

(1993) 05 GAU CK 0007

Gauhati High Court

Case No: Civil Rule No. 4652 of 1992

Swapan Kumar Roy

APPELLANT

Vs

Project Co-Ordinator, Regional
Science Centre, Jawahar Nagar &
Ors.

RESPONDENT

Date of Decision: May 4, 1993

Acts Referred:

- Constitution of India, 1950 - Article 12, 12, 6, 6

Citation: (1993) GLR 56 Supp

Hon'ble Judges: S.N.Phukan, J

Bench: Single Bench

Advocate: A.Dasgupta, B.N.Sarma, B.P.Sarma, J.K.Sarma, K.Deka, Advocates appearing for Parties

Judgement

1. The present petition under Article 226 of the Constitution of India has been filed by the writ petitioner against the order dated 24.7.91 issued by the Administrative Officer of the Birla Industrial and Technical Museum (National Council of Science Museums), Respondent No. 4 herein. By this order the offer of appointment given to the writ petitioner for the post of exhibition Assistant "A" for Regional Science Centre, Guwahati on 6th July, 1991 was withdrawn.

2. The writ petitioner is a commercial Artist having diploma in Commercial Arts from Govt. College of Arts & Crafts, Guwahati, Assam. The petitioner got the diploma after completion of 5 years course. It is not necessary to slate the facts in full regarding the earlier appointment of the writ petitioner as a trainee and also on adhoc basis by the respondents at Guwahati. An advertisement was issued by the respondents calling for applications for 3 posts of Exhibition Asstt. "A" and qualification laid down was a good degree/diploma in Fine Arts/Commercial Art of 4/5 years duration with one year experience in the relevant field. Along with the said posts applications were also invited for 4 posts of Artists "A" which is not necessary to be considered in the

present petition. The advertisement is available at AnnexureC to the writ petition. Petitioner applied for the posts and was duly selected and thereafter offer of appointment dated 6th July, 1991 for the post of Exhibition Asstt. "A" for Regional Science Centre, Guwahati was made to the writ petitioner and the said offer is available at AnnexureD to the writ petitioner. The petitioner duly accepted the offer vide his letter dated 20.7.91 and also reported for duty on 27th July, 1991 vide Annexures E & F. Thereafter the impugned withdrawal letter was issued.

3. A counter has been filed on behalf of the respondents and the 1st point taken is that this court has no jurisdiction, in as much as, advertisements were made at Calcutta, selection and tests were also made at Calcutta and offer of appointment was made at Calcutta also. It has also been urged that the offer of appointment was issued by the appointing authority from Calcutta and so also the impugned order of withdrawal. In para 10 of the counteraffidavit, a point has been raised that National Council of Science Museum is not an authority or State as contemplated under Article 12 of the Constitution of India. The main thrust in the counter is that subsequently it was discovered that the post for which the offer of appointment was issued was a reserved post of the members of the Scheduled Tribe and as such in view of the strict instruction of the Govt. of India, the offer was withdrawn.

4. Heard Mr. Das Gupta, learned counsel for the petitioner and Mrs. Deka, learned counsel for the respondents.

5. Regarding jurisdiction Mrs. Deka has placed reliance on a decision of the apex court in State of Rajasthan vs. Mis Swaika Properties & anr. AIR 1985 SC 1289. That was a case regarding a proceeding under Rajasthan Urban Improvement Act and notice was served under the Act on the respondents whose office was located at Calcutta. On this fact, the apex court held that merely because the office was located at Calcutta it would not give jurisdiction to Calcutta High Court to entertain such a petition. In my opinion the above ratio is not applicable to the case in hand. In the present case, there is an office of the National Council of Science Musuem at Guwahati and that office is known as Regional Science Centre. That apart, the post for which offer was made was located at the office of the Regional Science Centre at Guwahati and the offer of appointment was made to the writ petitioner for that post. Therefore, the contention of Mrs. Deka that this court has no jurisdiction is not tenable and accordingly it is rejected.

