

PETITIONER:
STATE OF PUNJAB

Vs.

RESPONDENT:
HIRALAL & ORS.

DATE OF JUDGMENT:
18/12/1970

BENCH:
HEGDE, K.S.
BENCH:
HEGDE, K.S.
SHAH, J.C. (CJ)
GROVER, A.N.

CITATION:
1971 AIR 1777 1971 SCR (3) 267
1970 SCC (3) 567

ACT:
Constitution of India, Art. 16(1) & (4)-Reservation for backward classes made applicable to initial appointments as well as promotions Validity of.

HEADNOTE:

The appellant-State issued an Order according to which reservation of posts for Scheduled castes, tribes and backward classes was made applicable not only to initial recruitment but also to promotions. Respondents 1 and 3 were in the 'State Government service and the former was the senior. But since the latter belonged to a scheduled caste he was promoted over the first respondent as per the Order. The High Court quashed the promotion on the basis that such reservation might lead to various anomalies.

In appeal to this Court,

HELD : Article 16(1) provides for equality of opportunity to all citizens in relation to appointment to any office in the service of the State subject to the exception in Art. 16(4) that the State may make reservations in favour of backward classes. The reservation contemplated by Art. 16(4) can be made not merely to initial recruitment but also to Posts to which promotions are to be made. Every such reservation under Art. 16(4) does introduce an element of discrimination and promotion of junior officers over seniors; but the Constitution makers thought fit, in the interests of society as a whole, that backward classes should be afforded some protection. If, however, the reservation under Art. 16(4) makes the rule in Art. 16(1) meaningless the decision of the State would be open to judicial review; but the burden of establishing that a particular reservation is offensive to Art. 16(1) is on the person who takes the plea. [271 C, E, 272 D-G, 273 D-F]

In the present case, there was no material from which it could be concluded that the impugned Order violated Art. 16(1). The reservation could not be struck down on hypothetical grounds or on imaginary possibilities. [273 H] General Manager, Southern Railway v. Rangachari, [1962] 2 S.C.R. 586 and A. Peeriakaruppan etc. v. State of Tamil Nadu, [1971] 2 S.C.R. 430, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1218 of 1968.
Appeal from the judgment and order dated November 29, 1966
of the Punjab High Court in Civil Writ No. 271 of 1966.

M. C. Setalvad and R. N. Sachthey, for the appellant.

The respondent did not appear.

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The Judgment of the Court was delivered by
Hegde, J.-On September 12, 1963, the Government of Punjab
passed the following order :

"Subject :-Reservation for the members of
Scheduled Castes, Scheduled Tribes and
Backward Classes in promotion cases.

Sir,

I am directed to refer you to the subject
noted above and to say that at present
reservation for Scheduled Castes, Scheduled
Tribes and other Backward Classes is
applicable to new appointments and not to
promotions which are governed by consideration
of merit and seniority alone. Since those
castes/classes are poorly represented in
various services in the upper grades under the
State Govt.-it has been under the active
consideration of Government that some
reservation in higher grade posts as well
should be made for them. It has now been
decided that except in the case of All India
Services 10 per cent of the higher posts to be
filled by promotion should be reserved for the
members of Scheduled Castes, Scheduled Tribes
and Backward Classes (9 per cent for the
members of Scheduled Castes and Scheduled
Tribes and 1 per cent for the Backward
Classes) subject to the following conditions :
(a) the persons to be considered must possess
the minimum necessary qualification; and
(b) they should have at least a satisfactory
record of service."

Up till that date reservation for Scheduled Castes,
Scheduled Tribes and Backward Classes was confined to
initial recruitment. The first out of every five initial
recruitments was reserved for, Scheduled Castes, Scheduled
Tribes or other Backward Classes.

On January 14, 1964, the Government clarified its order
dated September 12, 1963. In this case we are not concerned
with the first paragraph of that clarification. The second
paragraph of that clarification reads thus :

"Government have since been receiving
references from several quarters seeking
clarification in regard to the implementation
of the said decision. After careful
consideration of the matter, it has now been
decided that :-

(a) The said decision should be applied to
all promotion posts already vacant on 12th
September, 1963, or falling vacant thereafter.

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(b) The reservation should not imply that 10
per cent of the total posts reserved for
promotion in any cadre have to be filled by
Scheduled Castes personnel in the sense that

all existing/ future vacancies will be filled up by Scheduled Castes/Tribes and other Backward Classes candidates until their share in higher services comes up to 10 per cent.

(c) This provision of reservation applies to all State services including Class 1, II, III, and IV posts, the only exception being All India Services.

(d) This reservation should apply even in the case of short term leave vacancies unless it is likely to involve unnecessary dislocation of work in different offices and avoidable expenditure and inconvenience due to mid-year transfers etc.

(e) So far as Scheduled Castes/Tribes are concerned, the very first vacancy existing on/arising after the 12th September, 1963, should be treated as reserved for them and only if no such official is available for promotion against the vacancy reserved for them in the first block of 10 vacancies, a candidate belonging to other Backward Classes may be selected in preference to the remaining officials against one such post only out of one hundred, since the reservation for other Backward Classes may not exceed 1 per cent. However, if Scheduled Castes/ Tribes candidates are available to fill one out of every ten vacancies, the specific reservation in favour of other Backward Classes should be the 51st vacancy.

(f) One reserved vacancy should be carried over to the next block of ten vacancies in case it cannot be filled up within any block of ten posts. Thus, if no Scheduled Castes/Tribes/Backward Classes candidate is promoted against any of the first 10 vacancies the number of vacancies available to such candidates in the following block will be two.

(g) In case an out of turn promotion has already been given to a candidate belonging to Scheduled Castes/Tribes or Backward Classes against a reserved vacancy and then in the same block it happens to be the turn of a candidate belonging

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to the said castes/classes for promotion, such candidate should not be ignored on the ground that 10 per cent reservation has already been exhausted."

