

Shri Janki Prasad Parimoo and Others

Vs

State of Jammu and Kashmir and Others

Writ Petitions Nos. 175, 359 and 360 of 1971 (Under Article 32 of the Constitution of India for the enforcement of Fundamental Rights)

(CJI S.M. Sikri, A.N. Ray, D.G. Palekar, M.H. Beg, S.N. Dwivedi JJ)

10.01.1973

JUDGMENT

PALEKAR, J. -

1. These three petitions under Article 32 are a sequel to the action taken by the State of Jammu and Kashmir in pursuance of the order passed by this Court in Makhanlal Waza and Others v. State of Jammu and Kashmir and Other, ((1971) 1 SCC 749) on February 23, 1971. In order to understand the background of these case it would be sufficient to state here in bare outline the facts which are given in greater detail in the above case reported in (1971) 3 SCR 832.

2. Owing to historical reasons there was a large proportion of Kashmiri Pandits in the service of the State, especially, in the teaching line, although that community is hardly 2% of the total population of the State. In course of time other communities who were in a majority in the State agitated for a larger share in the services, with the result that prior to 1954 recruitment was made to the services in proportion to the population of the major communities in the State.

3. In 1954 Part III of the Indian Constitution with some modification was made applicable to the State. In spite of it representation in the services followed the communal pattern. On June 14, 1956, the State promulgated the Jammu and Kashmir Civil Services (Classification Control and Appeals) Rules, 1956. Rule 19 provided that reservation was permitted to be made in favour of any backward class which, in the opinion of the Government, was not adequately represented in the service. Rule 25(2) related to promotions. It provided that promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal. In other words, promotions were to be made by selection on merit-cum-seniority basis. Notwithstanding the rules, the State followed the communal pattern of appointments and promotions, reserving 50% of the posts for Muslims, 40% mainly to the Hindus of Jammu and the remaining 10% for Sikhs, Kashmiri Pandits and other minority communities. This led to an agitation, especially, by the teachers in the Secondary High Schools of the State who comprised a large proportion of Kashmiri Pandits. They found that in spite of their seniority in the service as teachers, promotions to the post of Head Masters and Tehsil Education Officers, which are gazetted posts in the service, were being made on communal basis and not in accordance with the law.

4. In December, 1965, Triloki Nath Tikoo and Shambu Nath filed Writ Petition No. 107 of 1965, in this Court alleging that promotions to the posts of Head Masters had been made in contravention of

Article 16 of the Constitution. The State admitted that 50% of the posts were filled by the Muslims of the State and 40% principally by the Hindus of Jammu. It was, however, claimed that this reservation was made on the ground that the Muslims of the State and Hindus of Jammu province constituted backward classes referred to in Rule 19 and such reservation was justified under clause (4) of Article 16. The court found that there was no sufficient material before it to decide if the claim made on behalf of the State was justified and so by an Order, dated December 15, 1966, directed the High Court of Jammu and Kashmir to gather the necessary material and to report on it. The decision is reported as *Triloki Nath Tikko v. State of Jammu and Kashmir*.((1967) 2 SCR 265 : AIR 1967 SC 1283 : (1967) 2 SCJ 187)

5. After the material was collected the case again came before this Court for consideration and this Court held (see *Triloki Nath Tikko v. State of Jammu and Kashmir* ((1969) 1 SCR 103 : AIR 1969 SC 1 : (1969) 1 SCJ 306), that on the material before it was clear that there was no reservation as permitted by Article 16(4) but that the posts had been distributed on the basis of community or place of residence. The promotions were accordingly held to be invalid. The order affected 81 teachers who had been promoted contrary to the provisions of Article 16(1) and (4). Their promotions were declared void. The court observed "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". This order was passed by the court on April 23, 1968.

6. In view of the order, the abovementioned 81 teachers had to revert. Along with them some others who had been promoted in the meantime had also to revert. All of them were, however, designated as teachers-in-charge because actually they held the charge of the schools. There is a difference between the parties before us to whether there was any actual reversion. It is alleged on behalf of the petitioners that teachers-in-charge were, of all purposes, including pay, Head Masters while, on the other hand, it is stated for the State that they were entitled only to the grade pay as teachers and not as Head Masters. In any case there seems to have been an anomalous situation which gave rise to the second Writ Petition by the teachers. That is Writ Petition No. 108 of 1969, filed by *Makhanlal Waza and Others v. State of Jammu and Kashmir* (supra), already referred to. To this petition a large number of so-called teachers-in-charge were made parties. Actually there were about 249 teachers who were made respondents. This Court found that all the promotions of the respondents in that case were made not purely on merit as required by Rule 25 referred to above but had been made on account of the communal policy which had been declared invalid by this Court in *Triloki Nath Tikko's case* (supra). The Court further observed "in the absence of any rule lawfully promulgated for employment of backward classes, promotions could be made only in accordance with Rule 25 and there can be no manner of doubt that there was absolutely no compliance with the provisions of that rule. Promotions thus made of all the respondent teachers were illegal and unconstitutional being violative of Article 16 of the Constitution. They have, therefore, to be set aside. All the promotions made to the higher posts or the higher grade pursuant to the communal policy would have to be revised and recognised and appropriate orders must be passed by Respondents 1 and 2 with regard to them as also the petitioners in accordance with the law. This order was passed on February 23, 1971.

