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considered. The eye witnesses in this case are five in number, while in the other case there were only two, but that apart, the earlier judgment can only be relevant if it fulfils the conditions laid down by the Indian Evidence Act in ss. 40-43. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence. Since the bar under s. 403 Criminal Procedure Code did not operate, the earlier judgment is not relevant for the interpretation of evidence in the present case.

Mr. Tewatia attempted to argue on the facts of this case but we did not permit him to do so because this Court, in the absence of special circumstances, does not review for the third time, evidence, which has been accepted in the High Court and the Court below. No such circumstance has been pointed out to us to make us depart from the settled practice. The appeal therefore fails and is dismissed.

Appeal dismissed.

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T. DEVADASAN
v.
THE UNION OF INDIA AND ANOTHER

(S. K. DAS ACTING C.J., K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.)

Equality—Employment under State—Reservation of posts for backward classes—Scheduled Castes and Scheduled Tribes—Unfilled vacancies of reserved posts for the year to be carried forward to subsequent year—"Carryforward rule"—Constitutional validity—Constitution of India, Arts. 14, 16(1), 16(4), 46, 335.

On February 6, 1960, the Union Public Service Commission issued a notification to the effect that a limited competitive examination for promotion to the regular temporary establishment of Assistant Superintendents of the Central Secretariat Service would be held in June, 1960. The notification further stated that a reservation of 12½% of the vacancies would be made for members of the Scheduled Castes and 5% for members of Scheduled Tribes. The result of this examination was announced by the Union

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Public Service Commission in April, 1961, and the Government made 45 appointments out of which 29 were from among the candidates belonging to the Scheduled Castes and Tribes. The result was that the reservation actually made in this case came to 65% and was far in excess of that set out in the notification of the Union Public Service Commission pursuant to which the competitive examination was held. Had the reservation been limited to 17½% only 8 vacancies could have gone to the members of the Scheduled Castes and Tribes and the rest to the other candidates according to their merit. The Government of India and the Public Service Commission sought to justify their action by relying upon what is known as "the carry forward rule", as set out in the office Memorandum of instructions dated May 7, 1955, issued by the Government of India, by which: "If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year". The petitioner, who was an assistant in Grade IV of the Central Secretariat Service, who expected to become a Section Officer (Assistant Superintendent) by way of promotion challenged the validity of the "carry forward rule" on the grounds, *inter alia,* that the rule contravened Arts. 14, 16 and 335 of the Constitution of India.

Held, (Subba Rao, J., *dissenting*), that the "Carry forward rule", as a result of which applicants belonging to Scheduled Castes or Tribes could get more than 50% of the vacancies to be filled in a particular year, is unconstitutional.

Article 14 of the Constitution of India prohibits the State from denying to any person equality before the law or the equal protection of laws. This means equality among equals. The Article does not provide for an absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the differences such as age, sex, education and so on. A provision made by the State for the reservation of a certain proportion of appointments and posts for backward classes in the public services of the State in order to provide them with an opportunity equal to that of the members of the more advanced classes, does not infringe Art. 14 of the Constitution of India provided that the reservation is not so excessive as to practically deny a reasonable opportunity for employment to members of other communities.

Though under Art. 16(4) of the Constitution a reservation of a reasonable percentage of posts for members of the Scheduled

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Castes and Tribes is within the competence of the State, the method evolved by the Government must be such as to strike a reasonable balance betwen the claims of the backward classes and claims of other employees, in order to effectuate the guarantee contained in Art. 16(1), and for this purpose each year of recruitment would have to be considered by itself.

The Manager, Southern Railway v. *Rangachari,* [1962] 2 S.C.R. 586 and *M. R. Balaji and Others* v. *The State of Mysore,* [1963] Supp. 1 S.C.R. 439, relied on.

per Subba Rao, J.—The provision for "Carry forward" is for the reservation of appointments for the Scheduled Castes and Tribes, and unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to a violation of the fundamental rights. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad.

The expression "nothing in this article" in Art. 16(4) of the Constitution of India is a legislative device to express its intention in a most emphatic may that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has reserved a power untrammelled by the other provisions of the Article.

The word "any" in the expression "any provision" in Art. 16(4) is of the widest amplitude and leaves the nature of the provision to be made by the State in its discretion. Once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State and it is not for this Court to prescribe the mode of reservation.

ORIGINAL JURISDICTION : Petition No. 87 of 1963.

Under Article 32 of the Constitution of India for the enforcement of fundamental rights.

R. Gopalakrishnan, for the petitioner.

R. Ganapathy Iyer and *R. N. Sachthey,* for the Respondents.

August 29, 1963. The Judgment of S. K. Das, Acting C.J., Raghubar Dayal, N. Rajagopala Ayyangar and J. R. Mudholkar, JJ. was delivered by Mudholkar, J., K. Subba Rao J., delivered a dissenting opinion.

Mudholkar, J.

MUDHOLKAR J.—The petitioner, who is a graduate, is an Assistant in Grade IV of the Central Secretariat Service, having been recruited therein in the year 1956. He became permanent on January 1, 1958. The next post

which the petitioner can expect to get is that of Section Officer (Assistant Superintendent) in the same service. Recruitment to the post of Section Officer is made in the following manner :

(i) 40% by direct recruitment from those who obtained lower ranks in the I.A.S. etc., examination ;

(ii) 30% by promotion from Grade IV to Grade III on the basis of a departmental examination held at intervals by the U.P.S.C.

