

State of Andhra Pradesh & Another

Vs

P. Sagar

Civil Appeal No. 1336 of 1967

(J. C. Shah, V. Ramaswami – I, G. K. Mitter JJ)

27.03.1968

JUDGMENT

SHAH, J.-

Against the order passed by the High Court of Andhra Pradesh declaring invalid the "reservation for backward classes under Rule 4A and 5A respectively for the Telangana and the Andhra Rules, and the directions in respect of the President's Scouts and Guides", under Government orders Nos. 1135 & 1136 - Health, Housing & Municipal Administration Department dated June 16, 1966, as modified by G.O.M.S. 1880 dated July 29, 1966 for the Telangana region, and by G.O.M.S. 1786 dated August 2, 1966 for the Andhra Region, the State of Andhra Pradesh has appealed to this Court with special leave.

The State of Andhra Pradesh is divided into two areas - Telangana and Andhra areas. In the Telangana area there are two Medical Colleges having in the aggregate 270 seats for entrants to the medical degree course. In Andhra area there are four Medical Colleges having in the aggregate 550 seats for new entrants. In admitting candidates for the medical degree course by Government orders Nos. 1135 & 1136 Health, Housing and Municipal Administration Department dated June 16, 1966, seats were reserved for Central Government nominees, for N.C.C., A.C.C., President's Scouts & Guides, for candidates with sports and extracurricular proficiency, for children of ex-Service army personnel, for children of displaced goldsmiths, for candidates from Scheduled Castes and Tribes, for women candidates, for candidates appearing from H.S.C. Multipurpose I.S.C. & P.U.C. Examinations, and for candidates who had secured the M.Sc. & B.Sc. degrees. By Government order No. 1880 dated July 29, 1966, twenty per cent. of the total number of seats were reserved for backward classes in each area, and pursuant thereto the Telangana Rules were amended by G.O.M.S. No. 1784-Health and the Andhra Rules were amended by G.O.M.S. No. 1783-Health dated August 2, 1966. The validity of the Government orders Nos. 1135 & 1136 was challenged on the ground that they infringed the fundamental freedoms guaranteed under Arts. 15(4), 16(4) and 29(2) of the Constitution. The High Court held that in reserving seats for nominees of the Central Government and from other States, for cultural scholars, for women, for graduates and for students from H.S.C. & P.U.C. Courses, no fundamental rights were infringed, but the reservation for members of the backward classes described in the list prepared by the Government of Andhra Pradesh were invalid.

By Art. 15 of the Constitution, as originally enacted, it was provided that :-

"(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

#(2) . . . ##

(3) Nothing in this article shall prevent the State from making any special provisions for women and children."

Article 29(2) provided that :

"No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

By Art. 46, which occurs in Ch. IV relating to Directive Principles of State Policy, the State was enjoined to promote the educational and economic interest of the weaker sections of the people, but Arts. 15 and 29 as originally framed prohibited the making of any discrimination against any citizen on grounds only of the religion, race, caste, sex, place of birth or any of them. In the State of Madras v. Shrimati Champakam Dorairajan [[1951] S.C.R. 525.] an order issued by the Government of the State of Madras fixing the number of seats for particular communities for selection of candidates for admission to the Engineering and Medical Colleges in the State was challenged on the ground that it violated the guarantee against discrimination under Art. 29(2) of the Constitution. This Court held that the Government order constituted a violation of the fundamental right guaranteed to the citizens of India by Art. 29(2) of the Constitution, notwithstanding the directive principles of State policy laid down in Part IV of the Constitution. The Parliament thereafter added cl. (4) in Art. 15, by the Constitution (First Amendment) Act, 1951, providing that :

"Nothing in this article or in clause (2) of article 29 shall prevent the State from making an special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

On July 31, 1962, the State of Mysore, in supersession of all previous orders made under Art. 15(4) divided backward classes into two categories : backward classes and more backward classes, and reserved 68% of the seats in the Engineering and Medical Colleges and other technical institutions for the educationally and socially backward classes and the Scheduled Castes and Scheduled Tribes, and left 32% seats for the merit pool. That order was challenged by a group of writ petitions under Art. 32 of the Constitution before this Court. This Court in M. R. Balaji & others v. State of Mysore [[1963] Supp. 1 S.C.R. 439.] held that the order passed by the State of Mysore : "was a fraud on the constitutional power conferred on the State by Art. 15(4)" and was liable to be quashed, because the order categorised, contrary to the plain intendment of Art. 15(4), the backward classes on the sole basis of caste. A similar order G.O.M.S. No. 1880-Health issued by the State of Andhra Pradesh on June 21, 1963, notifying a list of castes for the purpose of selecting candidates from the backward classes in the Medical Colleges in the State of Andhra Pradesh was declared invalid by the High Court of Andhra Pradesh on the ground that the order which classified the backward classes solely on the basis of caste subverted the object of Art. 15(4) of the Constitution : see P. Sukhadev and others v. The Government of Andhra Pradesh [(1966) 1 Andhra W.R. 294.].

