

(1991) 02 BOM CK 0077
In the Bombay High Court
Case No : Writ Petition No. 479 of 88

Vishvanath Putu Chipkar and Others

APPELLANT

Vs

Mormugao Port Trust and Others

RESPONDENT

Date of Decision : 13-02-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 16, 16(4), 335
Major Port Trusts Act, 1963 — Section 126, 28

Citation : (1991) 4 BomCR 39 : (1991) 93 BOMLR 220

Hon'ble Judges : G.D. Kamat, J;E.S. D'Silva, J

Bench : Division Bench

Advocate : F. Rebello and G.D. Kirtani, for the Appellant; V.B. Nadkarni and A.C. Navelkar for the respondent No. 1 and G.U. Bhobe, for the respondent No. 2., for the Respondent

Final Decision : Dismissed

Judgement

G.D. Kamat, J.—The petitioners and respondents Nos. 3 to 6 are the employees of Mormugao Port Trust, the first respondent. Mormugao Port is a Major Port under the Major Port Trust Act, 1963. u/s 3 thereof the Central Government constitutes a Board of Trustees for that port consisting of a Chairman, a Deputy Chairman and not more than 19 persons.

2. The petitioners were initially appointed as Clerks between the period 1964 to 1966 and promoted as Senior Clerks in 1972-1973. Respondents Nos. 3 and 4 were appointed as Clerks in the year 1979, respondent No. 5 in 1982 and respondent No. 6 in 1983 and subsequently promoted is Senior Clerks.

The next promotion for a Senior Clerks is that of Accountant. According to the petitioners based on seniority and otherwise nothing adverse found, they are liable to be promoted as Accountants, as on 31st August, 1987, respondent Nos. 4 and 5 on 5th September, 1988 and respondent No. 6 ad-hoc basis on 28th October, 1988. It is now set out that respondents Nos. 3, 4, 5 and 6 though junior to the petitioners were promoted to the posts of Accountants out of turn

they belong to Scheduled Caste/Scheduled Tribe.

3. Section 28 of the Major Port Trusts Act, 1963, enables the Board of Trustees to make regulations not inconsistent with the Act to provide for appointment, promotion, suspension, removal and dismissal of its employees, matters relating to leave, leave allowances, pension, gratuity, terms and service conditions of the employees and other matters which are incidental to or necessary for the purposes of regulating the appointment and conditions of service of its employees.

Section 126 thereof says that notwithstanding anything contained in the Act the first regulation under this Act shall be made by the Central Government and the same to have effect on being published in the Official Gazette. Section 125 empowers the Central Government when it considers necessary in public interest to do so, by order in writing, to direct the Board of Trustees to make any regulation for all or any of the matters specified in section 28 or to amend any regulation within such period as the Central Government may specify in that behalf.

4. By virtue of section 126 read with section 28 of the Major Port Trusts Act, the Central Government made a Regulation known as the Mormugao Port Employees (Recruitment, Seniority and Promotion) Regulation, 1964, for short the "Regulation". This Regulation has undoubtedly come into force from 1st July, 1964, and Clause 13(a) is to this effect :-

"Section 13(a)---Reservation to Specified Sections of the People:

Orders issued by the Central Government from time to time for the reservation of appointments or posts under the Central Governmental in favour of Scheduled Castes and Scheduled Tribes shall apply mutatis mutandis to all appointments governed by these regulations ."

5. From the above, therefore, it is clear that in matters of reservation of posts for Scheduled Caste for short "S.C" and Schedule Tribes, for short "S.T" the Regulation clearly provides that orders issued by the Central Government from time to time shall mutatis mutandis apply to all appointments governed by the Regulation. By invoking a Circular viz. Department of Personnel O.M. No. 27-2-71-Estt. (S.C.T.) dated 27th November, 1972, issued by the Central Government to all ministries, etc. on the subject of reservation for S.C/S.T. in posts filled by promotion-promotions on the basis of seniority subject to fitness (Exh. A-1), the Mormugao Port Trust issued an Office Order dated 28th July, 1975 (Exh. 1). This Office Order made in suppression of para 6 of the Office Order earlier made on 28th September, 1973, says that there will be reservation of 15% for Scheduled Caste and 71/2% for Scheduled Tribes in promotions made on the basis of seniority subject to fitness in appointments to all posts Class I, Class II, Class III and Class IV in grades or services in which the allotment of direct recruitment does not exceed 50%. It also lays down the procedure as to how the promotions are to be made on the basis of seniority to fitness and the

decision to be taken on the suitability of the employee by a Departmental Promotion Committee instead of individual officer. No further details of this Office Circular nor, for that matter the Circular of the Central Government dated 27th November, 1972, reserving posts of 15% for S.C. and 71/2% for S.T. in promotions need be referred as the same has no bearing on the controversy involved in the present except to say that seniority subject to fitness is sine qua non.

6. In the matter of reservation for S.C/S.T. the Government of India has been issuing Circulars. It is common ground that for direct recruitment to posts the reservation was 5% for S.C. and 2% for S.T. but from 1st June, 1985, is 2% and 1% respectively.