7. In view of the above decision the State had to take steps for making proper selections on the basis of merit to the gazetted posts of Head Masters and Tehsil Education Officers from the eligible teachers. As a preliminary to the same the State reverted by an order, dated February 23, 1971, all those teachers who had officiated as Head Masters or had been designated as teachers-in-charge. All

of them were asked to hand over charge to the second teachers in the school. Nearly 1,100 teachers were found eligible for promotion and all of them, including those who were officiating Head Masters, were acquitted to appear for an interview. A Departmental Promotion Committee was appointed in accordance with the rules and the Committee was directed to interview the candidates. These interviews were held from March to July, 1971.

8. But before the interviews were over the first of the writ petitions before us namely Writ Petition No. 175 of 1971, was filed by seven Kashmiri Pandit teachers who had been affected by the order reverting them on February 23, 1971. They were senior teachers who were officiating as Head Master being appointed between 1960 and 1964 and had not been directly affected by the two writ petitions already referred to. They alleged that while they were promptly reverted Respondents 3 to 34 who were all junior to petitioner No. 1 and also to some of the other petitioners had not been so reverted nor were they asked to appear for the interview. Therefore, they claimed, the petitioners should be either restored to their former posts or the respondents should be reverted like them in which case alone, all of them could be regarded as having been equally treated. They justified their refusal to appear for the interview on the ground that respondents had been exempted from the interview and continued in their former posts.

9. Writ Petitions Nos. 359 and 360 of 1971, were filed after the interviews were over and selections made by the Committee. The petitioners in Writ Petition No. 359 of 1971 are 37 in number and all of them belong to the Jammu region. Respondents 3 to 295 are some of the teachers selected for appointment to the higher posts by promotion. The grievance of the petitioners was that although they were seniors and had officiated as Head Masters for a number of years they had been deliberately dropped to make room for the respondents who were very much junior to them. They alleged that the selection by interview was a farce, the device being adopted to manipulate the selection in such a way that the old communal proportion was maintained. They further alleged that a large number of posts was claimed to have been reserved under the Rules for backward classes, but the whole exercise was merely to secure about 90% of the posts of Muslims. In other words, the complaint of the petitioners was that the alleged selection after interview was not a genuine selection but a fraud. Similar allegations were made in the other petition, namely, Writ Petition No. 360 of 1971. This was filed by 13 Kashmiri Pandit teachers in a representative capacity on behalf of 400 other Kashmiri Pandit who had boycotted the interviews on the ground that the interviews were bound to be a fraud. The Respondents 3 to 325 are the teachers who had been selected at the interview.

10. It must be stated here that in 1967 the Government of Jammu and Kashmir had appointed the Jammu and Kashmir Commission of Enquiry under the Chairmanship of Dr. P. B. Gajendragadkar. Its report was submitted in November, 1968 and one of the recommendations of the Commission was to appoint a high-powered Committee to draw up a list of backward classes in the State of Jammu and Kashmir. Accordingly, the Backward Classes Committee was appointed under the Chairmanship of Shri J. N. Wazir, Retired Chief Justice of Jammu and Kashmir High Court, on February 3, 1969. This Committee made its report in November, 1969 recommending several classes of citizens who deserved to be described as socially and educationally backward. Acting substantially on the recommendations of the Committee the State Government issued on April 18, 1970, the Jammu and Kashmir Scheduled Castes and Backward Classes (Reservation Rules), 1970. These rules purported to make provision for reservations of appointments and posts in favour of certain classes of permanent residents of the State who were backward and not adequately represented in such services and posts. Later on August 8, 1970, a further order was passed by the State known as Jammu and Kashmir Scheduled Castes and Backward Classes (Reservation of

Appointments by Promotion) Rules, 1970. By these rules the principles laid down for appointments under the earlier rules were made applicable mutatis mutandis to promotions also. The net result of the recommendations of the Committee as accepted by the State was to make reservations in appointments and promotions to the extent of 8% of the posts for Scheduled Castes and 42% in favour of the backward classes.

11. Since the above interviews had taken place after the application of the above named Reservation Rules, the Departmental Promotion Committee took these rules into consideration in making the selections.

12. It is one of the complaints of the petitioners that though the Committee had professed to follow the principles laid down by this Court in several decisions, it had failed to determine the backward classes in accordance with the decisions of this Court. On the other hand, great anxiety was shown, according to the petitioners, to rope in as many persons from the majority communities as possible so that in the selections made thereafter a disproportionate share in the appointments and promotions would go to the majority communities in Kashmir and Jammu.

13. In their affidavit in reply to the petition the State denied all the allegations made by the petitioners.

14. The principal points which were involved in these two petitions are : (i) whether the selections made after interviews are improper and illegal and should be set aside; (ii) whether the Rules of reservation of posts in favour of backward classes are in violation of Article 16 and should be set aside.

