

(2017) 05 PAT CK 0037

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 12055 Of 2015

Sapna Singh

APPELLANT

Vs

The State of Bihar & Anr

RESPONDENT

Date of Decision : 11-05-2017

Acts Referred:

Constitution Of India, 1950 — Article 13, 13(2), 14, 15, 15(1), 15(4), 16(4), 19(1), 19(1)(d), 19(1)(g), 21, 29, 38, 46, 141

Citation : AIR 2017 Pat 129 : (2017) 2 PLJR 948

Hon'ble Judges : Sudhir Singh

Bench : SINGLE BENCH

Advocate : Rajesh Kumar Singh, Lalit Kishore, Ranjeet Kumar

Final Decision : Dismissed

Judgement

1. In this writ application, the petitioner has challenged the Govt. Resolution No. 5676 (S) dated 24.06.2015 contained in "Annexure-4" by which Rule 159 (k)(i) of Bihar Public Works Department Code, has been amended, by which publication of tender notice in News paper and/or Internet for Public Works Contracts of estimated cost of Rs. 15 Lacs or lesser amount has been made inapplicable, and its consequential amendment in 159 (kh) of the same Code, and another Govt. Resolution No. 5931 (s) dated 01.07.2015 as contained in "Annexure-5" by which 50% of the Public Works Contracts of estimated cost up to Rs. 15 lacs or lesser amount, being reserved for Scheduled Castes, Scheduled Tribes, Extremely Backward Class, Backward Class and Women of Backward Class, as follows : i. Scheduled Caste - 16%

ii. Scheduled Tribes - 01%

iii. Extremely Backward class - 18%

iv. Backward class - 12%

v. Women of Backward class - 03%

Total - 50%

Remaining 50% of work shall be available for all categories.

2. The petitioner has challenged the above referred resolutions as being, violative of Article 14, Article 19(1)(g) and Article 38 of the Constitution of India.

3. Learned counsel for the petitioner submitted that the petitioner is a registered contractor, under Road Construction Department, Government of Bihar. The government resolutions referred above, are arbitrary, unreasonable and discriminatory. By virtue of amendments under challenge in Bihar Public Works Department Code, the government has taken a decision that publication of tender notice, in the news paper or Internet is not necessary, in respect of Public Works Contract having estimated cost of Rs. 15 lacs or lesser amount, and vide Govt. Resolution No. 5931 dated 01.07.2015, 50% of such Public Works Contracts have been reserved for Scheduled Castes, Scheduled Tribes,

Extremely Backward Class, Backward Class and Women of Backward Class. Absence of publication of tender notice would give rise to arbitrariness and monopoly, and implementation of reservation policy in such Public Works Contract, is violative of Article 14 and 19 (1) (g) of the Constitution of India.

4. The learned counsel for the State submitted that the impugned resolutions are not violative of any fundamental right, guaranteed under the Constitution of India. Article 38 of the Constitution under Part IV, directs the State to secure a social order for the promotion of welfare of people and to minimize the inequalities in income, and endeavour to eliminate the inequalities in status, facilities and opportunities. The learned counsel for the State further submitted that Article 46 of the Constitution directs that State shall promote with special care the educational and economic interest of the weaker sections of the people.

5. At this juncture, we may point out that such challenge, regarding validity of any "law" is made in terms of Article 13 (2) of the Constitution of India, which reads thus: "Art.13 (2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this Clause shall, to the extent of contravention, be void."

6. The term "law" in Article 13 of the Constitution has been given a wide connotation so as to include any ordinance, order, by law, rule, regulation, notification, custom or usage having in the territory of India the force of law. This means that not only a piece of legislation but any of the things mentioned under clause (3)(a) of Article 13 of the Constitution of India can be challenged as infringing a fundamental right.