6. Regarding authority under Article 12of the Constitution of India Mrs. Deka has placed reliance on a decision of the apex court in Sabhajit Tewari vs. Union of India, AIR 1975 SC 1329. In that case the apex court noted that Society was registered under the Societies Registration Act and the Prime Minister was the President and the Govt. used to nominate members to the Governing Body with power to terminate. On the basis of these facts in the above decision of the apex court it was held that Council of Scientific and Industrial Research is not an authority under Article 12 of the Constitution of India.

7. The law on the subject has developed in view of the subsequent decision of the apex court. This court in *Surendra Nath Kalita vs. Assam Cooperative Apex Bank Ltd.* (1989) 1 GLR 424 held that the said bank is an instrumentality of the State and therefore, it is amenable to the writ jurisdiction of the court and therefore, it is an authority under Article 12 of the Constitution of India. In coming to the said conclusion this court relying on the decision of the apex court in *Ajoy Hasia vs. Khalid Muji*, AIR 1981 SC 487, *International Airport Authority Case* in AIR 1979 SC 1628 and *Shome Prakash vs. Union of India*, AIR 1981 SC 212 summarised the test to be applied for determining this question. The said tests are as follows:

- (i) financial resources of the State being the chief funding source;
- (ii) functional character being Government in essence;
- (iii) Plenary control residing in Government;
- (iv) Prior history of the same activity having been carried on by the Government and over the new body; and
- (v) some element of authority or command.

It may be stated that the apex court in *Tekraj vs. Union of India*, AIR 1988 SC 469 also considered this question and held that there cannot be a strait jacket formula and it was not necessary that all the tests should be satisfied for holding an institution to be a State. It was also held that in a given case some of the features may emerge so boldly and prominently that a second view may not be possible. The apex court has gone to the extent of saying that if an institution gets 100% grant from Govt. it is amenable to the writ jurisdiction of the High Court. This law was laid down in *Vidya Dhar Pande vs. Vidyut Griha Siksha Samity*, AIR 1989 SC 341.

8. According to Mr. Das Gupta in a recent decision of the apex court in *Unni Krishnan, J.P. vs. A.P.*, 1993 (1) SCALE 290, the apex court went to the extent of saying that even if on some body public duty is imposed that body is amenable to the writ jurisdiction of the High Court.

9. I may state here that Mrs. Deka, learned counsel for the respondent has placed reliance in another decision of the apex court in *Chandra Mohan Kishan vs. NCERT*, AIR 1992 SC 76 to press the point that if the activities of any organisation is not wholly related to Govt. function and Govt. control is confined only to proper utilization of Govt. fund being gone of the sources of income, the organisation cannot be said to be a State (emphasis supplied). I have already referred to a decision of the apex court in *Vidyapati* (supra), which was a case of a school run by a private firm receiving 100% grant from the Govt. is an authority.

10 In view of the above law, let me examine whether the present society is an authority under Article 12 of the Constitution of India and is amenable to the writ jurisdiction of this court. At the time of hearing, this court has been supplied with

the memorandum of Association and the rules and regulations, bylaws of the Society which has been duly registered as a Society in the state of West Bengal. In the memorandum of Society, the object of the Society has been listed under para 3 and from subpara III, I find that the object is to establish, take over and organise Science Musuem at all level, National, Stale, District and Block. The Society has already taken over 3 Musuems as per subclause (i) of Clause in of the memorandum. As per clause IV, income and property of the society shall be applied for the promotion and the object thereof as set forth in the memorandum. Clause V of the memorandum empowers the Govt. to issue such direction to the Society as may consider necessary for furtherance of the object of the Society and for ensuring proper and effective functioning of the Society. Clause VI of the memorandum provides that in the event of winding up or dissolution of the Society, the debts and liabilities and other properties of the Society shall be death with in such manner as the Govt. of India may determine.

