Judgment Reserved on : 18.04.2017

Judgment Delivered on : 23.06.2017

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

WRIT PETITION (PIL) NO. 67 OF 2011

In the matter of appointments of activists on Group 'C' and Group 'D' posts under the Uttarakhand Rajya Andolan Ke Ghayal/Jail Gaye Andolankariyon Ki Sewayojan Niyamawali, 2010"

……. Petitioner

Versus

State of Uttarakhand and others

….. Respondents

Present : Mr. Arvind Vashistha, Senior Advocate (*Amicus Curiae)* for the petitioner.

Mr. S.N. Babulkar, Advocate General of the State assisted by Mr. Paresh Triapthi, Chief Standing Counsel for the State.

Mr. Raman Kumar Shah, Intervener (in person)

Mr. M.S. Pal, Senior Advocate assisted by Mr. Amir Malik, Advocate, Mr. S.K. Jain, Senior Advocate assisted by Mr. Siddhartha Jain, Advocate, M.C. Pant, Mr. Mahesh Chandra Pant, Mr. Siddhartha Sah, Mr. C.K. Sharma, Advocates for the interveners.

Mr. Raman Kumar Shah, Advocate, intervener (in person)

Coram: Hon'ble Sudhanshu Dhulia, J.
Hon'ble U.C. Dhyani, J.

Hon'ble Sudhanshu Dhulia, J.

1. The new State of Uttarakhand was created by an Act of Parliament[1], and was established on November 9, 2000, which is referred to as the "Appointed Day". In pure legal terms, the formation of the new State was a legislative act, which has its source in Articles 2 and 3 of the Constitution of India. Yet, to many who were a witness to the tumultuous events during the preceding years of its formation, the creation of Uttarakhand was also, in great measure, a fitting climax to years of demand and struggle for a new State. It was the culmination of an idea – the idea to form the hill districts of Uttar Pradesh into a separate and distinct unit in the Union of India!

2. This movement for the new State of Uttarakhand had its expressions in peaceful demonstrations, long marches, picketing, which in its wake led to imprisonment of men and women, *lathi* charges at several places, injuries and even death. The new State after its formation, acknowledged the contribution of the "andolankaris"[2] and granted certain benefits to them, such as free bus pass, easier entry in Vidhan Sabha, etc. In addition, the Government in Uttarakhand in the year 2004 not only gave direct appointments in Government service to the "andolankaris" i.e. appointment without any examination or competition, but at the same time made a reservation for them in Government service. In this PIL we have to

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1. The Uttar Pradesh Reorganisation Act, 2000

2. The word "andolankari" here would mean a person who has participated in the movement for a separate State, which is State of Uttarakhand, in the erstwhile State of Uttar Pradesh in the 1990s.

examine the validity of this act by which a one time direct appointment as well as reservation has been given to the “andolankaris” in Government service.

3. Two Government Orders were passed on 11.08.2004. The first order is G.O. No. 1269/2004. This Government Order straightaway provides for appointment to an “andolankari” on class III and class IV posts, in government service, subject to their qualifications for the posts. These appointments were to be made without any selection process. Being an “andolankari” in the Uttarakhand movement, was the sole criteria. An “andolankari” in the above Government Order is defined as one who was either “injured” or remained in jail for seven days or more, during the Uttarakhand movement.

4. The second Government order which is also of the same date i.e. 11.08.2004 is G.O. No. 1270/2004. This Government Order provides for 10 % horizontal reservation to an “andolankari”, in all Government Service, i.e. from Class I to Class IV posts. Here an “andolankari” is defined as one who had remained in jail during the Uttarakhand movement for less than seven days!

5. Two petitions came to be filed before this Court. The first being Writ Petition (S/S) No. 945 of 2007, Karunesh Joshi v. State of Uttarakhand and others, and the second being Writ Petition (S/S) No. 301 of 2009,

Narayan Singh Rana v. State of Uttarakhand and others. In both these petitions, the petitioners claimed to be "andolankaris" under the definition of "Andolankari" given in Government Order No. 1269/2004 dated 11.08.2004. Their case was that though they were identified as "andolankaris", by the concerned District Magistrate as per the G.O., yet they were not given appointment in Government service, as provided under the above Government Order. They hence sought a writ of mandamus commanding the State authorities to give them the appointment, which was their right, by virtue of G.O. dated 11.08.2004, G.O. Nos. 1269/2004 and 1270/2004.