7. Goa, Daman and Diu constituted a Union Territory until Goa became a separate State sometime on 30th May, 1987. The S.Cs recognized for the territory of Goa then were (1) Bhangi (Haladi), (2) Chamber, (3) Mahyavanshi (Vankar), (5) Mang and the S.Ts recognized were (1) Dhodia, (2) Dubla (Halpati), (3) Naikda (Talavia), (4) Siddi (Nayaka) and (5), Varli. But, once the territory of Goa was comprised as a separate State, by virtue of section 19 of the Goa, Daman and Diu Re-organization Act, 1987, the Constitution (Scheduled Castes) Order, 1950, the Constitution (Scheduled Castes) Union Territories) Order, 1951, the Constitution (Scheduled Tribes) Order, 1950 and the Constitution (Scheduled Tribes) (Union Territories) Order, 1951, stood amended and the Constitution (Goa, Daman and Diu) Scheduled Castes Order, 1968 and the Constitution (Goa, Daman and Diu) Scheduled Tribes Order, 1968, stood repealed. The S.Cs now specified in Part XXII Goa are : (1) Bhangi (Haladi), (2) Chambhar, (3) Mahar, (4) Mahyavanshi (Vankar), (4) Siddi (Nayaka) and (5) Varli, under Articles 341 and 342, respectively, of the Constitution of India.

8. After Goa became a State the Social Welfare Department of the Government of Goa on 8th February, 1988, issued a Circular. That Circular referring to the letter of the Government of India. Ministry of Home Affairs, New Delhi, bearing No. B.C. 16014/1/82-S.C. & O.B.C. II dated 2nd February, 1985, says and clarifies that the S.C./S.T. persons who have migrated from the State of origin to some other State for the purpose of seeking education, employment, etc. will be deemed to be S.C./S.T. of the State of their origin and will be entitled to derive benefits from the State of origin and not from the State to which they have migrated. The Circular further clarifies that hitherto the administration had adopted central procedure for reservation of vacancies in Government offices for S.C./S.T. candidates from any part of India who had migrated to Goa, but since Goa has become a State, Government has decided that only S.C./S.T. which have been notified for the State of Goa shall be appointed against reserved posts clarifying that S.C./S.T. officers who have been already appointed will continue to enjoy the benefits of the reservation provided in the rules.

9. The petitioners aver that respondent No. 3 hails from Chambhar community but his place of origin is Karnataka. Respondents No. 4 hails from Halbi

community and is from Maharashtra. Respondent No. 5 hails from Adi community and is from Andhra Pradesh and that respondent No. 6 claims to belong to Chambhar community from Goa.

None of these respondents have chosen to file their affidavits before this Court. It may therefore be taken that the statement made by the petitioners in respect of the community to which each of respondents Nos. 3 to 6 belongs to and their place of origin is not disputed.

10. Counsel for the petitioner has now urged the following propositions :-

(1) fixing of a higher percentage at the stage of promotions for S.C./S.T. than the percentage fixed at the stage of direct recruitment is arbitrary being violative of Articles 14 and 16 of the Constitution of India;

(2) when percentage of reservation for direct recruitment on a local or regional basis is done on the basis of actual population of S.C./S.T. for the local or regional area, then there cannot be different basis for reservation at the stage of promotion;

(3) when the recruitment is on local or regional basis then only those S.C./S.T. so declared for the local or regional area can get the benefit of reservation and not others who may be S.C./S.T. but not declared for the local or regional area notwithstanding whether the employer concerned is an instrumentality of the Central Government, and

(4) when reservation is based on percentage of population when even if the 40 point roster is adopted, the point of reservation must be based on the percentage reserved for the local or regional area.

11. In opposing this petition an affidavit has been filed by G.S. Borkar, Senior Assistant Secretary on behalf of respondent No. 1 and Thomas Mathew, Under Secretary, Government of India, Ministry of Surface Transport (Ports wing) on behalf of the Government of India, respondent No. 2. It is averred that the Mormugao Port Trust though an autonomous body in as much as constituted under the Major Port Trusts Act, 1963, is under the control and supervision of the Central Government. All orders issued by Government of India from time-to-time regarding reservation in the services for S.C./S.T. are applicable to port service; that prior to 1985 reservation for direct recruitment to Class III and IV posts was 5% for S.C. and 2% for S.T., but since 1st June, 1985, the percentage of reservation was changed to 2% for S.C. and 1% for S.T., but the reservation percentage for promotions in all categories including Class I and Class II are 15% and 7 1/2% for S.C./S.T. respectively. This percentage is applicable in all Government of India offices and organizations under the Government of India irrespective of the State or Union Territory in which they are located. In answering that such policy is not arbitrary it is averred that it is a conscious policy of the Government that reservation should be extended to posts filled in by promotion also. The rationale for providing higher percentage of reservation in

promotions with its background is explained by saying that it emanates from the mandate of the provision contained in Article 16(4) of the Constitution of India and in implementation of the constitutional requirements the Government of India issued those instructions. The reservation at the direct recruitment was available to start with but then it was represented to the Ministry of Home Affairs that the same does not ensure adequate representation of S.C./S.T. in higher grades of public services, with the result Government of India was perforce to make an Office Memorandum bearing No. 5-4-55-S.C.T. (1) dated 4th January, 1957, extending reservations to promotions also. Promotions in Groups "C" and "d" posts were also covered from 1963. The policy was extended to promotion on seniority basis in 1972 and further extended to include Group "B" and upto lowest rung of Group "A" posts since 1974. It is next averred that there are different and diverse percentages of reservation fixed for different regions States. With a view to achieve uniformity and stop wide variations a separate pattern has been evolved for direct recruitment in proportion to S.C. and S.T. population in different States and Union Territories. As an instance, in Nagaland and Mizoram the percentage of reservation for S.T. in direct recruitment is fixed at 45% for Group "C" and "D" posts which is considerably at higher level than other States and this is obviously so because the S.T. population in that region is very High and in relation to the State of Punjab the reservation for S.C. is 27% based on S.C. population. The percentage of reservation for S.C./S.T. as the case may be, comparatively is higher than the other, based on State/region wise population. Once S.C./S.T. candidates get into Government service, with a view to obtain uniform treatment in the matter of reservations in promotion, the percentage is 15% and 71/2% for S.C./S.T. respectively, is the thrust of the respondents.