(iii) 30% by promotion from Grade IV on the basis of seniority-*cum*-fitness.

On February 6, 1960 the Union Public Service Commision issued a notification to the effect that a limited competitive examination for promotion to the regular temporary establishment of Assistant Superintendents of the Cenrtal Secretariat Service would be held in June, 1960. The notification further stated that a reservation of 12½% of the vacancies would be made for members of the Scheduled Castes and 5% for members of Scheduled Tribes. The result of this examination was announced by the Union Public Service Commission in April, 1961. The Union Public Service Commission recommended 16 candidates for being appointed in unreserved vacancies and 28 candidates in reserved vacancies. Subsequently the U.P.S.C. recommended 2 more candidates belonging to the Scheduled Castes/Tribes for the posts. It may be mentioned that the number of vacancies which were expected to be filled was stated to be 48 out of which 16 were unreserved and the remaining 32 reserved, though in fact the U.P.S.C. recommended the names of only 30 candidates for the latter class of vacancies. The Government, however, made only 45 appointments out of which 29 were from among the candidates belonging to the Scheduled Castes and Tribes.

The petitioner points out that the percentage of marks secured by him at the examination was 61 whereas the percentage of marks secured by some of the 29 candidates from the Scheduled Castes and Tribes was as low as 35 and one of his grievances is that it was not competent to the U.P.S.C. to prescribe one qualifying standard for members of the Scheduled Castes and Tribes and another for the rest of the candidates.

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It is the petitioner's case that had the Union of India and the U.P.S.C. adhered to the quota of 17½% reservations in favour of Scheduled Castes and Tribes he would have had a fair chance of being selected to the post of Assistant Superintendent. His grievance is that the reservation actually made in this case comes to 65% and was far in excess of that set out in the notification of the U.P.S.C., pursuant to which the competitive examination was held. Had the reservation been limited to 17½% only 8 vacancies could have gone to the members of the Scheduled Castes and Tribes and the rest to other candidates according to their merit.

The petitioner points out that the respondents, that is, the Union of India and the Union Pubilc Service Commission seek to justify their action by relying upon what is known as "the carry forward rule". In order to understand what the aforesaid rule is it is necessary to refer to certain resolutions of the Government of India in the Ministry of Home Affairs. On September 13, 1950, the Government of India published a resolution indicating their policy in regard to communal representation in the services. There they have stated that the following reservations would provisionally be made in recruitment to the posts and services under them :

(a) Scheduled Castes : Reservation of 12½% of vacancies by direct recruitment through the Union Public Service Commission or by means of open competitive tests held by any other authority. Where recruitment is made otherwise than by open competition the reservation will be 16-2/3%.

(b) Scheduled Tribes : both in recruitment by open competition and the recruitment made otherwise than by open competition the reservation shall be to the extent of 50% of the vacancies filled by direct recruitment.

Then they refer to the resolution in favour of Anglo-Indians with which we are not concerned. Incidentally it may be mentioned that this resolution provides that in all cases a minimum standard of qualification will be prescribed and that the reservations will be subject to the overall conditions that candidates of the requisite communities possessing the prescribed qualifications and suitable in

all respects for the appointments in question are forthcoming in sufficient numbers for the vacancies reserved for them. These orders were made applicable to all services under the control of the Government of India. Supplementary instructions with regard to this subject were issued by the Government of India on January 28, 1952, of which the relevant portions may be quoted :

"2(a) RECRUITMENT BY OPEN COMPETITION : If the candidates of Scheduled Castes, Scheduled Tribes and the Anglo-Indian community obtain by competition less vacancies than are reserved for them, the difference will be made up by the nomination of duly qualified candidates of these castes, tribes and communities, *i.e.,* candidates of these communities etc., *who have qualified in the test, selection etc.,* held for the purpose, but have secured ranks lower than the candidates of other communities for whom no reservations have been made.

* * * * * *

5(3) If a sufficient number of candidates of the communities for whom the reservation are made, who are eligible for appointment to the posts in question and are considered by the recruiting authorities as suitable in all respects for appointment to the reserved quota of vacancies, are not available, the vacancies that remain unfilled will be treated as unreserved and filled by the best available candidates ; but a corresponding number of vacancies will be reserved in the following year for the communities whose vacancies are thus filled up in addition to such number as would ordinarily be reserved for them under the orders contained in the Resolution. (For further clarification please *see* Rule III in Appendix 'A').

(4) If suitably qualified candidates of the communities for whom the reservations have been made are again not available to fill the vacancies carried forward from the previous year under clause (3) above, the vacancies not filled by them will be treated as unreserved and the reservations made in those vacancies will lapse.

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APPENDIX 'A'

III. No gap should be left in the roster in filling vacancies and if a reserved vacancy (at, say, the 25th point of the roster) has, for want of suitable Schedule Caste candidate to be treated as unreserved, the candidate appointed should be shown against that point; but if a Scheduled Caste Candidate cannot be recruited against an unreserved vacancy later in the year, the reservation should be carried forward to the following year and after the Scheduled Castes quota for the latter year has been filled, the first unreserved vacancy in that year (say, the 32nd point) should be treated as reserved for Scheduled Castes."