6. The learned Single Judge, before whom these matters were taken up, was of the opinion that a provision for such appointments cannot be made in Government service by way of an executive order, particularly when there are Rules already in existence, made under Article 309 of the Constitution of India. Further since these Government Orders affect fundamental rights of citizens under Article 14 and 16 of the Constitution of India and are violative of the Constitution of India, the learned Judge not only declined to give any relief to the petitioners but while dismissing these petitions, he has also quashed the Government Order dated 11.08.2004, vide his judgment and order dated 11.05.2010.

7. Barely a few days after the dismissal of these petitions, the Government of Uttarakhand framed its Rules under Article 309 of the Constitution of India on

20.05.2010 known as "the Uttarakhand Rajya Andolan Ke Ghayal/Jail Gaye Andolankariyon Ki Sewayojan Niyamawali, 2010", providing for reservation in Government service to "andolankaris". These Rules provide for a one time appointment of all "andolankaris" in Government service on Class 3 and Class 4 posts, which were outside the purview of the State Public Service Commission. Promptly the petitioner Karunesh Joshi (Petitioner in Writ Petition (S/S) No. 945 of 2007) filed a Review Petition before this Court on grounds that since the main ground for rejecting his writ petition earlier was that such appointment cannot be made merely on the basis of an executive order and since now Rules have been framed, therefore, the judgment and order dated 11.05.2010 needs to be reviewed.

8. The learned Single Judge refused the relief sought in the review application, which was dismissed by him, but at the same time the learned Judge ordered that the matter be treated as a PIL, subject to the approval of the Hon'ble Chief Justice. The relevant portion of the order reads as under:

> "In the light of the aforesaid, the Court prima facie finds that the Rules so framed under the proviso to Article 309 dated 20th May, 2010 cannot stand the scrutiny of Article 14 and 16 of the Constitution of India. The Court is however of the opinion that it would not be appropriate to decide this question in this review petition, but at the same time, the Court could not be a mute spectator and allow the government to give benefits to a certain class of people which could infringe the provisions of Article 14 and 16 of the Constitution.
>
> .....
>
> i) Consequently, while dismissing the review application, the Court directs the Registry to place this order of the Court before the Chief Justice, to treat this order as a P.I.L. petition or as a P.I.L. letter and, consequent upon

> His Lordship's administrative approval, the Registry is directed to register the matter as a separate case as a P.I.L. The title of the case would be "in the matter of appointments of activists on Group 'C' and Group 'D' posts under the Uttarakhand Rajya Andolan Ke Ghayal/Jail Gaye Andolankariyu Ki Sewayojan Niyamawali, 2010."

9. Later with the approval of the Chief Justice, the matter was taken up as a PIL and a Division Bench of this Court passed the following orders in this PIL on 26.08.2013 :-

> "The counsel for the State, from time to time, assured that he will bring on record materials to show how *Andolankaris* have been selected. Those, which have been produced until date and perused by us, suggest that those faceless people, who had been carrying out *Andolans* in a peaceful manner, have been forgotten; but only rowdies have been given benefit. Furthermore, the State Government, prima facie it appears, is bereft of any power to do what it has done by giving public appointments to people of the choice of the State and not permitting the same to be open for competition by the citizens and has, accordingly, acted in contravention of Sub-Article (1) of Article 16 of the Constitution of India.
>
> 2. We accordingly, while admit the writ petition and direct the matter to be listed for hearing in its turn; restrain the State from giving any further appointment on the basis of the policy/rules being the subject matter of the present writ petition."

10. We have been told at the Bar that the issue before the learned Single Judge was not exactly relating to reservations made in favour of the "andolankaris" in Government service but it was regarding the straightway appointments given by Government Order No. 1269/2004

dated 11.08.2004 and the subsequent Rules. The other Government Order dated 1270/2004 which is also of dated 11.08.2004 has never been formally questioned. Yet, the fact remains that after the order passed by the learned Single Judge and the subsequent cognizance of this matter as a P.I.L. by the Hon'ble Chief Justice and the order passed therein on 26.08.2013, the implementation of Government Order No. 1270/2004 has also been put on hold and reservations pertaining to the "andolankaris" have also become ineffective. It must be placed on record that we in this PIL have been examining the validity of both the Government Orders i.e. 1269/2004 and 1270/2004, as well as the subsequent orders passed in furtherance of these two orders and the Rules. In other words, the core issue is whether these appointments can be made on the sole criteria of being an "andolankari" and whether reservation for "andolankari" in public service is permissible under the law.