7. Here, the challenge is made to the resolutions of the State Government contained in Annexure-4 and Annexure-5. In the case of *Madhya Pradesh -Vs- Mandawar*, AIR 1954 SC 493, it has been held that a resolution passed by a State Government under Fundamental Rule 44 of the State is a "law". Even, an administrative order has been held to be a law under Article 13 of the

Constitution of India, by the Hon"ble Supreme Court, in the case of Balejee -vs- State of Mysore, AIR 1963 SC 649.

8. The issue involved in this matter is relating to "grant of contract" following the reservation policy. At this juncture, we must not be unmindful of the principle laid down by His Lordship J. BHAGWATI (as he then was), in the case of Ramanna Dayaram Shetty -Vs- International Airport Authority of India, AIR 1979 SC 1628, as follows: "Where the government is dealing with the public, whether by giving of jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but it's action must be in conformity with standard or norm which is not arbitrarily, irrational or irrelevant."

9. A law is void, if inconsistent with a fundamental right, therefore, a void law is unenforceable, non-est, and devoid of any legal force. Any law made in contravention of Part III of the Constitution of India, is dead from the very beginning and cannot at all be taken notice or read for any purpose whatsoever.

10. Here, we would like to refer the relevant Articles of Part III of Constitution of India. Article 14 of the Constitution of India guarantees the Right to Equality which is one of the magnificent corner-stones of Indian democracy. Article 14 runs as follows: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

11. Two concepts are involved in Article 14, the first is a negative concept but the second is a positive concept. The Hon"ble Supreme Court of India, in the case of Sri Srinivasa Theatre -VS- Government of Tamil Nadu, AIR 1992 SC 1004 held that the two expressions "equality before law" and "equal protection of laws" do not mean the same thing, even if they may be much in common between them. "Equality before law" is a dynamic concept having many facets. One facet is that there shall be no privileged person or class and that none shall be above law. Another facet is the obligation upon the State to bring about, through the machinery of law, a more equal society" Though Article 14 prescribes "equality before law" but the fact remains that all persons are not equal by nature, attainment or circumstances, and, therefore, a mechanical equality may result in injustice. Thus, the guarantee against the denial of "equal protection of law" does not mean that identically the same Rules of law should be made applicable to all persons, in spite of difference in circumstances or conditions. The different needs of different classes or sections of people require differential and separate treatment. It is, therefore, necessary for the State to have the power of making laws to achieve particulars object and, for that purpose, to distinguish, select and classify persons and things. In the case of Gauri Shankar -Vs- Union of India, AIR 1955 SC 55, the Hon"ble Supreme Court observed that "equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike."

12. In the case of Western U.P. Electric Power & Supply Co. Ltd. -Vs- State of Uttar Pradesh, AIR 1970 SC 21, the Supreme Court of India has held thus: "Article 14 of the Constitution ensures equality among equals; its aim is to protect person similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced somewhere treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law"

13. We may take notice of Article 15 (4) of the Constitution of India, which reads thus: "15(4).Nothing in this Articles or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the Scheduled Caste and the Scheduled Tribes."

Article 15 (4) was added to the Constitution of the India in 1951. The reason behind the amendment was that The Madras Government issued an order, allotting seats in the State Medical Colleges community-wises. The said order is popularly known as communal G.O. This G.O was declared invalid because it classified students merely on the basis of caste and religion irrespective of their merit. In the case of State of Madras -VsChampakam Dorairajan AIR 1951 SC 226, the Hon"ble Supreme Court of India held the said G.O void as being violative of Article 15 (1) of the Constitution of the India. A seven Judge Bench of the Supreme Court struck down the classification as being based on caste, race and religion for the purpose of admission to educational institutions on the ground that Art. 15 did not contain a clause such as Art. 16(4).

To get over the difficulties created by such decisions in the way of helping backward classes by making favourable provisions in their favours, Art. 15 (4) was added to the constitution.

The scope of Art. 15(4) is wider than Art. 16(4). Art. 15(4) covers within it several kinds of positive action programs in addition to reservation, however, the reservation of post and appointment must be within reasonable limit i.e. 50% of the maximum.