15. Before dealing with those points, we shall dispose of the limited controversy involved in Writ Petition No. 175 of 1971, although the conclusion on the above two points may indirectly affect the parties in this Writ Petition. The latter is filed by seven Kashmiri Pandit teachers. They were all officiating Head Masters when they were reverted in 1971. Their grouse is that Respondents 3 to 34 were juniors to them when they were in the teachers' grade from which the promotions were made to the Head Masters' grade and if the principle of equality applied, they should have been also reverted along with the petitioners and required to appear at the interview along with the petitioners. On account of this unequal treatment, it is alleged, the petitioners had refused to appear for the interview. It cannot be disputed that petitioner No. 1 was the senior-most in the grade of teachers from which the promotion is made to the post of the Head Master or Tehsil Education Officer. The other petitioners also are seniors to some of the respondents. But what happened is that owing to the communal distribution of seats the Respondents 3 to 34 were all appointed as Head Masters in and before 1958. The petitioners had to wait their turn in the 10% seats ear-marked for Kashmiri Pandits and others and, therefore, although they were seniors in the grade of teachers, their chance of appointment as Head Masters came much later. Petitioner No. 1 was appointed as an officiating Head Master in 1960. Petitioners Nos. 2 and 3 in 1962 and petitioners No. 4 to 7 in 1964. They all officiated as Head Masters till 1971 when they were reverted. In the case of Respondents 3 to 34 not only were they promoted prior to 1958 but, except for Respondents 26, 27 and 30, they had all been confirmed in the Head Masters' posts before 1961. Some of the respondents were further promoted as Principals and District Education Officers which was a grade higher than that of Head Masters. Somehow it appears Respondents 26, 27 and 30, though holding such higher grade posts, had not been confirmed as Head Masters and they too were reverted as soon as this petition was filed. It is not necessary for us to investigate into the question why these three respondents had not been confirmed although some other respondent who were junior to them had been confirmed as Head

Masters. It might be simply an administrative omission or something else. But one thing is clear. All these Respondents 3 to 34 had been appointed as Head Masters much before the petitioners and most of them were also confirmed in the posts. They may be some substance in the petitioners' contention that the earlier appointment of these respondents, being based on the communal principle, was not a valid appointment and, therefore, their confirmation may not affect the question. On the other hand, it is to be noted that the respondents seems not to have figured in Triloki Nath Tikkoo's case (supra), Writ Petition 107 of 1965, filed in 1965. It would not, therefore be proper to interfere with their appointments now, especially, as in the meantime they have been promoted to posts which are higher than of Head Masters. Indeed if any one of the respondents was a respondent in Writ Petition No. 107 of 1965 [Triloki Nath Tikkoo's case (supra)], or in Writ Petition No. 108 of 1969 [Makhanlal's case (supra)], in which his appointment as Head Master had been set aside as invalid his case will have to be treated like that of any other officiating Head Masters who had been reverted in 1971. Otherwise we do not think that it would be right to interfere, at the instance of the petitioners, with these respondents whose appointments as Head Masters had been made in or before 1958.

16. We shall now turn to the two points referred to above arising out of Writ Petitions Nos. 359 and 360 of 1971. The first point involves the question whether the selection by interviews held by the Departmental Promotion Committee between March 15, 1971 and July 18, 1971 for the purposes of making promotions to the posts of Head Masters and Tehsil Education offers was a valid and proper exercise. The Department found more than 1100 teachers qualified for promotion and they were all called to interviews. The selection was to be made in accordance with the Jammu and Kashmir Civil Services (Classification Control and Appeals) Rules, 1969 which, it appears, had replaced the old rules of 1956. It appears to us that there is no distinction between the two rules because even as under the 1956 Rules the posts of Head Masters had to be filled on the merit-cum-seniority basis under the 1969 rules also selections had to be made on that basis only. From the beginning, it appears, some of the senior teachers, mostly coming from the Kashmiri Pandit Class, did not have faith in this system of selection and actually more than 400 of them boycotted the interview. Several allegations have been made that even before and during the period when the interviews were going on many in high authority were giving assurance to some of the reverted teachers that whatever happens those who had been reverted would get their posts back if only they appeared for interviews. We are not concerned with these allegations. It was also alleged that the selections were stage-managed with a view to maintain the old proportion of communal representation. It was pointed out that when previously the appointments were made on the communal basis, 178 posts had gone to Muslims and 134 to Jammu Hindus. Now after selection, 177 posts go to Muslims and 134 to Hindus. It is submitted on behalf of the petitioners that it could not have been a mere coincidence that the same number of Muslims and Hindus could have been selected in any properly conducted system of selection. It is contended on behalf of the State that if only the Kashmiri Pandit teachers had taken part in the interview, it was very likely that the result might have been somehow different. There is some substance in that contention also and, therefore, we shall not go merely by the coincidence that the same number of Muslims and Jammu Hindus had been selected.