11. We must also note that as a result of the above orders of this Hon'ble Court (dated 26.08.2013), the selection process already set in motion for various posts in Government service for Class I to Class IV posts came to a halt as in all of them there was a provision for reservation of 10% of seats for the "andolankaris", or their family members. We have tried to remove minor hurdles, through our interim orders, by directing the State Public Service Commission and other bodies to declare the list of selected candidates, on all posts save the 10% reserved for the "andolankaris", while keeping two separate lists of similar number of persons who may be appointed, depending upon the fate of this PIL. We also must note that the word "rowdy" in the above interim order of the

Division Bench dated 26.08.2013 was later deleted by us and this word is no more a part of the record.

12. Apart from the two Government Orders and the Rules, we also need to examine the subsequent Government Orders by which the benefit of reservation has been extended to the family members of the "andolankaris". "Family member" is defined as Wife/husband, son and unmarried or widowed daughter.

13. It must also be placed on record that a Bill was also passed by the State Legislature, known as the Uttarakhand Reservation in Government Services for the "marked andolankari" of Uttarakhand Movement and Their Dependents Bill, 2015:- The Bill not only seeks to reserve 10% of posts in Government service for the "andolankaris", but also for their "dependents". This Bill, though passed by the Legislative Assembly in the year 2016, has so far not received the assent of the Governor.

THE MAINTAINABILITY OF THE PRESENT PIL

14. A preliminary objection has been raised by Sri Raman Shah (who is appearing in person for the "andolankaris"), as well as by the learned Advocate General of the State, which must be settled, before we deal with the main questions. The objection is regarding the maintainability of the present case as a Public Interest Litigation, as according to the respondents the matter before this Court is primarily a service matter, which cannot be looked into in a PIL.

15. Procedural irregularity is also pointed out by the State. It has been stated before us that no petition was filed by any petitioner as a PIL nor was cognizance taken by the Chief Justice of the Court on a letter and as

these are the only two methods by which a PIL can be initiated, the very initiation of this case as a PIL is procedurally flawed. Since the present petition has not taken either of the two recognizable routes, this case cannot be treated as a PIL, submits Mr. Raman Kumar Shah.

16. In order to substantiate their objection to the maintainability of the PIL, the respondents have relied upon two decisions of the Hon'ble Apex Court. First is **Girjesh Shrivastava and others v. State of Madhya Pradesh and others** reported in (**2010) 10 SCC 707** and the second is **Bholanath Mukherjee and others v. Ramakrishna Mission Vivekananda Centenary College and others** reported in **(2011) 5 SCC 464.** These are the two cases where it has been held that a service matter cannot be agitated in a PIL.

17. In the two cases cited above, the well settled position of law has been reiterated by the Hon'ble Apex Court which is that matters which are purely in nature of "service" cannot be entertained as a PIL. In the above two cases, there was primarily a dispute between two parties or different individuals, relating to a service matter, and as such it could never have been entertained as a PIL. It is an accepted legal position that the remedy in form of PIL is not available in a service matter. In the case of Girjesh Shrivastava (supra), the facts were that certain primary school teachers were selected in the State of Madhya Pradesh, allegedly in violation of the Rules. This selection was challenged in a P.I.L., which was allowed and the selection was set aside. The review petition filed by the candidates was dismissed. While allowing their appeal,

inter alia, the Hon'ble Apex Court had held that P.I.L. cannot be filed in a service matter. Similarly the case of Bholanath Mukherjee (supra) was the one arising out of a case filed as a P.I.L. before the Calcutta High Court, where the primary question was of seniority.

