

(1984) 04 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 2180 of 1983

Shivaji and Another

APPELLANT

Vs

The Chairman, Maharashtra Public Service Commission and
Another

RESPONDENT

Date of Decision : 03-04-1984

Acts Referred:

Constitution of India, 1950 — Article 15(4), 16, 16(1), 16(4)

Citation : AIR 1984 Bom 434

Hon'ble Judges : Kotwal, J;Jahagirdar, J

Bench : Division Bench

**Advocate : A. Thorat, for the Appellant; M.B. Mehere, Asst. Government
Pleader, for the Respondent**

Judgement

Jahagirdar, J.—The two petitioners in this petitioner under Art. 226 of the Constitution have challenged the memoranda dt. 20th April, 1983 whereby their services are directed to stand terminated on the expiry of the period of 30 days from the date of the issue of the said notices. There is a somewhat long history behind the issuance of these notices and naturally the facts leading to the issuance of these notices must be stated in great details.

2. Pursuant to an advertisement issued by the Maharashtra public Service Commission on 4th Jan., 1979 the petitioner applied for the posts of Probationary Tahsildars in Maharashtra Civil Services Class II. The notification also declared the filling up of vacancies in several other services such as probationary Deputy Collectors in Maharashtra State, Maharashtra Finance and Accounts Services, Class I, Probationary Deputy Superintendents of Police, etc. and the posts were to be filled on the basis of an examination and that in each category of posts 80% of the posts were reserved for various classes mentioned therein. Scheduled castes, scheduled tribes, denotified nomadic tribes and other backward communities together were allowed 34% of the total number of seats in each category of the posts. Forty-six per cent of the posts in each category

were allotted to the economically weaker sections of the society. Together therefore, there was reservation of 80% of the posts in favour of what the Stat has regarded as backward classes within the meaning of Art. 16(4) of the Constitution.

3. The category of posts for which the petitioners applied and ultimately succeeded is probationary Tahsildars. Maharashtra Civil Service, Class II. There were 25 vacancies to be filled in this category. For the scheduled castes (including scheduled castes converted to Buddhism), scheduled tribes, denitrified nomadic tribes and other backward communities 9 posts were reserved. Nine posts out of 25 posts constituted 34% of the total posts. Eleven posts out of 25 posts constituting 46% of the posts were reserved for economically weaker sections of the society. Thus 20 of the posts were reserved for economically weaker sections of the society. Thus 20 out of 25 posts in the category of Probationary Tahsildars class II amounting to 80% of the total posts were reserved for one or the other section of the community.

4. It may also be stated that in the examination that was held by the Public Service Commission for filling the advertised posts. 10% additional marks were allotted to the people hailing from rural areas. The list of successful candidates in order of merit was to be prepared on the basis of the marks secured by them by following the system of giving 10% additional marks to the persons hailing from rural areas. Ultimately for the posts of probationary Tahsildars a list of a list of 25 candidates was prepared after the examination which followed the system of allowing 10% additional marks to those candidates who hailed from rural areas. The list, which has been annexed as Exh. III to the affidavit-in-reply to this petition, shows petitioner No. 1 at Serial No. 24 and petitioner No. 2 at Serial No. 19. In other words, both of them were successful in the examination and were thereafter duly appointed to the posts of Probationary Tahsildars in the Bombay Division. The appointments of the petitioners took place in the month of Oct. 1980. It has been mentioned to us that in Oct. 1981 the petitioners passed the departmental examinations and in Oct. 1982 they successful completed the training programme thus qualifying themselves for being confirmed in the posts of Tahsildars.

5. In the meantime a different development took place. That was the filing of a writ petition, Special Civil Application No. 1494 of 1980, by one Rajkumar Uday Patil before the Nagpur Bench of this Court. The petitioner in that writ petition had applied for the post of Deputy Collector and had not been selected for the said post. By the aforesaid writ petition he challenged the allotment of 10% additional marks to the persons hailing from rural areas. By a decision D/- 20th Aug. 1981 the Division Bench at Nagpur set aside the condition whereby the 10% additional marks were added to the candidate hailing from rural areas. Before the Division Bench, it was also urged that the reservation to the extent of notification D/- 4th Jan. 1979 of the Maharashtra public Service Commission as illegal, being ultra vires of the Constitution. However the Division Bench did not

express any final opinion on the question because it was thought that if 10% additional marks" condition was set aside the petitioner before the Division Bench could get the post for which he was aspiring. Accordingly, the Division Bench "set aside selection made by the Maharashtra Public Service Commission on the basis of the examination held as per notification D/- 4th Jan. 1979". A further direction was given by the Division Bench that the Maharashtra Public service Commission should prepare a list of the candidates in order of merit on the basis of the marks obtained by each one of them in the written examination and the viva voce test. It was further directed that the weightage of 10% of marks should not be given to any of the candidates.

