

'Economic criteria alone not basis'

From Our Legal Correspondent

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A special nine-judge Bench of the Supreme Court today, while upholding by a majority the 27 per cent reservation for backward classes, also said that even under Article 16(1) of the Constitution, reservation cannot be made on the basis of economic criteria alone.

The other conclusions reached by the majority judgments are:

Article 16 (4) of the Constitution "is exhaustive of the subject of reservation in favour of backward classes" though it may "not be exhaustive of the very concept of reservation". Reservation for other classes can be provided under Clause (1) of Article 16. (Clause 1 of Article 16 deals with equality of opportunity for all, citizens in matters of 'public employment' while Clause 4 of this Article shall not 'prevent the State from making any provision for the reservation of appointments and 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); The expression "backward class" in Article 16 (4) takes in "Other Backward Classes" (OBCs), Scheduled Castes (SCs), Scheduled Tribes (STs) and may be "some other backward classes as well". The accent in Article 16 (4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society.

"A caste can be and quite often is a social class in India".

Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16 (4).

The 'weaker sections' referred to in Article 46 (dealing with promotion of education and economic interests of SCs, STs and other weaker sections) do include SEBCs referred in Article 340 (appointment of a commission by a Presidential order to investigate into conditions of SEBCs etc);

The reservations contemplated in Clause (4) of Article 16 should not exceed 50 per cent. While 50 per cent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50 per cent of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only

when the State is satisfied that representation of backward class of citizens therein is not adequate;

There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16 (4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable — nay, necessary — to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding the 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement;

A 'provision' under Article 16 (4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(g) Reservation of appointments or posts under Article 16 (4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion.

The Bench directed that its decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis.

The Bench further directed that wherever reservations are already provided in the matter of promotion — be it Central services or State services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 — such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16 (4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (The Bench, however, on this aspect, indicated that Mr Justice Ahmadi did not consider it necessary to deal with this aspect).

Mr. Justice S. Ratnavel Pandian, in his separate judgment declared as "valid and enforceable" the Central Government order, dated August 13, 1990, issued by the then V. P. Singh Government reserving 27 per cent posts in the services of Central Government and Central public undertakings in favour of candidates of Socially and Educationally Backward Classes (SEBCs) (as specified in the Mandal Commission report read with relevant State lists on other Backward Classes).

"There is no legal impediment in immediately enforcing and implementing" the order, he said.

He also held that no section of SEBCs could be excluded on the ground of "creamy layer" till the Central and State Governments "take a deci-

sion in this regard on a review on the recommendations of the commission or a committee to be appointed by the Government."

'Unconstitutional': Mr. Justice Pandian struck down as unconstitutional and violative of Article 16(4) the relevant clauses of the order, dated September 25, 1991, issued by the Narasimha Rao Government giving preference to poorer sections among SEBCs in the implementation of the August 13, 1990, Central Government order and also providing 10 per cent reservation to economically weaker sections who are not otherwise provided reservation under any scheme.

Mr. Justice Pandian said that "caste is a primary criterion or a dominant factor though it is not the sole criterion" in the process of identification of "backward class of citizens" under Article 16(4).

He concurred the majority judgment in holding that reservation in the matter of appointment could not be extended to "promotions."

Mr. Justice Pandian also agreed with a conclusion of the majority holding that, while the rule of reservation could not be called "anti-meridian," there were certain services and posts to which it might not be advisable to apply the rule of reservation.

Mr. Justice Pandian also held that no maximum ceiling of reservation could be fixed under Article 16(4) for reservation of appointments or posts in favour of any SEBCs in the services under the State.

Dr. Justice T. K. Thommen, Mr. Justice Kuldip Singh and Mr. Justice R. M. Sahai delivered their respective separate judgments.

'Unsustainable': These judgments broadly held as unsustainable the orders dated August 13, 1990, and September 25, 1991, dealing with reservation in favour of candidates belonging to SEBCs etc.

Dr. Justice Thommen said that "neither the impugned orders of the Government of India nor the material relied upon by it nor the affidavits filed in support of the said orders disclose proper application of mind by the concerned authorities" to relevant principles for valid identification of the backward classes of citizens qualified for reservation in terms of Article 16.

These three judges also broadly agreed that reservation of seats or posts for backward classes of citizens, including those for SCs and STs, should be within 50 per cent of the total seats or posts and that reservation had no application to 'promotion'.

Dr. Justice Thommen noted that it was open to the State to adopt any valid affirmative action programme, otherwise than by reservation, for amelioration of the disabilities of the disadvantaged persons, including backward class of citizens.

Mr. Justice Thommen noted that the validity of the impugned Government Orders providing for reservation of posts depends on convincing proof of proper identification of backward classes of citizens by recourse to relevant criteria.