On February 3, 1964, the previous order issued by the State of Andhra Pradesh was cancelled. Thereafter it is claimed by the State of Andhra Pradesh that it took steps to prepare a fresh list of backward classes consistently with the provisions of the Constitution. The Chief Secretary of the Government of Andhra Pradesh has sworn in his affidavit that the Council of Ministers appointed a Sub-Committee to draw up a list of backward classes, inter alia, for the purpose of admission of

students to professional Colleges. The Committee invited the Law Secretary and the Director of Social Welfare to attend the meetings of the Sub-Committee, and letters were written to the other States calling for information about the criteria adopted by those States for determining backward classes for purposes of Arts. 15(4) and 16(4) of the Constitution, that after considering the replies received from the Chief Secretaries of the various States it was resolved that the existing list of backward classes pertaining to Andhra and Telangana areas be scrutinised with a view to selecting from that list those castes or communities which are "considered backward on account of the low standard of living, education, poverty, places of habitation, inferiority of occupations followed etc."; that at another meeting it was resolved that the list of 146 backward communities prepared by the Director be re-arranged in "the order of priority in consultation with the Law Secretary, taking into consideration the criteria given by Law Secretary in his note to the Cabinet Sub-Committee and that in doing so such of the criteria as capable of being practically possible for consideration may be taken into account", and accordingly the Law Secretary and the director of Social Welfare considered the representations made by certain communities to the Government from time to time and "drew up a list of the order of priority as called for by the Cabinet Sub-Committee", that thereafter the Cabinet Sub-Committee made its recommendations which were considered by the Council of Ministers on July 4, 1966, and that the Council of Ministers considered the social, educational and economic conditions of the backward classes named in the lists submitted to them, and dealt with each individual class and deleted certain items or classes in the lists, changed the denomination of certain classes "for the more precise effectuation of concessions to those classes only who really need them", and consolidated the backward classes into one list, ruling out the priorities suggested by the Director of Social Welfare in accordance with the opinion of the Cabinet Sub-Committee, and thereafter published resolution No. G.O. 1880 pursuant to which the rules were amended reserving 20% of the seats for the backward classes mentioned in the list prepared by the Cabinet of the State.

The list prepared on the basis of reservations for socially and educationally backward classes is indisputably a list communitywise. On behalf of the petitioners it was contended in the High Court that the Government of Andhra Pradesh had adopted the same list of backward classes which was struck down by the High Court in P. Sukhadev's case [(1966) 1 Andhra W.R. 294.] with some slight modifications and the new list also having made a reservation in favour of castes and not classes, it infringed the guarantee under Art. 15(1). On behalf of the State it was urged that caste is one of the relevant tests in determining backwardness, and cannot be ignored in determining the socially and educationally backward classes : if a group has been classified as backward on other relevant considerations, the classification is not liable to be challenged as invalid on the ground that for the purpose of classifying, the designation of caste is given. The High Court held that the earlier G. O. was struck down in P. Cukhadev's case [(1963) Supp. 1 S.C.R. 439.] on the ground that it was based on caste alone, and since the G.O. under challenge was again prepared on the same basis it could not be sustained as falling within the exception provided in Art. 15(4). Counsel for the State contends that the High Court erred in holding that the impugned rules reserving seats for backward classes made caste the determining factor.

In the context in which it occurs the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. By cl. (1) Art. 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. By cl. (3) of Art. 15 the State is,

notwithstanding the provision contained in cl. (1), permitted to make special provision for women and children. By cl. (4) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of cl. (1). But cl. (4) is an exception to cl. (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of cl. (1). The Parliament has by enacting cl. (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to cl. (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement. Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. These are the principles which have been enunciated in the decision of this Court in *M. R. Balaji's case* [(1963) Supp. 1 S.C.R. 439.] and *R. Chitralakha & Another v. State of Mysore and others* [(1964) 6 S.C.R. 368.]. In *R. Chitralakha's case* [(1964) 6 S.C.R. 368.], Subba Rao, J., speaking for the majority of the Court observed at p. 388 :

"The important factor to be noticed in Art. 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in cl. (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the constitution from using the expression "backward classes or castes". The juxtaposition of the expression "backward classes" and "Scheduled Castes" in Art. 15(4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong."