6. The State of Maharashtra preferred an appeal to the Supreme Court which in its judgment delivered in State of Maharashtra Vs. Raj Kumar, upheld the judgment of the Division Bench of Nagpur Bench confirming the view of the Nagpur Bench that the classification made has none's with the object sought to be achieved and that the said provision does not enjoy the protection of Art. 16(4) of the Constitution.

7. After this the Maharashtra Public Service Commission prepared a merit list by following the directions given in Rajkumar Uday Patil's case. We have already mentioned earlier that the Nagpur Bench did not decide the validity of the reservation made up to the extent of 80% of the total number of seats. The question of validity of reservation up to the extent of 80% was also not raised and, therefore, was not decided before the Supreme Court in the appeal preferred by the State against the judgment of the Nagpur Bench in Rajkumar Patil's case.

8. The Maharashtra Public Service Commission prepared a fresh list of the candidates for the posts of probationary Tahsildars by elimination weightage of 10% of the marks given but on the basis of the reservation of the posts to the extent of 80% on various grounds. This list has been annexed as Exh. IV to the affidavit-in-reply filed by the State of this petition. In this list both the petitioners do not find place. As a result, notices dt. 20th April, 1983 terminating their services have been served upon them and they have challenged the same. It may be noted at this stage that, as per the list originally prepared, both the petitioners also belong to the other backward classes. The second petitioner in fact belongs to not only other backward classes but also to the economically weaker section of the community.

9. In this petition the petitioners have made out a case that the reservation to the extent of 80% by including classes which are not backward classes within the meaning of Art. 16(4) of the Constitution, has deprived the petitioners of being considered and appointed for the posts of Tahsildars. According to the petitioners the reservation made by the State in the instant case beyond 34% is illegal and not protected by Art. 16(4) of the Constitution. According to the petitioner, if this additional reservation of 46% is not made in favour of what the State has regarded as the economically weaker section of the community, then they would

be among the candidates selected for the posts of Tahsildars. It is true that in the earlier list they had the advantage of the condition of 10 marks" weightage and as result of the deprivation of that weightage they have lost their places in the list of successful candidates. It is urged on behalf of the petitioners that they have been deprived of one advantage and have been saddled with a disadvantage, namely of not belonging to economically weaker section of the community. The classification made on this basis is not supportable by law and if this reservation made on the basis of this classification is removed they would be selected for the posts of Tahsildars.

10. Mr. Thorat, the learned Advocate, appearing in support of this petition, has taken us through the relevant provisions of the Constitution and of the decisions of ground to the Courts dealing with the question of reservation. It is not necessary for us to refer to all the authorities of which Mr. Thorat has placed reliance. In our opinion, three questions arise for determination in this case in the light of the law contained in the Constitution. The first question is whether what the State has regarded as economically weaker section of the community is included in backward classes as mentioned in Art. 16(4) of the Constitution? Secondly, whether they are or are not adequately represented in the service, under the State? The third question which is more important than the other two is whether the State is justified in making reservation of the posts to the extend of 80%? This deprives rest of the community of the equality that is guaranteed to it under Art. 16(4) of the Constitution.

11. Art. 16(1) says that there shall be equality or opportunity for all citizens in matters relating to employment or appointment to any office under the State. Cl. (4) of Art. 16 stipulates that nothing that is contained in Art. 16 "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." From what has been extracted from cl.(4) of Art. 16 of the Constitution it is easily seen that appointments to posts can be made in favour of any backward class of citizens. Further such reservation can be made only if in the opinion of the State that backward class of citizens is not adequately represented in the services under the State. Though it is not specifically mentioned in cl. (4) of Art. 16, reservation should not be such as to obliterate the equality of opportunity that is guaranteed to the citizens under cl. (1) of Art. 16 of the Constitution. These three propositions in our opinion, are well-established by a long line of decisions of the Supreme Court. The decision in M.R. Balaji and Others Vs. State of Mysore, is generally regarded as locus classic on the subject. That judgment dealt with to Art. 16(4) was equally true in regard to Art. 16(4), care should be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating generally competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4), beyond the permissible and legitimate limits would be liable to

be challenged as a fraud on the Constitution.

