

(2009) 02 PAT CK 0157

Patna High Court

Case No: CWJC No. 6666 of 2008

Baleshwar Prasad Rajak

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision: Feb. 5, 2009

Acts Referred:

- Constitution of India, 1950 - Article 341

Citation: (2009) 1 PLJR 873

Hon'ble Judges: Chandramauli Kr. Pd., Acting C.J.; Shyam Kishore Sharma, J

Bench: Division Bench

Advocate: Ram Suresh Roy and Manoj Kumar, Umesh Prasad Singh and Ravindra Kumar, for the Appellant; S.K. Ghosh for the State and M/s Chitranjan Sinha and Vindhyachal Singh for the Pvt. Respondent Nos. 4 and 5, Sanjay Pandey, for the Respondent

Final Decision: Allowed

Judgement

C.K. Prasad, A.C.J. and S.K. Sharma, J.

Petitioner, respondents 4 & 5 besides the interveners Ajay Kumar and Indrajit Bhaskar were candidates for appointment to the post of Civil Judge (Junior Division), reserved for the members of the Scheduled Caste. They have not been appointed but respondents 4 & 5 have been appointed in vacancy reserved for Scheduled Caste. Aggrieved by the same, petitioner preferred this writ application and seeks quashing of their appointment by issuance of an appropriate writ. Further prayer made by the petitioner is to issue a writ in the nature of mandamus commanding the respondent-Bihar Public Service Commission to recommend his case for appointment as Civil Judge (Junior Division) and the State Government to appoint him. Intervenors have joined the petitioner and support his case. Shorn of unnecessary details, facts giving rise to the present writ application are that for filling up three hundred eighteen (318) vacancies of Civil Judge (Junior Division), the Bihar Public Service Commission issued Advertisement No. 43 of 200b and notes 1 & 6 appended thereto, which are relevant for the purpose, read as follows:-

Note-1.-Its free translation means that the expression Scheduled Caste/ Scheduled Tribe would mean Scheduled Caste/Scheduled Tribe of the State of Bihar.

Note-6.-Its free translation means that benefit of reservation is admissible to the candidates who is native of State of Bihar."

2. There is no dispute that petitioner and intervenors are members of the Scheduled Caste and native of Bihar also. Further, there is no dispute that respondents 4 & 5 are Chamar by Caste and native of the State of Uttar Pradesh and this Caste comes under the category of Scheduled Caste in both the States. It is the assertion of the petitioner that respondents 4 & 5 are not the members of the Scheduled Caste of the State of Bihar and they being native of Uttar Pradesh are not fit to be appointed as Civil Judge (Junior Division) in the reserved category. In order to bring home the point, the petitioner has placed on record the voter list, which shows that both of them as late as in the year 2005 are voters in a constituency of Uttar Pradesh. It has also been pointed out that respondent No. 4 was educated at the institutions in the State of Uttar Pradesh.

3. In the counter-affidavit plea taken by respondents 4 & 5 is as follows:-

"4. The father of the answering respondent Nos. 4 & 5 owns a house situated in Indira Nagar, Kankarbagh, Patna which has purchased after due permission and information to the competent authority. He has been paying the holding tax to the Patna Municipal Corporation for the aforesaid land/house.

5. That the private respondent Nos. 4 & 5 belong to "Chamar" caste recognized as Scheduled Caste and have been residing at Patna. After due enquiry caste certificates and residential certificates have been issued by the competent authority certifying therein that the private respondent Nos. 4 & 5 are "Chamar" by caste recognized as Scheduled Caste and are the permanent resident of Indira Nagar, Road No. 4, P.O. Lohia Nagar, P.S. Kankarbagh, Sub-Division, Patna-Sadar, District-Patna."

4. Further elaborating their defence in reply to the rejoinder, they have stated as follows:-

"4. That it is humbly stated and submitted that the respondent Nos. 4 & 5 have been residing permanently at Indira Nagar situated in Kankarbagh and after due enquiry by the competent authority, the residential certificate was issued in their favour by the Sub-Divisional Officer, Patna-Sadar on 1.10.2007 (Annexure-C series) countersigned by DM, Patna on 2.10.07.

