

UR Category Candidates Can Be Excluded From Selection Process If Statute Disentitles Their Consideration Even In Absence Of Reserved Category Candidate: Kerala HC

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

P.B. SURESH KUMAR & C.S. SUDHA, JJ.

Writ Appeal No.1407 of 2022; 3rd November, 2022

SREE SANKARACHARYA UNIVERSITY OF SANSKRIT

versus

DIVYTA NEDUNGADI @ DIVYA BALAKRISHNAN

Against the Judgment in WP(C) 30548/2021 dated 04.07.2022 of High Court of Kerala

Appellants / Respondents in w.p.(c): by Adv Dinesh Mathew J. Muricken;

Respondents / Petitioners in w.p.(c): by Adv. M.P. Sreekrishnan

J U D G M E N T

P.B.Suresh Kumar, J.

This appeal is directed against the judgment dated 04.07.2022 in W.P.(C) No.30548 of 2021. The appellants were the respondents in the writ petition. Parties and documents are referred to in this judgment, as they appear in the writ petition.

2. The matter relates to the selection process initiated by Sree Sankaracharya University of Sanskrit (the University) for appointment to the post of Assistant Professor in Mohiniyattam in terms of Ext.P2 notification. As per the notification, the University invited applications from all eligible and qualified hands against the sole vacancy earmarked for candidates belonging to Ezhava Community. The petitioners were qualified to be considered for appointment to the post, but they do not belong to the Ezhava Community or any other community to which reservation benefits are applicable. Nevertheless, according to the petitioners, they cannot be deprived of the opportunity to participate in the selection process, for the rules of reservation are to be applied only at the stage of making the appointment and not at the stage of the notification inviting applications. The petitioners, in the circumstances, challenged the notification in the writ petition to the extent it provides that the vacancy is earmarked only for candidates belonging to the Ezhava Community.

3. A counter affidavit has been filed in the writ petition on behalf of the University. The stand taken by the University in the counter affidavit is that in terms of the provisions contained in Section 32 of the Sree Sankaracharya University of Sanskrit Act, 1994 (the Act), the rules of reservation and communal rotation provided for in clauses (a), (b) and (c) of Rule 14 and the provisions of Rules 15, 16, 17 and 17A of the Kerala State and Subordinate Service Rules, 1958 (KS&SSR) as amended from time to time, are to be observed category-wise in the selection process treating all the departments of the University as one unit; that as per Ext.R1(c) decision of the Syndicate of the University, the University is maintaining separate roster registers for each category of posts with rotation points in terms of the Annexure to Part II of KS&SSR, in which details relating to posts are entered in the order of the dates of occurrence of vacancy; that in terms of the roster register maintained for the category of Assistant Professor, the vacancy that arose on 01.05.2021 in respect of which the selection process was initiated, goes to the turn of candidates belonging to the Ezhava Community and that it is on account of the said reason

that it was mentioned in the notification that the vacancy is earmarked for candidates belonging to the Ezhava Community.

4. The learned Single Judge allowed the writ petition holding that this court has already declared in Exts.P9 and P10 judgments that reservation can be applied only at the stage of appointment, and consequently disposed of the writ petition directing the University to bring out an erratum notification or issue a fresh notification inviting applications without indicating the community turns. The University is aggrieved by the said decision and hence, this appeal.

5. Heard the learned Standing Counsel for the University as also the learned counsel for the petitioners.

6. The learned Standing Counsel for the University submitted that since the vacancy notified is one earmarked for candidates belonging to the Ezhava Community in terms of the roster register maintained by the University, candidates from open category cannot be appointed against that vacancy and there is therefore nothing illegal in indicating the community turns in the notification, so that those candidates who do not get appointed against the said vacancy will not be misled for preferring applications. The learned Standing Counsel has elaborated the said submission by referring to Rule 15(a) of Part II KS&SSR which precludes the University from appointing candidates belonging to open category against vacancies earmarked for reserved categories.

7. Per contra, the learned counsel for the petitioners contended, placing reliance on Exts.P9 and P10 judgments, that the University is not justified in depriving them an opportunity to participate in the selection process by earmarking the vacancy to one of the reserved categories at the stage of notification itself.