12. The scope of Art. 16(4) also came to be considered in *T. Devadasan Vs. The Union of India (UOI) and Another*, . In this latter decision also the law, relating to the reservation in so far as it related to Arts. 15(4) and 16(4) of the Constitution, was noted. Then, it was observed that generally speaking, reservation ought to be less than 50%. On the facts before the Supreme Court, reservation was as high as 64% and it was held unconstitutional. In *Shri Janki Prasad Parimoo and Others Vs. State of Jammu and Kashmir and Others*, , it was pointed out interpreting Art. 16(4) of the Constitution that mere educational backwardness or the social backwardness does not by itself make a class to citizens backward. In order to be identified as belonging to such a class one must be both educationally and socially backward. Backward classes must be comparable to Scheduled Casts and Scheduled Tribes. In a later judgment, namely *State of Uttar Pradesh and Others Vs. Pradip Tandon and Others*, it was pointed out that mere economic backwardness was not educational and social backwardness. Economical backwardness was one only of the tests to determine social and educational backwardness. If that test is the sole criterion of social and educational backwardness it was held that it would fail.

13. All the decisions of the Supreme Court including those to which we have made reference have taken the view that reservation under Art. 16(4) of the Constitution should not be unreasonable, namely that reservation should not exceed 50% of the total number of posts and that backwardness which is mentioned in Art. 16(4) is equivalent to social and educational backwardness mentioned in Art. 15(4). If this is so, it must necessarily follow that backwardness means both economical and educational. Economic backwardness cannot be the sole test of social and educational backwardness to merit special treatment mentioned in Art. 16(4) of the Constitution. This is so despite the fact that in one case, namely *Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others*, reservation to the extent of 64% was upheld but it was so done on the facts and circumstances of the case relating to the services in railway.

14. We must, therefore, proceed on the basis that Art. 16(4) applies only if two tests are satisfied:

The class of citizens is backward socially and educationally.

(2). That the class is not adequately represented in the services under the State.

Art. 16(4) could not be invoked unless a class of citizens is not adequately represented in services.

15. In the present case, it has not been demonstrated to us by any material placed on record in the affidavit-in-reply or otherwise that reservation to the extent of 46% on the basis of economic backwardness in addition to 34% made

in favour of scheduled castes and others, is justified. Social and educational backwardness alone can be valid basis for reservation. Since the state in the instant case had proceeded to determine the aforesaid backwardness of only on the basis of economic backwardness, this reservation made to the extent of 46% in addition to 34% made in favour of scheduled castes must be held to be invalid and ultra vires of the Constitution.

16. Mr. Mehre, the learned Government Pleader appearing for the State has sought to support the main reservation by contending that economic backwardness itself is an ingredient of social and educational backwardness and on the facts of the case before us reservation made in favour of the economically weaker section of the community should be upheld. According to him the classification of economically weaker section of the community has been made by the Government on the basis of objective tests, such as salaries of the persons where they are employed and income from all sources where the persons are not salaried persons. Reservation to the extent on 80% embraces economically weaker section of the community after taking into account the reservations which have already been made in favour of other backward classes. This is also at present embodied in the circular dt. 27th April, 1979.

17. Our attention was invited by Mr. Mehre to the content of this circular. Para 4 of the same mentions that where adequate number of qualified suitable candidates are not available to fill 80% reservation from persons having family income within Rs. 2,400/- per annum, preference for the balance of reserved seats may be given to candidates whose family income ranges from Rs.2,400 to Rs.45,800 per annum. Para 6 proceeds to state that while filling in the vacancies reserved for the economically weaker section of the community, other things being equal, preference should be given for appointment to the candidates belonging to economically weaker sections of the backward classes. According to Mr. Mehre, this itself shows that the reservation that itself shows that the reservation that is mentioned in this circular and which has been followed by the Maharashtra Public Service Commission in the instant case in pith and substance reservation for the backward classes and is not merely in favour of the economically weaker section of the community.

18. We are unable to agree with these interpretations of the facts before us. Merely because among particular class of persons who are chosen for the selective treatment preference is given to another sub-class which may be backward within the meaning of Art. 16(4) of the Constitution, it does not follow that the test of the making reservations for backward classes as mentioned in Art. 16(4) is reservation for the backward classes only which is permissible under art. 16(4) then probably we would not have launched further inquiry into this question except to find out whether the other conditions mentioned in Art. 16(4) are satisfied. That the reservation for the economically permissible under the provisions contained in Art. 16(4) has been sought to be established by the affidavit-in-reply which states as follows:

"I say that the candidates belonging to economically weaker section of the Society have no opportunities of education and, therefore, they are educationally backward and hence the State has certain reservations for them on humanitarian grounds by making the sub-classification."