It is then explained away that it is a policy decision of the Government that while proportion of S.C./S.T. based on the local population could be the basis for recruitment at initial level, in promotion the percentage should be based on the proportion of the S.C. and S.T. on All India population at 15% and 71/2% respectively and in that fashion it is averred that the 40 point roster now prescribed for reservation on promotion is consistent with that policy of the Government.

12. At the threshold, Mr. Nadkarni, learned Counsel appearing for the first respondent, urged that the policy of the Government of India which is imbibed by the Mormugao port Trust with its variation from time-to-time has been consistently followed for a large number of years in the first place and secondly regard being had to the promotions of respondents No. 3 to 6 already effected between the period from 1987 to 1988, cannot now be undone at the behest of the petitioners and set the clock back. He also equality urged that what is finally challenged in the prayers to the petition is the quashing of the Officer Order dated 28th July, 1975 (Exh. A) and Government of India Memorandum dated 27th November, 1972 (Exh. A-1) and not Clause 13(a) of the Regulation made under a statute. In other words, the argument is even if this Court is to grant a

writ as prayed for in favour of the petitioners, Clause 13(a) of the Regulations will remain in the field and therefore, the petition is liable to be dismissed on this ground alone.

It is true that the petitioners have not specifically prayed for striking down Clause 13(a) of the Regulation, but what that clause finally says is that orders issued by the Central Government from time-to-time for reservation of appointments to posts under the Central Government in favour of the S.C./S.T. shall apply Mutatis mutandis to all appointments governed by the Regulation.

13. Now, Mr. Nadkarni relying upon an observation in the Supreme Court decision in S.S. Sharma and Others Vs. Union of India (UOI) and Others, , says that ordinarily the Court should insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well-known process of formally applying for amendments.

We do not think that any particular advantage can be derived by the respondents from that omission, for finally the petitioners have put under challenge the Office Memorandum of the Government of India (Exh. A-1) as also the Office Order (Exh. A) made thereunder which admittedly Mormugao Port Trust had imbibed for the purpose of making reservations in favour of S.C/S.T.

14. Mr. Rebello, Counsel for the petitioners, on invoking Articles 15(4), 16(4), 335, 341 and 342 of the Constitution of India urged that the reservations to backward classes spoken to in Clause (4) of Article 16 must stand the test of equality and once it is shown that the reservation in favour of any class is either arbitrary or offends the maintenance of efficiency the courts are bound to strike it down. He now says in what manner direct recruits belonging to S.C. or S.T. differ from promotees so as to lay down two different percentages one for their direct recruitment and other for the class of promotees. According to him, if percentage initially on direct recruitment is 2% of S.C. and 1% of S.T. the same must be the percentage for promotions and this argument is further supplemented by saying that it is the same S.C./S.T. persons who were initially recruited who would be promoted on their turn later. Viewed in this context according to him, fixing a higher percentage is arbitrary or unreasonable having no basis whatsoever.

15. He relies on the decisions of C.A. Rajendran Vs. Union of India (UOI) and Others, and Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others, . In Rajendran's case the Supreme Court observed that there can be reasonable classification of employees for the purpose of appointment and promotion but however held that provisions of Article 16(4) are to be strictly construed and they are required to be interpreted in the context and background of Article 335. It is equally held that Article 16(4) confers discretionary power on the State to make reservation and no constitutional duty is imposed on

Government and secondly, in making provision for reservation of appointments or posts the Government has to take into consideration not only the claims of the members of the backward classes, but also the maintenance of efficiency of administration which is a matter of paramount importance. In fact, the maintenance of efficiency in administration was upheld in the earlier decision of the Supreme Court in *The General Manager, Southern Railway Vs. Rangachari*, .

It is therefore urged that S.C./S.T. candidates initially recruited by virtue of the reservation policy when their turn would come for promotions the requirement of efficiency at higher posts being higher cannot be given a go-by and this is stated to be a constitutional mandate contained in Article 335. It is indeed true that Article 335 of the Constitution clearly says that the claim of the members of the S.C./S.T. shall be taken into consideration consistently with the maintenance of efficiency of administration in making appointment to services and posts in connection with the affairs of the Union or of a State.

16. According to the Counsel for the respondents, the reservation policy of 15% and 7 1/2% at promotional level is independent from the policy of reservation at the direct recruitment level. These two independent policies are based on the requirement of adequate representation at the two stages/levels. It is next urged that a greater percentage of reservation at promotional level is from amongst that class of persons, namely SC/ST who had been initially recruited and therefore, in so far as promotions are concerned, they are restricted to those persons only and that in any case the reservation at 15% and 7 1/2% is not a matter of course and it is based on the criterion of seniority subject to fitness and therefore, there can be no complaint that efficiency in administration would be stake. The appointments at higher level are far less in number compared to the requirement of filling posts at lower level. Being so, it is urged that maintaining same percentage on direct recruitment and promotional level will not only operate unjustly to the class in whose favour the reservation is made, but will also hit the adequate representation at higher levels.