17. There are, however, two important considerations which show that the selections by interview were thoroughly unsatisfactory. The candidates for selection included a large number of senior teachers many of whom had officiated as Head Masters over long periods. They were asked to appear before a Committee consisting of four officials. One was a Member of the Public Service Commission, the second was the Secretary of the Education Department, the third was the nominee of the Chief Secretary and the fourth member was the Director of Education. The Committee was also assisted by an Educational expert from outside the State and this body was expected to make

the selection after interviewing the candidates. Undoubtedly when appointments to higher posts are made it may be perfectly legitimate to test the candidates at a properly conducted interview. But it appears to us that the interview cannot be made the sole test in case of this kind. The efficiency of a teacher and his qualifications to be appointed as Head Master depend upon several considerations. His character, his teaching experience, ability to manage his class, his popularity with the students and the high percentage of successful students she is able to produce are all matters which must be necessarily taken into consideration before a selection is made. For this any Committee which desires to make a selection is made. For this any Committee which desires to make a selection after interview should insist that the character roll and the service record of the teacher should be before it. At the time of these interviews, however, the Committee did not have before it either the character rolls or service records of the teachers nor any confidential reports about them. They had to go merely by the result of the interview. In his affidavit the Educational Secretary had admitted that such confidential records were not made available to the Committee and the reason given as follows :

"Necessary service records in respect of the confidential rolls or character rolls of all the eligible candidates for the last few years were not available. Moreover the number of candidates was very large."

18. It is rather extraordinary that such a statement should be made by a high official of the Government. It is impossible to conceive that confidential reports were not available. The statement does not make it clear whether all the confidential reports were not available or any a few of them or for what years. The statement is so vague that it is difficult to accept it. Whenever appointments to gazetted posts are made and have to be approved by the Public Service Commission, confidential reports must be forwarded to the Commission, for otherwise it is difficult to see how the Public Service Commission can approve the appointments. It may happen that in a few cases the confidential records may be lost or missing. But to deprive the Committee of the benefit of these reports on the ground that such reports of all the eligible candidates for the last few years were not available would be ridiculous. The very fact that some other reason was necessary to be given, namely, that the number of candidates was very large goes to show that the first reason given by the official was considered by him as not altogether satisfactory. All the available reports ought to have been produced before the Committee and if any was lost or not available it was the duty of the Department to call for confidential reports afresh from authorities who had opportunities to observe the character and work of the teachers concerned. All the schools are Government schools and they must have been inspected from time to time by the Education Officers or Inspectors. Their reports could have been called to aid the Committee in its deliberations. We consider that the Committee was wrong in undertaking to make the selections on the basis of mere interviews.

19. It would appear from the affidavit filed on behalf of the State that out of the total of 50 marks to be given to the candidate, 20 marks were allotted for general knowledge, 20 marks for aptitude and 10 marks for personality. An assessment of the merit of a teacher was to be made in a short half hour or even less. The petitioners have criticised the system of interviews in these words :

"Personality connotes traits in one's character and not merely physical appearance or muscular strength. Their ability to control the students and administer the work of a school could not possibly be tested by a viva voce test. For this purpose the service record and personal files of the candidates were the best criteria for assessing the suitability and merit. Unfortunately for reasons best known to them the authorities never placed the service record and personal files before the Departmental Promotion

Committee members. The rich experience gained through his career in the service, teaching and administrative quality, discipline, punctuality, regularity, popularity, ability to carry on with staff, qualities to tone up the schools to create healthy tradition and create interest among the students in extra curricular activities which were the most relevant aspects and would have been known to the members of the interviewing Committee from the service and personal records of the candidates."

There is considerable force in the above criticism.

20. The second consideration is the wholly inept way of making selections. Selection means that the man selected for promotion must be of merit. Where promotion is by seniority, merit takes the second place but when it is a selection, merit takes the first place and it is implicit in such selection that the man must not be just average. When responsible posts are filled by selections, cases are known where selections are not made because candidates of the required merit were not available. It is, therefore, customary for a Committee making the selection to fix a standard below which they should not go. In fact it appears from the affidavit filed by one of the Educational experts who assisted the Committee that he had suggested "that an optimum cutting score for selection should be at least 50%". In other words, his advice was that those candidates who got more than 50% marks along should be considered. The affidavit is of Dr. N. K. Dutt, Reader in Education, Central Institute of Education, Delhi who was the very first expert who sat with the Committee at the time of the selection. Dr. Dutt says that his suggestion for optimum cutting score of not less than 50% had been favourably received by the Departmental Promotion Committee. He further says that every member of the Committee and the advisor were each required to make his own assessment and give the marks out of the maximum 50 marks fixed for a candidate. In a counter-affidavit filed on behalf of the State by the Education Secretary the statements made by Dr. Dutt in his affidavit, though referred to are not controverted. But the actual marking result show an entirely different story. The four members of the Committee made their independent assessment and an average was taken representing the marks received by a candidate. According to the affidavit filed on behalf of the State instead of following the suggestion of the expert, the Committee fixed 30% instead of 50% as the optimum cutting score. 30% is generally considered to be less than just pass marks, being less than one third of the maximum, and it would be absurd to make selections with such a cutting score. The expert advisor had advised 50% of cutting score but the Committee adopted 30% as the cutting score. The expert found that there were many candidates who could not score even 30% marks and so the Committee decided that even candidates who got only 20% marks from the expert may be considered. In this way those who got more than 30% marks from the Committee and more than 20% marks from the expert were declared eligible for selection. This is indeed a travesty of selection. The Secretary has clearly stated in his affidavit that in fixing the qualifying minimum percentage to determine the suitability of the candidate the candidate need have obtained 30% marks and above from the Committee and 20% and above from the expert. We considered that a selection made on such a poor basis cannot be called a real selection at all. For the reason given above therefore we think that the whole process of selection is wrong and unsatisfactory and must be set aside.

