

THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Extra-Ordinary Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

W.P. (C) No. 15 of 2016

Miss Tshering Eden Bhutia,
D/o Shri D. T. Bhutia,
C/o Kardo Lodge-Chooksing,
Arithang, P.O. & P.S. Gangtok,
East Sikkim.

... **Petitioner.**

versus

1. State of Sikkim,
Through the Secretary,
Department of Personnel, Adm. Reforms,
Training & Public Grievances,
Government of Sikkim,
Manan Bhawan, Gangtok,
East Sikkim.

2. Through the Secretary,
Sikkim Public Service Commission,
Old West Point School,
Gangtok, East Sikkim.

... **Respondents.**

Petition under Article 226/227 of the Constitution of India

Appearance:

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chhetri and Ms. Hemlata Sharma, Advocates for the Petitioner.

Mr. Karma Thinlay, Senior Government Advocate with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Assistant Government Advocates for State-Respondent No. 1.

Mr. J.K. Kharka, Advocate for Respondent No. 2.

J U D G M E N T
(03.08.2017)

Satish K. Agnihotri, CJ

In the instant petition, the petitioner seeks to assail her non-appointment on the post of Under Secretary (Bhutia/Lepcha category) (for short "BL category"). The petitioner is stated to be the applicant for selection in the Junior Grade of Sikkim State Civil Service, pursuant to the Advertisement dated 12.09.2012 (Annexure P-4). According to the petitioner, she was duly selected as her name was found in the Select List of the Under Secretary and equivalent, notified on 09.06.2015. Thus, she is entitled to appointment against the said category under which she made application and was selected thereto. Non-appointment of the petitioner, notwithstanding the availability of post and merit, constraints her to file this petition.

2. The facts, in brief, relevant for adjudication of the *lis* as projected by the petitioner are that the petitioner pursuant to the aforesaid advertisement successfully competed the written test and viva-voce conducted by the second respondent, Sikkim Public Service Commission (for short "SPSC") for the selection to the post of Under Secretary (BL). The petitioner, feeling dissatisfied with the marks awarded to her in the examination at the first instance, made a request for re-evaluation of her answer

scripts on 26.08.2015 to the second respondent. On re-evaluation, the marks were revised and the revised merit position of the petitioner was informed to the petitioner vide communication dated 15.02.2016 enclosing a statement of her rectified marks and revised merit position, wherein the petitioner's total marks obtained in written test were increased to 408 from 392 and the final total marks were accordingly enhanced to 478 from 462. Consequently, she was upgraded in the merit list in Bhutia/Lepcha category, entitling her to appointment.

3. Mr. A. K. Upadhyaya, learned Senior Counsel appearing for the petitioner, contends that the petitioner was informed under provisions of Right to Information Act, 2005 that out of 25 candidates for the posts of Under Secretary, 23 seats have been filled up and the remaining 2 seats are still vacant. One post reserved for BL category is still lying vacant. Further, one Miss Hissay Doma Lepcha from the BL category opted out and against the said vacant post, one Mr. Topden Ongyal Zangpo was selected. One more seat under BL (W) category fell vacant on account of upward movement of Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia. The petitioner was placed just below Miss Sonam Palmu Bhutia, who belonged to BL (W) category. In such a factual scenario, the petitioner is entitled to

appointment against the seat, which fell vacant accordingly. Learned Counsel would further contend that the petitioner, having been duly selected, is denied the appointment which amounts to violation of her fundamental right and also the same is discriminatory, arbitrary and illegal.

4. Referring to a decision rendered by this Court in **Mr. Rinzing Choppel Rai vs. State of Sikkim & Ors. [W.P. (C) No.66 of 2015]**, Mr. Upadhyaya seeks parity and similar order for appointment.