18. All the same, considering the nature of the case before us, this basic proposition of the learned Advocate General as well as of Mr. Raman Kumar Shah to treat the present matter as a service matter, has to be rejected. The issue before us is not whether an individual A or B is entitled for appointment in Government service. The core issue before us is whether reservations can be validly made in public service for the "andolankaris", or whether they are in violation of Article 14 and 16 of the Constitution of India. The matter is of a general public importance and would concern people of Uttarakhand. It is a case where a large volume of posts and appointments are to be given to a particular class of persons, many of whom have already been appointed in Government service, without having faced any selection process. The action on the part of the Government has to be ultimately tested on the touchstone of Article 14 and 16 of the Constitution of India. More importantly a concern has been raised before this Court that this action on the part of the State has deprived the legitimate aspirations of a large number of people in Uttarakhand who are also competing for public employment and posts, which are limited. This is precisely the stand taken before this Court by the interveners, who are being heard through their counsels Shri Mahesh Chandra Pant and Shri Siddhartha Sah, Mr. Arvind Vashastha, Sr. Advocate, who

appears as *amicus curiae* in the matter has raised similar concerns.

19. The learned Single Judge of this Court while referring the matter to a larger Bench as PIL had done that as he was of the opinion that reservation for "andolankaris" in government service is a matter which has to be examined within the parameter of the Constitution of India and it is not simply a service matter. I respectfully agree with this view.

20. Moreover a Division Bench of this Court has already admitted this writ petition as a PIL. There is no doubt in my mind that the matter before this Court has much larger implications and it cannot be looked into the narrow confines of a service matter. The constitutional validity of a law is to be examined and it is not just a service matter as it is being made out to be. Secondly, even as a service matter, it is not a matter relating to a few private individuals, competing for a limited number of posts or appointments, but even here the issue is one that concerns public at large.

21. Now to the procedural part. In spite of its large benefit to the society and the litigants in particular, with the passage of time, this form of litigation (i.e. PIL), has also come to be abused, and has therefore received its fair share of criticism. The Hon'ble Apex Court in the case of **State of Uttaranchal v. Balwant Singh Chaufal and others** reported in **(2010) 3 SCC 402** in order to preserve the purity and sanctity of the PIL gave general directions, which included directions to the various High Courts. Some of these directions which must be stated

here are contained in Paragraph 181 of the above judgment:

> "181. We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other Courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-
>
> (1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.
>
> (2) Instead of every individual Judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.
>
> ....."

22. Following the above directions, Rules were framed by the Uttarakhand High Court, which were notified in the Gazette on 20.05.2010 and a new Chapter i.e. Chapter XXI-A was added to the Rules of the Court marked as "Writs in the Nature of Public Interest Litigation under Article 226 of the Constitution of India.

23. In the said Rules, Rule 2 (a) of Chapter XXI-A defines "PIL Petition" as under:

> "(a) 'PIL-Petition' means a petition filed under Article 226 of the Constitution of India by a "Public Spirited Person", for espousing a cause in public interest."

24. Rule 2(b) defines “PIL-Letter” as under:

> “(b) ‘PIL-Letter’ means a “Letter” addressed to the “Chief Justice” or the “Registrar General”, raising issues of public interest, and deserving consideration on the judicial side at the hands of the “High Court”.

25. Rule 2 (c) defines ‘Letter’ as under:

> “(c) ‘Letter’ means a communication addressed to the “Chief Justice” or the “Registrar General” of the High Court of Uttarakhand, complaining of an issue, espousing a cause in public interest and desiring consideration on the judicial side by the “High Court”.

26. Rule 3 of the said Rules is regarding subject matter of “PIL- Petition” and “PIL-Letter”, which cover a wide range of subjects which are of public importance.

27. In the present case, as it has been already referred above, a learned Single Judge of this Court in a review petition vide his order dated 02.08.2011 while dismissing the review petition had referred the matter to the Chief Justice for taking the matter as a PIL. A bare reading of the provisions of the Rules of Court, would show that the subject matter before us is not only of public importance but the Rules also give powers to the Chief Justice to entertain even a letter or a “communication” as a PIL, in case it is covered under the subject on which cognizance can be taken. The above provisions which were added vide an amendment, have now to be read with the provisions which were already there under the Rules of Court.

28. Under Chapter V Rule 2 of the Rules of Court, the jurisdiction of Single Judge has been defined, which also provides that “a Judge may, if he thinks fit, refer a

case which may be heard by a Judge sitting alone or any question of law arising therein for decision to a larger Bench." This provision gives the power to a Single Judge to refer a matter to a Larger Bench on a question of law.

