

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**THE CHIEF JUSTICE SHRI VIPIN SANGHI
AND
JUSTICE SHRI RAMESH CHANDRA KHULBE**

24th AUGUST, 2022

(1) WRIT PETITION (S/B) No.492 OF 2022

Ananya Attri and others Petitioners

Vs.

State of Uttarakhand and another Respondents

Presence: -

Mr. Harshit Sanwal, learned counsel for the petitioners.

Mr. S.N. Babulkar, learned Advocate General along with Mr. C.S. Rawat, learned CSC for the State.

Mr. Ashish Joshi, learned counsel for the respondent-Commission.

(2) WRIT PETITION (S/B) No.355 OF 2022

Pavitra Chauhan and others Petitioners

Vs.

State of Uttarakhand and another Respondents

Presence: -

Ms. Sugandha Jain, learned counsel for the petitioners.

Mr. S.N. Babulkar, learned Advocate General along with Mr. C.S. Rawat, learned CSC for the State.

Mr. Ashish Joshi, learned counsel for the respondent- Commission.

COMMON ORDER: (Per Shri Vipin Sanghi, C.J.)

Issue notices to the respondents in both the matters.

2. Notices have been accepted by Mr. C.S. Rawat, learned CSC on behalf of the State and by Mr. Ashish Joshi, learned counsel on behalf of respondent-Commission.

3. Counter affidavit(s) be filed within three weeks.

4. Rejoinder before the next date.
5. List these matters together on 11.10.2022 for final disposal.

Interim Relief Application (IA/1/2022)

6. Issue notices.
7. Learned counsels for the respondents accept notice.
8. We have heard the submissions of learned Counsel for the petitioner, learned Advocate General on behalf of respondent-State as well as of learned counsel appearing on behalf of respondent no.2- Commission.
9. The challenge in the present petitions is primarily laid to the government order dated 18.07.2001 and the subsequent government order dated 24.07.2006 on the premise that in so far as they provide horizontal reservation on the basis of 'domicile' of women candidates in the State of Uttarakhand, the same are *ultra vires* of the provisions of Articles 14 and 16 of the Constitution of India.
10. Learned counsels for the petitioners have submitted that Articles 14, 15 and 16 of the Constitution of India are part of the same Scheme. Article 15, however, deals with the aspect of prohibition of discrimination on grounds of religion, race, caste, sex or

place of birth, generally, whereas, Article 16 is specific to the aspect of equality of opportunity in matters of public employment.

11. Learned counsels submit that Article 16(1) categorically provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

12. Article 16(2) further explains the position and goes on to state that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

13. Learned counsels for the petitioners have placed reliance on the decision of the Supreme Court in '***Kailash Chand Sharma v. State of Rajasthan and others***' **(2002) 6 SCC 562**, and in particular, on paragraph nos.11, 13 and 14 of the said decision. In that case, the Court was concerned with the selection held and the consequential appointments made to the posts of Primary School Teachers by the Zila Parishads of various districts in the State of Rajasthan. Bonus marks/preference was granted to the candidates on the basis of

their 'place of residence'. The Supreme Court struck down the said preference/bonus marks while observing as follows: -

“11. The first and foremost question that would arise for consideration in this group of appeals is, whether the circular dated 10.6.1998 providing for bonus marks for residents of the concerned district and the rural areas within that district is constitutionally valid, tested on the touch stone of Article 16 read with Article 14 of the Constitution. It is on this aspect, learned senior counsel appearing for the candidates concerned have argued at length with admirable clarity, making copious reference to several pronouncements of this Court. There can be little doubt that the impugned circular is the product of the policy decision taken by the State Government. Even then, as rightly pointed out by the High Court, such decision has to pass the test of Articles 14 and 16 of the Constitution. If the policy decision, which in the present case has the undoubted effect of deviating from the normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well-settled norms, both positive and negative, underlying Articles 14 and 16, which together with Article 15 form part of the Constitutional code of equality.

12. In order to justify the preferential treatment accorded to residents of the district and the rural areas of the district in the matter of selection to the posts of teachers, the State has come forward with certain pleas either before the High Court or before this Court. Some of these pleas are pressed into service by the learned counsel appearing for the parties who are the possible beneficiaries under the impugned order of the Govt. Such pleas taken by the State Government and from which support is sought to be drawn by the individual parties concerned will be referred to a little later.

13. Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some of the parties. Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio-economic backwardness of the area for the purpose of admissions to professional colleges, it has been suggested that residence within a district or rural areas of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16(2) and in the light of Art. 16(3). An argument of this nature flies in the face of the peremptory language of Article 16(2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past. We would like to reiterate that residence by itself- be it be within a State, region, district or lesser area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16(3). It

is not possible to compartmentalize the State into Districts with a view to offer employment to the residents of that District on a preferential basis. At this juncture it is appropriate to undertake a brief analysis of Article 16.

14. Article 16 which under clause (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State reinforces that guarantee by prohibiting under clause (2) discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Be it noted that in the allied-Article 15, the word 'residence' is omitted from the opening clause prohibiting discrimination on specified grounds. Clauses (3) and (4) of Article 16 dilutes the rigour of clause (2) by (i) conferring an enabling power on Parliament to make a law prescribing the residential requirement within the State in regard to a class or classes of employment or appointment to an office under the State, and (ii) by enabling the State to make a provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. The newly introduced clauses (4-A) and (4-B), apart from clause (5) of Article 16 are the other provisions by which the embargo laid down in Article 16 (2) in somewhat absolute terms is lifted to meet certain specific situations with a view to promote the overall objective underlying the Article. Here, we should make note of two things: firstly, discrimination only on the ground of residence (or place of birth) in so far as public employment is concerned, is prohibited; secondly, Parliament is empowered to make the law prescribing residential requirement within a State or Union Territory, as the case may be, in relation to a class or classes of employment. That means, in the absence of parliamentary law, even the prescription of requirement as to residence within the State is a taboo. Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This, in effect, is the import of the expression 'only'.

14. Learned counsels for the petitioners have also placed reliance on a judgment of learned Single Judge of the High Court of Allahabad in '**Vipin Kumar Maurya and others v. State of U.P. and others**' (Writ A. Nos.11039 of 2018) **MANU/UP/0282/2019** decided on 16.01.2019, wherein, the horizontal reservation was restricted in favour of women who are original residents

of the State of Uttar Pradesh alone, in the matter of public employment in the State of Uttar Pradesh. The learned Single Judge exhaustively considered the judgments of Supreme Court including in *Kailash Chand Sharma (Supra)* and held as follows: -

"57. Reservation under the Act of 1994 would have to be restricted to the residents of State, inasmuch as grant of declaration of a particular caste as Scheduled Caste, Scheduled Tribe and Other Backward Caste itself is restricted to the castes declared under the relevant presidential order of 1950 or the Act of 1994 for the particular State only. Such reservation is otherwise protected by Article 16 (4) itself. This distinction does not appear to have been noticed nor the restriction contained under Article 16(2) and (3) have been taken note of.

58. In our constitutional scheme women of this country are otherwise a homogeneous lot and they cannot be differentiated unless reasons and materials exists for their further classification. Classification based only on residence would otherwise be permitted only by law made by the Parliament, which is not the case here. In such circumstances and for the reasons disclosed, it is held that Clause (4) of the Government Order dated 9.1.2007 restricting grant of horizontal reservation only to the women who are original residents of Uttar Pradesh as also specific stipulations in that regard, contained in Advertisement No. 14 of 2015 would be contrary to Articles 16(2) and 16(3) of the Constitution of India."

15. On the other hand, the submission of learned Advocate General, appearing for the State Government, is that since Articles 14 to 16 form part of the same Scheme of rights, the distinction sought to be drawn by the petitioner between Articles 15 and 16 is not correct. He has placed reliance on the judgment of the Supreme Court in '*Saurabh Chaudri and others v. Union of India and others*' **AIR 2004 Supreme Court 361**, to submit that the Supreme Court upheld the grant of admissions to

candidates to medical courses on the basis of 'domicile'.

He has particularly placed reliance on Paragraphs nos.29 to 31 of the said decision which read as follows: -

"29. The first question that arises for consideration is, whether the reservation on the basis of domicile is impermissible in terms of Clause (1) of Article 15 of the Constitution of India? The term 'place of birth' occurs in Clause (1) of Article 15 but not 'domicile'. If a comparison is made between Article 15(1) and Article 16(2) of the Constitution of India, it would appear that whereas the former refers to 'place of birth' alone, the latter refers to both 'domicile' and 'residence' apart from place of birth. A distinction, therefore, has been made by the makers of the Constitution themselves to the effect that the expression 'place of birth' is not synonymous to the expression "domicile" and they reflect two different concepts. It may be true, as has been pointed out by Shri Salve and pursued by Mr. Nariman, that both the expressions appeared to be synonymous to some of the members of the Constituent Assembly but the same, in our opinion, cannot be a guiding factor. In D.P. Joshi's case (supra), a Constitution Bench held so in no uncertain terms.