5. Responding to the aforesaid submission as well as averments made in the Writ Petition, Mr. Karma Thinlay, learned Senior Government Advocate appearing for the first respondent/ State, would submit that 7 candidates under BL category were recommended for appointment to the post of Under Secretary in order of merit. Out of 7, 2 candidates, who were higher in the merit list, were appointed against the unreserved category. The petitioner obtained total marks of 478 on re-verification and was placed in the 10th position in order of merit under the BL category. The two other women, Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia, who were appointed against BL(W) category, obtained 485 and 482 marks respectively. In the BL category, 2 posts meant for BL(W) were accordingly filled up. Mr. Thinlay would further contend that Miss Hissay Doma Lepcha,

who was appointed on the post of Under Secretary, declined the offer as she was working as Veterinary Officer in Mangan. The post, fallen vacant, was carried forward to the next recruitment process.

6. It is further contended that under horizontal reservation, if the two seats are filled up by women candidates, the other seat must go to a candidate on merit. In the case on hand, the petitioner is below the other two applicants namely, Mr. Zenden Lingzerpa and Mr. Salem Lepcha, who have obtained 479 and 478 marks respectively and as such the petitioner is not entitled to an appointment in preference to their candidature. It was reiterated by Mr. Thinlay that two seats reserved for women candidates under BL category are filled up by Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia. Thus, the writ petition is misconceived and deserves to be dismissed.

7. I have considered anxiously the submissions put forth by the learned counsel for the parties, perused and analyzed the pleadings and documents appended thereto.

8. Indisputably, the marks obtained by the petitioner were revised on revaluation and it was enhanced to 478 from 462, accordingly, she was upgraded in the merit list of BL category for appointment on the post of Under Secretary. The

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merit list for the appointment on the post of Under Secretary was published on 09th June 2015 as under:

Roll No.	Name	Gender	Total Marks obtained	Recommend/ Selected	Category/ Roster Point
2109	Tenzing Choden Bhutia	Female	545	Recommended	UR/16
4344	Sisum Wangchuk Bhutia	Male	533	Recommended	UR/22
3737	Tenzing Pema Bhutia	Female	520	Recommended	BL/02
1609	Hissay Doma Lepcha	Female	512	Recommended	BL/12
831	Topden Ongyal Zangpo	Male	490	Recommended	BL/17
2837	Kunga Diki Lachungpa	Female	485	Recommended	BL(W)/07
773	Sonam Palmu Bhutia	Female	482	Recommended	BL(W)/21
3815	Zenden Lingserpa	Male	479		
373	Salem Lepcha	Male	478		
997	Tshering Eden Bhutia	Female	478		
823	Nancy Choden Lhasungpa	Female	477		
949	Rinkila Bhutia	Female	471		
2548	Yangchen Doma Bhutia	Female	469		
3395	Tseten Palzor Bhutia	Male	467 (Dy.SP)	Recommended	BL/02
2678	Deeki Wangmo Euthenpa	Female	461		
1578	Tshering Lhamu Bhutia	Female	453		

9. The five persons were selected for appointment under BL category are (i) Miss Tenzing Pema Bhutia, (ii) Miss Hissay Doma Lepcha, (iii) Mr. Topden Ongyal Zangpo, (iv) Miss Kunga Diki Lachungpa and (v) Miss Sonam Palmu Bhutia. Out of five seats reserved for BL category, two seats were meant for BL (Women). Under horizontal reservation, requirement of appointment of two women candidates was met on appointment of Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia, who obtained 485 and 482 marks respectively. The petitioner was placed at Sl. No. 3, however, in all, there were two male members, one obtained more marks than the petitioner i.e. 479 and the other one obtained equal marks, but was placed above her in merit on the basis of other criteria. The petitioner is

claiming appointment against the post which remained vacant on account of refusal of Miss Hissay Doma Lepcha. The contention of Mr. Upadhyaya is that selection of Miss Kunga Diki Lachungpa as well as Miss Sonam Palmu Bhutia was against general category, being better placed in the merit list. Thus, reserved seat for women category be treated as vacant and against that the petitioner be appointed in preference to other candidates, who have obtained more marks. The contention of Mr. Upadhyaya is misconceived and is rejected on the sole ground that the reservation for a woman in a particular category comes within the ambit of horizontal reservation. The concept and philosophy of this kind of reservation is that within the post reserved for a particular category, there should be sufficient representation and placement of women. Accordingly, two BL (Women) seats meant for women candidates are already filled up. Thus, the petitioner is not entitled to march over other candidates, who have better marks and merit than the petitioner. If the post has fallen vacant, on opting out by Miss Hissay Doma Lepcha, the same may go to the second candidate, who is a male member and not to the petitioner on the ground that the seat has fallen vacant on account of the fact that a woman has declined.