21. We have now to turn to the second point involved in the case namely, reservations in favour of backward classes. We are not concerned in this case with reservations made in favour of the Scheduled castes. According to the reservation rules already referred to 8% of the posts are reserved for Scheduled caste candidates and 42% in favour of backward classes. According to the figures given by the State, 163 candidates were selected against unreserved vacancies and 136 candidates were selected against reserved vacancies in favour of backward classes. This, however, did not mean

that a backward class candidate could not be selected to the unreserved vacancies on merit. A backward class candidate can come under the rules in the unreserved vacancies also solely on merit. We are not concerned here whether such a rule is proper when a large percentage of 42% is reserved for the backward classes. We are, however, concerned with the fundamental question as to whether the rules by which backward classes are determined for the purpose of Articles 15(4) and 16(4) of the Constitution are violative of those Articles.

22. Article 15(4) speaks about "socially and educationally backward classes of citizens" while Article 16(4) speaks only of "any backward class citizens". However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 16(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4).

23. Many State Governments had found it difficult to determine which class of citizens can be properly regarded as socially and educationally backward. Several cases have come to this court and the decision of this Court in *M. R. Balaji and Others v. State of Mysore*, (1963 Supp 1 SCR 439 : AIR 1963 SC 649) is generally regarded as the locus classicus on the subject. Several Other decisions have been rendered thereafter and the passage in a judgment delivered by Shah, J. (as he then was) in *State of Andhra Pradesh and Another v. P. Sagar*, ((1968) 3 SCR 595 : AIR 1968 SC 1379 : (1968) 2 SCJ 778) summarises the general principles at page 600. It is as follows :

"In the context in which it occurs the expression "class" means a homogeneous section of the people grouped together because of certain likeness 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 clause (1), Article 15 prohibits the State from discriminating against any citizen on grounds only religion, race, caste, sex, place of birth or any of them. By clause (3) of Article 15 the State is, notwithstanding the provision contained in clause (1), permitted to make special provision for women and children. By clause (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 clause (1). But clause (4) is an exception to clause (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of clause (1). The Parliament has by enacting clause (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 clause (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 Schedule 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 SCR 439 and R. Chitrlekha and Another v. State of Mysore and Others, (1964) 6 SCR 368."

24. It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. In India social and educational backwardness is further associated with economic backwardness and it is observed in Balaji's case (supra) referred to above that backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor - some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words 'socially' and 'educationally' are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced it is generally also socially advanced because of the reformative effect of education on that class. The words "advanced" and "backward" are only relative terms - there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as being socially and educationally backward.

25. In the report submitted by the Backward Classes Committee to the State of Jammu and Kashmir it is stated that agriculture is the main stay of the State's economy. 90% of the population depends for its living on land. See : Chapter IV, Para 38 of the Report. Therefore, the problem of social backwardness in the State, as elsewhere, is the problem of rural India. Nevertheless so much has been accomplished during the past 25 years for the amelioration of the conditions of the rural population that rural India of a past generation has no relevance today. Facilities for education which were practically non-existent a generation ago are now available at the villagers' door-step. In a former age it was only the fortunate few who got through Secondary education because of paucity of teaching institutions, but now the rural areas are studded with Secondary schools at comparatively easy distances. Except in wholly inaccessable areas, even colleges are established not far from the rural population. There is hence a growing sector in the village population which firmly believes in education as an instrument of social advancement and more and more of them are receiving education in these institutions. As a matter of fact, the concept of education as a cardinal element in social equipment has so much permeated these sectors that it is almost the measure of social advance they have made recently. However, side by side with these sectors there are still some sectors of the population which show extreme apathy towards education due to age-old customs and habits of living fostered by poverty, ignorance, superstition and prolonged social suppression. The interests of these sectors must very naturally be the prime concern of the State. Indeed all sectors in the rural areas deserve encouragement but whereas the former by their enthusiasm for education can get on without special treatment, the latter require to be goaded into the social stream by positive efforts by the State. That accounts for the *raison-de-tre* of the principle explained in Balaji's case which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally. If those examples are steadily kept before the mind the difficulty in determining which other classes should

be ranked as backward classes will be considerably eased.

26. The failure to grasp this fundamental requirement has distorted investigations of those who plumped for special reservations for communities which comprised both advanced and backward groups. In *R. Chitralekh and Another v. State of Mysore and Others.* ((1964) 6 SCJ 368 : AIR 1964 SC 1823) Subba Rao, J., (as he then was), speaking for the majority, discarded caste as the dominant criterion in the following words at page 388 :

"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.

This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles. It helps the really backward classes instead of promoting interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority maybe socially and educationally, far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes", object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution."

27. In identifying backward classes, therefore, one has to guard oneself against including therein section which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated. In this connection it must also be remembered that State resources are not unlimited and, further, the protection given by special reservation must be balanced against the constitutional right of every citizen to demand equal opportunity. Moreover, where appointments and promotions to responsible public officers are made, greater circumspection would be required in making reservations for the benefit of any backward class because efficiency and public interest must always remain paramount. It is implicit in the idea of reservation that a less meritorious person is to be preferred to another who is more meritorious.

