

(1998) 08 AP CK 0007

Andhra Pradesh High Court

Case No: Writ Petition No. 18307 of 1998 and Batch

Md.Iqbal Ahmed and Others

APPELLANT

Vs

High Court of Andhra Pradesh
and Another

RESPONDENT

Date of Decision: Aug. 31, 1998

Acts Referred:

- Andhra Pradesh State and Subordinate Service Rules, 1996 - Rule 22, 22
- Andhra Pradesh State Higher Judicial Services Rules, 2007 - Rule 10, 2, 28, 5, 5(2)
- Constitution of India, 1950 - Article 14, 15, 15 (3, 16, 16(4)

Citation: (1998) 5 ALD 590 : (1998) 5 ALT 385

Hon'ble Judges: R.M. Bapat, J; P. Venkatarama Reddi, J

Bench: Division Bench

Advocate: Mr. L. Ravichander, Mr. C.V. Mohan Reddy, Mr. Sanka Ramakrishna Rao and Mr. Y.V. Ravi Prasad, for the Appellant; Government Pleader for Home and Mr. C.V. Nagarjuna Reddy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

P. Venkatarama Reddi, J.

The petitioner are said to be practising Advocates, who appeared for the written test and viva voce held pursuant to the recruitment notification issued by the High Court in October, 1996. According to the petitioner, they qualified themselves in the selection. In fact, some of the petitioners alleged that their names were included in the original list of selected candidates sent up by the High Court to the Government. But later on, their names were deleted on the application of the principle of carry forward of vacancies reserved for women and left unfilled. In Writ Petition No. 18307 of 1998 filed by five petitioners, the prayer is to direct the respondents to appoint the petitioners as District Munsifs in response to the Notification dated 23-10-1996 adjudging their candidature in accordance with their merit and not to

keep the posts vacant, but to fill them in accordance with law. Writ Petition No.21451 of 1998 is filed by four petitioners who seek a declaration that the action of the respondents in applying the Note (2) of Rule 22 of A.P. State and Subordinate Service Rules pertaining to the principle of carry forward vacancies in respect of women for recruitment to the posts of District Munsifs pursuant to the Notification dated 23-10-1996 is illegal and unconstitutional and consequently to appoint the petitioners to the said posts without applying the said rule. The petitioner in Writ Petition No.22178 of 1998 seeks a declaration that the action of the respondents in deleting his name from the list of candidates selected vide G.O. 60 dated 7-4-1998 is illegal and arbitrary and to direct the third respondent to appoint him to the post of District Munsif. In WP No.23972 of 1998, the petitioner seeks a declaration that the action of the respondents in not appointing him as District Munsif even after his selection and verification of antecedents is illegal and arbitrary and seeks a direction to appoint him as District Munsif. He also questions Note II to Rule 22 introduced by G.O. 65, dated 15-2-1997 as illegal and unconstitutional.

2. By the Notification dated 23-10-1996 issued by the High Court of Andhra Pradesh and published in the news-papers on 30-10-1996, applications were invited for two hundred posts of District Munsifs of which 27 were to be filled by limited recruitment to back-log vacancies reserved for SCs and STs and 173 by general recruitment. Out of 173 vacancies, 139 were set apart for direct recruitment and 34 for "recruitment by transfer".

Note (1) of the Notification says:

"1. The General Recruitment vacancies are subject to the rule of Special Representation under Rule 10 of the Special Rules for A.P. State Judicial Service and also Rule 22-A(2) of the A.P. State and Subordinate Service Rules"

3. There is no need to refer to the other terms and clauses of the Notification. Out of 561 women candidates who appeared for the written examination, only 37 qualified themselves as against 47 vacancies in various groups ear-marked for women. After interview, 31 women candidates were finally selected. Thus, for 11 vacancies reserved for women, candidates were not available. In mentioning the figure 11, we have not taken into account the unfilled vacancies of women in ST category as neither men nor women could come up to the level of selection in that category. It may be mentioned that by virtue of merit, some women candidates belonging to backward class groups were assigned OC category vacancies. Though initially in the select list sent by the High Court to the Government for approval, 12 men candidates were shown to have been selected against the unfilled vacancies reserved for women, on receipt of letter dated 8-10-1997 from the Government requesting the High Court to prepare and forward the "communal roster following the rule of reservation as per G.O.No.65 (GASD), dated 15-2-1997," the High Court sent up a revised list of 118 direct recruits deleting the names of 12 men candidates who were included in the list earlier sent. Such revised list was eventually approved

by the Government.