10. Under the constitutional scheme, Article 15 (3) of the Constitution of India enables the State to make any special provision for women and children, in addition to reservation provided to socially and educationally backward classes of citizens as contemplated under clauses (4) and (5) of Article 15. Article 16 provides equality of opportunity in matters of public employment carving out exception under clauses (3), (4), (4A) and (4B). The Court is not concerned with other clauses of reservation in this petition.

11. The issue came up for consideration in ***Indra Sawhney vs. Union of India and others***¹, wherein a nine Judges Bench of the Supreme Court, examining all aspects of the reservation, analyzed and differentiated the reservation under Article 16 (4) and reservation under other clauses as under: -

"95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes (under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped (under Clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after

¹

providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions, concessions or relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4)."

12. In **Anil Kumar Gupta and others vs. State of U.P. and others²**, referring to the principle of law laid down by the Supreme Court in **Indra Sawhney** (supra), the Supreme Court reiterated the proposition of law as under:

"18. The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen per cent in favour of special categories, overall, may be satisfied or may not be satisfied.)"

13. Again in **Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others³**, the aforesaid proposition of law was reaffirmed and observed as under: -

"8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for

² (1995) 5 SCC 173

³ (2007) 8 SCC 785

SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of "male" or "men".

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for the respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. [Vide - *Indra Sawhney (supra)*, *R. K. Sabharwal v. State of Punjab* [(1995) 2 SCC 745], *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684] and *Ritesh R. Sah v. Dr. Y. L. Yamul* [(1996) 3 SCC 253]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC woman candidates, then there is no need to disturb the list by including any further SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit,

will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four woman SC candidates. (But if the list of 19 SC candidates contains more than four woman candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess woman candidates on the ground that "SC women" have been selected in excess of the prescribed internal quota of four.)"

14. It is well established proposition of law that the horizontal reservation is to ensure minimum reservation of women in a vertical category. A woman candidate selected on merit in the category will be reckoned for the purpose of determining the fulfillment of reservation of women category in a particular vertically reserved category. Applying the said principle to the facts of the case, wherein two seats reserved for BL (Women) are filled up, other woman candidate cannot be permitted to supersede or bypass the merit list. As in the case on hand, there are two male candidates, who are better placed in the merit list and as such the petitioner is not entitled to appointment in preference to others.

15. It is lastly contended by Mr. Upadhyaya that the other candidates, who obtained more marks have not come officially to claim appointment, thus, a direction be issued to appoint the petitioner against the vacant post of the Under Secretary. Not approaching the Court for relief cannot deprive the eligible candidate his/her right to appointment for the reason, other

candidate having lesser marks knocked the door of justice. In such view, the petitioner cannot claim appointment in preference to other meritorious candidates. It is apt to refer herein an observation made by the Supreme Court in ***R.K. Jain vs. Union of India***⁴, which reads as under: -

"74. In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public-spirited person."

16. In the case of ***Rinzing Chopel Rai*** (supra), cited by Mr. Upadhyaya, the petitioner, being properly placed in the merit list, was given appointment to the post of Deputy Superintendent of Police by the State during pendency of the petition and as such the petition was dismissed as having become infructuous. The facts involved in the instant case are different and distinguishable, thus, not applicable.

16. As a sequel, there is no merit in the case. The writ petition is dismissed. No order as to costs.

Chief Justice
03.08.2017

pm/jk Approved for Reporting : Yes/No.
Internet : Yes/No.