These supplementary instructions were given apparently because sufficient number of qualified candidates from among the Scheduled Castes and Tribes were not available. However, even carrying forward the vacancies for one year proved to be inadequate for giving effect to the policy of the Government of India to give adequate representation in the services to members of the Scheduled Castes and Tribes. The Government considered and rejected the holding of separate examinations for Scheduled Castes and Tribes for recruitment to public services. Then by Office Memorandum No. 2/11/55-RPS, dated May 7, 1955, the Government of India modified sub-paras (3) and (4) of paragraph 5 of the Supplementary Instructions dated January 28, 1952, by substituting the following:

"3(a) If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a correspoding addition should be made to the number of reserved vacancies in the second following year."

Thus the number of reserved vacancies of 1954 which were treated as unreserved for want of suitable candidates in that year will be added to the normal number of reserved vacancies in 1955. Any recruitment against these vacancies in 1955 will first be counted against the additional quota carried forward from 1954. If however, suitable candidates are not available in 1955 also a certain number of vacancies are treated accordingly as 'unreserved' in that year, the total number of vacancies to be reserved in 1956 will be the unutilised balance of the quota carried forward from 1954 and 1955 plus the normal percentage of vacancies to be reserved in 1956. The unutilised quota will not, however, be carried forward in this manner for more than two years. An annual report of reserved vacancies which were treated as unreserved for want of suitable candidates from Scheduled Castes or Scheduled Tribes as the case may be, should be forwarded to the Ministry of Home Affairs in the form enclosed as Annexure along with the annual communal returns already prescribed. In addition Ministries themselves will take adequate steps to ensure that any lapse on the part of subordinate authorities in observing the reservation rules cannot go unnoticed by a reviewing authority within the Ministry itself at a sufficiently early date. (b) In the event of a suitable Scheduled Castes candidate not being available, a Scheduled Tribe candidate can be appointed to the reserved vacancy and *vice versa* subject to adjustment in the subsequent points of the roster. (For further clarification please see Rule III in Appendix 'A').

It is these instructions of the Government of India which are being challenged by the petitioner in this petition which he has presented to this Court under Art. 32 of the Constitution. His contention is that Art. 16(1) of the Constitution provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Mr. Gopalakrishnan, who appears for the petitioner, concedes that under cl. (4) of Art. 16 it is open to the State to make provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State, is not

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adequately represented in the services of the State. But his contention is that this reservation cannot be so extensive as to nullify or destroy the right conferred by cl. (1) of Art. 16. He points out that according to the previous decisions of this Court cl. (4) is merely an exception to cl. (1) of Art. 16, which, being subservient to the main provision cannot be so interpreted as to render the main provision meaningless. His next contention is that cl. (4) of Art. 16 is to be read with Art. 335 of the Constitution which, while providing for the consideration of the claims of members of Scheduled Castes and Tribes, reiterates that the efficiency of administration should be maintained and not allowed to suffer. His next contention is that as no reservation of posts in favour of members of Scheduled Castes and Tribes is made in the offices of the Lok Shabha and Rajya Sabha and the Supreme Court or in the Armed Forces, Art. 14 of the Constitution is infringed. Then, according to him, the standard for all candidates must be the same and the Union Public Service Commission has no power to recommend for appointment candidates from Scheduled Cates and Tribes for appointment to the reserved posts even though they have secured far less marks than the candidates belonging to the more advanced communities. These are the main points which Mr. Gopalakrishnan has urged.

On behalf of the respondents it is claimed that the carry forward rule is perfectly valid, that it was a rule in force before the commencement of the Constitution and that it was decided to continue it even after the Constitution came into force as a matter of public policy and for giving effect to the provisions of the Constitution and that that is why supplementary instructions were issued by the Government in 1952. They further say that the carry forward rule was extended upto two years because of inadequacy of representation of Scheduled Castes and Tribes in services regarding which there was persistent criticism in Parliament and by the Commissioner for Scheduled Castes and Tribes and by others. It is for this reason that the revised supplementary instructions of 1955 were issued as a matter of policy. The respondents relied upon the provisions of Art. 16(4) and Art. 335 in support of these instructions.

It was contended on behalf of the respondents that having regard to the prayers in the petition, the petition was unsustainable in law because the persons who would be adversely affected have not been joined as respondents. It is also contended that the petition does not disclose any justiciable issue. The right to promotion cannot, according to the respondents, be the subject of a complaint in a court of law. Nor again, questions of policy could be agitated before a court of law. The respondents denied that the petitioner has any right, much less a fundamental right. The respondents also deny that the carry forward rule was a negation of equality before law and equal opportunity in the matter of appointment to posts under the State. The infringement of the alleged fundamental right could not thus furnish a cause of action to sustain a petition under Art. 32.

While replying in detail paragraph by paragraph to the petition, the respondents admitted that at the competitive examination held in pursuance of the notification of March, 1961, 28 vacancies which had been filled in the two previous years from amongst candidates who belong to communities other than the Scheduled Castes and Tribes because suitable candidates from the latter classes were not available and stated that by operation of the carry forward rule those vacancies were, therefore, earmarked for being filled at the competitive examination held in the year 1961 in addition to $17\frac{1}{2}\%$ of the total vacancies to be filled that year.