4. The principal submission made by the learned Counsel for the petitioners is that the posts/vacancies remaining unfilled against those reserved for women on account of women candidates not coming up to the standard of selection, should be allocated to the men candidates who were successful in the selection. The proviso to Rule 22-A(2) as it stood at the point of time when the Notification was issued, is relied upon by the learned Counsel to make good their point.

5. Sub-rule (2) of Rule 22-A of A.P. State and Subordinate Service Rules (hereinafter referred to as APSS Rules) as amended by G.O. Ms. No237 dated 28-5-1996 provided for the first time reservation for women to the extent of 33 1/3% of posts in each category i.e., OCs, BCs, SCs, STs, Physically Handicapped and Ex-service men with effect from 8-3-1996. This was in modification of the earlier rule of preference in favour of women. It is laid down by means of a proviso that if sufficient number of women candidates are not available, the vacancies shall be filled by men. The Rule in the same form was retained when the APSS Rules were further amended by G.O. No.436, dated 15-10-1996. A few months thereafter, Rule 22-A(2) had undergone a further change by G.O. No.65, dated 15-2-1997. The proviso to Rule 22-A(2) was deleted. Simultaneously, there was a corresponding amendment to Rule 22 placing the women candidates on par with SCs, STs, BCs and Physically handicapped candidates for the purposes of application of the procedure for limited recruitment and carry forward of vacancies. Note (2) was added to Rule 22 by which it was provided that the "principle of carry forward of vacancies in respect of women shall be with effect from 28-10-1996" Note (3) provided for application of roster points for women candidates with effect from 1-8-1996.

6. In view of the retrospective effect given by Note (2) to Rule 22, it must be deemed that under APSS Rules, the carry forward principle was in vogue in relation to women also on the date of publication of recruitment Notification i.e., 30-10-1996. It is true that the deletion of proviso to Rule 22-A was not given retrospective effect. But, the fact that the remaining vacancies unfilled by women out of the quota of 33 1/3% have to be carried forward necessarily implies that the vacant posts cannot be filled up by successful men candidates. Thus, with effect from 28-10-1996, it must be deemed that the proviso to Rule 22-A has been superseded or repeated by necessary implication; otherwise, the proviso cannot co-exist with the amendment brought about by G.O. No.65 providing for carry forward of vacancies reserved for women with effect from 28-10-1996. Whether or not the amendment brought about by G.O. No.65 with retrospective effect from 30-10-1996 in regard to the carry forward of vacancies reserved for women governs the recruitment with which we are concerned, is a different question. But, we are only clarifying that the non-deletion of proviso to Rule 22-A with effect from an anterior date does not make material difference.

7. Before we proceed to examine legality or otherwise of applying the rule of reservation for women, let us make it clear that any doubt as regards the Constitutionality of State's action in extending the reservation for women is dispelled by the recent decision of the Supreme Court in [Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another](#). The Supreme Court considered the interrelation between Articles 14, 15 and 16 in matters relating to employment under the State and expressed the view that employment under the State is not excluded from the purview of Article 15 which by clause (3) permits special reservation to be made for women. While clarifying that Article 15 is a general provision and Article 16 is more specific provision, Mrs. Sujata V. Manohar, 3. observed:

"Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State."

It was then observed:

"...To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3) is not whittled down in any manner by Article 16."

The scope of Article 15(3) was explained thus :

"What then is meant by "any special provision for women" in Article 15(3)? This "special provision" which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals with special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes"

8. The Supreme Court pointed out that Article 15(3) should be considered in the same light as Articles 15(4) and 16(4) were considered in *Indra Sawhney v. Union of India*, 1992 Suppl. (3) SCC 217. At paragraph 11, it was observed :

"Both reservation and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian Society."

9. In that very case, Rule 22-A(2) as it stood before the amendment made in the year 1996, came up for consideration, before the Supreme Court. Rule 22-A(2) as it then stood, provides that in the matter of direct recruitment to posts, where women and men are equally suited, other things being equal, preference shall be given to

women and they shall be selected to an extent of atleast 30 per cent of the posts in each category. The Supreme Court held that the said Rule does not provide for any reservation for women and it is a Rule for a very limited affirmative action of preference to the extent of 30 per cent for women. On such interpretation of the Rule, the Constitutional validity thereof was upheld. In the wake of this judgment rendered on 32-5-1995, the State Government considered it expedient to provide reservation for women in public services. The rule of preference in certain limited circumstances has now given way to reservation to the extent of 1/3rd of vacancies in various social groups.