11. Now let me refer to some of the provisions in rules and regulations of the Society.

In rule 3, the list of members of the Society has been laid down and Minister incharge of the Ministry is the President and most of the members are exofficio members by virtue of being holding Govt. offices. The eminent persons are also to be nominated by the Govt. According to rule 68, the accounts shall be maintained and audited as may be prescribed by laws to be framed by the Governing Body and approved by the Govt. According to rule 71, matter relating to financial implications which falls beyond the power of the D.G. shall be forwarded to the F. A. for advice. Rule 74 provides that rules of the Society can be altered by a resolution passed by the majority of the members of the Society and with prior sanction of the Govt.

12. By law No. 19 provides that the fund of the Society can be invested only in such manner as may be prescribed by the Govt. of India. According to bylaw No. 22 accounts of the Society shall be maintained in such form as may be prescribed by the Govt. of India in consultation with the Comptroller and Auditor General of India.

13. Coming to the counter filed on behalf of the respondent a specific statement has been made in para 12 that the respondents are bound to follow strictly all instruction received from the Govt. of India from time to time for reservation of posts for Scheduled Caste and Scheduled Tribes. It has also been stated that the respondents have no other alternative but to strictly follow and implement the instructions received from the Govt. of India.

14. From the above facts it is absolutely clear that the respondent Society is dependent only on financial assistance from the Govt. of India and the Govt. has plenary control over the Society, in as much as, the Minister incharge is the President, most of the members are officers of the Central Govt. by virtue of holding their offices and other members are nominated by the Govt. and can be removed by

the Govt. I also find that the whole object of the Society is to administer and manage Musuem/Culture and initially 3 such Musuems were taken over, which is normally the function of the State Govt.

15. In view of the above position, I have no hesitation to hold that the respondent Society is an authority under Article 12 of the Constitution of India.

16. Main thrust of Mrs. Deka is that the post in question which the petitioner was offered appointment was a reserved post for the members of the Scheduled Caste and Scheduled Tribes. In this connection a roster maintained by the Society has been placed before this court. I may slate here that a copy of the roster has also been annexed as Annexure "Ka" to the counter and also a model roster at Annexure "Kha". From the model roster been maintained. In other words, reservation policy in respect of posts has been applied separately in each state by taking into account the number of vacancy for each state and not for the entire country. From the model roster I find that 6 posts are reserved for Scheduled Caste and 11 for Scheduled Tribes and the point for filling up reserved posts is indicated in the model roster. From the roster maintained vide Annexure "Kha", I find that in the year 1985, 86, 87, 88 and 89 that one person was appointed in each year for the post of Education Asstt., Technical Asstt., Technical Asstt., Educational Asstt. and Technical Asstt. respectively for the Centre at Guwahati. In other words, no posts for Exhibition Asstt. "A" was filledup for the Centre at Guwahati during the above years.

17. The law is well settled on the point that there can be no reservation if there is only 1 post in a cadre to be filled up as it would amount to 100% reservation thereby violating the provisions of Article 16 of the Constitution. This law was laid down by the apex court in number of decisions and I may refer to Dr. Chakradhar Paswan vs. State of Bihar, AIR 1988 SC 959. In that case, however, the apex court considered 50 point roster and held that according to said 50 point roster if in a particular grade a single post fall vacant in the roster at the 1st point the same cannot be treated as reserved.