The main question for consideration thus is whether the carry forward rule as modified in 1955 is unconstitutional either because its operation will practically destroy the fundamental right guaranteed by Art. 16(1) of the constitution or because it is violative of the guarantee contained in Art. 14 of the Constitution. If on either of these grounds the carry forward rule is found to be bad no other question need be considered by us.

It seems to us that the argument based upon Art. 14 of the Constitution in fact turns on the same considerations as the argument that Art. 16(1) is infringed by the aforesaid rule. What Art. 14 provides is that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. What is meant

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by equality in this Article is, equality amongst equals. It does not provide for an absolute equality of treatment to all persons in utter disregard in every conceivable circumstance of the differences such as age, sex, education and so on and so forth as may be found amongst people in general. Indeed, while the aim of this Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law reasonable classification is permissible. It does not mean anything more.

It is an accepted fact that members of the Scheduled Castes and Tribes are by and large backward in comparison with other communities in the country. This is the result of historical causes with which it is not necessary for us to deal here. The fact, however, remains that they are backward and the purpose of Art. 16(4) is to ensure that such people, because of their backwardness should not be unduly handicapped in the matter of securing employment in the various services of the State. This provision, therefore, contemplates reservation of appointments or posts in favour of backward classes who are not adequately represented in the services under the State. Where, therefore, the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14 merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes, or merely because such reservation is not made in every kind of service under the State. Where the object of a rule is to make reasonable allowance for the backwardness of members of a class by reserving certain proportion of appointments for them in public services of the State what the State would in fact be doing would be to provide the members of backward classes with an opportunity equal to that of the members of the more advanced classes in the matter of appointments to public services. If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open when for a

member of a more advanced class to complain that he has been denied equality by the State.

That is precisely the point which we must consider in dealing with the argument of learned counsel that the rule violates the guarantee contained in Art. 16(1) of the Constitution because the excessive reservation permitted by it almost destroys the guarantee contained in the provision. In order to appreciate the argument it is necessary to consider the operation of the rule. Now, the rule provides that $17\frac{1}{2}\%$ of the total vacancies in a year will be reserved for being filled from amongst candidates belonging to scheduled castes and tribes. It further provides that if in any year suitable candidates are not available from amongst such classes the reserved posts will be dereserved, filled by candidates from other classes and a corresponding number of posts be carried forward to the next year. If in the subsequent year the same thing happens, the posts unfilled by candidates from Scheduled Castes and Tribes can be carried forward to the third year. In the third year the number of posts to be filled from amongst candidates of Scheduled Castes and Tribes would thus be $17\frac{1}{2}\%$ of the total vacancies to be filled in that year, plus the total unfilled vacancies which have been carried forward from the two previous years. The rule thus permits a perpetual carry forward of unfilled reserved vacancies in the two years preceding the year of recruitment and provides addition to them of $17\frac{1}{2}\%$ of the total vacancies to be filled in the recruitment year. In order to appreciate better the import of this rule on recruitment let us take an illustration. Supposing in two successive years no candidate from amongst the Scheduled Castes and Tribes is found to be qualified for filling any of the reserved posts. Supposing also that in each of those two years the number of vacancies to be filled in a particular service was 100. The reserved vacancies for each of those years would, according to the Government resolution, be 18 for each year. Now, since these vacancies were not filled in those years a total of 36 vacancies will be carried forward to the third year. Supposing in the third year also the number of vacancies to be filled is 100. Then 18 vacancies out of these will also have to be reserved for members of the Scheduled Castes and Tribes.

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By operation of the carry forward rule the vacancies to be filled by persons from amongst the Scheduled Castes and Tribes would be 54 as against 46 by persons from amongst the more advanced classes. The reservation would thus be more than 50%. It has been held by this Court in *M. R. Balaji & Ors.* v. *The State of Mysore*(1) that the reservation of more than half of the seats in an educational institution for being filled from members of the backward classes is unconstitutional. Speaking for the Court Gajendragadkar, J., has observed therein :

> "Speaking generally and in a broad way a special provision should be less than 50 per cent ; how much less than 50 per cent. would depend upon the relevant prevailing circumstances in each case ..... In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Article 15(4) it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements ; the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations."

In that case the reservation was to the extent of 68% and it was struck down by this Court. No doubt, what was challenged was the reservation of seats in an educational institution in favour of members of "backward communities" under Art. 15(4) which permits the State to make a special provision for the advancement of any socially and educationally backward classes or for the Scheduled Castes and Tribes while Art. 16(4) in specific terms provides for the reservation of appointments or posts in favour of such classes. But the difference in the language used in these provisions is not, however, of any significance because this Court has accepted the position that reservation can be made under Art. 15(4). Indeed, at p. 474 this Court has pointed out :

> "..... what is true in regard to Article 15(4) is

(1) [1963] Supp. 1 S.C.R. 439.

equally true in regard to Art. 16(4). There can be no doubt that the Constitution makers assumed, as they were entitled to, that while making adequate reservation under Art. 16(4) care would be taken not to provide unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially effect efficiency. Therefore, like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution."