10. But, the basic and foremost question still remains whether the High Court is justified in adopting and giving effect to the reservation provided for in Rule 22-A of the APSS Rules and the State Government in according approval to the list prepared by the High Court as per Rule 22-A(2) read with amended Rule 22. The answer to this depends in our view, on the effect and impact of Andhra Pradesh State Judicial Service Rules (hereinafter referred to as "APSJS Rules") framed by the Governor under Article 234 read with proviso to Article 309 of the Constitution of India. At the out-set, it may be noted that it is specifically laid down in Rule 28 that "except to the extent expressly provided in clauses (1), (17) and (18) of Rule 2, Parts I and II of the APSS Rules shall not apply to this Service." In the face of this exclusionary provision, the APSS Rules or the amendment thereto or any executive instructions issued by the Government in relation to the said Rules, do not ipso facto apply to the judicial service.

11. The judicial service which is governed by APSJS Rules consists of: 1) Category I Subordinate Judges; 2) Category II-District Munsifs; and 3) Category III Judicial Magistrates of Second Class. A perusal of APSJS Rules shows that it is almost a complete Code on the subject of recruitment, appointment, probation, promotion, qualifications, tests, confirmation, seniority, pay and allowances, resignation, re-employment etc., concerning the categories of Officers included in the service. Rule 10 therein provides for special representation to SCs STs and BCs. The APSJS Rules were amended by G.O. Ms. No.124, Law (Courts-C) Department, dated 5-8-1996. The substituted Rule 5 reads as follows:

".5. Preparation of Lists of Approved candidates :--(1) The High Court of Andhra Pradesh, shall from time to time after holding the examinations in accordance with the scheme specified in the Schedule to these rules for the candidates for appointment by Direct Recruitment and by Transfer to the posts of District Munsifs prepare lists of persons considered suitable for appointment thereto.

(2) The High Court shall notify the vacancies as per the estimate of vacancies prepared for the year of recruitment, i.e., calendar year, invite applications, scrutinise them conduct examinations both written and oral prepare the select lists on the basis of the merit, by following the rule of reservation and send the said lists to the Government for approval of the selection and issuing orders for appointment

as District Munsifs. On appointment they will be imparted training in batches and given posting orders by the High Court,

(3) The list of the approved candidates to be prepared by the High Court shall contain not more than such number of candidates as are equal to the number of notified vacancies.

(4) Every list prepared in accordance with the provisions of sub-rules (1), (2) and (3) shall be operative until the last person therein is appointed to the service.
(Explanation is omitted)".

12. Rule 7 provides that all first appointments to the posts of District Munsifs other than those made by the High Court by the promotion of Judicial Magistrates of Second Class shall be made by the Governor from the list of approved candidates in accordance with Rule 10. The rule of reservation is laid down in Rule 10 of APSJS Rules which reads as follows:

"The Rule of special representation namely, Rule 22, in Part II of the A.P. State and Subordinate Service Rules, insofar as it relates to the Scheduled Castes and Scheduled Tribes, shall apply separately to the appointments to be made by direct recruitment and recruitment by transfer to the categories of Judicial Magistrate of Second Class and District Munsifs, and the reservation of appointment to these categories, insofar as it relates to the Backward Classes, shall be for the appointment to be made by direct recruitment only."

13. Thus, Rule 10 by the device of reference adopts or transposes the rule of special representation of Scheduled Castes, Scheduled Tribes and Backward Classes as laid down in Rule 22 of A.P.SS Rules for the specific purposes mentioned therein. By virtue of that Rule, the special representation or reservation embodied in Rule 22 of APSS Rules as amended from time to time will govern as far as SCs, STs and BC candidates are concerned, in the matter of appointments to the posts of District Munsifs etc., to be made by direct recruitment. There is no other reservation provided for or contemplated by the APSJS Rules. In fact, Rule 28 makes explicit what is really implicit in the Constitutional scheme relating to the appointments to the posts in judicial service. Article 234 of the Constitution enjoins that appointments of posts other than the District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with the Rules made by him in that behalf, after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State. Article 234 is the fountain source of the APSJS Rules. Insofar as the subjects or matters relating to appointments to Judicial Service are concerned, the exclusive source of rule making is to be found in Article 234. The preamble to APSJS Rules shows that it is in exercise of that power conferred by Article 234, the APSJS Rules were framed by the Governor after consulting the High Court and the Public Service Commission. Even the amendments to Rules, for eg., G.0.124, dated 5-8-1996 were similarly made. No

doubt, there is also a reference to the proviso to Article 309. That may be out of abundant caution or in order to cover subjects or matters not strictly falling within the ambit of appointments to the judicial service. That is the reason why Rule 28 of APSJS Rules guardedly provided for the exclusion of APSS Rules to the judicial service. Be it noted that Rule 22 of APSS Rules applies not on its own force, but on account of insertion of the rule of special representation contained therein by means of Rule 10 of APSJS Rules.