17. It is next contended that based on the population of both ST/SC the reservation made is on local or regional basis for the purpose of recruitment and appointments. The Constitution provides for the President to specify who are SC and ST but based on the population, the ratio of reservation varies considerably from region to region or from State to State and/or Union Territory. The recruitment is made on local or regional basis, for employment within a State of those members of the SC/ST who are given the benefit based on the specification made by the President and no outsiders. In other words, the contention is that though for the State of Goa Mahar is declared to be SC a person belonging to that community need not be so in another State. It is therefore urged that a SC or ST can therefore claim benefit of reservation in a State of his origin and not from a State to which he may have migrated.

In this connection it is said that no sooner Goa became a State in the year 1987 the Social Welfare Department of Government of Goa on 8th February, 1988

issued a Circular that reservation of vacancies in Government offices for SC/ST candidate would be available only to these SC/ST of Goan origin which have been specified for the State of Goa and not available to SC/ST who have migrated to the State of Goa. It may be pointed out that the State of Goa is not the only State which has adopted this procedure for reservation in the matter of appointment of SC/ST candidates but that it what is prevailing in most of the States in this country. It is now vehemently therefore period out that the reservation has been made to the benefit of persons belonging to SC/ST in the State of their origin and that being so the reservation is restricted on regional or local basis.

18. It may be seen that in 1985 Memorandum issued by the Central Government, Ministry of Personnel and Training, Administrative Reforms the percentage of reservation for SC and ST in each of the States and Union Territories is shown giving also how the points reserved at 100% roster is required to be followed. This Memorandum has been annexed to the affidavit filed on behalf of the first respondent which is Exh. R. 1. On perusal of this annexure to the Memorandum it is clear that there is great variance in reservations for SC/ST and it is so undoubtedly because of the density of the population in a particular region or in a particular State. For example, reservation for Goa on direct recruitment from SC is 2% and for ST is 1%, points of 100% roster being 1 and 50 and ST being 4. In Dadra Nagar Haveli percentage of reservation for SC is 2% and for ST 43% and accordingly the points in the roster vary. There is no point in referring to other States/Territories and suffice to mention that there is considerable variation depending upon population of SC/ST based on census.

19. Mr. Rebello now says that though Mormugao Port Trust is an instrumentality of the Central Government and therefore a State within the meaning of Article 12 of the Constitution, the operation of Mormugao Port Trust is confined only within the State of Goa. He says that apart from the activities of the port administration confined to port and in the State of Goa the cadre of Mormugao Port Trust is non-transferable. In other words, he says that an employee of Mormugao Port Trust cannot be transferred outside the Port and this being so he says that the cadre of Mormugao Port Trust is nothing but a local cadre and once it is held that it is a local cadre there is no escape for the Mormugao Port Trust to adopt the reservation percentage adopted on All India basis.

20. He now says that the cadre employed at the port administration is a local cadre, has been recognized in a Division Bench judgment of this High Court in Writ Petition No. 1098/82, Damodar Anant Karandikar & another v. Board of Trustees of the Port of Bombay & others, decided on 29th August, 1988. Mr. Rebello therefore urges that there cannot be any different reservation in the same locality or region and therefore the percentage of 15% for SC and 7 1/2% for ST in the matter of promotion cannot be applied to the cadre in Mormugao Port Trust even when such percentage on promotional level is accepted for

Central Government offices.

21. Mr. Nadkarni, learned Counsel for respondent No. 1 and Mr. Bhohe, Counsel for the respondent No. 2, have seriously disputed this position. While not denying that employees of Mormugao Port Trust are not transferable there is nothing to suggest that it is a local cadre and secondly, as long as Mormugao Port Trust is an instrumentality of the Central Government like the Government of India office, or organizations, it is bound by the reservations policy of 15% and 7 1/2% for SC/ST respectively. It is further urged that there is nothing to suggest that the Division Bench of this High Court in Writ Petition No. 1098/82 has in terms laid down that a cadre of port administration is a local cadre and that in any case a Division Bench of this Court in a later decision in Writ Petition No. 390/88, Mrs. Olga D'souza Vs. Board of Trustees of the Port of Marmugao and Others, , has held that such posts are not local so as to be filled from the State of Goa. And even assuming that Mormugao Port Trust posts are to be held as local cadre, then Mormugao Port Trust being a Central Government instrumentality, it has nothing to do with the recruitment policy of the local State Government.

22. Coming to Writ Petition No. 1098/82 (supra), a challenge was made to the promotions and reservation policy of the Bombay Port Trust on the ground that Bombay Port Trust had not framed and Regulation u/s 28 read with section 126 in that behalf and the policy thus followed ran counter to the policy decision taken by the Port Trust, viz. seniority to be the criterion for promotion.