In a recent judgment of this Court *P. Rajendran & Ors. v. The State of Madras and others* [[1968] 2 S.C.R. 786.], Wanchoo, C.J., speaking for the Court observed :

"..... if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Art. 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Art. 15(4). . . . It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens."

That case makes no departure from the rule enunciated in the earlier cases.

The list dated June 21, 1963, of castes prepared by the Andhra Pradesh Government to determine backward classes for the purpose of Art. 15(4) was declared invalid by the High Court of Andhra Pradesh in P. Sukhadev's case [[1966] 1 Andhra W.R. 294.]. A fresh list was published under the amended rules with some modifications, but the basic scheme of the list was apparently not altered. It is true that the affidavits filed by the Chief Secretary in the High Court and the Director of Social Welfare in this Court have set out the steps taken for preparing the list of backward classes. It is also stated in the affidavit of the Director of Social Welfare that he considered the representations made to him, consulted the Law Secretary and certain publications relating to the study of backward classes e.g. Thurston's "Caste and Tribes" and Sirajul-Hasan's "Castes and Tribes", and made his recommendations which were modified by the Sub-Committee appointed by the Council of Ministers and ultimately the Council of Ministers prepared a final list of backward classes. But before the High Court the materials which the Cabinet Sub-Committee or the Council of Ministers considered were not placed, nor was any evidence led about the criteria adopted by them for the purpose of determining the backward classes. The High Court observed :

"A perusal of this affidavit (Chief Secretary's affidavit) as well as that of the Director of Social Welfare, . . . which are filed on behalf of the Government do not say what was the material placed before the Cabinet Sub-Committee or the Council of Ministers, from which we could conclude that the criteria laid down by their Lordships of the Supreme Court have been applied in preparing the list of backward classes.

After referring to the opinion of the Law Secretary and the views of the Director of Social Welfare they observed :

".... We are not able to ascertain whether any material, and if so, what material was placed before the Cabinet Sub-Committee, upon which the list of backward classes was drawn. On the other hand, it is stated that the Law Secretary and the Director of Social Welfare sat together and drew up a list, the former specifying the legal requirements and the latter as an expert advising on the social and educational backwardness of class or classes."

It was urged before the High Court that expert knowledge of the Director of Social Welfare and of the Law Secretary was brought to bear upon the consideration of the relevant materials in the preparation of the list and they were satisfied that the correct tests were applied in the determination of backward classes and on that account the list should be accepted by the High Court. The High Court in dealing with the argument observed :

"..... the impugned backward classes list cannot be and has not sustained by the Government as coming within the exception provided in Art. 15(4) on any material placed before this Court. In fact, there is a total absence of any material, from which we can say that the Government applied the criteria enunciated by their Lordships of the Supreme Court in the above referred cases, in preparing the list of backward classes. We cannot accept the contention of the learned Advocate General that "once there is proof that the Government bona fide considered the matter it is sufficient". Acceptance of this argument would make for arbitrariness, absolving the party on whom the burden of proof to bring it within the exception rests, from proving it. The mere fact that the act is bona fide and that there was total absence of mala fides, is not relevant."

Article 15 guarantees by the first clause a fundamental right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in cl. (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist. When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under cl. (4) of Art. 15, the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the Society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arise whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the Courts on materials placed before them. By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded.

The High Court has repeatedly observed in the course of their judgment that no materials at all were placed on the record to enable them to decide whether the criteria laid down by this Court for determining that the list prepared by the Government conformed to the requirements of cl. (4) of Art. 15 were followed. On behalf of the State it was merely asserted that an enquiry was in fact made with the aid of expert officers and the Law Secretary and the question was examined from all points of view by the officers of the State, by the Cabinet Sub-Committee and by the Cabinet. But whether in that examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is ex-facie based on castes or communities and in substantially the list which was struck down by the High Court in P. Sukhadev's case [[1966] 1 Andhra W.R. 294.]. Honesty of purpose of those who prepared and published the list was not and is not challenged, but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law-maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed.

The appeal therefore fails and is dismissed.

# Appeal dismissed.##

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