

CASE NO.:
Appeal (civil) 3430 of 2006

PETITIONER:
Atyant Pichhara Barg Chhatra Sangh & Anr

RESPONDENT:
Jharkhand State Vaishya Federation & Ors

DATE OF JUDGMENT: 08/08/2006

BENCH:
Dr. AR. Lakshmanan & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T
(@ S.L.P.(C) No. 23559 of 2003)

Dr. AR. Lakshmanan, J.

Leave granted.

The above appeal is directed against the impugned common final judgment and order dated 16.8.2003 of the Division Bench of the High Court of Judicature at Jharkhand, Ranchi passed in L.P.A. No.176 of 2003, whereby the High Court allowed the said appeal of respondent No.1 \026 Jharkhand State Vaishya Federation and set aside the common judgment and order dated 3.3.2003 of the learned single Judge of the High Court and thus upheld the validity of Resolution No. 5800 dated 10.10.2002 of the State Government and thus affirmed the decision of the State Government to amalgamate the two classes i.e. Extremely Backward Class and Backward Class and the reduction of reservation from 12% and 9% respectively to 14% only for the purpose of admission in professional educational institutions. This appeal raises important questions of law with respect to reservation in professional educational institutions for the Extremely Backward Classes in the State of Jharkhand. The State of Jharkhand had given 73% reservation for appointments in Government services adopting the Bihar (Scheduled Castes, Scheduled Tribes and Backward Classes) Reservation Act (Bihar Act No. 3 of 1992) with certain modifications vide Notification No. 3465 of 2001 issued on 3.10.2001. Similarly through Notification No. 3884 of 2001 issued on 5.11.2001, there were four specific categories that were entitled to reservation in professional/technical colleges:

Scheduled Caste	-	14%
Scheduled Tribe	-	32%
Extremely Backward Classes	-	18%
Backward Classes	-	09%
Total	-	73%

The process of reservations to 73% was challenged before the High Court of Jharkhand on the ground that it was ultra vires the Constitution in a number of writ petitions. Keeping in mind the fact that a similar petition was pending before this Court (VOICE vs. State of Tamil Nadu \026 S.L.P.(C) No. 13526 of 1993), the Full Bench of the High Court deferred the hearing to await the judgment of this Court. But as an interim measure, the High Court on 22.8.2002 reduced the reservation to 50% with specific directions to be given that any

appointment to Government service made in the open category would be subject to the decision of this Court and also directed that the same reservations would mutatis mutandis apply to reservation in educational institutions as well. The Court clarified this order on 30.9.2002 which reads as under:

"The appointments thus to be made in the said 50% categories(as would now correspondingly stand reduced from 73% to 50%) shall, be on proportionate basis, with due reference and regard being had to the percentage of the categories as constituted the sum-total of the original impugned 73%."

Accordingly, the State of Jharkhand issued Notification No. 5800 of 2002 on 10.10.2002 superseding the earlier Notification of 5.11.2001 whereby quotas were reduced to 50% in consonance with the High Court's orders.

This action by the Government through Notification No. 5800 of 2002 dated 10.10.2002 of amalgamating two classes namely, Backward Classes and Extremely Backward Classes was challenged by the appellants before the High Court of Jharkhand through W.P.(C) Nos. 6220, 6332 and 6545 of 2002. The learned single Judge quashed the Notification. On appeal by the State, the Division Bench allowed the appeal. In response to a number of writ petitions (W.P.Nos. 3696/2002, 4706/2001, 4637/2001 etc.) challenging the validity of 73% reservations with respect to appointments, Full Bench of the High Court through an interim order mandated that the reservation should be limited to only 50% and that the reduction should be done on a proportionate basis with due reference and regard being had to the percentage of categories as constituted the sum total of the impugned order. It also noted that the observations would mutatis mutandis apply to the admission process. This order of Full Bench (Five Judges) is marked as Annexure P-2.

On a petition seeking clarification of the said order at the instance of the State of Jharkhand, the High Court made modifications whereby it clarified that it would be open to the State to fix appropriate percentage quotas with respect to each individual, class and category, as it may objectively and fairly decide, constituting the sum total of 50% (Annexure P-3).

