

PETITIONER:
UNION OF INDIA & ANR.

Vs.

RESPONDENT:
MADHAV S/O GAJANAN CHAUBAL & ANR.

DATE OF JUDGMENT: 18/09/1996

BENCH:
K. RAMASWAMY, FAIZAN UDDIN, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Delay condoned.

Leave granted.

On the last occasion where the matter had come up after notice, since the respondents were not represented either in person or through counsel and when, the counsel had pointed out the decision followed by the Tribunal, namely, Dr. Chakradhar Pasvan vs. State of Bihar [(1988) 2 SCC 214], this Court had referred the matter to three-Judge Bench. Thus, the matter has come up to-day, Even now, none is appearing for the respondents; nor are they appearing in person. We have taken the assistance of Sri Goswami, learned senior counsel. We requested him to place on record the decisions for or against him. He has fairly argued case.

The admitted facts are that in the National Savings Scheme Service the Government had created various posts upto the post of Superintendent; there are number of posts but there is only one post of Secretary. This post is a feeder post for promotion as Regional Deputy Director in which category there are several posts. The Government applied the rule of reservation by rotation to the vacancies in the post of Secretary. 40 point roster is also being applied to these vacancies. In the post of Secretary, point No.4 vacancy was reserved for Scheduled Tribes. When that vacancy was sought to be filled up by promotion from the Superintendents in Group A category from Scheduled Tribe candidates, the respondent filed of in the Central Administrative Tribunal at Bombay. The Tribunal, following the decision of this Court in Pasvan's case [supra], by order dated March 11, 1992 in OF Mo.613/90, set aside the promotion holding that since the post of Secretary is a single point post, no reservation could be granted to the reserved candidates as it would amount to 100% reservation therefore, it is unconstitutional. Thus, this appeal by special leave.

The question is: whether the application of 40 point roster to the successive vacancies in the post of Secretary violates Article 16 (1) of the Constitution? Shri Goswami has contended that in Pasvan's case, that question was left open since the controversy did not arise therein on those facts. since the Government have decided that when a single

post vacancy arises as per roster point and when candidates belonging to Scheduled Castes or Scheduled Tribes are available, then the vacancy reserved for respective Scheduled Caste or Scheduled Tribe could be considered as per rules for appointment by promotion to the post Secretary in the absence of their availability the vacancies would be and is being carried forward. Therefore, the principle of rotation applied to a single post is not violative of Article 16(1) of the Constitution. He has taken us through various judgments of this Court concerning the question.

In *General Manager, Southern, Southern Railway vs. Rangachari* [(1962) 2 SCR 586], the Constitution Bench, per majority, had held that appointment by reservation to the selection post was not violative of Article 16(1) of the Constitution. The same principle was followed in the case of promotion in *State of Kerala vs. Thomas* [1976 1 SCR 1906]. In the *State of Punjab vs. Hira Lal* [(1970) 3 SCR 185] and *A.B.S.K. Sangh vs. Union of India* [(1985) 2 SCR 185] and *Comptroller & Auditor General v. S.K. Jagannath* [(1986) 2 SCR 17], the matters were referred to a larger Bench. In *Indra Sawhney & Ors. vs. Union of India & Ors.* [(1992) Supp. 3 SCC 217], per majority, the Bench of nine Judges of this Court had held that Article 16(1) and 16(4) do not apply to appointment by promotion. They would be applicable only to initial appointments. By Section 2 of the Constitution [77th Amendment], Act, 1995, Article 16(4A) was introduced which envisages that nothing in this Article shall prevent the State from making any provision in reservation in matter of promotion to any class or classes of posts in the service under the State. It is well settled legal position that Preamble of the Constitution is part of the Constitution. In *S.R. Bommai vs. Union of India* [(1994) 3 SCC 1], this Court had held that preamble to the Constitution is a part of its basic structure. Socio-economic justice, equality of opportunity and of status, dignity of persons are the arch of the seen that the Constitution. Social Justice is a fundamental right as held in *LIC of India v. Consumer Education and Research Centre* [(1995) 5 SCC 482]. Economic empowerment to the poor was held to be a fundamental right in *Smt. H.B. Usha v. D.S. Ramachandra* [(1995) Supp. 2 SCC 49]. Article 335 mandates the State to take into consideration the claims of the Dalits and Scheduled Tribes for appointment to a post or office under the state, consistent with efficiency of administration. Article 46 enjoins upon the State to provide socio-economic and educational facilities and opportunities Government evolved reservation in posts or offices under the State as one of the modes to socio-economic justice to Dalits and Tribes, Appointment to an office or post into a service under the State is one of the means to render socio-economic justice. Constitution [77th Amendment] Act, 1995 has resuscitated the above objective to enable the Dalits and Tribes-employees to improve excellence in higher echolons of service and a source of equality of opportunity social and economic status guarantees by the Preamble to the Constitution. As a consequence, the Parliament has removed the lacuna pointed out by this Court in *Indra Sawhney's* case. Thus, it would be seen the legal position held by this Court in *Rangachari's* case and followed in other cases has been restored and reservation of appointment by promotion would be available to the members of the Schedule Castes and Scheduled Tribes as per 50% quota as is maintained by this Court in *Indra Sawhney's* case. The carry forward principle has also been upheld in *Indra Sawhney's* case In *commissioner of Commercial Taxes v. D. Sethu Madhva Rao* (1996) 7 SCC 5121 a Bench of