8. We have considered the arguments advanced by the learned counsel for the parties on either side.

9. Section 32 of the Act reads thus:

“32. Reservation of appointments— In making appointments to the teaching and non-teaching posts, the University shall, *mutatis mutandis*, observe the provisions of clauses (a), (b) and (c) of rule 14 and the provisions of rules 15, 16, 17 and 17A of the Kerala State and Subordinate Services Rules, 1958, as amended from time to time, and communal rotation shall be followed categorywise treating all the department as one unit”

In the light of the extracted provision, the rules of reservation provided for in the KS&SSR are to be applied while making appointments to teaching posts in the University category-wise, treating all the departments of the University as one unit. It has been held by the Apex Court in **University of Cochin v. Dr. N. Raman Nair**, (1975) 3 SCC 628 that even though clause (c) of Rule 14 of KS&SSR does not specifically say that the rule of rotation will be applied in the order in which vacancies occur, the rule is intended to be applied to vacancies in the order in which they occur, and not meant to be applied with reference to the date on which a vacancy is announced or advertised because these are fortuitous matters over which those in power in the University may, if so inclined, be able to exercise control. It was also held by the Apex Court in the said case that the whole object of such rules is to introduce fixity of principle and of the method of its application so as to remove, so far as possible, uncertainty and opportunities for abuse of power. In the light of the decision aforesaid, the principle that entitlement of the community to which benefits of reservation is available, shall be fixed at the stage of occurrence of the vacancy itself, cannot be doubted.

10. From the averments in the counter affidavit filed by the University, it is evident that the University is maintaining category-wise rosters with rotation points in terms of the Annexure to Part II of KS&SSR and as per the said roster, the subject vacancy goes to candidates belonging to the Ezhava Community. As noted, the specific case of the University is that insofar as candidates belonging to open category are not entitled to be considered for appointment against the said vacancy, there is no illegality in showing the community turn in the notification, for if the University invites applications from open category to posts that are to be filled up from the reserved categories, the same would, in effect be giving a false hope to candidates applying for those posts. The University relies on Rule 15(a) of KS&SSR, in support of the said contention. Rule 15(a) of the KS&SSR which is made applicable for the appointments to be made in the University reads thus:

“15. (a) The integrated cycle combining the rotation in clause (c) of rule 14 and the sub-rotation in sub- rule (2) of rule 17 shall be as specified in the Annexure to this Part. Notwithstanding anything contained in any other provisions of these rules or in the Special Rules if a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, such vacancy shall be kept unfilled, notified separately for that community or group of communities for that selection year and shall be filled by direct recruitment exclusively from among that community or group of communities. If after renotification, repeatedly for not less than two times, no suitable candidate is available for selection from the respective community or group of communities, the selection shall be made from available Other Backward Classes candidates. In the absence of Other Backward Classes candidates, the selection shall be made from available Scheduled Castes candidates and in their absence, the selection shall be made from available Scheduled Tribes candidates.”

As is evident from the extracted rule, if a suitable candidate is not available for selection from a particular community, such vacancy shall be kept unfilled, notified separately for that community and shall be filled by direct recruitment exclusively from among that community. It is also evident from the extracted rule that if after re-notification, repeatedly for not less than two times, no suitable candidate is available for selection from that community, the selection shall be made from available Other Backward Classes candidates. It is also evident from the rule that in the absence of Other Backward Classes candidates, the selection shall be made from available Scheduled Castes candidates and in their absence, the selection shall be made from available Scheduled Tribes candidates. Therefore, it is evident from the said provision that as contended by the University, candidates belonging to open category are not entitled to be considered for appointment against a vacancy earmarked for a particular community falling under Other Backward Classes. It appears that the Rule does not envisage a situation as to what should be done in a given case where no suitable candidate is available for selection from a particular community even after successive re-notifications and where there is no suitable candidate either from the Scheduled Castes or from Scheduled Tribes Communities. There is, therefore, force in the contention of the University that if the University invites applications from open category to posts that are to be filled up from the reserved categories, the same would, in effect, be giving a false hope to candidates who apply for those posts. If there is a requirement for payment of fees for the purpose of preferring applications and if it is not mentioned that the vacancy for which selection process is initiated is earmarked for a particular community, those candidates belonging to open category would also be remitting fees for participating in the selection process without knowing the fact that they will not be considered for selection, irrespective of their merit. That apart, if they are not informed that they will not be considered for the vacancy earmarked for a reserved category, the efforts they would take to participate in the selection process by undertaking preparations, at times of several months, would go in vain.

11. On a query from the court, the learned counsel for the petitioners did not dispute the fact that the sole vacancy for which selection is made being one earmarked for candidates belonging to Ezhava Community, the petitioners are not entitled to be considered for appointment against that vacancy. Nevertheless, he asserted that the petitioners cannot be deprived of the opportunity to participate in the selection process. The learned counsel was unable to give a satisfactory answer to the query made by the court as to the purpose for which they should bother themselves by participating in the selection process.

