

V.K. Banerjee Vs State of U.P. and Others

Court: Allahabad High Court

Date of Decision: Dec. 4, 1998

Acts Referred: Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 – Section 3

Citation: (1999) 1 UPLBEC 768

Hon'ble Judges: D.P. Mohapatra, C.J; Palok Basu, J; G.P. Mathur, J

Bench: Full Bench

Advocate: Amit Bose, for the Appellant; S.C., R.P. Goel, General and Ashok Mehta, Chief Standing Counsel, for the Respondent

Final Decision: Dismissed

Judgement

Palok Basu, J.

A Division Bench consisting of one of us looking to the importance of the question raised, has on 10-11-1994 opined that

a Larger Bench be-constituted and this is how under the orders of the Hon"ble the Chief Justice, this Bench is seized with the matter.

2. The question formulated in the interim order passed by the Division Bench may have been more relevant on that date but the subsequent

decisions of the Hon"ble the Supreme Court on the issues arising do not leave much scope for the petitioner to argue because Hon"ble Supreme

Court"s decision which has come in the meantime in Ashok Kumar Gupta and Anr. v. State of U.P. and Ors. 1996(72) FLR 349 , practically

concludes the matter so far as this Court is concerned.

3. The petitioner has prayed for quashing of the Government Order dated 10-10-1994, restraining the respondents from enforcing the U.P.

Government Servants (Criterion for Recruitment by Promotion) Rules, 1994 vide notification dated 10-10-1994 and to command the respondents

to make promotions on the basis of Rule 8 of U.P. Service of Engineers (Public Works Department) (Higher) Rules, 1990 by preparing one list of

eligible candidates under Rule 4(1) of the U.P. Promotion by Selection (On Posts Outside Purview of the Public Service Commission) Eligibility

List Rules, 1986.

4. The short facts are that the petitioner, V.K. Banerjee, having been appointed as Assistant Engineer in U.P. Public Works Department was duly

promoted as Executive Engineer. He was expecting promotion as Superintending Engineer but because of change in the eligibility rules and also by

applying enhanced percentage of reservation in promotional posts, the petitioner's chances were marred in as much as the action of the

respondents in bringing about the said changes is ultra vires Articles 14 and 16 of the Constitution of India and, therefore, the aforesaid reliefs have

been claimed through this writ petition filed under Article 226 of the Constitution. It has been contended that the State Government is bent upon

giving undue benefits to the members of the reserved categories and, therefore, the persons who are far junior to the petitioner may be about to get

advantage of promotion which is otherwise due to the petitioner or the like.

5. The only question up for consideration before this Full Bench"" in this writ petition is as to whether the order issued by the State of Uttar Pradesh

on 10-10-1994 increasing reservation quota in promotion in favour of Scheduled Castes candidates from 18% to 21% u/s 3 of the Uttar Pradesh

Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 is valid or not?

6. In Ashok Kumar Gupta and Anr. v. State of U.P. and Ors. (supra), a Bench of three Hon"ble Judges of the Apex Court has held that:

It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts

depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits

and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration..... Therefore,

the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the

one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian

protective discrimination in favour of the Dalits and Tribes to give effect to the constitutional goals, policy and objectives referred to hereinbefore.

7. It may be pointed out that the Hon"ble Apex Court made the aforesaid observations after taking due note of the cases on the topic, i.e. Indra

Sawhney v. Union of India 1992 Supp. (3) SCC 217 ; The General Manager, Southern Railway Vs. Rangachari, ; R.K. Sabharwal and others

Vs. State of Punjab and others, and State of Karnataka v. Appa Balu Ingale (1995) Suppl. (4) SCC 469.

8. Coming back to the facts of the case, when the writ petition was admitted on 10-11-1994 calling affidavit in reply, an interim order was passed,

relevant portion of which is quoted below:

.....It is hereby directed that no promotion would be made to the posts of Superintending Engineers in the existing vacancies beyond 18%

of the vacancies from Scheduled Caste category. If any promotion has already been made in excess of the aforesaid 18% of the vacancies, these

officers will not be allowed to function subject to the final decision to be passed in the writ petition.

9. It is on 17-6-1995 that the Parliament has passed Seventy-seventh Amendment Act inserting Article 16(4-A) in the Constitution, which reads

as under:

4-A. Nothing in this Article shall prevent the State from making any provision for reservation in the matters of promotion to any class or classes of

posts in the services under the State in favour of Scheduled\ Castes and Scheduled Tribes which, in the opinion of the State are not adequately

represented in the services under the State.