What this Court has laid down there would also apply to the present case. The ratio of this decision appears to be that reservation of more than half the vacancies is *per se* destructive of the provisions of Art. 15(1) which is to the effect that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Adverting to the effect of such reservation this Court has observed at p. 467 :

"But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Art. 15(4). It would be extremly unreasonable to assume that in enacting Art. 15(4) the Constitution intended to provide that where the advancement of the Backward Classes of the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored."

The startling effect of the carry forward rule as modified in 1955 would be apparent if in the illustration which we have taken there were in the third year 50 total vacancies instead of 100. Out of these 50 vacancies 9 would be reserved for the Scheduled Castes and Tribes. Adding to that the 36 carried forward from the two previous years, we would have a total of 45 reserved vacancies out of 50, that is, a percentage of 90. In the case before us 45 vacancies have actually been filled out of which 29 have gone to members of the Scheduled Castes and Tribes on the basis of reservation permitted by the carry forward

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rule. This comes to about 64.4% of reservation. Such being the result of the operation of the carry forward rule we must, on the basis of the decision in *Balaji's case*(1) hold that the rule is bad. Indeed, even in *The General Manager, Southern Railway* v. *Rangachari*(2) which is a case in which reservation of vacancies to be filled by promotion was upheld by this Court, Gajendragadkar, J., who delivered the majority judgment observed:

> "It is also true that the reservation which can be made under Art. 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Art. 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration ; ....."

It is clear from both these decisions that the problem of giving adequate representation to members of backward classes enjoined by Art. 16(4) of the Constitution is not to be tackled by framing a general rule without bearing in mind its repercussions from year to year. What precise method should be adopted for this purpose is a matter for the Government to consider. It is enough for us to say that while any method can be evolved by the Government it must strike "a reasonable balance between the claims of the backward classes and claims of other employees" as pointed out in *Balaji's case*(1).

We would like to emphasise that the guarantee contained in Art. 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who

(1) [1963] Supp. 1 S.C.R. 439. (2) [1962] 2 S.C.R. 536.

is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.

Further, this Court has already held that cl. (4) of Art. 16 is by way of a proviso or an exception to cl. (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under cl. (4) would in effect efface the guarantee contained in cl. (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein. It is true, as pointed out by Mr. Ganapathy Iyer on behalf of the respondent, that effect must be given to the express words of Art. 16(4). "Nothing in this Article shall prevent the State from making any provision for the reservation of appointments ..... etc.," but that does not mean that the provision made by the State should have the effect of virtually obliterating the rest of the Article, particularly cls. (1) and (2) thereof. The overriding effect of cl. (4) on cls. (1) and (2) could only extend to the making of a reasonable number of reservation of appointments and posts in certain circumstances. That is all.

Going back on his earlier concession, it was contended by Mr. Gopalakrishnan on behalf of the petitioner, that there can possibly be no reservation whatsoever in favour of members of Scheduled Castes or Tribes or any of the backward classes and that the proper way of discharging the duty laid upon the State by Art. 16(4) of the Constitution would be to adopt a method of the kind which has appealed to the Government of Maharashtra in exercising its powers under Art. 15(4). In this connection he has referred us to the following passage from the judgment of this Court in *Balaji's case*(1) :

(1) [1963] Supp. 1 S.C.R. 439.

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"It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. The said scheme is not before us and we are not called upon to express any opinion on it. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty. An attempt can also be made to start newer and more educational institutions, polytechnics, vocational institutions and even rural Universities and thereby create more opportunities for higher education. This dual attack on the problem posed by the weakness of backward communities can claim to proceed on a rational, broad and scientific approach which is consistent with, and true to, the noble ideal of a secular welfare democratic State set up by the Constitution of this country. Such an approach can be supplemented, if necessary by providing special provision by way of reservation to aid the backward classes and Scheduled Castes and Tribes. It may well be that there may be other ways and means of achieving the same result. In our country where social and economic conditions differ from State to State, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Art. 15(4) it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Art. 46 and the preamble of the Constitution. It is for the attainment of social and economic justice that Art. 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Art. 15 or 29(2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach free from all extraneous pressures. The said action is intended to do social and

economic justice and must be taken in a manner that justice is and should be done." (p. 472-473).

It may well be that what the Government of Maharashtra has done is one of the ways of discharging the duty which Art. 15(4) casts upon the State but in a case like the one before us we must regard to the express language of Art. 16(4). Under this provision it is clear that reservation of a reasonable percentage of posts for members of the Scheduled Castes and Tribes is within the competence of the State. What the percentage ought to be must necessarily depend upon the circumstances obtaining from time to time.

In supporting the impugned rule reliance was placed on behalf of the respondents upon a passage from the judgment of Wanchoo J., in *Rangachari's case*(1) :

> "Art. 16(4) tells us that it may be made either by reserving appointments to the services or reserving posts in the services. Appointments in my opinion clearly mean the initial appointments to a service, for a person is appointed only once in a service and thereafter there is no further appointment. Therefore, when the article speaks of reservation of appointments it means reservation of a percentage of initial appointments to the service. Posts refer to the total number of posts in the service and when reservation is by reference to posts it means reservation of a certain percentage of posts out of the total number of posts in the service. The reason why these two methods are mentioned in this Article is also to my mind plain. The method of reservation of appointments would mean that the goal of adequate representation may be reached in a long time. Therefore, in order that the goal may be reached in a comparatively shorter period of time, the Article also provides for the method of reservation of posts."