18. Mrs. Deka, is trying to make out a case that all Use 3 posts Technical Asstt. Exhibition Asstt. and Educational Asstt. are in the same cadre and as such all the posts under this category have to be taken together for the purpose of determining the number of reserved posts and that is why the Society is keeping a roster as annexed to the counter. In reply to the counter it has been specifically mentioned on behalf of the writ petitioner that 3 posts are of different cadre as their qualifications are different and also the line for promotion. It has been stated that the nature of works of these 3 posts are also different. In support on advertisement issued in the Assam Tribune, a local English Daily dated 30th October, 1988 has been annexed at Annexure J. From this advertisement it appears that the qualification are different for the above 3 posts. I quote below the relevant portion of the reply of the writ petitioner in this connection :

"The deponent further begs to state that reservation in appointment should be with reference to the posts and not vacancies which may occur in the cadre. Moreover, the posts, Technical Asstt., Exhibition Asstt. and Education Assistant are from three distinct cadres. The person appointed in the post of Exhibition Assistant is entrusted with Artwork, designing, gallery display, and modeling etc. Minimum qualification to hold this post is 1st class in 4/5 Diploma in fine/commercial Art after H.S.L.C. The avenue of promotion of these classes of employees are Exhibition Assistant A.B.C., Exhibition Officer etc.

Nature of works entrusted to the Tech. Assistant are civil work, Mechanical works, and Electrical work. The requisite qualification for holding this post is 1st class in 3 years Diploma in Mechanical/Civil/Electrical after H.S.L.C. Technical Assistant has the following avenue of promotion Technical Assistant A.B.C., Technical officer.

A person holding the post of Education Assistant is entrusted with education works and other research works. Minimum qualification to hold this post is good Honours degree in B.Sc., with Physics, Chemistry. An Education Assistant has the following avenue of promotion. Assistant A.B.C.....Education Officer. A copy of the advertisement for appointment indicating the requisite qualification to hold such post are annexed as Annexure J."

Mrs. Deka has urged that in addition to the above posts even Library Assistant also come under the said category and accordingly roster is maintained. I am unable to accept the contention of Mrs. Deka. Mrs. Deka has also drawn my attention to Govt. order dated 20.12.74 (page 79) available in Swamy's compilation on Reservations and Concessions for Scheduled Castes and Scheduled Tribes (Second Edition). This office memorandum, inter alia, provides that whenever in a cadre or grade or a class of service to which direct recruitment is made consisting of less than 20 posts steps should be taken to grant these posts with prior approval of the Home Ministry with similar posts in the service which are filled up by direct recruitment for the purpose of providing reservation for Scheduled Caste and Scheduled Tribes. I may state here that there is nothing on record to show that such permission has been taken as the respondents are governed by all the instructions and norms of the Govt. of India. Thus an isolated post is excluded from the purview of reservation orders. In fact nothing has been shown to this court that except the present post other posts of Exhibition Asstt. are also available or likely to be created for Guwahati Office.

19. Coming to the roster as stated above only one person was appointed for one year and out of 5 persons so far appointed from the year 1985-91 only one member of scheduled Caste has been appointed. It is our solemn duty to give protection to scheduled Caste and Scheduled Tribes. But unfortunately, in the service rule reservation quota has not been mentioned as pointed out by Mr. Das Gupta.

In view of the law laid down by the apex court in case of appointment for a single post it would always be treated as unreserved post and accordingly no member of the Scheduled Caste and Scheduled Tribe will get a chance. I may state here that the 3 posts cannot be grouped together unless it was done properly and by framing rule for this purpose. According to Mrs. Deka it has been done only because the payscale is same. To protect the future interest of the members of the Scheduled Caste and Scheduled Tribes the respondents Society may consider making suitable amendment to the service rules and creating a separate cadre or grade and also provide for reservation and carry forward rules as per direction of the Govt. of India.

20. Coming to the case in hand as I have held that in view of the reservation rule and the law laid down this post is an isolated post and it being the only post at the Guwahati Centre it cannot be treated as a reserved post. Therefore, the initial appointment was rightly issued and it cannot be withdrawn.

In the result, the present petition is allowed and the impugned order dated 24.7.91 vide Annexure G to the writ petition is quashed. The respondent are directed to allow the writ petitioner to join his duties immediately and positively within 8 (eight) weeks.

With the above direction the petition is disposed of.