Now the issue has been set at rest that other backwards classes are also illegible to get the benefit of special treatment noticing they being unequal circumstanced, if the Government so wishes by making such law.

14. Now we may refer Art. 19(1) of the Constitution of the India which reads thus; "Protection of certain rights regarding freedom of speech, etc. -(1) All citizens shall have the right (a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form association of unions (or Co-operative Societies);

- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) omitted by Constitution (Forty-fourth Amendment) Act, 1978;
- (g) to practice any profession, or to carry on any occupations, trade or business".

15. Now we must take notice of Art. 46 of the Constitution of India which reads thus; "Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections- The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

16. In the case of *Dalmia Cement (Bharat) Ltd. V. Union of India*, (1996) 10 SCC 104, The Supreme Court of India held thus: "13. Social justice is the comprehensive form to remove social imbalances by law harmonizing the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State. The ideal of economic justice is to make equality of status meaningful and the life worth living at its best removing inequality of opportunity and of status - social, economic and political."

17. In the case of *Consumer Education & Research Centre v. Union of India* (1995) 3 SCC 42, the Hon"ble Supreme Court of India held that social justice is the arch of the Constitution to ensure life to everyone to be meaningful and liveable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which is the expression. It relates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilized society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. Justice, liberty, equality and fraternity are supreme constitutional values to establish the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. Social justice consists of diverse principles essential for the orderly growth and development of personality of every citizen. Justice is the generic term and social justice is its facet, a dynamic device to mitigate the sufferings of the disadvantaged and to eliminate handicaps so as to elevate them to the level of equality to live life with dignity of person Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury, toward them off from distress and to make their lives liveable for greater good of the society at large. Social justice, therefore, gives substantial degree of social, economic and political equality, which is the constitutional right of every citizen. In para 19, it was further elaborated that social justice is one of the disciplines of justice which relates to the society. What is due cannot be ascertained by an absolute standard which keeps changing depending upon the time, place and circumstances. The constitutional concern of social justice, as an elastic

continuous process, is to transform and accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing. It aims to secure dignity of their person. It is the duty of the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in result. Article 1 of the Universal Declaration of Human Rights envisions that all human beings are born free and equal in dignity and rights and each should act towards one another in a spirit of brotherhood. In that case the question was whether right to social security is a fundamental right of a workman? To make the life of the workman worth living with health, right to health was held to be a fundamental right and it is the duty of the State and the employer to provide facilities and opportunities for ensuring sustained good health and leisure to the workman as a facet of right to life under Article 21.

18. In Paragraph 10 of the judgment, rendered in the case of Panchayat Varga Sharamjivi Samudaik Sahakari Khedut Cooperative Society v. Haribhai Mevabhai, (1996) 10 SCC 320, the Supreme Court of India held thus: "10. Social democracy means a way of life which recognizes liberty, equality and fraternity as principles of life. They are the trinity. One cannot diverse one from the other. Without equality, liberty would produce supremacy of the few over the many. Equality without liberty would denude the individual of his initiative to improve excellence. Without fraternity, liberty and equality would not nurture as their natural habitat. Social and economic justice is a constitutional right enshrined for the protection of the society. The right to socioeconomic justice in the trinity, the Preamble, Fundamental Rights and Directives is to make the quality of life of the disadvantaged people meaningful. Equal protection in Article 14, therefore, requires affirmative action by the State to those unequals by providing facilities and opportunities."

19. In the case of Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 the Supreme Court of India held thus: "17. Providing adequate means of livelihood for all the citizens and distribution of the material resources of the community for common welfare, enable the poor, the Dalits and tribes, to fulfill the basic needs to bring about a fundamental change in the Indian structure. Therefore, with a view to make political democracy stable, the State should see that socio-economic democracy takes strong roots and becomes a way of life. The State, therefore, is enjoined to provide adequate means of livelihood to the poor, weaker sections of the society, the Dalits and tribes and to distribute material resources of the community among them for common welfare etc. The socio-economic justice was held to be fundamental right of the poor. Economic empowerment was, therefore, held to be basic human right and the fundamental right as a part of right to live with equality of status and of dignity."