29. Chapter V Rule 2 read with Chapter XXI-A on PIL, leave no room for any kind of doubt, that in this case, even the manner in which the case has proceeded was perfectly in accordance with the procedure laid down under the Rules of the Court. In short, under the Rules of Court, a Single Judge has powers to refer a matter to a larger Bench and the Chief Justice has powers, to treat a "communication" or letter as a PIL. I hence see no anomaly here even in the procedural aspect.

CAN RESERVATIONS BE MADE IN GOVERNMENT SERVICE BY AN EXECUTIVE ORDER!

30. The second question which is before us is whether the Government can make reservations on posts and appointments in public service, only by way of a statute or can that be equally done by way of Rules under Article 309 of the Constitution of India, or even by an executive order. Although Rules were framed later for the one time appointment given to the "andolankaris" which was initially done by Government Order No. 1269/2004, but as far as 10% horizontal reservation which has been given to the "andolankaris" till now there only seems to be the Government Order No. 1270/2004 and the subsequent Government Orders dated 08.11.2006 and Government Order No. 13.12.2011 by which the benefit of horizontal reservation was extended to the dependants and family members of "andolankaris". The Bill known as "The

Uttarakhand Reservation in Government Services for the marked andolankari of Uttarakhand Movement and Their Dependents Bill, 2015" which was passed by the State Legislature in the year 2016 has not received the assent of the Governor as yet. Mr. Arvind Vashistha, Senior Advocate (*Amicus Curiae*) as well as Mr. Mahesh Chandra Pant, learned counsel for the interveners, submit that since reservations in public service have been made by executive order alone, without there being any Statute or Rules, these Government Orders need to be quashed.

31. As far as this question is concerned, it is no more *res integra* as it stands answered by the Nine-Judges Constitution Bench in **Indra Sawhney and others v. Union of India and others** reported in **1992 Supp. (3) SCC, 217**. The majority opinion in Indira Sawhney was that reservation in service can be made even by an executive order. The only caveat being that such reservation should not be in conflict with the existing rules or statute.

32. In the majority opinion formed by Justice B.P. Jeevan Reddy (on behalf of Kania, C.J., Venkatachalah, J., Ahmadi, J. and himself), the fist two questions framed by the learned Judges were as follows:

> "1. (a) Whether the 'provision' contemplated by Article 16 (4) must necessarily be made by the legislative wing of the State"
>
> (b) If the answer to clause (a) is in the negative, whether an executive order making such a provision is enforceable

without incorporating it into a rule made under the proviso to Article 309?"

33. The argument raised before the Apex Court in Indra Sawhney against a reservation made by an executive order was that the word 'provision' in clause (4) of Article 16 logically means a provision made by the legislative wing of the State and not by the executive or any other authority. Argument was that provisions made under Article 16 (4) affects the fundamental rights of other citizens and hence provision can therefore be made either by the Parliament or by the State Legislature. Grave apprehensions were also raised that if such vital powers are given to the executive, it may result in its abuse. Examples were given of the degeneration of the electoral process, which has its political and electoral compulsions and, hence, reservations by executive order are liable to be made out of sheer political and electoral compulsions rather than for just and fair reasons. It was further argued that if such a provision is to be made only by the legislative wing of the State, or by the Parliament, it will only be done after the subject is thoroughly debated and discussed in the Parliament or the State Legislature (as the case might be), after hearing all shades of opinion and representation and it will only be after such a debate and discussion that a balanced and unbiased decision will be made.

34. The above argument, however, was rejected by the Hon'ble Apex Court. The precise opinion of the majority of the four Hon'ble Judges on this aspect was as follows:

"...We are not concerned with the aspect of what is ideal or desirable but with what is the proper meaning to be ascribed to the expression 'provision' in Article 16(4) having regard to the context. The use of the expression 'provision' in clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the Government and Parliament of India and Government and Legislature of each of the States but all local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3 (31) of the General Clauses Act. It takes in all municipalities, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides

providing for in respect of services under the Central/State Government?"

35. The wide definition of "law" in Article 13 (3) (a) was also emphasized by the learned Judges, which would mean not only law by the State Legislature but also an ordinance, order, bye-law, rule, regulation, notification, custom or usage. It was for this reason and after much thought that in clause (4) of Article 16, the word used is 'provision' and not 'law' as used in clauses (3) & (5) of Article 16 ad clauses 2 to 6 of Article 19.