14. The learned Advocate-General who was requested to assist us, has contended that the expression "in accordance with the rule of reservation" occurring in Rule 5(2) (introduced by G.O. 124, dated 5-8-1996) has to be construed widely so as to take in all the rules of reservation made in public service being enforced in the State whether emanating from the provisions enshrined in Article 16(4) or 15(3). It is contended that when Rule 5(2) in the present form was introduced in the year 1996, the reservation for women to the extent of 33 1/3 per cent of posts was in force. Therefore, it can be assimilated into the rules governing the appointments to judicial service even without a specific provision in Rule 10. The language of Rule 5 permits its reservation in favour of women to be made while making appointments to the posts of District Munsifs, on par with other services. Otherwise, the learned Advocate-General points out that one particular service viz., A.P. Judicial Service will be left out of the Rule of reservation for women. A segment of public service in the State will stand apart with the inevitable consequence of not catering to gender justice which the amended Rule 22-A(2) of APSS Rules professes to bring about. Though the argument is plausible, on a deeper consideration, we are unable to accept the contention of the learned Advocate-General.

15. Rule 5 of the said Rules does no more than reiterating that the list has to be drawn up by the High Court in accordance with the rule of reservation contained in APSJS Rules which obviously means Rule 10. The expression "in accordance with the rule of reservation" used in Rule 5 does not have the effect of bringing within the gamut of APSJS Rules all the provisions relating to reservation embodied in APSS Rules. Otherwise, Rule 5 could have been couched in a more explicit and clear language. The expression "rule of reservation" in our considered view, only means the rule of reservation applicable to judicial service. Obviously, in using that expression, the Rule-making authority had in view Rule 10 which contains the provision for reservation as far as APSJS is concerned. The singular "rule" used in Rule 5(2) reinforces this idea. We do not think that Rule 5(2) can be regarded as an additional or supplemental provision providing for special representation for women. By using the expression "by following the rule of reservation" the idea was only to reiterate the principle of reservation as obtaining under the existing provisions of APSJS Rules and it is not meant to expand the concept of reservation by bringing in categories other than those specified in Rule 10.

16. We are, therefore, of the view that the High Court without the authority of a specific rule in APSJS Rules providing for reservation for women, purported to adopt and apply Rule 22-A(2) of State and Subordinate Service Rules for the purpose of providing reservation to women candidates to the extent of 33 1/3% of vacancies. This, in our view, goes against the Constitutional mandate underlying Article 234 and the provisions of APSJS Rules. It is trite to say that State is not obliged to provide reservation for women in regard to the appointments to public offices by virtue of any specific Constitutional injunction. That being the case, the relevant Service Rules wherever they are existing should themselves provide for such reservation or in the alternative, the executive power of State under Article. 162, can be invoked to issue orders providing for reservations insofar as they do not go against the existing Rules. As far as appointments to judicial service is concerned, as rightly pointed out by the learned Advocate General, an executive order issued by the Government has no application. Thus, the only course-left open is to amend the APSJS Rules in order to give effect to the concept of reservation for women so as to fall in line with the other services under the control of the State. The mere fact that the Governor who is the appointing authority for the District Munsifs, in exercise of the power under the proviso to the Article 309, has provided for reservation for women and carry forward of vacancies to the next recruitment in relation to the services governed by APSS Rules, does not mean and necessarily imply that the same Rules should be made applicable mutatis mutandis to the judicial service. The fact that the power to make Rules under Article 234 is subject to certain pre-conditions, makes it impossible to hold that the rule of special representation for women could be read into the APSJS Rules.

17. Let us examine it from another angle. Assuming that the High Court having regard to the language in Rule 5, on its own adopted the rule of reservation for women already provided for by the Governor the Rules framed under the proviso to Article 309 in relation to other services and assuming further that due procedure for adoption of such rule was gone through by the High Court, we are still of the view that the principle of carry forward of vacancies and roster points for women cannot be applied vis-a-vis the recruitment that has taken place. We have already extracted Note (1) to the Notification. In referring to Rule 22-A (2) and purporting to give effect to the principle of reservation for women in terms of the said Rule, the High Court had in view the Rule as it existed on the date on which the Notification was approved or issued on that date, the provision of carry forward of women vacancies was not there. As noticed earlier, it was brought into force with retrospective effect by G.O. No.65, dated 15-2-1997. We may take it that the Notification springs into action and initiates selection process as and when it is published and on the date of publication i.e., on 30-10-1996, the amendments to APSS Rules must be deemed to have been fictionally operational by reason of the retrospective effect given to it. Even then, we are unable to hold that the carry forward rule as far as women are concerned, should be applied. The question is not whether the amended rule was