28. The Jammu and Kashmir Scheduled Castes and Backward Classes Reservation Rules, 1970, are comprised of 5 parts. Part I contains 6 Chapters and Rule 3 says that the permanent residents of the State belonging to the categories of persons in these six Chapters are declared as socially and educationally backward classes of citizens. Chapter I enumerates occupations which are regarded as traditional occupations and Rule 4, says that every person whose traditional occupation is one of the 62 mentioned therein must be regarded as a person belonging to the backward class. Chapter II mentions 23 social casts, and persons belonging to these social castes are regarded as backward. Chapter III describes small cultivators as backward. Chapter IV groups low paid pensioners as backward. Chapter V puts residents in an area adjoining the ceasefire line in the backward class.

Chapter VI, specifies some areas in the State as "bad pockets" and every person belonging to that area is to be regarded as belonging to the backward class. We are not directly concerned with the other parts of these rules. Objection is taken by Mr. Sen, on behalf of the petitioners, to the several types of backward classes designated under the rules and also to the peculiar manner in which the definitions have been framed.

29. Chapter I gives the class designated by traditional occupations. In all about 62 occupations have been identified as traditional. They follow closely the classes designated as traditional occupational classes by the Committee in Chapter XIV of its report. In Para 124, the Committee has stated that with a view to sorting out backward classes from others the claim of each and every occupational and industrial category listed in the census report of 1961, had been carefully examined and it is obvious that the list of traditional occupations is made as exhaustive as possible. A class can be identified on the basis of traditional occupation. A traditional occupation means an occupation followed in a family in which it is handed down by an ancestor to his posterity. If there is a section of the population following an occupation of that description that section can be regarded as a class. Such occupations are generally occupations in which some special skills are necessary like those of an artisan or a craftsman. It is contended by Mr. Sen, that though 62 occupations have been mentioned as traditional occupations a good many of them are not really traditional occupations and with regard to others there has been no investigation in depth as to whether they are traditional occupations or not. It is also contended by him that the definition of 'traditional occupation given in the rules actually distorts the whole picture because whether the father of the person claiming reservation follows the traditional occupation or not, he becomes entitled to be considered as of the class if his grandfather did.

30. There is no doubt that a large number of occupations mentioned in the list is capable of being followed as a traditional occupation. But some of them, at least, do not deserve to be called traditional occupations. Take for example an "agricultural labourer". We have grave doubts if agricultural labour can be regarded as a traditional occupation. The occupation is seasonal and, as is well-known, it is the last refuge of the landless unskilled labourer who has no other source of employment in the rural community. Indeed, if any one deserves special consideration it is the agricultural labourer, but the objection is to its identification as a traditional occupation. An agricultural labourer is just a labourer whose services are utilized wherever unskilled labour is required. In fact he is the source material for hamals and the like-occupations which merely require physical strength and capacity to work. Similarly it would be difficult to say that the following occupations are traditional occupation :

(5) Bearer boy, waiter.

(7) Book binders.

(11) Cook.

(20) Grass seller.

(21) Hawkers, pedlars.

(23) Load carriers.

(29) Old Garment sellers.

(48) Watch repairs.

(51) Grocers in rural areas.

(53) Milk-sellers in rural areas.

(58) Vegetable sellers in rural areas.

(62) Drivers of Tongas and other animal, driven vehicles.

31. All these occupations do not require special skills developed by tradition and can be resorted to by any body with the requisite resources. Then again at serial Nos. 34 and 56 we have a category of priestly classes who, though following a traditional profession can hardly be regarded as socially and educationally backward. We, therefore, think that there must be a proper revision of the traditional occupations to fall properly under Rule 4.

32. But the most serious objection is to the artificial definition given in Rule 2(j). The "traditional occupation" in respect of a person means the main occupation of his living or late grandfather and does not include casual occupation. This would mean that if a person wants the special advantage as a member of the backward class it is enough for him to show that his grandfather was following a traditional occupation. His father may not be following the traditional occupation at all. He might have given it up to follow some other occupation or trade. It is not enough, it is contended, that a traditional occupation was followed by the grandfather but that the occupation should have descended to his son also so that at the date when the grandson is asking for the benefit of reservation the traditional occupation must still in the family and continues to be the living of the family. There is great force in this contention. If the father of the person who claims special treatment under Articles 15(4) and 16(4) has given up his low income occupation and become a trader or a Government servant it will be wrong to give the person the special benefit merely on the ground that his grandfather was following a certain traditional occupation. It was against such misuse that the Committee had issued a warning in Para 129 of its report. It observed :

"While making the foregoing provisions, every possible care should be taken by the State to ensure that the benefit of such provisions is availed of only by those who are bona fide members of the classes declared backward and not by imposters. As already stated it is quite open to the State to declare that persons belonging to low income families following a traditional occupation should be regarded as persons belonging to a backward class if, on the whole, that class is socially and educationally backward. But it is equally essential that at the time when a person belonging to that class claims the special treatment his family must be still following the traditional occupation. Since the rule does not completely ensure this it is likely to be abused and the real person for whose benefit the rule is made will not get the benefit. The rules, therefore, pertaining to traditional occupations must be suitably revised."

33. Chapter II deals with some 23 low social castes. The Committee in Chapter XIII had identified the first 19 out of them and stated that these castes are considered inferior in society as the service which they render carry a stigma in it. They suffer from disabilities and both educationally and economically they are extremely backward. The last four castes in Rule 5 have not been mentioned in Chapter XIII of the report. It is not also known on what basis they have been included as socially

and educationally backward. There may be good reasons for the State Government to do so, but we have no material before us. As at present advised, therefore, we are not prepared to proceed on the basis that serial Nos. 20 to 23 are backward classes.