10. The other relevant fact to be mentioned here is that by Government order dated 10-10-1994 the State Government increased reservation for

Scheduled Castes from 18% to 21%, on the same date it issued a notification promulgating the U.P. Government Servants (Criterion for

Recruitment by Promotion) Rules, 1994, which provided that the post of Head of the Department, one rank below the Head of the Department

and a post carrying a pay scale of Rs. 6700/- and above would be filled up by promotion on the basis of merit and the rest of the posts would be

filled up by promotion on the basis of the criteria of seniority subject to rejection of unfit. On 23-2-1996 the State Government has promulgated

the U.P. Government Servants Criterion for Recruitment by Promotion (First Amendment) Rules, 1996 which amends Rule 4 of the said Rules

quoted above. This amendment provides that the posts carrying the maximum of pay-scale of Rs. 5700/- and above were to be filled up by

promotion on the basis of the criteria of merit. It is not disputed that in view of this Amendment the posts of Superintending Engineers would be

affected as it carries a maximum pay scale of Rs. 5700/-. It follows that after 23-2-1996 only the posts of Assistant Engineer and Executive

Engineer were to be filled up by promotion on the basis of seniority subject to rejection of unfitness and other posts such as Superintending Engineer,

Chief Engineer Level- II, Chief Engineer Level-I and Engineer-in-Chief were to be filled up by promotion on merit. It may be mentioned here that

Rule 5 of the U.P. Promotion by Selection (on Posts Outside the Purview of the Public Service Commission) Biggity List Rules, 1986 has made

a provision that where the criterion for promotion is seniority subject to the rejection of unfit the appointing authority shall prepare three lists to be

called the eligibility lists of the senior most eligible candidates from each of the category namely, General, Scheduled Caste and Schedule Tribes,

separately in the light of vacancies available for each of the said category in proportion of 1 to 5 vacancies-two times the number of vacancies

subject to a maximum of 5 and for over 5 vacancies one and half times the number of vacancies subject to a minimum of 10. Reference has already

been made to the change brought about by the Promotion Rules of 1994 which again stands amended by the First Amendment Rules of 1996

referred to above.

11. Sri Amit Bose, learned Counsel for the petitioner, has argued the matter with ability and lucidity. Likewise, Sri R.P. Goel, learned Advocate

General, has applied to the said arguments elaborately, who has been ably assisted by Sri Ashok Mehta, Chief Standing Counsel for the State of

Uttar Pradesh.

12. In view of the observations in Indra Sawhney (supra) and the latter case has flowing from the Hon'ble Apex Court Sri Amit Bose diverted his

arguments in the following manner. Sri Bose argued that saving of reservation in promotional Rules through the aforesaid judgment in Indra

Sawhney case for a period of five years has expired on 15-11-1997 and even though Article 16(4-A) was introduced of the Constitution of India

with effect from 17-6-1995 the State of Uttar Pradesh cannot continue with the policy of reservation in promotion after 15-11-1997. It was

contended by Sri Bose that it was essential for the State Government to collect material to ascertain whether the members of Scheduled Castes

and Scheduled Tribes were adequately represented in the higher posts or not and there being no material to indicate such analysis by the State

Government, the judicial scrutiny should be applied and since there is no material the impugned order should be quashed.

13. In this very connection it was argued that the Eligibility Rules of 1996 have permitted different levels of evaluation and have permitted the three

lists to be drawn, one for General, second for Scheduled Caste and third for Scheduled Tribe candidates and, therefore, he strongly contended

that because there is no provision for inter-se comparison of merit or suitability amongst the three categories, the levels of evaluation in favour of

Scheduled Castes and Scheduled Tribes have been lowered and, therefore, the said lowering of level of evaluation is not permissible under Article

16(4) of the Constitution. Therefore, the State Government's steps in changing the criterion of promotion from merit to seniority subject to

rejection of unfit should itself be hit by Article 16(4) of the Constitution.

14. The aforesaid decision of the Apex Court in Ashok Kumar Gupta and another (supra), arose out of an order passed by Lucknow Bench of

this Court on 4-8-1993. It has been noticed in Paragraph 5 of the judgment that increase of percentage of promotional posts for reservation has

been made with effect from 11-12-1993 and further that in the then existing 1973 Rules Dalits and Tribes candidates were to be treated on the

same standard of suitability as general candidates. The litigation related to promotion of several Scheduled Castes and Scheduled Tribes

candidates in the same department in which the petitioner in the instant case is employed. It may be mentioned here that apart from the matter

which went to the Apex Court through SLP against the judgment of Lucknow Bench, a writ petition was also filed before the Hon"ble Supreme

Court under Article 32 of the Constitution of India challenging the action of the State of Uttar Pradesh in extending the enhanced reservation to

Scheduled Castes and Scheduled Tribes candidates in promotional posts. In para 64 of the judgment the Apex Court has dismissed the appeal as

well as the writ petition. The relevant point which deals with the controversy attempted to be raised by the petitioner through this writ petition does

not survive.

15. Before concluding it may be added that State"s opting to three eligibility lists which was so severely attacked by Sri Bose on behalf of the

petitioner would not leave the matter for the petitioner any more to challenge, for, it is admitted fact that the petitioner has already been promoted

and in none of the paragraphs it is contended that the said promotion has in any way affected his seniority or any other benefits. It was, therefore,

rightly pointed out by the learned Advocate General that for practical point of view the petitioner has no cause of action to maintain this writ

petition. This objection is sustainable on the facts of the case. In so far as legal questions argued by Sri Amit Bose are concerned, their probing by

this Court is no more permissible in view of the decision of the Hon"ble the Supreme Court in Ashok Kumar Gupta and another (supra).

16. In view of the aforesaid discussions, the writ petition fails and is dismissed. The stay order dated 10-11-1994 is hereby vacated. The parties

will bear their own costs.