20. The Supreme Court of India in the case of Lingappa Pochanna Appelwar v. State of Maharashtra & Another, (1985) 1 SCC 479, While discussing the concept of distributive justice, held thus: "14. Under the scheme of the Constitution, the scheduled tribes as a Class require special protection against exploitation. The very existence of scheduled tribes as a distinctive class and the preservation of their culture and way of life based as it is upon agriculture which is inextricably linked with ownership of the land, requires preventing and invasion upon their lands. The impugned acts and similar measures under taken by different States placing restriction on transfer of lands by members of the Scheduled Caste and Scheduled Tribes are aimed at the State policy enshrined in Article 46 of the Constitution, which enjoins that" The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the scheduled castes and tribes and shall protect them from social injustice and all forms of exploitation". One has only to look at the artlessness, the total lack of guile, the ignorance and the innocence, the helplessness, the economic and the educational backwardness of the tribals pitted against the artful, usurious, greedy land grabbers and exploiter invading the tribal area from outside to realize the urgency of the need for special protection for the tribals if they are to survive and to enjoy the benefits of belonging to the "Sovereign, Socialist, secular, democratic republic" which was

vowed to secure to its citizen "justice, social, economic and political" assuring the "dignity of the individual". The great importance which the founding father of the Constitution attached to the protection, advancement and prevention of exploitation of tribals people may be gathered from the several provisions of the Constitution. A part from Article 14 which, interpreted positively, must promote legislation to protect and further the aspirations of the weak and the oppressed, including the tribals, there are Article 15 (4) and 16 (4) which make special provision for reservation in government posts and admission to educational Institutions. Even the fundamental rights guaranteed by Article 19 (1) (d) and (e), that is the right to move freely throughout the territory of India and right to resides and settle in any part of the territory of India are made expressly subject to reasonable restriction for the protection of the interest of any scheduled tribes.

15. The problem of how far and to what extent the law of contract should be used as an instrument of distributive justice has been engaging the attention not only of the legislatures and the courts but also of scholar. Cronman in his recent article, "contract law and distributive justice" observes: If one believes it is morally acceptable for the State to forcibly redistribute, wealth from one group to another the only question that remains is how far the redistribution should be accomplished.

According to learned Author, this could be achieved, not only by taxation but also by regulatory control of private transactions. He accept that distributive fairness can only be achieved by taxation or contractual regulation, at some sacrifice in individual liberty.

16. The present legislation is a typical illustration of the concept of distributive justice, as modern jurisprudence know it. Legislators, judges, and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed "distributive justice". The concept of distributive justice in the sphere of lawmaking connotes, inter-alia, the removal of economic inequalities and rectifying the injustice resulting from dealing or transactions between unequal in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of Society based upon the principle: "From each according to his capacity, to each according to his needs". Distributive justice comprehends more than achieving, lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holding both agricultural and urban, or by direct regulation of contractual transaction by forbidding certain transactions and, perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be resorted their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreement."

21. In the case of M/S Kasturilal Lakshmi Reddy vs. The State of Jammu & Kashmir & another AIR 1980 SC 1992, the Hon"ble Supreme Court held thus: "The concept of Public Interest must as far as possible receive its orientation from the Directive principles. What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody per excellence the constitutional concept of public interest. If, therefore, any government action is calculated to implement or to give effect to a Directive Principles, it would ordinarily, subject to any other overriding considerations, be informed with public interest".

22. The Hon"ble Supreme Court of India in the case of E.P. Royappa v. State of Tamilnadu AIR 1974 SC 555 observed that: "As a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and nondiscrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground. This principle has been re-affirmed by the Supreme Court of India while rendering judgment of Maneka Gandhi's case: AIR 1978 SC 597".