34. Chapter III identifies cultivators of land with small holdings as a backward class. The limits of his holding differ according to the type of land cultivated and the region in which such land is situated. The cultivator may be an owner or a tenant. He may even be a non-cultivator provided he wholly depends on land for his livelihood. The cultivator is designated as a class on the basis of recommendations made by the Committee in Chapter XII of its report. The reasons given by the Committee go to show that the overriding consideration was economic. A class, as already observed, must be a homogeneous social section of the people with common traits and identifiable by some common attributes. All that can be said about the cultivators is that they are persons who cultivate land or live on land, and the simple accident that they hold land below a certain ceiling is supposed to make them a class. In such a case the relevance of social and educational backwardness takes a subordinate place. In some areas as in Kashmir valley the ceiling for a cultivator is 10 kanals of irrigated land. If a cultivator holds 10 kanals of land or less he is to be regarded as backward, i.e., to say socially and educationally backward. But if his own brother living in the same village owns half a kanal more than the ceiling he is not to be considered backward. This completely distorts the picture. It will be very difficult to say that if a person owns just 10 kanals of land he should be considered socially and educationally backward while his brother owning half a kanal more should not be so considered. The error in such a case lies in placing economic consideration above considerations which go to show whether a particular class is socially and educationally backward. The same error is repeated in Chapter IV wherein the dependant of a pensioner is supposed to belong to the backward class if such pensioner had retired from certain Government posts mentioned in Appendix I and if the maximum of the scale of pay of these posts did not exceed Rs. 100/- p.m. They also included defence service pensioners of the ranks of sepoy, Naik Havaldars, etc. This again is based upon the recommendation of the Committee which in Chapter XI of the reports says "Among others, representatives of pensioners also called on the Committee and explained the difficulties faced by them because of being in receipt of a meagre income in the shape of pensionary emoluments. The memorialities contended that they cannot keep pace with the ever-rising price index as rates of pension have remained static and have not been enhanced as is being done from time to time in the case of Government servants in regular service. It was further argued that they could ill afford to spare any part of their meagre earnings for the education of the children". The Committee felt that these pensioners deserve on these grounds to be shown consideration as backward classes because most of them held Class IV or similar posts. Ex-servicemen who fall in this class are about 90,000 and civil posts pensioners are about 15,000. It is difficult to say that these pensioners are a class in the sense that they are a homogeneous group. They are an amorphous section of Government servant who by the accident of receiving Rs. 100/- or less as pay at the time of retirement or being ex-servicemen of certain grades are pushed into an artificially created body. It may be that they belong to Class IV or similar grade service of the State. But that is not the test of their social and educational backwardness. In days when sources of employment were few, many people though socially advanced might have accepted low paid jobs. Some of them may have failed to make the educational grade and were hence forced by necessity to accept such low paid jobs. Some others might have pre-maturely retired from posts carrying the scale referred to above. The accident, therefore, that they belong to a section of Governments servants of certain category is no test of their social backwardness. The test breaks down if the position of a brother of such a pensioner is considered. If the brother, also a Government servant, has the misfortune of retiring when holding a post the maximum of which Rs. 105/- he was liable to be regarded as not socially and

educationally backward when, in all conscience, so far as the two brother are concerned they remain on the same social level. Another brother who is privately employed and retires from service without any pensionary benefits would not be entitled to be classed as backward under the test. The anomalies arise because of the artificial nature of the group created by Committee. If all the brothers are socially and educationally backward, you will be differentiating between them by calling some more backward and others less backward, a thing not permitted by Balaji's case (supra). There is, therefore, substance in the contention of Mr. Sen that the Committee has created these two artificial groups of "cultivators" and "pensioners" for the purpose of affording certain benefits under the Constitution instead of identifying socially and educationally backward classes.

35. Chapters V and VI of the Rules identify residents of certain areas as backward. In Chapter V the residents of certain village mentioned in Appendix II are considered as backward, these villages being within five miles of the ceasefire line. In Chapter VI some areas in the State are regarded as "bad pockets" and all the residents of those areas are stated to be backward. These two Chapters incorporate the recommendations made by the Committee in Chapter X and IX respectively of the report. Chapter IX relates to "bad pockets". 10 such bad pockets have been identified by the Committee and cover 696 village in certain Districts and Tehsils far away in the interior. The population of these areas according to 1961 census was about three lakhs. The Committee reports as follow :

"There are, for instance well known rather notorious backward areas which have to be treated differently from the rest of the State. There are others which because of difficult terrain, inaccessibility and absence of vehicular communications still retain their primitive character. There are still some others which suffer from deficient production on account of soil being rocky and sandy and irrigation facilities being scanty and inadequate. Besides these, there are areas where due to non-availability of electric power, industrial development even on the scale of cottage industry has yet to come into existence. There are certain areas which combine all or some of these characteristics."