legally in existence on the effective date of recruitment notification. But the question is in what form and to what extent, the High Court purported or intended to give effect to the reservation. The obvious answer is that the High Court had only in view the unamended rule with its proviso and without the provision for carry forward of vacancies. So, the question of adopting the carry forward rule insofar as women are concerned, could not have entered into the mind and thought of by the High Court at all because on the date on which the notification was finalised or issued, the amended rule was not in existence. Thus, even on the plain terms of the Notification issued, the carry forward principle cannot be applied to the vacancies left unfilled by women candidates. The fact that the High Court after entire process was over and at the time of drawing up the list, accorded its seal of approval to the carry forward principle, does not mean that it should be read into the Notification issued one year earlier by invoking the theory of *ex-post facto* approval or the like.

18. Our attention has been drawn to a decision of Gopal Rao, J. in WP No.798 of 1993 and WP No. 17214 of 1993 dated 2-8-1995. In that Writ Petition, a direction was sought to reserve 30 per cent of posts in favour of women candidates in the category of District Munsifs by applying Rule 22-A. The learned Judge allowed the writ petitions purporting to give effect to the judgment of the Supreme Court in Vijaykumar's case (*supra*). The learned Judge gave a direction that three women candidates shall be selected on merit. The learned single Judge missed to note that the Supreme Court did not consider Rule 22-A(2) as a rule providing for reservation. But it was only interpreted as a rule of preference. More-over, the question whether Rule 22-A(2) of APSS Rules applies to Judicial Service by its own force, was not considered in that judgment. With great respect, we decline to follow that decision. It must be considered to be a decision rendered per incuriam.

19. While that being the legal position we are however, not inclined to set aside the selections of women candidates against the vacancies ear-marked for them inasmuch as no one has challenged the reservations in favour of women. In the absence of such challenge, we do not think it just and proper to set at naught the reservation to the extent it has been given effect to in favour of successful women candidates at this distance of time, more especially, when there is no Constitutional taboo against such reservation and in fact such reservation promotes a laudable objective. It does not however follow that we should countenance the application of carry forward principle in relation to unfilled vacancies earmarked for women. The petitioner's challenge is directed more against the application of such carry forward principle than to the provision of reservation for women. The learned Counsel for the petitioners have stated in categorical terms that they are not interested in unseating the women candidates already appointed against the reserved quota, but, they are only staking their claim against the unfilled vacancies. When the reservation for women itself cannot be given effect to without a specific provision in the APSJS Rules, the logical corollary would be that the principle of carry forward of vacancies cannot at all be applied. The carry forward concept is an enlarged

dimension of the rule of reservation. Though both are connected with each other, they are not inextricably linked up. It is therefore proper to strike down the action of the respondents in carrying forward the unfilled vacancies reserved for women candidates, while not disturbing the selections and appointments of women candidates already made. In fact Rule 22-A (2) which the High Court purported to adopt in the recruitment notification does not contain any principle of carry forward of vacancies relating to women candidates as already discussed.

20. Though a contention has been raised that the vacancies arising on account of certain selected candidates not joining the service should be filled up by the qualified candidates next in order, that contention has not been pressed by the learned Counsel for the petitioners in view of Rule 5(3) as introduced by G.O. 124, dated 5-8-1996. So also, the contention that while fixing the roster points for women candidates, one extra vacancy not due to them has been assigned and carried forward, has been given up.

21. We therefore, strike down the action of the respondents in carrying forward the vacancies reserved for, but unfilled by women candidates and direct that those vacancies should be thrown open to the men candidates in the order of merit and subject to the observance of roster points and the rules of reservation applicable to SCs, STs and BCs. In effect, the original list sent up by the High Court will get revived substantially. The cases of the petitioners for inclusion in the approved, list shall be considered against the resultant vacancies. The writ petitions are accordingly, allowed. No costs.

22. Before parting with the case, we would like to observe that in keeping with the policy to give better employment opportunities to women which policy has been accepted by the High Court in principle, expeditious steps may be taken by the High Court and the State Government to amend the APSJS Rules, so that for the next recruitment, the rule with respect to reservation for women would become part of the APSJS Rules. It is also desirable to introduce a specific provision for carry forward of vacancies to a reasonable extent keeping in view the exigencies of Judicial Service.