23. We may observe that persons who are in the like circumstances should be treated equally. On the other hand, where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of Article 14 as

this would itself result in inequality. As all persons are not equal by nature or circumstances, the varying needs of different classes or sections of the people require differential treatment. This leads to classification among different group of persons and differentiation between such classes. Therefore, if the law in question is based on rational classification it is not regarded as discriminatory.

24. We are of the view that when a person challenges the validity of a law on the ground that it offends Art. 14, the onus is on him to plead and proved the infirmity. If a person complains of inequality treatment the burden lies on him to place before the Court sufficient material from which it can be inferred that there is unequal treatment. A mere plea that he has been treated differentially is not enough. He must produced necessary fact and figures to established, that he has not only been treated differently from others, but that he has been so treated from persons similarly situated and circumstanced without any basis and that such differential treatment has been made unjustifiably.

25. The initial presumption is in favour of the validity of law, therefore if the person who seeks to impeach the validity of law but fails to adduced sufficient evidence in support of his challenge to the law in question, his plea of the law in question being violative of Article 14 cannot be entertained. The Supreme Court of India has explained the Principal of initial presumption of validity in the case of Ashutosh Gupta -Vs- State of Rajasthan (2002) 4 SCC 34; "There is always presumption in favour of the constitutionality of enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitution Principles. The Presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity possess in making laws operating differently as regards different groups of persons in order to give effect to policies. It must be presumed that the legislature understands and correctly appreciates the need of its own people"

26. Article 14 in its ambit and sweep involves two facets. It permits reasonable classification which is founded on intelligible differentia and accommodates the practical needs of the society and the differential must have a rational relation to the objects sought to be achieved. Further, it does not allow any kind of arbitrariness and ensures fairness and equality of treatment. It is the "fontainhead" of our Constitution, the fountainhead of justice. Differential treatment does not per se amount to violation of Article 14 of the constitution and it violates Article 14 only when there is no reasonable basis and there are several tests to decide whether a classification is reasonable or not and one of the tests will be as to whether it is conducive to the functioning of modern society.

27. We are of the view that whenever a question, whether the action of the government, is reasonable and in public interest, is to be adjudicated by the court, one basic principle which must guide the court in arriving at its determination on the question, is that there is always a presumption that the governmental action is reasonable and in the public interest and it is for the party challenging its validity to substantiate that the State action in question

suffers from want of reasonableness, and public interest. The burden is a heavy one and has to be discharged to the satisfaction of the court by proper and adequate material. The court must not lightly assumed the action taken by the government is unreasonable or without public interest because there are many policy consideration for the government as to take action.

28. The judgment of the Supreme Court of India, rendered in the case *Indra Sawhney Vs. Union of India* (II) AIR 2000 SC 498 (Kerala Creamy Layer Case) is binding under Article 141 of the Constitution of India wherein it has been held that nonexclusion of creamy layer will not only be a breach of Article-14 but even of the basic structure of the Constitution and, therefore, totally illegal.

29. We must, observe that- -Socially advanced Persons/Sections i.e., "Creamy layer" among the "other backward class", which includes "Extremely Backward Class", "Backward Class" and "Women of Backward Class" as defined and notified under The Bihar Reservation of Vacancies in Posts And Services (For Scheduled Castes, Scheduled Tribes And other Backward Classes) Act 1991, shall be excluded as being not entitled to get benefit of reservation in terms of Resolution No. 593(S) dated 01.07.2015 "Annexure-5".

30. In view of the foregoing discussions and except for observation made in preceding paragraph, we find that the Govt. Resolution No. 5676 (S) dated 24.06.2015 and Resolution No.5931 (S) dated 01.07.2015 as contained in Annexures- 4 & 5 respectively, do not suffer from vice of arbitrariness and unreasonableness, and they are not violative of Article 14 and 19 (1) (g) of the Constitution of India.

31. Accordingly, therefore, this writ application is dismissed.