36. Ten such pockets were then examined in detail and the Committee came to the conclusion that owing to lack of communication, inaccessibility, lack of material resources and the like the residents of these areas are living in almost primitive conditions and they are all socially and educationally backward. The civilizing influence of modern life is yet to reach them. These areas are carefully mapped. They are situated in the recesses of inaccessible mountains which have primarily led to the residents therein being almost in a primitive state. The population is about 8% of the total population of Jammu and Kashmir and, in our opinion, there is no serious difficulty in regarding the residents of these areas as being backward. Similar considerations apply to areas adjoining the ceasefire line. They comprise about 179 villages with a population of about a lakh. The difficulties of their situation near the ceasefire line for the last 25 years seem to have contributed to this area being cut off from the main stream of life. The Committee noticed that the difficulties inherent in the living conditions in these areas have inevitably lead the inhabitants of these areas living in economic and educational backwardness. There are restrictions on their free movement and they have to remain indoors after sun set. The male members cannot leave their villages in search of livelihood elsewhere for fear of their wives and children being left behind unprotected. The land is unproductive, no investments could be made in the land because of the nearness ceasefire line. Raids accompanied by cattle lifting and damage to property are not uncommon. Loss of life also takes place occasionally. The inhabitants find it equally difficult to pursue their traditional arts and crafts. The effect of all these contributory factors have kept these areas, in so far as social and

educational progress is concerned, very much behind the rest of the State. We thus find that special reasons have been given by the Committee why it considered these areas socially and educationally backward, and since the classification is not made merely on the ground of place of birth, we do not think that there is any serious objection to regard the residents of the bad pockets and the ceasefire areas as socially and educationally backward. But Rules 10 to 12 have been so framed that the advantage is likely to be misused by imposters. A person wanting the advantage of reservation would be regarded as belonging to these areas if his father is or has been resident of the area for a period of not less than areas if 10 years in a period of 20 years preceding the year in which the certificate of backwardness is obtained. The rules do not insist that either the father or the son should be a resident of the area when the advantage is claimed. Nor does it require that the son should have his earlier education in these area to ensure that he and his father are permanent residents of that area. Any trader or Government servant from outside who is residing for about 10 years in these areas within 20 years of the date when the advantage is claimed would be entitled to be regarded as belonging to the backward class. In order that the benefit may go to the residents of these areas, Government ought to frame rules with adequate safeguards that only genuine residents will get the advantage of special reservation and not outsiders. As the rules stand, outsiders who, in the course of their trade or business happened to live in these areas for 10 years out of past 20 years would be able to claim the benefit. This loophole must be plugged and till that is done, the production of a certificate from the Tehsildar as to the backwardness of any person would be of little value.

37. We have shown above the defects in the rules which purport to identify certain residents of the State as backward. Till the defects are cured, the rules are not capable of being given effect to.

38. In view of the above findings the selections made by Departmental Promotion Committee have to be set aside.

39. It is very unfortunate that this controversy is going on from 1965. The net result of it has been to deprive schools of their Head Masters. There can be no doubt also that on account of various changes effected during the past years, considerable damage must have been done to overall discipline in the schools. The rules of 1969 provide for promotions to the post of Head Masters and Tehsil Education Officers by selection. Therefore, it is essential that these selections must be made on a proper basis. That will take some time. In the meantime the schools must have a proper administrative set up and we, therefore, propose an interim arrangement. Since the selections made on the basis of the present backward class reservations rules are illegal and it would take sometime before those rules are properly revised the State may consider the suggestion whether all the posts which are now vacant may not be filled by selections under the rules of 1969 and appropriate reservations in favour of backward classes be made for future vacancies as they occur after the backward class reservation rules properly revised. Accordingly, the following directions are given as a result of our findings in the three petitions -

(1) All those Head Masters and Tehsil Education Officers who have been confirmed as such or promoted to yet higher posts with effect from the date prior to the filing of the Writ Petition No. 107 of 1965 [Triloki Nath Tikkoo's case (supra)] will not be affected by the orders passed in these cases;

(2) The cases of all other teachers including those who were officiating as Head Masters and Tehsil Education Officers and are eligible for promotion shall be reviewed in a proper selection made in accordance with the 1969 rules. Interviews shall not be the only test. The character rolls and the confidential records shall be taken into due consideration. If in any case the same are not available,

a report or reports should be obtain from authorities who had opportunity to observe the teachers' performance and character;

(3) Pending selection as per (2) above, the following interim arrangement for filing the vacant posts of Head Masters and Tehsil Education Officers is directed :

(a) Those Head Masters and Tehsil Education Officers who were officiating as such since prior to the filing of Writ Petition No. 107 of 1965 [Triloki Nath Tikkoo's case (supra)], and whose appointments had not been set aside as invalid in that Writ Petition or Writ Petition No. 108 of 1969 [Makhanlal's case (supra)] will be restored to the position they held before the filing of Writ Petition No. 107 of 1965;

(b) The remaining vacant posts of Head Masters and Tehsil Education Officers will be filled by those selected in 1971 interviews, provided that each one those selected had obtained at least 50% marks from the Departmental Promotion Committee and 50% marks from the expert. As between them, seniority will be respected;

(c) If in spite of following (b) above, all the vacancies are not filled the remaining vacancies shall be filled by teachers in order of their seniority.

40. The petitioners in the three petitions shall get their costs from respondent No. 1 (i.e. State) in one set of hearing fees.

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