The view of Wanchoo, J., stands by itself and does not seem to have been accepted by the majority of the Court. The validity of the carry forward rule was not challenged in that case and, therefore, this Court had no occasion to say anything concerning it. Apart from that we may point out that the Government resolution does not con-

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template reservation of any posts in the service cadre but merely provides for reservation of vacancies. Even if the Government had provided for the reservation of posts for Scheduled Castes and Tribes a cent. per cent. reservation of vacancies to be filled in a particular year or reservation of vacancies in excess of 50% would, according to the decision in *Balaji's case*(1), not be constitutional.

Considerable argument was advanced before us by Mr. Gopalakrishnan on the basis of Art. 335 of the Constitution which reads thus:

> "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

The need for the maintenance of efficiency of administration, even when giving effect to the provisions of Art. 16(4) has been emphasised in *Rangachari's case*(2). It is therefore, not necessary for us to say anything more on the point.

Having held that the carry forward rule as modified in 1955 is unconstitutional, the question which arises is as to the relief which we should grant to the petitioner. Mr. Gopalakrishnan made it clear that all that he wants is a declaration about the invalidity of the rule and that he hopes that the department concerned will implement the decision of this Court in an appropriate way. Indeed, no further relief can be given to him because the persons who have been appointed and who may be affected by this decision have not been joined as respondents in this petition.

In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid. Costs of the petition will be paid by the State.

Subba Rao J.

SUBBA RAO J.—I regret my inability to agree. The short but difficult question is whether the impugned provision of reservation of posts made by the Government of India in favour of Scheduled Castes and Scheduled Tribes offends Art. 16(4) of the Constitution.

(1) [1963] Supp. 1 S.C.R. 439.

The facts are fully stated in the judgment of my learned brother and I need not restate them. The relevant provisions may now be read :

> *Article* 16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
>
> * * * * * *
>
> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
>
> *Article* 46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
>
> *Article* 335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

These three Articles, along with the others with which we are not now concerned, are designed to uplift the said castes and tribes. There is no conflict between these three provisions. Article 46 is a directive principle of State policy ; and, though not justiciable, it is fundamental in the governance of the country. Article 335 is a mandatory direction given to the State to take the claims of the Scheduled Castes and the Scheduled Tribes into consideration in the making of appointments to the said services and posts. Article 16(4) empowers the State to make a provision for the reservation of posts and appointments for the backward classes, which certainly include the said Castes and Tribes. While Art. 335 is mandatory in character, Art. 16(4) is directory and permissive. The State may or may not make such reservations for such Castes and Tribes, if it thinks that the implementation of Art. 335 meets a given situation. In my view, Art. 335 has no bearing in the matter of construing Art. 16(4) of

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the Constitution. We have, therefore, to fall back upon Art. 16(4) alone to ascertain the validity of the provisions made by the Government.

Article 14 lays down the general rule of equality. Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race—one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced cl. (4) in Art. 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.

Now let us give a close look to its provisions to ascertain its ambit. Three expressions stand out in bold relief, namely, (1) "any provision for the reservation of appointments", (2) "in favour of any backward class of citizens", and (3) "in the opinion of the State, is not adequately represented in the services under the State". The word "any" in the expression "any provision" is of the widest amplitude and leaves the nature of the provision to be made by the State in its discretion. But the limitation on the provision is found in the words "for the reservation of appointments or posts". It follows that if a provision is for the reservation of appointments or posts, the clause does not further circumscribe the power of the State to make any provision to achieve that object. That reservation must be in favour of any backward class of citizens. "Backward class" is not defined ; whether a particular class is backward or not is a question of fact in each case and it must satisfy certain objective tests. But it is admitted in this case that the Scheduled Castes and the Scheduled Tribes are backward classes. The third condition is that, in the opinion of the State they are not adequately represented in the services under it. Once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State. The result of the analysis of the Article is that to invoke cl. (4), (i) there shall be a backward class of citizens, and (ii) the said class, in the opinion of the State, is not adequately represented in the services of the State. If these two conditions are complied with, the State is at liberty to make any provision for the reservation of appointments or posts in favour of the said class of citizens. In the present case it is not disputed that the two conditions have been satisfied, and, therefore, the only question is whether the provision made is for the reservation of appointments or posts for the said backward classes of citizens.

Learned counsel for the petitioner contends that Art. 16(1) confers an individual right on a citizen and cl. (4) of the said Article, which embodies the principle of social justice is an exception to the said right ; and, therefore, the question has to be decided in the context of every selection whether the provision made is

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one of reservation or in effect one of destruction of the fundamental right. He further elaborates that, as every citizen has an individual right to apply for appointments whenever applications are called for, he cannot be deprived of his right on the ground that in a previous selection the community to which that individual belongs had more than its share. It is further contended that the concept of reservation for a community implies the carving of a part of the entire field, and that if the provision covers the entire field or a major part of it, it ceases to be a reservation and, therefore, not protected by cl. (4). He says that the principle of "carry forward", if logically extended, will result, after some time, in the destruction of the right itself. Finally, he argues that Art. 16 and Art. 335 must be read together and that, if so read, they indicate that reservation could not be made at the expense of efficiency.