5. That it is humbly stated and submitted that the father of respondent No. 4 and 5 had joined the Bihar Judicial Services in the year, 1980 pursuant to notification dated 29.5.1980 and since then he has been residing permanently in the State of Bihar. The father of the private respondent Nos. 4 and 5 has also purchased a house in the Indira Nagar, Kankarbagh, Patna with an intention to settle here permanently

alongwith all his family members including private respondent Nos. 4 & 5. The private respondent Nos. 4 & 5 as well as their father belong to Chamar by caste, which is recognized as a Scheduled Caste both in the State of Bihar as well as Uttar Pradesh, and as such the benefit of reservation cannot be denied to them.

5. That it is humbly stated and submitted that the private respondent Nos. 4 & 5 are Chamar by caste and caste Chamar is recognized as Scheduled Caste both in the State of Bihar as well as Uttar Pradesh in the presidential notification issued under Article 341 of Constitution of India with respect to the State of Bihar and Uttar Pradesh. In view of the aforesaid fact it is humbly stated and submitted that the respondent Nos. 4 and 5 are entitled to get the benefit of reservation in the State of Bihar. Moreso they have permanently settled in the State of Bihar and as such have become the permanent resident of Bihar."

6. It is relevant to state here that respondent Nos. 4 & 5 claim to be the permanent resident of Kankarbagh in the State of Bihar on account of purchase of a dwelling house by their father but have not disclosed the date of its purchase. However, petitioner has placed on record the sale deed dated 19.9.2007, in which the address of the father of respondent Nos. 4 & 5 as vendee has been shown as Mahatam Prasad son of Shri Ramjit, resident of village-Satvaria, P.O.-Gonaria, P.S.Kaptanganj, District-Kushinagar, presently residing at Mohalla Indira Nagar, Road No. 4, P.O.-Lohia Nagar, P.S.-Kankarbagh, District-Patna.

6. Plea of the Bihar Public Service Commission is that respondents 4 & 5 in support of their claim that they belong to the Scheduled Caste, had annexed the certificate granted by the authority of the State of Bihar and, accordingly, it recommended their names in the category of Scheduled Caste.

7. State Government's stand is that it accepted the recommendation as it is and appointed respondents 4 & 5 as Civil Judge (Junior Division).

8. In view of pleading, there is no escape from the conclusion that respondents 4 & 5 are not the Scheduled Caste of the State of Bihar nor native of Bihar and, hence, the question is as to whether they are eligible to be appointed to the post of Civil Judge (Junior Division) in terms of the advertisement.

9. Mr. Umesh Prasad Singh, Senior Advocate, appearing on behalf of petitioner contends that undisputedly respondents 4 & 5, according to their own showing, came to the State of Bihar on appointment of their father in the judicial service and, hence it cannot be said that they are members of the Scheduled Caste of the State of Bihar or for that matter they are native of Bihar and, therefore, in terms of the advertisement, they are not eligible to be considered for appointment on the post reserved for the members of the Scheduled Caste. In support of the submission, reliance has been placed on a decision of the Constitution Bench of the Supreme Court in the case of [Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College and Others](#), . In this case a member of the Scheduled Tribe of Andhra Pradesh on

transfer of his father went to Maharashtra and claimed benefit of reservation in admission to Medical College in Maharashtra. The Constitution Bench of the Supreme Court in the said case laid down the law as follows:-

"21. We have reached the aforesaid conclusion on the interpretation of the relevant provisions. In this connection, it may not be inappropriate to refer to the views of Dr. B.R. Ambedkar as to the prospects of the problem that might arise, who stated in the Constituent Assembly Debates in reply to the question which was raised by Mr. Jai Pal Singh which are to the following effect:-

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing, the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in his Constitution. But, so far as the present Constitution stands, a member of a Scheduled Tribe going outside the Scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them...."

22. In that view of the matter, we are of the opinion that the petitioner is not entitled to be admitted to the medical college on the basis of Scheduled Tribe certificate in Maharashtra. In the view we have taken, the question of petitioner's right to be admitted as being domicile does not fail for consideration."

10. Yet another decision on which reliance is placed is the decision of the Supreme Court in the case of Action Committee on issue of caste certificate to [Action Committee on Issue of Caste Certificate to scheduled Castes and Scheduled Tribes in the State of Maharashtra and Another Vs. Union of India \(UOI\) and Another](#), in which it has been held as follows:-

"16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Scheduled Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different.

Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution".

