved category, second post by candidate belonging to ST and third post again by unreserved category. The respondents have also stated that para 2 has to be read conjointly with para 3 and 4 of the model roster and the same provides that reservation will not exceed 50% at any point of time. They have stated that in the present case as one post is occupied by OBC, one by ST and in case the contention of the

petitioner is accepted it will amount to 100% reservation and the same is not permissible in law. Respondents have prayed for dismissal of the writ petition. An application for intervention has also been filed in the matter by a candidate belonging to general category and the contention of the learned counsel is that in case the plea of the petitioner is accepted the same will result in 100% reservation which is against the constitutional mandate. He has prayed for dismissal of the writ petition. The intervenor has also informed this Court that interviews have taken place on 6/1/10. However, on account of an interim order passed by this court no appointment order has been issued and therefore the respondents be directed to issue an appointment order in favour of the successful candidate.

Heard learned counsel for the parties at length and perused the record.

In the present case it is an admitted fact that 3 sanctioned posts are in existence in the Department of Prosthodontics at Autonomous College of Dentistry, Indore. Out of 3 posts one post was occupied by Dr. Alka Gupta (unreserved category), one by Mukesh Soni (OBC) and the third was occupied by Dr. Subhash Sonkeshri (ST). Dr. Alka Gupta on account of her

promotion to the post of Reader has vacated one post out of the 3 posts and an advertisement was issued on 8/9/09 inviting applications for post of lecturer in Prosthodontics. Applications were received and the petitioner has also submitted his application 3/10/09. Petitioner after submitting his application has approached this Court stating therein that the posts in question has to be filled up exclusively by a person belonging to Scheduled Caste alone. Rules have been framed for providing reservation to SC / ST and OBC Categories and the extent of reservation provided for SC / ST and OBC is 16%, 20% and 14% respectively. The aforesaid percentage comes to 50%. As per the Rules known as M P Public Service (Reservation of ST / SC and OBC) Rules, 1998 roster have been prepared and the petitioner himself has enclosed the roster prepared under the Rules of 1998. In respect of a department or establishment where 3 posts are in existence the following roster has been prepared by the State Government.

उदाहरण क्रमांक:- 2

संवर्ग में स्वीकृत पदों की कुल संख्या-03
उपरोक्त 3 पद प्रथम बार, 100 बिन्दु मॉडल रोस्टर के
बिन्दु क्रमांक 1 से 3 में दर्शाये अनुसार निम्नानुसार
भरे जायेंगे:-

प्रथम पद :- अनारक्षित।

द्वितीय पद:- अनुसूचित जनजाति।

तृतीय पद :- अनारक्षित ।

2 तत्पश्चात् संवर्ग में पद रिक्त होने पर, उन्हें प्रतिस्थापन, त्मचसंबमउमदजद्ध प्रक्रिया से चक्रानुक्रम द्वारा ठल तवजंजपवदद्ध नीचे दर्शायी गयी प्रक्रिया से भरा जायेगा:-

प्रथम प्रतिस्थापन :- अनुसूचित जाति ।

द्वितीय प्रतिस्थापन:- अनारक्षित ।

तृतीय प्रतिस्थापन :- अन्य पिछड़ा वर्ग ।

3 उपरोक्तानुसार, एक बार चक्रानुक्रम पूरा हो जाने पर भविष्य की रिक्तियां भी उपरोक्त चक्रानुक्रम से ही भरी जायेगी । यह एक निरंतर प्रक्रिया रहेगी ।

4 किसी भी स्थिति में संवर्ग में आरक्षण का लाभ प्राप्त कर नियुक्त होने वाले व्यक्तियों (अनुसूचित जाति, अनुसूचित जनजाति एवं अन्य पिछड़ा वर्ग को सम्मिलित कर) की संख्या 50 प्रतिशत से अधिक नहीं होगी । ऐसी स्थिति आने पर आरक्षित प्रवर्ग से संबंधित चक्रानुक्रम छोड़ दिया जायेगा । अर्थात् रिक्त अनारक्षित मानकर भरी जायेगी ।

The contention of the petitioner is that on account of paragraph 2 of the aforesaid model roster, the first available vacancy has to be filled up by a candidate belonging to Scheduled Caste. Paragraph 4 of the same roster reveals that in case the reservation is exceeding 50 % then the procedure provided in para 2 will not be followed and the vacancy shall be filled up by a unreserved candidate. In the present case as 2 posts are already filled up by person belonging to reserved category and in case the contention of the petitioner is accepted the same will result in 100% reservation. The apex court in the case of Indira Sahani Vs. Union of India (AIR 1993 SC 477) has held that reservation should not exceed 50% in any manner. Not

only this the majority view in the aforesaid case in para 95 has held as under :

95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture : all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes, and other backward classes (under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16); can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations --- what is called inter-lock reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains -- and should remain -- the same This is how these reservations

are worked out in several States and there is no reason not to continue that procedure.

It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be applicable to exemptions, concessions relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4).

The apex court in the aforesaid case in para 112 has held as under :

112. While on Art. 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/Institutions, in specialities and super-specialities in medicine engineering and other such courses in physical sciences and mathematics, In defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India Scientists and Technicians in nuclear and space application, provision for reservation Would not be advisable.

As a matter of fact, the impugned Memorandum dated 13th August, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence

forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are : (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August 1990 cannot be stayed or withheld.

We may point out that the services posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Art. 335.

We may add that we see no particular relevance of Article 38(2) in this context. Art. 16(4) is also a measure to ensure equality of status besides equality of opportunity.

Keeping in view the aforesaid reservation cannot exceed 50% in respect of the sanctioned posts available in an establishment / department. Not only this the roster as prepared by the State Government also provides that in case the reservation is exceeding 50%, the next available vacancy has to be given to candidates belonging to unreserved category and therefore this court is of the considered opinion that the respondents were justified in not reserving the vacancy which was available on account of promotion of Dr. Alka Gupta for SC / ST / OBC Category candidates. Keeping in view the aforesaid, no case for interference is made out in the matter and the writ petition stands dismissed. However, respondents are directed to finalise the process of appointment to the post of lecturer Prosthodontics within a period of 30 days from the date of receipt of the certified copy of this order. No order as to costs.

(S. C. SHARMA)
J U D G E