We are only concerned with the interpretation of the constitutional provisions, but not with the policy underlying it. The makers of the Constitution laid down that provision shall be made for the reservation of appointments and posts in favour of such Castes and Tribes. The only question, therefore, is whether in the instant case the State did not provide for the reservation of appointments or posts. I find it difficult to say that the provision for "carry forward" is not for the reservation of appointments for the said Castes and Tribes. The reservation of appointments can be made in different ways. It is not for this Court to prescribe the mode of reservation. In the context of a permissible provision that can be made by a State under Art. 16(4) of the Constitution, some observations of Wanchoo, J. in his judgment in *The General Manager, Southern Railway* v. *Rangachari*(1) may be extracted usefully. The learned Judge observed at p. 610 thus :

> "Suppose there are 1,000 posts in a particular service and the backward classes have no representation at all in that service. The State considers it necessary that they should have adequate representation in that service. Suppose also that the annual appointments

(1) [1962] 2 S.C.R. 586.

to be made to the service in order to keep it at full strength is thirty. Now the State if it chooses the method of reservation of appointments will reserve a percentage of appointments each year for backward classes. Now suppose that the percentage is fixed at ten per centum of the total number of posts in the service by the method of reservation of appointments, the period taken would be roughly 34 years. This period may be considered too long and therefore the State may decide to adopt the other way, *i.e.*, the reservation of posts; and suppose it is decided to reserve ten per centum of the posts, *i.e.*, 100 in all. It will then be open to the State having reserved 100 posts in this particular service for backward classes to say that till these 100 posts are filled up by backward classes all appointments will go to them provided the minimum qualifications that may be prescribed are fulfilled. Suppose further that it is possible to get annually the requisite number of qualified members of backward classes equal to the annual appointments, the representation of the backward classes will be made adequate in about four years. Once the representation is adequate there will be no power left for making further reservation. Thus by the method of reservation of appointments the representation is made adequate in a long period of time while by the method of reserving posts the representation is made adequate in a much shorter period. That seems to be the reason why the Article speaks of reservation of appointments as well as of posts."

No doubt these observations were made in a different context, but they show that reservation can be made in the posts, *i.e.*, in the cadre strength, or in the annual appointments to be made in the service in order to keep it at full strength. They also show that the provision for reservation can be implemented in diverse methods, such as, by providing for the recruitment only from the Scheduled Castes and the Scheduled Tribes till the percentage reserved for them is reached or by providing a percentage for recruitment from the said Castes and Tribes every year till the reserved percentage is reached in the cadre. The following may be some of the

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methods of implementing the provision for reservation: (1) The cadre strength of a particular service is 1,000; the State may reserve 100 posts out of them for the Scheduled Castes and the Scheduled Tribes and make appointments solely from the said Castes and Tribes till the percentage reserved is reached. (2) In the same situation the State may direct that a specified percentage of the 100 vacancies for which applications were called for shall be filled up by candidates from the said Castes and Tribes: by this process, 100 will be reached in some years. (3) If the applicants from the said Castes and Tribes do not come upto the percentage reserved for them in a particular year, the State may provide that the vacancies not filled up shall be carried over to the next selection. (4) In the same contingency, instead of providing for the carrying over of the said vacancies to the next selection, the said vacancies may be filled up by candidates belonging to castes other than the Scheduled Castes and the Scheduled Tribes; but the seats reserved to the Scheduled Castes and Tribes but not filled up by them may be added to those reserved for them in the next selection. (5) The State, instead of applying the principle of "carry forward", may provide that if the applicants belonging to the said Castes and Tribes are not sufficient in the first selection to come up to the percentage reserved, a larger percentage of candidates belonging to the Scheduled Castes and the Scheduled Tribes shall be selected in the next year or the year after. (6) Instead of specifically making any reservation in the cadre strength, the State may adopt one or other of the aforesaid provisions for the reservation till such time the State is satisfied that the said Castes and Tribes have secured a proper representation in a particular service. The above provisions for reservation are only illustrative; there may be more effective and equitable methods other than the said provisions. Any one of the said provisions, however reasonably framed, would inevitably cause hardship to some candidates from the non-Scheduled Castes and non-Scheduled Tribes in the sense that some of them would have been selected but for the reservation, but nonetheless it cannot be said that the provisions are not provisions for reservation of seats for the Scheduled Castes and the Scheduled Tribes.

In the instant case, the State made a provision, adopting the principle of "carry forward". Instead of fixing a higher percentage in the second and third selection based upon the earlier results, it directed that the vacancies reserved in one selection for the said Castes and Tribes but not filled up by them but filled up by other candidates, should be added to the quota fixed for the said Castes and Tribes in the next selection and likewise in the succeeding selection. As the posts reserved in the first year for the said Castes and Tribes were filled up by non-Scheduled Caste and non-Scheduled Tribe applicants, the result was that in the next selection the posts available to the latter were proportionately reduced. This provision certainly caused hardship to the individuals who applied for the second or the third selection, as the case may be, though the non-Scheduled Castes and non-Scheduled Tribes taken as one unit, were benefited in the earlier selection or selections. This injustice to individuals, which is inherent in any scheme of reservation, cannot, in my view, make the provision for reservation anytheless a provision for reservation.