12. Let us now consider the question whether Exts.P9 and P10 judgments have any bearing on the facts of the present case. Ext.P9 is a common judgment in a batch of appeals preferred against Ext.P8 judgment. Ext.P8 judgment was one rendered in a batch of writ petitions challenging a few notifications for selection issued by the University of Calicut. In the notifications, as in the case on hand, the community turns of the vacancies were indicated. One among the grounds raised in those writ petitions, in the circumstances, was that reservations cannot be made in the notification and the rules of reservation are to be applied only at the time of appointment. The learned Single Judge who dealt with the cases took the view that such a provision would not only exclude eligible candidates entitled to reservation but also open category candidates from applying for the post and consequently set aside the notifications. The said decision of the learned Single Judge was affirmed in appeal by the Division Bench, in terms of Ext.P9 judgment. Paragraph 11 of Ext.P9 judgment reads thus:

11. Of course, there is some justification on the part of the appellants to contend that in the peculiar situation where appointments are made in different streams of subjects, unless the candidate know as to whether it is in the Open Category or a particular classification of Other Backward Classes or SC/ST, there is no necessity for all the candidates to apply for the post. But as already stated, candidates having reservation can also compete against posts which are in unreserved category. Their appointments depend upon the merit of the respective candidates. Therefore, such a situation does not arise. But in respect of reserved categories, especially OBC and SC/ST, if it is limited to a particular class of candidate coming under OBC, if such a candidate is not available, and even after re-notification not less than two times, the appointing authority will have to go back to the original rank list to find out the next candidate available under OBC or SC/ST, as the case may be, for making appointments. In such an event, if the candidates confine themselves to the notified class in each post, they may not get the advantage of Rule 15(a) of KS & SSR.

As we entertained a doubt as to whether candidates entitled to be considered for appointment, in the event suitable candidates were not available from reserved categories, have been given an opportunity to participate in the selection process, we have called for and verified the Judges Papers in the said cases. It has been found on the said verification that only those candidates who belonged to categories to which the vacancies were earmarked were permitted in terms of the notifications to apply for selection. Needless to say, it is in that context, Exts.P8 and P9 judgments have been rendered in the light that rules of reservation are to be applied only at the stage of making the appointment and not at the stage of the notification inviting applications. As far as the case on hand is concerned, the University maintains that despite the indication of community turns, the University has mentioned in the notification that all eligible candidates are permitted to apply for selection. We have perused the notification and found that the University has indicated in the notification itself, though not satisfactorily, that all eligible candidates are entitled to prefer applications. As such, according to us, merely for the reason that community turns of the vacancies notified are indicated in the notification, it cannot be said that the notification is bad, if it is specifically mentioned in

the notification, the particulars of the categories of candidates who are entitled to apply for selection against those vacancies in the event suitable candidates are not available from the concerned backward classes. Exts.P8 and P9 judgments, in the circumstances, cannot have any bearing on the facts of the case on hand. It is all the more so since the petitioners are candidates belonging to open category who are not entitled to be considered for appointment in the absence of any candidate from the Ezhava community. Ext.P10 is only a judgment rendered following Ext.P8 judgment.

13. Even while accepting the fact that a vacancy earmarked for a particular reserved category cannot be filled up by a candidate belonging to open category, having regard to the provisions contained in Rule 15(a) of KS&SSR, in a contingency where a suitable candidate is not available for selection from a particular reserved category even after successive re-notifications, the selection shall be made from the available Other Backward Classes candidates. In the absence of Other Backward Classes candidates, the selection shall be made from available Scheduled Castes candidates and in their absence, the selection shall be made from available Scheduled Tribes candidates. In other words, even if a vacancy is earmarked for a particular community falling under the category “Other Backward Classes”, when a selection is made for filling up of that vacancy, candidates belonging to other Other Backward Classes as also candidates belonging to Scheduled Castes and Scheduled Tribes are entitled to be considered for appointment against that vacancy and they cannot, therefore, be deprived of the opportunity to apply for selection. To a query made by the Court to the learned Standing Counsel for the University in this regard, the learned Standing Counsel pointed out, placing reliance on the statement “All eligible candidates can apply”, in the notification that, it enables all such candidates to make applications for participating in the selection process. As this Court entertained a doubt as to whether the statement aforesaid would serve the purpose intended, the learned Standing Counsel submitted that if the same is not adequate to communicate the entitlement of other Other Backward Classes candidates, Scheduled Castes and Scheduled Tribes candidates to participate in the selection process, appropriate erratum notifications can be issued in order to make that position clear.

In the circumstances, the writ appeal is allowed, the impugned judgment is set aside and the writ petition is disposed of with a direction that the University, before proceeding further with Ext.P2 notification, shall issue an erratum for the same, indicating clearly the particulars of the candidates who are entitled to apply for selection against the vacancy earmarked, if no candidate is available from the Ezhava community even after successive re-notifications.