Undoubtedly, in the case Bombay Port Trust had not made Regulations in the matter of appointments, promotions, etc. of Class III and IV posts in service matters. Class III and Class IV employees were being recruited on local or regional basis and posted in various departments of the Bombay Port Trust departments, such as railways, estate, dock, labour, etc. and their posts were non-transferable and promotions limited only within the port departments. The Bombay Port Trust has been following the reservation policy for the initial recruitment viz. 6% for SC and 6% for ST as was applicable to the State of Maharashtra and for that purpose points reserved at 100 point roster. The percentage was raised to 7% and 9% respectively from June, 1985 by the State Government. It was therefore, contended in that petition that the same policy ought to be followed in promotional posts instead of the reservation of 15% posts for SC and 7% for ST on 40 point roster on All India ratio of population. It was therefore contended on behalf of Karandikar and another that by following higher percentage on promotion level their rights were impaired.

It was contended on behalf of Bombay Port Trust as it was contended presently before us that the Bombay Port Trust is under the control of the Government of India and is bound to follow the policy laid down by the Central Government in that behalf and incorporated in the Brochure for SC/ST in service where direct recruitment is made on open competitive basis. It was also contended that where the recruitment is restricted to region the percentage is fixed taking into account the proportion of the population of SC/ST in the region; that prior to 1985 it was

6% for both SC as well as ST, but after 1985 it was raised to 7% for SC and 9% for ST, but however, as per Government of India instructions, uniform policy followed in the matter of promotion for Class II and Class III posts is 15% and 7 1/2% that this was done to achieve uniformity on All India basis.

The Division Bench however, thought it fit not to interfere with the promotions already made but however, in the absence of the Regulation or Regulations not being made by Bombay Port Trust u/s 28 and 126 of the Major Port Trust Act for Class III and Class IV posts and no adequate reasons given viz. the absence, the Court directed the Bombay Port Trust to frame necessary Regulation within a period of six months from the date of the order.

23. However, in para 12 it was observed that since Bombay Port Trust was following the policy of the State Government of 6% for SC and 6% for ST qua initial appointments, it was not open to Bombay Port Trust to reserve promotional posts on the basis of 40 point roster, i.e. 15% for SC 7% for ST because that policy was laid down by the Government of India in order to achieve uniformity, but operation of the Bombay Port Trust was confined to Bombay and the services of Class III and Class IV employees are not transferable and therefore, it was practically a local cadre in which event adoption of All India roster in the matter of promotion resulted in inequality.

It must then be observed that Counsel appearing for the Bombay Post Trust had conceded that the cadre of the Bombay Port Trust is a local cadre. Secondly the facts in the Bombay case stand on their own. We will presently point out that there had been a change in the reservation policy of the State Government in the State of Maharashtra itself and the reservation in enhanced from 6% to 7% for SC and 9% for ST and despite this enhancement by the State Government the Bombay Port Trust was following the old policy of 6% for both ST and SC and that too in the absence of Regulation. The reservation was in fact going against that interest of ST. There was another great reason which we must hold prevailed with the Division Bench and that is the Bombay Port Trust had not framed any Regulations though required u/s 28 read with section 126 of the Major Port Trusts Act and what is more, Bombay Port Trust had already framed Regulations for Class I and Class II posts. In the absence of Regulations, the reservation policy of Maharashtra State was imbibed and followed and it is in that context the Division Bench held that there was some substance in the challenge, while clearly holding that Bombay Port Trust is an authority within the meaning of Article 12 and can reserve posts for SC and ST consistent with the reservation policy laid down in the Constitution of India (para 11 thereof). The Division Bench decision must therefore be confined to the facts of that case and limited to Bombay Port Trust in the circumstances of absence of Regulation, unlike the case of Mormugao Port Trust which has framed Regulations.

24. Mr. Rebello had indeed contended that apart from this judgment Mormugao Port Trust being confined to the port area and therefore its cadre a local cadre, now relies upon the definition of a "local authority" contained in the General

Clauses Act, 1897. Section 2(31) of the General Clauses Act defines local authority to mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally entitled to or entrusted by the Government with the control or management of a municipal or local fund. Relying upon Rule 9(4) of Fundamental rules, he says that "cadre" means strength of a service or a part of a service sanctioned as a separate unit.

Mr. Rebello supplemented his argument by relying upon a decision of R. Sarangapani & another v. The Port Trust of Madras, which is a Division Bench judgment of the Madras High Court reported in AIR 1961 mad. 324, where it is laid down that Port Trust is a local authority by virtue of section 3(31) of the General Clauses Act read with section 367 of the Constitution.

25. In our view it is possible to accept that the services at any port are local cadre but in a different sense. "Local" in the sense that the posts are not transferable out of the Port and confined at ports and their various departments. But then it has nothing to do with State or cadres of State Government. A Port is confined to a small part in a State and that too in what is locally called "port area". For instance, the Port of Mormugao is situated in one of the 11 talukas of Goa and its Port area is confined to what is called "Mormugao Harbour" and some coastal area abutting that Harbour/Port (See definitions of "Dock" and "Post" in Major Port Trusts Act). The Mormugao Port Trust as an instrumentality of the central Government has nothing to do with the State of Goa/State Government and otherwise bound by the All India Policy on reservation and its own Regulations which are undoubtedly made under a Statute by which it is bound.

26. Apart from this, according to Mr. Nadkarni, learned Counsel appearing for the Mormugao Port Trust, the observation of the Division Bench in Writ Petition No. 1098/82 are not available as these observations according to him are explained in a subsequent decision in Writ Petition No. 390/89 decided by a Division Bench of this Court on 13th September, 1989, to which one of us (Kamat, J.) was a party. Before, however, we embark on an analysis of the observations, we may mention the facts.