There are no merits in the contention that the principle of "carry forward" has resulted in the third year in the selection of candidates belonging to the Scheduled Castes and the Scheduled Tribes to a tune of 80 per centum of the total applicants for that year and, therefore, the selection amounted to destruction of the fundamental right. If reservation was within the competence of the State, I do not see how the said fortutitous circumstance would affect the reservation so made. Suppose for two selections there were no candidates from the Scheduled Castes and the Scheduled Tribes and the vacancies reserved for them were filled up by candidates belonging to castes other than the Scheduled Castes and the Scheduled Tribes. In the third year the State reserved all the posts or most of the posts for the Scheduled Castes and the Scheduled Tribes, having regard to the actual position of the said Castes and Tribes in the cadre. This is certainly a provision for reservation. The effect of the operation of the principle of "carry forward" is practically the same. Reservation made in one selection or spread over many selections is only a convenient method

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of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right. There is neither an allegation nor evidence in this case to that effect.

If the provision deals with reservation—which I hold it does—I do not see how it will be bad because there will be some deterioration in the standard of service. It is inevitable in the nature of reservation that there will be lowering of standards to some extent; but on that account the provision cannot be said to be bad. Indeed, the State laid down the minimum qualifications and all the appointments were made from those who had the said qualifications. How far the efficiency of the administrations suffers by this provision is not for me to say, but it is for the State, which is certainly interested in the maintenance of standards of its administration.

Strong reliance is placed by the petitioner on the decision in *M. R. Balaji* v. *State of Mysore*(1) in support of the contention that, whenever a State makes a reservation for backward classes of over 50 per centum of the posts in a single selection, such a provision is not one of reservation but of destruction of the fundamental right. If that decision decided to that effect, I would be bound by it. A careful perusal of that judgment discloses that this Court did not lay down any such proposition. In that case, 68 per centum of seats in colleges were reserved for backward communities. It was contended before this Court on behalf of the petitioners therein that the impugned order, which had been passed under Art. 15(4) of the Constitution, was not valid, because the basis adopted by the order in specifying and enumerating the socially and educationally backward classes of citizens in the State was unintelligible and irrational and that the classification made was inconsistent with, and outside, the provisions of Art. 15(4). It was also urged by them that the extent of reservation prescribed by the said order was so unreasonable and extravagant that the order was a

(1) [1963] Supp. 1 S.C.R. 439.

fraud on the constitutional power conferred on the State. Gajendragadkar, J., speaking for the Court, gave the following reasons for holding that the provisions so made were contrary to Art. 15(4) of the Constitution: (1) The concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it: the test of backwardness must be social and educational. (2) The criteria adopted by the State in ascertaining the social backwardness of a community and its educational backwardness were neither correct nor sound. (3) The sub-classification made by the order between backward classes and more backward classes does not appear to be justified under Art. 15(4). The learned Judge traced the history of the order, considered all the relevant circumstances and held that reservation of 68 per centum in the circumstances of the case was a fraud on the constitutional power conferred on the State by Art. 15(4) of the Constitution. It would, therefore, be seen that the judgment of this Court was based mainly upon two grounds, namely, the State had adopted a wrong criteria for ascertaining who were backward classes and also on the ground that the State committed a fraud on its constitutional power. In the present case it is not disputed that the Scheduled Castes and the Scheduled Tribes are backward classes and there is no material on which I can hold that the Government committed a fraud on the constitutional power conferred on it. The only observations on which learned counsel for the respondent can rely are the following found at p. 470 :

> "The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50 per cent.; how much less than 50 per cent. would depend upon the relevant prevailing circumstances in each case."

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These general observations made in the context of admissions to college cannot, in my view, be applied in the case of a reservation of appointments in the matter of recruitment to a cadre of particular service. The doctrine of "destruction" of the fundamental right depends upon the entire cadre strength and the percentage reserved out of that strength. Further, the expression used in the observations, *viz.*, "generally" and "broadly", show that the observations were intended only to be a workable guide but not an inflexible rule of law even in the case of admissions to colleges.

I cannot, therefore, hold that in the present case the provision made by the State was not for reservation but for a purpose not sanctioned by the Constitution. In the result, the writ petition is dismissed with costs.

ORDER BY COURT

In accordance with majority opinion the Writ Petition is allowed with costs.

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HUKMA

v.

STATE OF RAJASTHAN

(M. HIDAYATULLAH AND K. C. DAS GUPTA, JJ.)

Sea Customs—Seizure of Gold—Jurisdiction of Customs Officer—"Adjoining", meaning of—Proof of mens rea—*Sea Customs Act,* 1878 (8 *of* 1878), *ss.* 167(81), 178-*A*—*Land Customs Act,* 1924 (19 *of* 1924), *cls.* (*e*)(*g*), *of ss.* 2, 3—*Central Excises Rules,* 1944, *r.* 2(*ii*)(*A*)(*i*).

The appellant was found carrying 286 tolas of gold in running train between Kerla and Pali stations by the Sub Inspector of Barmer District. After the gold was seized, criminal proceedings were instituted against the appellant. The trial court acquitted the appellant but the High Court convicted him. The appellant's case in this Court was that the seizure of the gold from him had not been proved; that the Sub-Inspector was not a Customs Officer for the place where the seizure was made, and so the