

SUPREME COURT OF INDIA

Triloki Nath Tiku

Vs.

State of J. and K.

Writ Petn. No. 107 of 1965

(M. Hidayatullah, C.J.I., J. C. Shah, S. M. Sikri, V. Ramaswami and V. Bhargava, JJ.)

23.04.1968

JUDGEMENT

SHAH, J.:-

1. By order dated December 15, 1966,* this Court called upon the High Court of Jammu and Kashmir 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", and to make a report in that behalf. The report has now been submitted to this Court together with copies of the evidence oral and documentary produced by the parties. It is unfortunate that the learned Judge who heard the matter did not record his opinion on the evidence. We do not, however, on the view we take deem it necessary to send back the papers for recording the opinion of the High Court on the evidence led by the parties pursuant to the previous order.

* reported in AIR 1967 SC 1283

2. The petitioners had by the writ petition claimed that in declining to promote them and others similarly circumstanced to the gazetted cadre, the State had "acted purely on communal basis inasmuch as senior members of the Service belonging" to one community had been placed below the junior-most members of other communities only on the basis of their respective community and on the basis of residence in a locality, and had thereby denied the guarantee of equality in matters of employment and appointment to the gazetted cadre of the Education Department under Art. 16 of the Constitution. By Cl. (1) of Art. 16 equality of opportunity in matters relating to employment or appointment between members of the same class is guaranteed by a positive injunction: Cl. (2) enjoins the State not to discriminate against citizens in respect of any employment or office on the ground of race, religion, caste, sex, descent, place of birth or residence. Clause (4) provides a limited exception to the operation of the other clauses of Art. 16: it authorises the State to make provision for reservation of appointments or posts in favour of backward classes of citizens, which are not adequately represented in the services under the State.

3. The petitioners claimed that they had been discriminated against in the matter of promotion to the gazetted cadre, solely on the ground of religion and place of residence. The case that junior officers were promoted to the gazetted cadre over officers senior to them on the ground solely that they the junior members - belonged to the Muslim community or that they were Hindus belonging to the Jammu province of the State of Jammu and Kashmir was not denied. But this prejudicial treatment of senior officers was sought to be supported on the plea that the State had acted in consonance with the principles of Cl. (4) of art. 16 of the Constitution. It was the case of the State that Muslims as a community in the whole of the State of Jammu and Kashmir formed a backward class of citizens and they were not adequately represented in the services under the State: similarly Hindus from the province of Jammu formed as backward community and were not adequately represented in the services of the State, and on that account reservation in the matter of appointments or posts and promotions in the services of the State was made in respect of those classes. Clause (4) of Art. 16 undoubtedly empowers the State to make reservation of appointments or posts in favour of any backward class of citizens so as to give the class an adequate representation in the services under the State. The provision making such reservation need not be by a statutory enactment: it may be made by an executive order or direction. But there is not even a formal executive order expressly dealing with reservation of posts and appointments in the Education Department. On behalf of the State it is claimed that as a matter of State policy, in making appointments and promotions, reservations in fact have been made by the State as alleged by the petitioners with some variations as to percentage reserved for the Hindus from the province of Jammu. No opinion need be expressed in this case on the question whether a provision under Art. 16 (4) is not effective, unless it is made by legislation, or by an executive order formally published.

4. Article 16 in the first instance by Cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of

a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous 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. But for the purpose of Art 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution.

5. In the voluminous evidence produced before the High Court a formal order making a provision for reservation of appointments or posts in favour of any backward class of citizens does not find a place. The only evidence to which our attention has been invited is the statement of Malik Ghulam Nabi, who deposed

"that the policy laid down by the Government in matters of the employment to the State services is that 50 percent of the vacancies are reserved for the Muslims of Kashmir (for the entire state). Out of the remaining 50 per cent, 40 per cent are reserved for the Jammu Hindus and 10 per cent for the Kashmir Hindus. There are a number of Government orders by which this policy has been laid down, but due to the short time at my disposal, I have been able to get only one copy of such order, which is signed by the Chief Secretary whose handwriting I know and identify".

In cross-examination Malik Ghulam Nabi dated that the order produced by him applied to all kinds of services under the State and it was "being implemented even now and was still in force". The witness was unable to speak to the criteria on the basis of which the order was issued. The order of which a copy was produced by Malik Ghulam Nabi related to the promotion to the posts of Superintendents in the Civil Secretariat and other offices. It purports to be a record of the decisions taken by the Council of Ministers in the matter of promotion of Superintendents in the Secretariat. It was recorded in paragraph 4 of the order that a Selection Board consisting of four Secretaries to the Government was set up and they were asked "to prepare a Select List on the basis of meritcum-seniority, keeping in view the policy of adequate representation of such elements as are not adequately represented in the services and to pay due regard to Provincial proportions. There is no reference in any of the clauses of the order to selection of officers on the basis that they belong to backward classes. The injunction to the Secretaries to select candidates "keeping in view the policy of adequate representation of such elements as were not adequately represented in the services," is not a provision making reservation of appointments or posts in favour of backward classes. Selections made, assuming that similar orders were passed enjoining the making of promotions to the gazetted cadre in the Educational Service, could not be deemed to have been made on the basis of backwardness of the classes to which they belonged.

6. The State of Jammu and Kashmir had it is admitted, from time to time framed lists of backward communities that is evident from Ex. Z-3 which is a list of classes who are regarded by the State as backward. But it is not claimed that in making promotions to the gazetted cadre in the Educational Service, the authorities acted in pursuance of the List Ext. Z-3. As already observed, the normal rule contemplated by the constitutional provision is equality between aspirants to public employment,

but in view of backwardness of certain classes it would be open to the State to make a provision for reservation of appointments or posts in their favour when the State proceeds not to make reservations in favour of any backward class, but to distribute the total number of posts or appointment on the basis of community or place of residence, no reservation permitted by Cl. (4) of Art. 16 can be said to be made. In effect the State policy which Malik Ghulam Nabi spoke to was a policy not of reservation of some appointments or posts: it was a scheme of distribution of all the posts communitywise. Distribution of appointments posts or promotions made in implementation of that State policy is contrary to the constitutional guarantee under Art. 16 (1) and (2) and is not saved by Cl. (4).

7. The promotions granted to respondents 3 to 83 are accordingly declared contrary to the provisions of Arts. 16 (1) and (4) of the Constitution and therefore void. This will not however prevent the State from devising a scheme, consistent with the Constitutional guarantees for reservation of appointments posts or promotions 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. The petitioners will be entitled to their costs of the petition including the costs of the hearing which culminated in the interlocutory order, and the costs incurred before the High Court.

Petition allowed.