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TRILOKI NATH TIKU & ANR.

v.

STATE OF JAMMU & KASHMIR & ORS.

December 15, 1966

B [K. SUBBA RAO, C.J., J. C. SHAH, S. M. SIKRI, V. RAMASWAMI AND C. A. VAIDIALINGAM, JJ.]

Constitution of India, Art. 16(4)—*Reservation in favour of backward classes—Requirements of Article—Backward class, what is.*

The petitioners were school teachers in the service of the State of Jammu & Kashmir. Persons below them in the seniority list were promoted to the higher grade because the State Government in making the promotions gave 50% of the higher posts to Muslims, 60% of the remaining 50% to Jammu Hindus and the rest to Kashmiri Pandits and Sikhs. This method of reservation was justified under Art. 16 of the Constitution on the ground that Muslims all over the State and Hindus in Jammu were backward communities. The petitioners were Kashmiri Pandits. They came to this Court under Art. 32.

D HELD : The predominant concept underlying Art. 16 is equality of opportunity in the matter of employment; and without detriment to that concept, the State is enabled to make reservations in favour of backward classes to give a practical content to the concept of equality. It is implicit in the article that the doctrine of equality of opportunity shall be reconciled with that of reservation in favour of backward classes in such a way that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality. [268 G-H]

E The power under cl. 4 of Art. 16 can only be exercised in favour of backward classes of citizens. While the State has necessarily to ascertain whether a particular class of citizens are backward or not, having regard to acceptable criteria, its is not the final word on the question, it is a justiciable issue. The power under cl. (4) is also conditioned by the fact that in regard to any backward classes of citizens there is no adequate representation in the services of the State. [269 A-B]

F A class cannot be accepted as backward merely because it is not adequately represented in the services under the State. Such a contention if accepted would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured have taken to other avocation in life [270 B-C]

G [On the material before it the Court found it impossible to say whether the Muslims of the entire State of Jammu and Kashmir and the Hindus of Jammu Province were backward communities within the meaning of Art. 16. The High Court was therefore asked to collect the relevant material and to sent a report.] [270 E-G]

M. R. Balaji v. *State of Mysore*, [1963] Supp. 1 S.C.R. 439 and *R. Chitralekha* v. *State of Mysore*, [1964] 6 S.C.R. 368, referred to.

ORIGINAL JURISDICTION : Writ Petition No. 107 of 1965.

H Writ Petition under Art. 32 of the Constitution of India for enforcement of fundamental rights.

Naunit Lal and *Vineet Kumar* for the petitioners.

S. V. Gupte, Solicitor-General of India, Raja Jaswant Singh, Advocate-General for the State of Jammu and Kashmir, and *R. H. Dhebar*, for respondents Nos. 1 and 2. A

The Judgment of the Court was delivered by

Subba Rao, C.J. This petition under Art. 32 of the Constitution of India has been filed by two teachers for the issue of an appropriate writ to quash the orders of promotion of respondents 3 to 83 and to direct the State of Jammu & Kashmir, the 1st respondent, and the Director of Education, Jammu & Kashmir State, Srinagar, the 2nd respondent, to promote them to the cadre of gazetted teachers with retrospective effect. B C

The facts are simple. The 1st petitioner entered government service of the erstwhile State of Jammu & Kashmir on May 16, 1943, as a teacher in the Government School, Trehgam. He is an M.A., B.T., and is at present working as a teacher in the Government Higher Secondary School, Sopore. The 2nd petitioner was likewise appointed as a teacher on February 26, 1952, in the Government Middle School, Nigam, Kashmir. He is a B.A., B.T., and is at present working as a teacher in the Government High School, Batamallo. In the year 1957, the 1st respondent prepared a seniority list of teachers of grade Rs. 80-8-200. From time to time the 1st respondent prepared the seniority lists of teachers of the said grade and the last of them was prepared in 1961. Therein the 1st petitioner was given the serial No. 104, and the 2nd petitioner was given the serial No. 140. Whenever there were vacancies in the higher grade of Rs. 250-25-350-EB-30-500, which is a gazetted cadre, they were filled by promotion of teachers in the lower grade comprised in the said seniority list. It is alleged that in promoting teachers to the gazetted cadre, respondents 1 and 2 adopted the following basis : D E F

(1) 50% of the gazetted posts to be filled by promotion are given to Muslims;

(2) about 60% of the remaining 50% of the posts are filled by Jamvi Hindus (Hindus from Jammu Province of the State, majority of whom are Dogras); and G

(3) the remaining 40% of the 50% of the posts are given to Kashmiri Pandits; some time one or two posts are given to Sikhs out of turn.