Resolution contained in Memo No. 5 - Reservation-03/2001-5800/Ranchi was issued by the State Government superceding the earlier Notification of 5.11.2001 whereby quotas were reduced to 50% in consonance with the High Court orders. But the quotas were now fixed amalgamating the categories of Backward Classes and Extremely Backward Classes in the following manner:

Scheduled Caste	-	10%
Scheduled Tribe	-	26%
Other Backward Category	-	14%
Total	-	50%

Writ Petition No. 6220 of 2002 was filed by the appellant herein in the High Court of Jharkhand at Ranchi challenging the validity of the Government's Resolution contained in Memo No. 5800/2002 which did not fix the quotas in terms of the order of the Full Bench of the High Court but amalgamated the Backward Classes and Extremely Backward Classes quotas and provided consolidated reservation.

The learned single Judge by his judgment and order dated 3.3.2003 allowed the writ petitions and came to the conclusion that the original Resolution No. 3884/Ranchi dated 5.11.2001 being still in existence so far as it relates to the "Reserved Categories", the respondents cannot club together

the Extremely Backward Category and Backward Category for the purpose of interim arrangement. Consequently, he set aside Resolution No. 5800/Ranchi dated 10.10.2002 to the extent it clubbed together the Extremely Backward Category and Backward Category. The matter was remitted to the State to determine separately as to what will be the percentage of Extremely Backward Category and Backward Category for the purpose of interim arrangement and for admission in professional/technical and equivalent training. The Court also took note of the fact that the High Court on earlier occasion, had merely brought down the percentage of reservation and it did not permit the State to club together one or other category or interfere with the reservation given in favour of the Extremely Backward Category.

Being aggrieved, the State Government filed L.P.A. No. 237 of 2003 and the Intervenor-Jharkhand State Vaishya Federation filed L.P.A. No. 176 of 2003 with the leave of the Court against the common judgment and order of the learned single Judge in W.P.(C) No. 6332 & 6220 of 2002 respectively. However, no appeal was preferred against the said judgment and order of the learned single Judge passed in W.P.(C) No. 6545 of 2003 and the said judgment and order was allowed to become final.

The Division Bench of the High Court by its final judgment and order allowed the appeals and set aside the judgment and order of the learned single Judge and thus upheld the validity of Resolution No. 5800 dated 10.10.2002 of the State Government and thus affirmed the decision of the State Government to amalgamate the two classes i.e. Extremely Backward Classes and Backward Classes and the reduction of percentage of reservation from 18% and 9% respectively to 14% only.

The Division Bench came to the conclusion that even though, a sub-categorization of a particular category may not be interfered with by the Court, the Court cannot direct that the State should make a sub-categorization of a reserved category, that was really a matter of policy. It also came to the conclusion that the earlier order of the Full Bench cannot be understood as confined to altering the proportion and not the category or as preventing it bringing together two categories into one common category. It further came to the conclusion that Resolution No. 5800 dated 10.10.2002 passed by the Government cannot be called in question either on the ground that it is beyond the power of the Government generally or on the ground that it is against the terms of the interim order of the Full Bench as modified. In view of the aforesaid conclusion, it also set aside the direction of the learned single Judge remitting the matter to the State Government to determine separately the percentage of seats for the Extremely Backward Categories and Backward Categories.

Aggrieved by the said order, the above appeal is filed by way of special leave before this Court.

We heard Dr. Rajeev Dhawan, learned senior counsel assisted by Mr. Lakshmi Raman Singh, learned counsel appearing for the appellants and Mr. Anil K. Jha, learned counsel appearing for the respondents.

We have gone through the papers, records and documents placed before us including the order impugned in this appeal and also the order passed by the Full Bench of the High Court. Dr. Rajeev Dhawan, learned senior counsel appearing for the appellants, submitted that the Government was not justified in ordering amalgamation of two classes i.e. Extremely Backward Classes and Backward Classes based on different sets of relevant materials and also ordering amalgamation without there being any study, data and

materials to justify the amalgamation and, therefore, the decision of the Government is vitiated on account of non-consideration of the relevant facts and materials and consideration of irrelevant materials. He further contended that the decision of the State Government to amalgamate two classes does suffer from the vice of discrimination as the two unequals have been treated as equals and thus two different classes of people have been treated as similar.