In the light of the law which we have discussed earlier it is impossible for us to accept the assertion made in the affidavit-in-reply. We are, therefore, satisfied that the class of persons for whom reservation is made to the extent of 146% of the total seats in the instant case is not permissible under the provision of Art. 16(4) of the Constitution. It is not demonstrated to us that the said class is a backward class as understood under Art. 16(4) of the Constitution.

19. The next question is whether the State is of the opinion that the said class, namely economically weaker section of the community, is not adequately represented in the services under the state. No material has been placed before us to show that the state is of the required opinion. What has been stated in para 5 of the affidavit-in-reply is as follows:--

"I say that Government Circular dt. 27-4-1979 clarifies that the Government has examined the existing measures pertaining to the employment opportunities and concessions at present admissible to the economically weaker section of the Society and considered all the modifications or additions needed to be made therein. I further submit that, as a positive measure for helping the Economically Weaker Section of the Society, the Government has decided by the above Circular to reserve 4 out of every 5 vacancies.

We do not find in the affidavit-in-reply or otherwise any material to show that the state was called upon to apply its mind to this question arising necessarily under Art. 16(4) of the Constitution and after the application of mind formed an opinion that the present class was not adequately represented in services under the State. The second question must also be answered in the negative against the State.

20. the greatest infirmity in the policy which has been implemented in the present case is the large percentage of reservation which has been made by the Government. The learned Government Pleasured was naturally hard pressed to support the reservation which has been made to the extent of 80% in the present case. Mr. Mehre made an attempt to justify the same by contending that the reservation to the extent of 34% in favour of the scheduled castes and allied classes is wholly and totally supportable. If this is so, then the state would be justified in making reservation to the same extent or to similar extent in favour of another backward class which in the instant case, in the opinion of the State, is economically weaker section of the community. If reservation to the extent of 34% of the seats or the posts can be made in favour of one segment of that class says Mr. Mehre, reservation of 146% as it has been made in the instant case, can be made validly in favour of another segment of backward class. It is impossible to accept this statement. If this is accepted nothing can prevent the

State from making reservation of 25% in respect of each of the 4 or 5 segment of backward classes and swallow up the entire 100% in favour of the backward classes. This is exactly what is prohibited by Art. 16(4) as interpreted by the Supreme Court in its various decision. Such a reservation or reservations even to the extent of 80% as it has been done in the instant case, therefore, destroys the equity of opportunity guaranteed to the citizens under Art. 16(1) of the Constitution. We have, therefore, no hesitation in holding that the reservation of 46% by the State in the instant case in favour of the alleged backward classes of the community is not supportable by law. We must make it clear that the reservation to the extent of 34% of the total number of seats made in favour of the scheduled castes (including scheduled castes converted to buddism), Scheduled Tribes, dignified nomadic tribes and other backward classes is supportable in law and we are not interfering with the appointments made on the basis of the said reservation.

21. Mr. Mehre has canvassed a view that this court can suggest that reservation should not exceed 50% and appointments may be made on the basis that there should be reservation up to 50% and appointments may be made on the basis that there should be reservation up to 50%. It is not possible to accept this suggestion of Mr. Mehre because it is not for the Court to suggest as to what should be extent of reservation in a particular case. It is for the State to decide, after considering all the factors which are relevant to the question arising under Art. 16(4) as to what should be the extent of reservation for the backward classes. Mere over, in the present case we have held that there is no formation of the opinion of the State that any particular backward class in respect of which reservation is to be made is not adequately represented in the service under the State.

22. In the result, this petition must succeed. The revised list of candidates prepared by the Maharashtra Public Service Commission after deleting the weightage of 10% marks but adhering to 46% reservation in favour of the economically weaker section of the community therefore lacks the authority of law. The letter s dated 20th April 1983 issued to both the petitioners on the basis of the said revised list are, therefore, illegal and are set aside. It is, however, made clear that the Government in consultation with the Maharashtra Public Service Commission should proceed to prepare a revised list of candidates eligible to fill in the posts of Tahsildars on the basis that there is reservation of 34% in favour of scheduled castes and other allied classes and that there is no reservation beyond 34% up to 80% in favour of the economically weaker sections of the community. There shall be no order as to costs.

23. Petition allowed.