11. Reliance has also been placed on a decision of the Supreme Court in the case of [U.P. Public Service Commission, Allahabad Vs. Sanjay Kumar Singh](#), , and our attention has been drawn to paragraph-11 of the judgment, same reads as follows:-

"11. The ruling in the above case applies with greater force to the present case for the reason that it is not the case of the writ petitioner that there is any caste or tribe bearing the same nomenclature of "Naga" in U.P. State. In Mani Chandra Shekhar Rao vs. Dean, Seth G.S. Medical College Case, supra, it was pointed out that the "Scheduled Castes and the Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled to, in order to become equals with others but those who go to other areas should ensure that they make way for the disadvantaged and disabled of that part of the community who suffer from disabilities in those areas"."

12. Mr. Chitranjan Sinha, Senior Advocate, appearing on behalf of respondents 4 & 5, however, contends that requirement in terms of the advertisement is that a candidate for being eligible for appointment in the reserved category has to be a permanent resident of the State and respondents 4 & 5 being such a resident they are eligible to be considered for appointment against the vacancies reserved for the members of the Scheduled Caste. He points out that permaner resident is not a fix concept and may vary with passage of time and, according to him, once respondents 4 & 5 have started living in this State with intention to settle here, they become its permanent resident. In support of the submission, reliance has been placed on [Bhagwan Dass and Another Vs. Kamal Abrol and Others](#), whereof reads as follows:-

"6. The word "resident" is in common usage and many definitions were attributed to it in different decisions.... Nevertheless, it is difficult to give an exact definition for the term is flexible, elastic and somewhat ambiguous. The meaning of the word "resident" in itself creates certain doubts. It does not have any technical meaning and no fixed meaning, would be applicable in all the facts and circumstances. It is used in various senses and has received various interpretations by the Courts. Generally, the construction of the term is governed by the connection in which it is used and it is dependent on the context of the subject matter, and the object, the purpose or result designed to be accompanied by its use, and the meaning has to be adduced from the facts and circumstances taken together in each particular case. The word "resident" as defined in Oxford Dictionary is "to dwell permanently or for considerable time, to have one"s stay or usual abode, to live in or at a particular place". Similarly, the Webster"s Dictionary has defined it as "to dwell permanently

and for any length of time" and words like dwelling place or abode are held to be synonymous. From the above, it can be seen that the term "residents" makes it clear that the word "residents" includes two types which are; (1) a permanent residence, and (2) a temporary residence. First type of residence is from all the permanent dwelling which means that the person has settled down at a particular place permanently and regularly for some purpose. The second type refers to a situation that the person is not residing at a place forever but residing at a place for a temporary period or not for a considerable length of time. This is also referred to as temporary living in a place. Hence, in one place the word "residence" is interpreted in the strict sense to include only permanent living at a place which may be referred to as a domicile and in the second place the word is interpreted in a flexible sense to show a temporary or tentative residence."

13. Having appreciated the rival submission, we find substance in the submission of Mr. Singh and the decisions relied on clearly support his contention. The terms of advertisement have been quoted in extenso in the preceding paragraph of the judgment and from its plain reading, it is evident that the requirement is not of a permanent resident but the place of origin. The resident may change but not the origin. Further requirement is that the candidate must be of Scheduled Caste of the State of Bihar. There is no inhibition in migration of a member of the Scheduled Caste from one place to another but when he migrates, it is well settled, he does not and cannot carry any special rights or privileges attributed to him or granted to him in their original State.

14. Admittedly, respondent Nos. 4 & 5 were born not in the State of Bihar and, according to their own showing, after their father joined the Bihar Judicial Service in the year 1980, they have started living in the State of Bihar. Intention to settle in the State of Bihar will not make them the members of the Scheduled Caste of the State of Bihar or for that matter their origin cannot be considered to be of this State. In that view of the matter, we are of the opinion that respondent Nos. 4 & 5 ought not to have been considered for appointment to the post of Civil Judge (Junior Division) against the vacancies reserved for the members of the Scheduled Caste.

15. In order to justify the appointment of respondent Nos. 4 & 5 Mr. Sinha, alternatively submits that proviso added to Section 4 of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991 Bihar Act 3 of 1992 by Section 3 of the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Act, 2003 (Bihar Act 15 of 2003), only prohibits appointment of such Scheduled Caste candidates, who are residing outside of the State of Bihar, it has been emphasized that respondent Nos. 4 & 5 are residing in the State of Bihar and, therefore, claim for benefit in this State is justified.

16. Section 4 of Bihar Act 3 of 1992, after its amendment by Bihar Act 15 of 2003, reads as follows:-

4. Reservation for direct recruitment.-All appointments to services and posts in an establishment which are to be filled by direct recruitment shall be regulated in the following manner, namely:-

(1) The available vacancies shall be filled up.