Our attention was drawn to Notification No. 5800 of 2002 dated 10.10.2002 passed by the State of Jharkhand which, according to the learned senior counsel, was not in terms of the order of the Full Bench of the High Court dated 22.8.2002 read with the clarificatory order dated 30.9.2002 which was passed during the pendency of the writ petitions before the Full Bench. It was further submitted that the Division Bench ought to have noticed that after being given Statehood, the State of Jharkhand had specifically adopted the Bihar Act and also issued Notifications giving 73% reservation to four categories, but in the gap of a year after the High Court orders, the State had issued Notification amalgamating the categories of Extremely Backward Classes and Backward Classes into one without application of mind and without taking into account all the relevant facts which have got an important bearing on the issue. Our attention was also drawn to the decision of this Court in the case of Mandal Commission, Indira Sawhney & Ors. Vs. Union of India & Ors., 1992 Supp(3) SCC 217. Our attention was drawn to certain passages in the said judgment.

Mr. Anil K. Jha, learned counsel appearing for the respondents, submitted that the State Government superseded the earlier Resolution No. 3884 dated 5.11.2001 regarding extension of reservation in admission in specified professional and technical institutions and issued a fresh Resolution No. 5800 dated 10.1.2002 in its place to make it consistent with the directions of the High Court and that in accordance with the directions of the High Court. It was further contended that no separate percentage was fixed for Backward Classes and Extremely Backward Classes and the same was done after careful application of mind and due deliberation by the highest policy making body of the Government i.e., the Council of Ministers and that the decision was taken in view of the fact that the categorization of other Backward Classes between Extremely Backward Classes and Backward Classes was done by the undivided Government of Bihar and was not found exactly relevant in the context of the State of Jharkhand. It was contended that this new policy of the State Government of allocating reservation of other Backward Classes as one block is also similar to and consistent with the policy of the Central Government in this regard.

We have given our thoughtful consideration to the rival submissions made by the learned counsel appearing for either side.

In our opinion, the Division Bench did not appreciate that the Full Bench had given the Government the limited liberty to bring down the percentage of reservation from 73% to 50% for an interim purpose and did not give any direction with respect to the amalgamation of categories. In our opinion, the amalgamation of two classes of people for reservation would be unreasonable as two different classes are treated similarly which is in violation of the mandate of Article 14 of the Constitution of India which is to "treat similar similarly and to treat different differently." It is well settled that to treat unequals as equals also violates Article 14 of the Constitution.

The State has failed to show any new circumstances except for a bald statement that the same was done after careful application of mind and due deliberation by the highest policy making body i.e., the Council of Ministers. There are no materials or empirical data to indicate that the circumstances had been changed and the State has not undertaken any study, research or work. In such circumstances to merely suggest that the council of Ministers had applied their minds and had reached a decision is arbitrary and unreasonable. Mandal Commission's decision(supra) has specifically noted that there is no constitutional bar to a state categorizing the backward classes as backward and more backward class. State of Jharkhand by its actions seeks to disempower communities that have been extended the benefits of reservation after a conscious adoption of the Bihar Act. What the G.O. 5800 seeks to do by combining the Extremely Backward Class and Backward Class into one group is to treat unequals as equals thus violating the notion of substantive equality and Article 14 of the Constitution of India bringing it within the purview of judicial review by Court. It is also to be noticed that while the Bihar Act applied only to the appointment to posts in services, it had been extended to the admissions in educational institutions in the State by the operation of the Court's order dated 22.8.2002 which enabled the mutatis mutandis application of the reservations in employment to educational institutions as well. Mandal Commission's case notes that the actions of the State Government while including or excluding classes to the List is subject to the judicial review. Paragraphs 229 and 422 of the judgment of the Mandal Commission note that a community that has been included in the List can be taken out only after the State has reached a conclusion that the community is adequately represented in the services of the State. Paragraphs 229 and 422 of the Mandal Commission's decision are as under:

"229\005\005There cannot be any controversy indeed there is none - that the Government which is certainly interested in the maintenance of standards of its administration, possesses and retains its sovereign authority to adopt general regulatory measures within the constitutional framework by reviewing any of its schemes or policies. The interval of the period at which the review is to be held is within the authority and discretion of the Government, but of course subject to the constitutional parametres and well settled principles of judicial review. Therefore, it is for the Government to review the lists at any point of time and take a decision for the exclusion of any pseudo community or caste smuggled into the backward class or for inclusion of any other community which in the opinion of the Government suffers from social backwardness."