The petitioner Olga D'Souza in Writ Petition No. 390/89 challenged the appointment of the second respondent Shripad N. Rao, when he was promoted as Personal Assistant to the Chairman of the Mormugao Port Trust. Olga set out in her case she is a Senior Stenographer, Grade I in the office of Mormugao Port Trust since March, 1975, and claimed No. 1 in the Seniority List. The post of Personal Assistant to Chairman is a promotional post for Senior Stenographer, Grade I, subject to a test. According to her she had been declared successful in the test held but for a long time no appointment was made despite several representations made by her. However, Rao who was otherwise not qualified to be promoted, was promoted. This Rao admittedly belongs to the Halbi community of ST declared as such in the State of Maharashtra. According to Mormugao Port Trust, the promotion of Rao was made in a reserved vacancy for ST. Olga's challenge was that Rao could not have been appointed merely

because he belonged to ST because Halbi community of ST had not been specified under Article 342 of the Constitution for the State of Goa.

The question before the Division Bench was whether of Rao by giving the benefit of the reservation as a member of the Halbi community not recognized as ST in the State of Goa where he has migrated, though it is so in his State of origin Maharashtra was sustainable. The Division Bench held that this appointment being to an instrumentality of the Central Government has nothing to do with the State Government on the rationale that Rao was not deriving any benefit from the State of Goa. The principle of entitlement of reservation to SC/ST from the State of origin and not from the State of migration is confined to State jobs or posts under the State and Mormugao Port trust being a Central Government instrumentality, there can be no such embargo for appointment of Rao.

27. The Division Bench in Olga's case in paragraph 10 observed ---

"When it is a matter of deriving benefits from the State one has to derive it from the State of his/her origin and not from the State to which he/she migrates and the concept of the State of origin will not be applicable if the benefits are to be derived from the Central Government."

We will have therefore seen that the Division Bench of this Court held in Olga's case that the judgment of the Division Bench at Bombay in Karandikar's case does not help Olga.

28. What is however required to be seen in Olga's case as rightly mentioned by Mr. Nadkarni is that Mormugao Port Trust is an instrumentality of the Central Government and therefore, a State within the meaning of Article 12 of the Constitution and this was so held based on several provisions of the Major Port Trust Act by which the Mormugao Port Trust is not merely under the supervision and control of the Central Government, but further that the Central Government has control even over recruitment and conditions of service of the employees of the Board of Trustees. In the second place, it was also equally held that though the employees of the Mormugao Port Trust and their posts are not transferable outside the Port and even if the cadre of the Mormugao Port Trust can be called a local cadre then only people from Goa and Goa alone would be entitled to the benefits available to the members of the SC/ST in the matter of employment and promotion in the Mormugao Port Trust was negated. In other words, it is clearly held that since Mormugao Port Trust is an instrumentality of the Central Government for the purpose of appointment and promotion to the reserved posts in the Mormugao Port Trust, the persons belonging to the SC or ST need not necessarily have Goa as State of their origin and specification of SC and ST for the State of Goa is immaterial. It is in that view of the matter that the promotion of Mr. Rao to the post of Personal Assistant to the Chairman of the Mormugao Port Trust was upheld though he belonged to the Halbi community of ST which is not recognized for the State of Goa even though he hailed from the State of Maharashtra where that caste had been specified u/s 342 of the Constitution.

29. Mr. Rebello, however, mentions that the decision in Olga's case did not consider the point required to be considered in the present petition and therefore the question which arose in Olga's case is different. He says and not without jurisdiction, that Olga's case was not required to consider the question of initial recruitment on local or regional basis with diverse higher percentage at the promotional level. He says that recruitment of 2% and 1% for SC/ST respectively on the basis of the population of the State comes from the State itself and therefore the question as to whether it is for the Central Government or the instrumentality of the Central Government is irrelevant. On pointing out this difference from Olga's case he says that the reservation of the higher percentage for promotions making it available to SC/ST from outside the State is self-defeating as non-specified members of SC and ST are bound to compete with local SC and ST.

Though there is some difference it is undeniable that the question decided in Olga's case was whether it was necessary that only a person from the State of origin was to be promoted or appointed to the instrumentality of the Central Government situated in that State and that was answered in the negative.

He indeed said that if this Bench now finds a cleavage in the two earlier decisions, the matter be referred to Full Bench.

Counsel for respondents say that Karandikar's case is explained by Olga's case and going by the ratio in Olga's case the Bench is bound by the decision in Olga's case.

We are in agreement with the respondents. Indeed, discipline requires a co-ordinate Bench to follow earlier decision. Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others, in the decision of Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors, Co., etc. v. The State of Andhra Pradesh & others, is one authority out of many which says so.

30. Counsel for the respondents have relied upon "Brouchure on Reservation For Scheduled Castes and Scheduled Tribes in Service" (7th Edition), published by the Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel and Training, New Delhi. Regard being had to what is pointed out to us what emerges in the first place is that the present policy of reservation for promotions of 15% and 7 1/2% for SC/ST respectively has been in force on All India basis since the year 1972. Secondly, the overall position with regard to the direct recruitment and promotion is as follows:---

Method of recruitment Roster to be followed

Direct recruitment made on 40-point roster as given in Appendix 1 all-India basis by open for reservation " 15% for SCs and " competition, i.e. through the 7% for STs. UPSC or by means of open competitive test held by any other

authority. Direct recruitment made on 40-Point roster as given in Appendix 2 all-India basis otherwise than for reservation " 16 2/3% for SCs and by open competition. 7% for STs. Direct recruitment to Group C 100-point roster as given in Appendix 3 & D post normally attracting for percentages of reservation based on candidates from a locality the population of SCs/STs in these ar eas or a region./regions.