Thereafter by another letter of March 18, 1964, the Government issued further clarification of their aforementioned communications. That clarification reads

"To illustrate the above point if there is an official of the Scheduled Castes placed at a position say 73rd in a list prepared for promotion to the higher parts and a vacancy arises therein, he would have precedence over the other 72 officials to benefit out of the first vacancy that occurs on or after 12th September, 1963. His turn would not be withheld merely for the fact that his number on the select list is not in the first ten."

Respondents Nos. 1 and 3 to this appeal were both working in

the Forest Department of the Government as Head Assistants. Respondent No. 1 was senior to Respondent No. 3. Respondent No. 3 belonged to a Scheduled Caste. Hence in view of the order of the Government, Respondent No. 3 was promoted temporarily as Superintendent ignoring the claim of Respondent No. 1. 'Aggrieved by that order Respondent No. 1 moved the High Court of Punjab to quash the promotion of Respondent No. 3 and direct the Government to promote him as Superintendent in the place of Respondent No. 3. The High Court has quashed the promotion of Respondent No. 3. The State of Punjab (now substituted by the State of Haryana) has brought this appeal after obtaining a certificate from the High Court under Art. 133(1)(c) of the Constitution.

In the opinion of the High Court reservation made for the Scheduled Castes, Scheduled Tribes and Backward Classes is not impermissible under the Constitution in view of Art. 16(4) of the Constitution as interpreted by this Court in *The General Manager, Southern Railway v. Rangachari*.⁽¹⁾ But the Government has violated Art. 16(1) by reserving the first out of a group of 10 posts for the Scheduled Castes, Scheduled Tribes and Backward Classes. The High Court was persuaded by the Counsel for the first respondent to visualise various hypothetical cases under which reservation of the type impugned in the present case could lead to various anomalies such as the person getting the 'benefit of the reservation may jump over the heads of several of his Seniors not only in his own grade but even in the higher grades.. They visualised the possibility of Head Assistant leaping over the heads of several seniors of his in the grade of Head

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

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Assistants and thereafter in the grade of Superintendent; subsequently in the grade of Under-Secretaries, Deputy Secretaries and so on and so forth. It is not the finding of the High Court that in any of the grades to which the impugned orders apply, the possibilities visualised by the High Court are imminent or even likely.

Art. 16(1) is an extension of Art. 14. It provides

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

But the equality contemplated by this clause is not an embodied equality. It is subject to several exceptions and one of the exceptions is that provided in Art. 16(4) which says :

"Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State."

In *Rangachari's case*⁽¹⁾ this Court ruled that the reservation contemplated by Art. 16(4) can be made not merely to initial recruitment but also to posts to which the promotions are to be made. This is what Gajendragadkar J. (as he then was) speaking for the majority observed (at pp. 604 & 605) :

"We must in this connection consider an alternative argument that the word posts must refer not to selection posts but to posts filled by initial appointments. On this argument reservation of appointments means reservation of certain percentage in the initial appointments and reservation of posts means

reservation of initial posts which may be adopted in order to expedite and make more effective the reservation of appointments themselves. On this construction the use of the word posts appears to be wholly redundant. In our opinion, having regard to the fact that we are construing the relevant expression 'reservation of appointments' in a constitutional provision it would be unreasonable to assume that the reservation of appointments would not include both the methods of reservation, namely, reservation of appointments by fixing a certain percentage in that behalf as well as reservation of certain initial posts in order to make the reservation of appointments more effective. That being so, this alternative argument which confines the word 'posts' to initial posts

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

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seems to us to be entirely unreasonable. On the other hand under the construction by which the word 'posts' includes selection posts the use of the word 'posts' is not superfluous but serves a very important purpose. It shows that reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may fall to be filled by employees after their employment. This construction has the merit of interpreting the words 'appointments' and 'posts' in their broad and liberal sense and giving effect to the policy which is obviously the basis of the provisions of Art. 16(4). Therefore, we are disposed to take the view that the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. This construction, in our opinion, would serve to give effect to the intention of the Constitution-makers to make adequate safeguard for the advancement of backward classes and to secure for their adequate representation in the services."

The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Art. 16(4) should not make the rule embodied in Art. 16(1) meaningless. But the burden of establishing that a particular reservation made by the State is offensive to Art. 16(1) is on the person who takes the plea. The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. The length of the leap to be provided depends upon the gap to be covered. As observed by the majority in Rangachari's case(1) :

"The condition precedent for the exercise of the powers conferred by Art. 16(4) is that the

State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires

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

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not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports; considerations of 'size' as well as 'values', numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage. In a given case the State may well take the view that a certain percentage of selection posts should also be reserved. for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively."

It is true that every reservation under Art. 16(4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interest's of the society as a whole that the backward class of citizens of this country should be afforded certain protection as observed by this Court in A. Peeriakaruppan etc. V. State of Tamil Nadu(1):

"It cannot be denied that unaided many sections of this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served taking a long range view-if the backward classes are helped to march forward and take their place in line with the advanced sections of the people."

There was no material before the High Court and there is no material before us from which we can conclude that the impugned order is violative of Art. 16(1). Reservation of appointments under Art. 16(4) cannot be struck down on hypothetical

(1) [1971] 2 S.C.R.430.

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grounds or on imaginary possibilities. He who assails the reservation under that Art. must satisfactorily establish that there has been a violation of. Art. 16(1).

For the reasons mentioned above this appeal is allowed and the order of the High Court set aside. Respondent No. 1 who was the petitioner before, the High Court is not represented before this Court. In the circumstances of this case we make no

order as to costs.

V. P. S.

Appeal allowed.

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JUDIS