To state it differently, out of every 100 gazetted posts, 50 went to Muslims of the entire State of Jammu & Kashmir, 30 went to Hindus from the Province of Jammu, and the remaining 20 went H

A to Kashmiri Pandits, out of which one or two went to Sikhs. The said basis is not disclosed in any order made by the State, but is arrived at on the footing of recruitments by promotion made to the gazetted posts of teachers from time to time. It is also averred that promotions are made not on the basis of merit and seniority, but purely on the ground of religion, caste and place of birth. It B is further alleged that though the two petitioners are seniors as per the aforesaid seniority list, they have been superseded by respondents 3 to 83 only on the ground that the petitioners happen to be Kashmiri Pandits and respondents 3 to 83 are either Muslims or Jammu Hindus.

C In the counter-affidavit the State does not deny the fact that promotions to gazetted posts are made in the manner indicated by the petitioners but says that 50% of the posts were filled by Muslims of the entire State of Jammu & Kashmir and 40% of them were filled by Jammu citizens. It proceeds to support this reservation on the ground that Muslims of the entire State and the Hindus of D Jammu Province constituted "backward classes" for the purpose of employment and that it is done in order to reduce gradually the imbalance between the backward classes and the progressive ones.

It may be noticed at the outset that though the factual basis for the promotions to the gazetted posts is admitted, no order made E by the Government is placed before us either specifying the backward classes or the criteria for backwardness or fixing a proportion between backward classes and others in the matter of promotion. There is also no acceptable material from which we can gather the relevant facts, namely, the latest census figures disclosing the strength of the population in the Provinces of Jammu and Kashmir, the population figures of the various religious groups, the break-up F figures of the different communities of the two major religious groups, the state of their backwardness—social, economic and cultural—the criteria adopted by the State for ascertaining the backwardness of different groups and other relevant material. What is placed before us is a general assertion, unsupported by any acceptable data, that all the Muslims of both the Provinces of the G State are backward and the majority of the Hindus of the Jammu Province are likewise backward. During the course of the argument, two statements showing the population figures community-wise (1961 census) and the population figures community-wise (1941 census) with literacy figures and their percentage are placed before us. Apart from the fact that the petitioners have no oppor- H tunity to test the correctness of the figures, the 1941 census figures may not afford any workable guide, as a quarter of a century has passed by since then and there must have been revolutionary changes during this period.

The law on the subject is well settled. The relevant provision of the Constitution is Art. 16, which reads : A

> (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
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> (2) 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. B
>
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment. C
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> (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. D

Clauses (1) and (2) of Art. 16 guarantee equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. But if the said clauses of the article are literally enforced, instead of giving equality of opportunity to all citizens, it will lead to glaring inequalities. In a country where there are different strata of society ranging from highly sophisticated to lowly backward, the concept of equality will drive the latter to the wall. Their condition would become worse than what it is. So, in order to give a real opportunity to them to compete with the better placed people, cls. (3) and (4) are introduced in the article. While clause (2) prohibits the place of birth or residence as the sole criterion in the matter of employment, clause (3) permits residential qualification in the State or Union territory. While clauses (1) and (2) guarantee equal opportunity to all citizens, clause (4) enables the State to make a provision for reservation of appointments or posts in favour of any backward classes of citizens. The predominant concept underlying the provision is equality of opportunity in the matter of employment; and, without detriment to the said concept, the State is enabled to make reservations in favour of backwarded classes to give a practical content to the concept of equality. It is implicit in the article that the doctrine of equality of opportunity shall be reconciled with that of reservation in favour of backward classes in such a way that the latter while serving the cause of backward classes shall not unreasonably E F G H