"422. Under the Constitution, the reservations in employment in favour of backward classes are not intended either to be indiscriminate or permanent. Article 16(4) which provides for reservations, also at the same time prescribes their limits and conditions. In the first place, the reservations are not to be kept in favour of every backward class of citizens. It is only that backward class of citizens which, in the opinion of the State, is "not adequately represented" in the services under the State, which is entitled to the benefit of the reservations. Secondly, and this follows from the first, even that backward class of citizens would cease to be the beneficiary of the reservation policy,

the moment the State comes to the conclusion that it is adequately represented in the services."

This apart, Mandal Commission's case went on to note the importance of setting up of a Backward Commission. It was observed by this Court in Paragraph 847 as under:

"We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under Clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of O.B.Cs. As suggested by Chandrachud, C.J. in Vasant Kumar, there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be."

The communities which are included in the List of Backward Classes and most Backward Classes have been receiving the benefit of reservation after a conscious adoption of the Bihar legislation and categorization by the State of Jharkhand. To say that there has been a complete change in their circumstances in two years so as to exclude them from their special status without any reference to the Backward Castes Commission or a Special Commission which has been specifically appointed for the purpose would be in violation of the guidelines laid down in the Mandal Commission's case. Such a stand has been taken by the Andhra Pradesh High Court in a Muslim reservation's case, T. Murlidhar Rao vs. State of Andhra Pradesh, W.P.M.P.No. 15546 of 2004 in W.P.No.12239 of 2004 which has noted that consultation with the Commission is a mandatory requirement.

It was argued by the learned counsel appearing for the respondents that the Central Government is following the policy of clubbing the Extremely Backward Classes with the Backward Classes. In our opinion, it does not justify Jharkhand following the same policy. Jharkhand Government will look into the facts and circumstances that are peculiar to it

by appointing an Expert Commission or a Body as has been provided for in the Mandal Commission's case which can inquire into the representations/complaints made over under-inclusion and over-inclusion and make binding recommendations. As rightly pointed out by the learned senior counsel appearing for the appellants, the Division Bench failed to notice that the Government did not provide any material on record which would have justified amalgamation of the two classes of people nor were any documents, relevant materials or any reports produced to show a change in circumstances as was alleged by the Government. Before taking the decision to amalgamate two classes, the relevant factors were not taken into account. In fact, the specific reservation for Extremely Backward Classes had been granted on the recommendation of the Backward Commission headed by Shri Mungeri Lal constituted for the said purpose. The said Committee before making recommendation to make reservation separately for Backward Classes and Extremely Backward Classes had kept in mind the economic and social situation as also the necessity for separate reservation. The recommendation is based after a detailed survey. On the other hand, when the amalgamation of the categories took place, there were no material or empirical data to indicate that the circumstances had been changed other than a mere bald statement to the effect. It is settled law that even policy matters have to be tested at the touchstone of arbitrariness and that the present policy is discriminatory and arbitrary. As already noticed, the State of Jharkhand has specifically adopted the Bihar Act and also issued Notifications giving 73% reservation to four categories. This apart, the Full Bench had allowed the State Government only the liberty to reduce the percentage of reservation and not the categories or classes to whom the reservation could be extended to. For the aforesaid reasons, we hold that the order dated 16.8.2003 passed by the Division Bench in L.P.A. No. 176 of 2003 is set aside and the matter is remitted to the State Government for undertaking a deep study and research by a special Committee of Experts constituted for the purpose or by appointing an Expert Commission headed by a Retired High Court Judge or body as has been provided for in the Mandal Commission's case to enquire into the recommendations/complaints made over under-inclusion and over-inclusion and make binding recommendations. The State Government is directed to constitute an Expert Commission of a Body within three months from the date of the receipt of this order. In the result, the appeal is allowed and the order dated 16.8.2003 passed in L.P.A. No.176 of 2003 is set aside. However, there shall be no order as to costs.