X X X X

(2) The vacancies from different categories of reserved candidates from amongst the 50% reserved category shall, subject to other provisions of this Act, be as follows:

X X X X

Provided that the State Government may, by notification in the official Gazette, fix different percentage for different district in accordance with the percentage of population of Scheduled Castes/Scheduled Tribes and Other Backward Classes in such districts:

Provided further that in case of promotion, reservation shall be made only for Scheduled Castes/Scheduled Tribes in the same proportion as provided in this section:

Provided further that the candidates residing out of the State of Bihar shall not claim for benefits of reservation under this Act."

17. According to Mr. Sinha, the provision of the Act has to be read in the advertisement and in terms thereof, respondent Nos. 4 & 5 being eligible for consideration of their candidature for the vacancies reserved for the Scheduled Caste, their appointment cannot be said to be illegal. In support of this contention, he has placed reliance on a judgment of the Supreme Court in the case of [Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others](#), and our attention has been drawn to paragraph-21 of the judgment, which reads as follows:-

"21. The present controversy has arisen as the advertisement issued by PSC stated that the candidates who were within the age on 1.7.2001 and 1.7.2002 shall be treated within age for the examination. Undoubtedly, the excluded candidates were of eligible age as per the advertisement but the recruitment to the service can only be made in accordance with the Rules and the error, if any, in the advertisement cannot override the Rules and create a right in favour of a candidate if otherwise not eligible according to the Rules. The relaxation of age can be granted only if permissible under the Rules and not on the basis of the advertisement. If the interpretation of the Rules by PSC when it issued the advertisement was erroneous, no right can accrue on basis thereof. Therefore, the answer to the question would turn upon the interpretation of the Rules."

18. In answer thereto Mr. Singh, contends that the proviso aforesaid excludes the candidature of such Scheduled Caste candidates belonging to the State of Bihar who are residing out of the State of Bihar. He points out that respondent Nos. 4 & 5 do not belong to the State of Bihar.

19. We do not have the slightest hesitation in accepting the broad submission of Mr. Sinha that recruitment has to be made in terms of the Act and in case a candidate is eligible in terms of the Act, he cannot be disqualified on any other ground but the question is as to whether in terms of the Act respondent nos, 4 & 5 were eligible to be considered for appointment to the post of Civil Judge (Junior Division) against the vacancies reserved for the members of the Scheduled Caste?

20. Having given our most anxious consideration to this aspect of the matter, we are of the opinion that respondent Nos. 4 & 5 are not eligible to be considered for appointment against the vacancies reserved for the members of the Scheduled Caste. Section 4 of Bihar Act 3, 1992, as amended by Bihar Act 15 of 2003, deprives benefits of reservation under the Act to the Scheduled Caste candidates of the State of Bihar but residing outside. It does not make eligible members of the Scheduled Caste who belong to the other State.

21. We hasten to add that the expression residing outside of the State of Bihar is not to be given a narrow meaning and a candidate temporarily residing outside the State of Bihar, if belongs to the reserved category having his origin here, shall not be deprived of the benefits of reservation only on the ground that for some period such candidate has resided outside the State.

22. To put the record straight, it is relevant here to state that Mr. Sinha has drawn our attention to a Division Bench judgment of the Bombay High Court in Writ Petition No. 6534 of 2006 (Radhabai Charansingh Chaware vs. State of Maharashtra) to contend that respondent Nos. 4 & 5 were rightly considered for appointment as reserved category candidates. This was the case in which the election to the Municipal Council for the seat reserved for Scheduled Caste was an issue. In the present case, we are faced with altogether different issue.

23. In view of what we have observed, respondent Nos. 4 & 5 were not eligible to be considered for appointment against the vacancy reserved for the members of Scheduled Caste. Hence, we have no option than to hold their appointment illegal.

24. The Bihar Public Service Commission shall now recommend the case of persons just below respondent Nos. 4 & 5 in the merit list/waiting list of the candidates belonging to the category of Scheduled Caste without unnecessary delay. The State Government on receipt of the recommendation shall make appointment. Persons so appointed shall carry their seniority but shall not be entitled to any emoluments. We make it clear that if the petitioner or the intervenor are not the candidates below respondent Nos. 4 & 5 in the merit list, the Bihar Public Service Commission shall be at liberty to recommend the names of those persons whose placement is just below

respondent Nos. 4 & 5. In the result, the writ application is allowed with the direction aforesaid. No cost.