three Judges and in M. Venkateswarlu v. Government of Andhra Pradesh [1996] 5 SCC 1671 a Bench of two Judges have held that right to reservation in promotion stands restored by Constitution [77th Amendment] Act which introduced clause [4 A] to Article 16.

The question, therefore, arises: whether the Government would be justified in law to provide reservation in promotion in a single post by rotating the vacancy as per the roster point prepared by the Government? It is true that in Paswan's case the Government with a view to provide reservation to the Scheduled Castes to the post of Director which is a single post, was fused with two posts of Deputy Directors which do not carry the same scale of pay. Therefore, this Court had pointed out that the cadre would mean the cadre carrying the same scale of pay. Since the Deputy Directors are not carrying the same scale of pay they cannot be fused together for applying the principle of reservation. By implication, thus Court had accepted that two or more single posts carrying the same scale of pay would be fused to elongate the Constitutional objective of providing reservation to a post in the service or office of the State. It was then held that single post cannot be reserved which amounts to 100% reservation and, therefore, it is violative of Article 16(1) of the Constitution. The further question whether in the same single post reservation by rotation could be granted and whether it will be violative of Article 16(1) was left open in that case. The Constitution Bench of this Court in Arati Ray Choudhury vs. Union of India & Ors. [(1974) 1 SCC 87] considered the question of the single post and applied the rule of reservation by rotation to the carried forward post and filled the post when reserved candidates were available on the carried forward posts. In this regard, this Court had laid down thus:

"That is precisely what happened here. The S.E. Railway runs only two Secondary Schools for girls, one at Adra and the other at Kharagpur. Senior-most other Assistant Mistress, Smt. Gita Biswas. In pursuance of the memorandum dated December 4, 1963 of the Ministry of Home Affairs the Railway Board revised the Model Roster by their letter of January 16, 1964. The first point in this roster is a reserved point and therefore the Adra vacancy was strictly a reserved vacancy. But there being only one particular year of recruitment it had to be treated as unreserved and therefore the appointment went to Smt. Biswas, an open, not a reserved candidate. This, however had to be compensated for by carrying forward the reservation though not over more than 2 subsequent recruitment years. For the purposes of Services under the Railway administration 'recruitment year' means the financial year and the other appointment having been made in the financial year 1966-67 it was permissible to carry forward the

reservation till the close of the financial year 1968-69. There was no vacancy in 1967-68. The vacancy in the post of the Headmistress of the Kharagpur school occurred in the financial year 1968-69 by the retirement of Smt. Bina Devi with effect from December 31, 1968. This vacancy, indubitably, had to be treated as a reserved vacancy and since from amongst the 4 Assistant Mistresses, respondent No.3 was the only candidate belonging to the Scheduled Castes she was entitled to be considered for selection to the post of the Headmistress to the exclusion of the other. The claims if any of the petitioner who is not a reserved candidate have to be postponed, though in the normal course it may be quite some years before she gets her turn. The Adra Headmistress and respondent No.8 would seem to have a long tenure in their respective office.