A encroach upon the field of equality. It is also clear from the provisions that the power conferred upon the State under clause (4) can only be exercised in favour of backward classes of citizens; that is to say, whether a particular class of citizens are backward is an objective factor to be determined by the State. While the State has necessarily to ascertain whether a particular class of citizens
B are backward or not, having regard to acceptable criteria, it is not the final word on the question; it is a justiciable issue. While ordinarily a court may accept the decision of the State in that regard, it is open to be canvassed if that decision is based on irrelevant considerations. The power under clause (4) is also conditioned by the fact that in regard to any backward classes of citizens there is
C no adequate representation in the services under the State. The opinion of the State in this regard may ordinarily be accepted as final, except when it is established that there is an abuse of power. A fair reading of Art. 16, therefore, discloses the following ingredients for the applicability of the provision : (i) there shall be equality of opportunity for all citizens in the matter of employment; (ii) there can be reservations of appointments or posts in
D favour of backward classes; and (iii) the backward classes are not adequately represented in the services under the State.

Decided cases have laid down certain tests for ascertaining whether a particular class is a backward class or not. Though the decision in *M. R. Balaji* v. *State of Mysore*(1) turned upon
E Art. 15(4) of the Constitution, the principles laid down therein will equally apply to the facts of the present case. There this Court held that backwardness under Art. 15(4) must be social and political and that social backwardness was in the ultimate analysis the result of poverty to a very large extent. In the context of admission to educational institutions this Court held that speaking generally in a broad way the provision for reservation should be
F less than 50% and that actual percentage should depend upon the prevailing circumstances in each case.

The decision in *R. Chitralekha* v. *State of Mysore*(2) also turned upon the interpretation of Art. 15(4) of the Constitution. In that case the Government of Mysore laid down that classification of socially and educationally backward classes should be made
G on the following basis : (i) economic conditions, and (ii) occupation. But the order of the Government did not take into consideration the caste of the applicant as one of the criteria for backwardness. This Court pointed out that, though the caste of a group of citizens might be a relevant circumstance in ascertaining their social backwardness, it could not be the sole or the dominant test in that
H behalf. This Court accepted the criteria adopted by the Mysore Government for ascertaining the backwardness of a class. The

(1) [1963] Supp. 1 S.C.R. 439. (2) [1964] 6 S.C.R. 368.

argument advanced on behalf of the State, namely, that the difference in the phraseology used in Art. 15(4) and Art. 16(4), namely socially and educationally backward classes in the former and backward classes in the latter, leads to the inevitable conclusion that "backward classes" of citizens in Art. 16(4) are only such classes of citizens who are not adequately represented in the services of the State does not appeal to us. The sole test of backwardness under Art. 16(4), the argument proceeds, is the inadequacy of representation in the services under the State; that is to say, however advanced a particular class of citizens, socially and educationally, may be, if that class is not adequately represented in the services under the State, it is a backward class. This contention, if accepted, would exclude the really backward classes from the benefit of the provision and confer the benefit only on a class of citizens who, though rich and cultured, have taken to other avocations of life. It is, therefore, necessary to satisfy two conditions to attract clause (4) of Art. 16, namely, (i) a class of citizens is backward, *i.e.*, socially and educationally, in the sense explained in Balaji's case(1); and (ii) the said class is not adequately represented in the services under the State.

The question, therefore, is whether Mohammedans of the entire State of Jammu & Kashmir and the Hindus of the Jammu Province are backward in the sense explained above and also whether they are not adequately represented in the services of the State. Secondly, if they are backward, whether the percentages of reservations provided for them in the gazetted cadre of teachers are reasonable, having regard to the employment opportunities in that cadre of service to the general public. We find it very difficult to come to one conclusion or other on the material placed before us. It is, therefore, necessary to call for a report before we can finally dispose of the writ petition. We direct the High Court of Jammu & Kashmir either directly or through a District Court to gather the necessary material, such as, the total population of the entire State, the break-up figures of the two provinces, the strength of different communities and the extent of their social and economic backwardness and the criteria applied by the State in that regard. The High Court is directed to submit the report within two months from the date of receipt of the record. The parties will have liberty to place necessary material, oral and documentary, before the High Court or the District Court, as the case may be. Costs will abide the result.

G. C. *Report called for.*

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