Thirdly, several posts in various categories have been kept out to which reservation orders do not apply. They are posts outside reservation. Lastly, based on the census (population revealed) in the years 1971 and 1981 there had been review of percentages of reservation. 100% roster for all State, except Assam, further explicitly making it clear that there is no change in all India percentage of reservation for SC/ST. What therefore emerges is that despite changes effected insofar as initial direct recruitment is concerned, it is based on local or regional basis, there is no change whatsoever on All India percentages on reservation for SC and ST.

31. In the context of all this material it is advantageous to see how matters are viewed by the Apex Court in the authorities relied upon by the learned counsel.

32. In the decision of *The General Manager, Southern Railway Vs. Rangachari*, it has been held (i) that the power of reservation conferred under Article 16(4) can be exercised in a proper case not only by providing for reservation for appointments, but also by providing for reservation of selection posts. This construction was held to 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; (ii) that Articles 16(1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). The two provisions form part of the same constitutional code of guarantee and supplement each other. Being so, it is further held that matters relating to employment must include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment. The expression "in respect of any employment", used in Article 16(2) must include all matters relating to employment specified therein and therefore, promotion to selection posts included both under Article 16(1) and 16(2).

33. Despite what is derived from the case of *General Manager, Southern Railway v. Rangachari*, (supra) I can advantageously extract para 26 thereof, on which reliance is sought to be placed by both sides. It reads thus:---

"26. The condition precedent for the exercise of the powers conferred by Article 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 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 service adequate, the adequacy of such representation being considered qualitatively. If it is conceded that "posts" in the context refer to posts in the services and that selection posts may be reserved but should be filled only in the manner suggested by the respondent then we see no reason for holding that the reservation of selection posts cannot be implemented by promoting suitable members of backward class of citizens to such posts as the circulars intend to do."

Mr. Nadkarni is right in saying that the thrust is the advancement of the socially and educationally backward classes and not only requiring adequate representation in the lowest rung of services, but they should aspire to secure adequate representation in Selection Posts in services as well.

Mr. Rebello however, says that the observation "if that be so it would not be reasonable to hold that inadequacy of representation can and must be cured only by receiving a proportionately higher percentage of appointments at the initial stage", cannot be ignored. We do not think this can really make any difference as it is clear from the very next line that it is left to the State this can really make any difference as it is clear from the very next line that it is left to the State to 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.

34. In the decision of Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others, , Krishna Iyer, J., speaking for the majority observed:

"No debate is needed to uphold reservation in promotions as such. Not only has The General Manager, Southern Railway Vs. Rangachari, sustained it in regard to selection posts, State of Kerala and Another Vs. N.M. Thomas and Others, decided by a Bench of seven Judges, has expressly approved Rangachari. The only question bearing on reservation vis-a-vis promotion is as to whether it is

unconstitutional if it is extended to non-selection posts while it is constitutional in regard to selection posts."

35. In the decision of *State of Punjab Vs. Hira Lal and Others*, , observes that every reservation under Article 16(4) thus introduces an element of discrimination particularly when the question of promotion arises, but however that is an inevitable consequence of any reservation of posts and that he who assails the reservation under that Article must satisfactorily establish that there has been violation of Article 16(1).

Counsel for the respondents are justified in pointing out that in fact there is no foundation laid in the petition as to how the reservation in favour of SC/ST at promotional level in the percentages of 15 and 7 1/2 respectively, is arbitrary or unreasonable. No material has been brought out to show that there has been violation on the ground of discrimination, differentiation or of arbitrariness.

In the decision of *C.A. Rajendran Vs. Union of India (UOI) and Others*, , the Supreme Court held that there can be reasonable classification of employees for purpose of appointment and promotion, though they are required to be interpreted in the context and background of Article 335; that though under Article 16(4) the power vested on a State is discretionary, to make reservation there is no constitutional duty imposed on the Government, but though the power is discretionary it is for the State to make the reservation of appointments in favour of backward class of citizens which in its opinion is not adequately represented in services of the State. Therefore, what is clear from the above is that it is for the Government to come to the opinion that the backward class citizens are not adequately represented at certain levels in the services and with a view to give them adequate representation, reservation is necessary. What is therefore required to be culled out is the question as to the fixation of percentage is clearly a decision for the Government. Nevertheless, it is true that the issue is justiciable and cannot escape the scrutiny of the Court if the reservation of the percentage is far in excess. We may safely record that petitioners have not indicated in the entire petition as to how these percentage of 15% and 7 1/2% for SC/ST respectively is excessive.

36. Coming to *Devidasan's* case reported in *T. Devadasan Vs. The Union of India (UOI) and Another*, , it has been clearly laid down that under Article 16(4) reservation of a reasonable percentage of posts for members of the SC/ST is within the competence of the State. What the percentage ought to be must necessarily depend upon the circumstances obtaining from time to time.

37. In *State of Kerala and Another Vs. N.M. Thomas and Others*, , while examining the challenge u/s 16(1) on equality of opportunity in employment, the Supreme Court observed:---

"Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether

it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

Further, Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservation of appointments and post for them secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14 and 15(1) and 16(1). A little later it is said:

"Equality of opportunity for unequals can only mean aggravation of the inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination with reason. Discrimination with reason means rational classification for differential treatment having nexus to the constitutionally permissible object."