30. This Bench is bound by the said decision.

31. In State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors. [1975] 1SCC 267, this Court observed:

"The reservation for rural areas cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appears to be made for the majority population of the State. Eighty per cent of the population of the State cannot be a homogeneous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty, is found in all parts of India, In the instructions for reservation of seats it is provided that in the application form a candidate for reserved seats from rural areas must submit a certificate of the District Magistrate of the District to which he belonged that he was born in rural areas and had a permanent home there, and is residing there or that he was born in India and his parents and guardians are still living there and earn their livelihood there. The incident of birth in rural areas is made the basic qualification. No reservation can be made on the basis of place of birth, as this would offend Article 15."

16. Learned Advocate General has also placed reliance on "**Government of A.P. v. P.B. Vijayakumar and another**" (1995) 4 SCC 520. In this case, the State had provided for reservation for women in the

matter of public employment.

17. At this stage, we may observe that the petitioner has not questioned the grant of reservation for women in the matter of public employment in the State of Uttarakhand. What has been assailed is the restriction imposed by the State with regard to reservation for women only of Uttarakhand. The decision in *P.B. Vijayakumar (Supra)*, therefore, does not appear to be relevant for our discussion.

18. So far as the decision in *Saurabh Chaudri (Supra)* is concerned, the aforesaid extract would, in fact, show that the Supreme Court compared the language used in Articles 15(1) on the one hand, and Article 16(2) on the other, and found that Article 15(1) mentions the term 'place of birth' but does not include 'domicile'. On the other hand, Article 16(2) refers to both 'domicile' and 'residence' apart from 'place of birth'. The Supreme Court takes note of the fact that a distinction has been made by the makers of the Constitution themselves, and therefore, the expression 'place of birth' is not synonymous to the expression 'domicile' and they reflect two different concepts. In fact, the Supreme Court noticed the decision in '***State of Uttar Pradesh v. Pradip Tandon and others***' **(1975) 1 SCC 267**, wherein, reservation for

rural areas was not sustained on the ground that the rural areas represent socially and educationally backward classes of citizens.

19. Thus, *prima facie*, it appears to us that the reservation, granted by the State of Uttarakhand *vide* Government Order dated 24.07.2006, appears to be contrary to the mandate of Article 16(2) of the Constitution of India.

20. At this stage, we may also observe that another aspect raised by the petitioner is that the Government Order dated 18.07.2001, while granting reservation in favour of women, nowhere stipulated that the same is limited only in respect of Uttarakhand women, and the second Government Order dated 24.07.2006 proceeds on the assumption that the first Government Order dated 18.07.2001 provides for reservation to the extent of 20% for women of Uttarakhand, whereas that is not the case. In this regard, the learned counsels for the petitioners have also referred to an order passed by the Division Bench of this Court in '***Deepali Sharma v. State of Uttarakhand and others***' **MANU/UC/0347/2008** (WPSB No.316 of 2007) dated 28.03.2008. However, we have proceeded to consider the submissions of learned counsels on merit on the assumption that even if the

government dated 18.07.2001 did not provide for horizontal reservation for women of Uttarakhand, and provided for such reservation for women generally, the Government Order dated 24.07.2006 requires examination independently, and if the government has the authority to provide for horizontal reservation for women candidates of the State of Uttarakhand in the matter of public employment, the government order dated 24.07.2006 may be sustainable. However, as already noticed above, we are *prima facie* of the view that the State Government, cannot, merely by issuing a government order, provide for reservation for women candidates on the basis of their domicile in the matter of public employment in the State.

21. We, therefore, stay the operation of the Government Order dated 24.07.2006 in so far as it seeks to provide 30 percent horizontal reservation only in respect of women candidates of Uttarakhand in the matter of public employment. The said 30 percent reservation for women shall, therefore, be construed as horizontal reservation for women candidates irrespective of their 'domicile' or 'place of residence'.

22. We, accordingly, direct the Commission to permit the petitioners to appear in the Mains Examination

provisionally.

23. Interim relief application stands disposed of accordingly.

VIPIN SANGHI, C.J.

RAMESH CHANDRA KHULBE, J.

Dated: 24th August, 2022

R.Bisht