Accordingly, it was held that in carrying forward post in a single post, reservation would be applied and the vacancies, after carrying forward, would be filled up by promotion from the members of the Scheduled Castes. This principle would apply in a single post carry forward by applying rotation and it would be consistent with the principle of equality envisaged under Articles 14 and 16(1) of the Constitution. Article 14 and 16(1) equally applies to Scheduled Castes and Scheduled Tribes and they too are entitled to seek equal opportunity to hold the single post, by promotion. Otherwise, it would amount to total prohibition of opportunity to hold the single point post which also violates Articles 14 and 16(1). A three Judges Bench was to consider the same question in *Sou. Vidyulata Arvind kakade vs. Digembar Gyanba Surwase & Ors.* [C.A. No.242 of 1992 decided on January 17 1992] in a short judgement. This Court stated thus:

We have also perused the judgment of the Constitution bench and the Division Bench of this Court in *Arati Ray Choudhury vs. Union of India & Ors.* [(1972) 2 SCR 1] and *Dr. Chakradhar Paswan vs. State of Bihar & Ors.* [(1988) 2 SCC 214] respectively. no copy of the writ petition has been filed in that Court. There is no material on record to show that the Resolution providing for reservation provides that the for reservation has not to be applied in isolated posts which is the basis of the Challenge in this petition."

It would thus be seen that this court has accepted that reservation could be provided even to the isolated posts on the basis of the rule of rotation. Extension of reservation in such cases is not unconstitutional. On the other hand, such scheme provides opportunity and facilities to Scheduled Castes and Scheduled Tribes to be considered for promotion to hold single posts consistent with equality of opportunity

on par with others. In R.K. Sabharwal & Ors. vs. the State of Punjab & [(1995) 2 SCC 745] a Constitution Bench of this Court considered whether the reservation as per the roster by promotion could be valid and consistent with Article 16(1) of the Constitution. This Court had pointed out that the reservation to the post as per the roster for the purpose of promotion is valid in law. The same can be filled up applying the roster points prescribed by the Government. When a candidate belonging to the backward classes was appointed by promotion on merit, he cannot be considered to be reserved candidate but the candidate appointed on rule of reservation to be filled up in roster point available to the reserved candidates. In Chetan Dilip Motghare vs. B.L. Education Society Nagpur & Ors. [(1995) Supp. 1 SCC 157] a Bench of two Judges of this Court considered whether reservation to single post could be valid in law. Though the decision in the Arvind Kakade's case was brought to the notice of the learned Judges, the learned Judges found that it did not lay down any contra principle to the one laid down by this Court in Paswan's case and, therefore, it was held that single point post could not be reserved for promotion. With due respect, we hold that the learned Judges have not correctly appreciated the ratio laid down by this Court in Vidyulata's case and Arti Choudhry's case. In State of Bihar vs. Bageshwardi Prasad [(1995) Suppl. 1 SCC 432], the Bihar Government had provided by way of a circular, the rule of rotation to a single post and applied the roster point for providing promotion to the vacancies that had arisen in accordance with roster point. This Court had upheld the rule of reservation and held that reservation to the single post by applying the rule of rotation is not violative of Articles 14 and 16 (1) of the Constitution. The judgment in Paswan's case was distinguished.

Thus, we hold that even though there is a single post, if the Government have applied the rule of rotation and the roster point to the vacancies that had arisen in the single point post and were sought to be filled up by the candidates belonging to the reserved categories at the point on which they are eligible to be considered, such a rule is not violative of Article 16(1) of the Constitution.

In this case, it is seen that the post of Secretary is carrying the scale of pay of Rs.2200-4000/-. The Government have decided to apply the 40 point roster maintained for the post of Secretary. The vacancy available at the time of point No.4 of the roster was reserved for the Scheduled Tribes. When the Department had sought for the clarification from the Department of Personnel and Training, the Government of India, had stated thus:

"There is no change in the positions, however, it may be stated that unless this Department changes the earlier instructions, the old order will remain in force. Thus the Supreme Court Judgment cannot be made applicable to other cases automatically".

Thus, the Government have adhered to the rule or rotation to a single post and the 40 point roster to the single post was applied and the vacancy reserved for the Scheduled Castes and Scheduled Tribes as and when had arisen, was sought to be filled up, when the candidates were available. Thus, we hold that the roster point No.4 in the vacancy of the Secretary reserved for the Scheduled Tribes was valid and constitutional. When the officer available and was eligible to be considered, he was entitled to be

considered in accordance with the rules and he promoted as Secretary. The Tribunal, therefore, was not right in directing, that the rule of rotation to the single post could not be applied. It is brought to our notice that the original promotee died pending the proceedings and, therefore as and when vacancy arises as per rule of rotation as per roster the same would be filled up in accordance with law.

The appeal is accordingly allowed but in the circumstances, without costs.

JUDIS