"Length of the leap depends upon the gap to be covered", Chinappa, Reddy JJ., of the Supreme Court quoted this in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association Vs. Union of India (UOI) and Others*, , from the earlier decision of the Supreme Court in *State of Punjab Vs. Hira Lal and Others*, , That authority also further laid down that the mere fact that the reservation made may give extensive benefits to some persons who have the benefit of the reservation, does not by itself make the reservation bad.

38. Once we have seen that it is a prerogative of the State to fix the percentage on reaching the decision with regard to making adequate representation, of the socially and educationally backward classes, the Supreme Court had to be consider the question as to whether the percentage of reservation as high as 50% can be held to be arbitrary. The Supreme Court in the decision of *M.R. Balaji and Others Vs. State of Mysore*, held that reservation as high as 68% is inconsistent with Article 15(4). That a provision to that effect should be less than 50%, though of course the Supreme Court said how much less than 50% would depend upon relevant prevailing circumstances in each case. This was indeed a case in relation to reservation of seats in technical institutions but nevertheless cannot be ignored because the reservation for posts and reservation in educational institutions emanated from the same Article 15(4).

39. Mr. Rebello indeed referred to a decision of the Supreme Court in *Ram Bhagat Singh & another v. State of Haryana & another*, reported in J.T. 1991(2) S.C. 114 to view how the Supreme Court has laid emphasis relying upon Article 335 of the Constitution on the requirement of efficiency in administration.

This was a case where two law graduates belonging to SC and ST complained to the Supreme Court that the State Services (Judicial Branch) Rules has laid down a high standard of at least obtaining 55% marks in the aggregate of all papers including viva voce test for eligibility to the judicial posts. It was their contention that such a high standard has resulted in denial of opportunity to the SC and ST thus amounting to denial of equality of opportunity in jobs. It was set out in the

petition that though 20% of the posts in the Haryana Civil Service (Judicial Branch) have been reserved for SC and ST the strength of the appointments made since 1969 onwards revealed that hardly 8% of the total posts of the cadre strength have been allotted to the SC and ST. In opposing the petition, it was urged on behalf of the State of Haryana that the requirement of 55% of the aggregate marks to become eligible for consideration was laid down to ensure efficiency in administration. In the light of the facts which came before the Supreme Court, it was observed that the minimum percentage of marks to be determined must be on an objective and rational basis for maintaining efficiency in administration. But then, however, it must be said that the Supreme Court directed the Haryana State Government to reconsider the requirement of the high standard of 55% on an objective and rational basis.

40. A reference was made to the decision *Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College and Others*, . In the first place it may be noted that this was a case where admission was denied to a student belonging to the Gouda community, a ST specified for the State of Andhra Pradesh, in one of the colleges at Bombay in the State of Maharashtra, on the grounds that he is not entitled to reservation benefit in the State of Maharashtra as the State is not the State of his origin. The question in the case strictly arose on the interpretation of Article 341 and 342 of the Constitution read with Article 300A(1). The expressions, "in relation to the State" and "for the purposes of this constitution", appearing in those Articles are interpreted to mean that the benefit of reservation is available to only those members of SC/ST from the State of origin where they are so specified for that State and not from the State of migration.

This authority does not held the petitioners in the present case. It equally does not help the respondents for it contains in para 18 the factual position placed before the Apex Court by the Attorney General, viz., present reservation of 15% and 7% SC and ST respectively and percentage for direct recruitment, etc.

41. In the light of the authorities seen above and discussion, there is no merit in any of the challenges taken.

42. The overall picture that emerges is that the policy of reservation at the initial direct recruitment is entirely different from the policy of reservation of posts at promotional level. This being so, the percentages of 2% and 1% for direct recruitment based on local and regional basis has nothing to do with the reservation of 15% and 7% for promotion on All India basis.

There is nothing arbitrary or unreasonable or any hostile discrimination offending Articles 14 and 16 to follow reservations at these two levels in different proportions.

The reservation of 2% and 1% for SC/ST respectively, for direct recruitment, no doubt based on local or regional basis is independent from the reservation of 15% and 7% at promotional levels, for, the socially backward classes need adequate representation at higher level.

The recruitment on regional or local basis adopted by instrumentalities of the Central Government like Mormugao Port Trust has nothing to do with the recruitment policy of the local State Government. Mormugao Port Trust is bound to follow its regulations and the directions of the Central Government in the matter of reservation of seats on All India basis.

Reservation at promotional level at 15% for SC and 7% for ST is by no stretch of imagination excessive or extensive, looked from any angle. Even otherwise, appointments at higher levels are far less in number than posts filled at lower level at initial direct recruitment. Therefore, it stands to reason that higher percentage for promotional posts is more in the nature of equalization as otherwise the constitutional requirement may be whittled down because only a negligible percentage of SC/ST would get opportunity for promotion at higher levels without adequate representation.

The challenge on the ground that these percentage (15% and 7%) will impair the efficiency in administration is without any merit inasmuch as promotions are not based merely on seniority, but the same are subject to fitness which is amply made clear by the very Circular Exh. A-1. Even otherwise, people who are already recruited and are in employment are being considered for promotion based on seniority, but subject to fitness.

43. Nothing survives in the petition. The petition is dismissed. Rule made is discharged with no order as to costs.