36. While giving the above reasoning, the majority opinion also relied upon the case of **M.R. Balaji v. State of Mysore, AIR 1963 SC 649,** which was followed later in the case of **Comptroller and Auditor-General of India v. Mohan Lal Mehrotra, (1992) 1 SCC 20.** As regarding the apprehension that such powers can be abused by the executive, the Court cautioned as under:

> "…Any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held therein – as also by earlier judgments – the exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group of class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power."

37. The second question framed by the learned Judges was "whether an executive order making a provision under Article 16 (4) is enforceable forthwith?"

38. The argument against the above proposition was that Article 16(4), the provision for reservations in service is after all only an enabling provision and is not a source of power by itself. It was argued that unless made into a law by the appropriate legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the executive does not become enforceable.

39. This argument was again rejected, as it was held that once provision of reservation can be validly made under Article 16 (4) by an executive order, by necessary implication it must also follow that such a provision is effective the moment it is made. The law as laid down by Hon'ble Apex Court in **Comptroller and Auditor-General v. Mohanlal Mehrotra** reported in **(1992) 1 SCC 20** was reiterated, wherein it was held as follows:

> "The High Court is not right in stating that there cannot be an administrative order directing reservation for Scheduled Castes and Scheduled Tribes as it would alter the statutory rules in force. The rules do not provide for any reservation. In fact, it is silent on the subject of reservation. The Government could direct the reservation by executive orders. The administrative orders cannot be issued in contravention of the statutory rules but it could be issued to supplement the statutory rules (See the

> observations in Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910). In fact similar circulars were issued by the Railway Board introducing reservations for Scheduled Castes and Scheduled Tribes in the Railway services both for selection and non-selection categories of posts. They were issued to implement the policy of the Central Government and they have been upheld by this Court in Akhil Bhartiya Soshit Karamchari Sangh (Railways) v. Union of India, (1981) 1 SCC 246."

40. Justice S. Ratnavael Pandian, in a separate judgment, concurring with the majority opinion, held as under on the above formulated question:

> "(5) 'Any provision' under Article 16 (4) is not necessarily to be made by the Parliament or Legislature. Such a provision could also be made by an Executive order."

41. Similarly, Justice P.B. Sawant in his concurring opinion reiterated the position of the majority that provision of reservation can be made either by a statute, rule or even by an executive order. In para 526 of the judgment, Justice Sawant stated as under:

> "526. The language of Article 16 (4) is very clear. It enables the State to make a "provision" for the reservation of appointments to the posts. The provision may be made either by an Act of legislature or by rule or regulation made under such

> Act or in the absence of both, by executive order. Executive order is no less a law under Article 13 (3) which defines law to include, among other things, order, bye-laws and notifications. The provisions of reservation under Article 16 (4) being relatable to the recruitment and conditions of service under the State, they are also covered by Article 309 of the Constitution. Article 309 expressly provides that until provision in that behalf is made by or under an Act of the appropriate legislature, the rules regulating the recruitment and conditions of service of persons appointed to services under the Union or a State may be regulated by rules made by the President or the Governor as the case may be. Further, wherever the Constitution requires that the provisions may be made only by an Act of the legislature, the Constitution has in express terms stated so. For example, the provisions of Article 16 (3) speak of the Parliament making a law, unlike the provisions of Article 16 (4) which permit the State to make "any provision". Similarly, Articles 302, 304 and 307 require a law to be enacted by the Parliament or a State legislature as the case may be on the subjects concerned."

42. Even Justice Kuldeep Singh, who was with the minority on the main issue of reservation, sided with the

majority on the above question. The answer to this question framed by Justice Kuldeep Singh was given by him as follows:

> "392. This question has been examined by Brother Judges and they have held that the reservations can be provided by the Parliament, State Legislature, statutory rules as well as by way of Executive Instructions issued by the Central Government and the State Governments from time to time. The Executive Instructions can be issued only when there are no statutory provisions on the subject. Executive Instructions can also be issued to supplement the statutory provisions when those provisions are silent on the subject of reservations. These propositions of law are unexceptionable and I reiterate the same. I, however, make it clear that any Executive Instruction [issued under Article 16 (4), 73 or 162] providing reservations, which goes contrary to statutory provisions or the rules under Article 309 or any other statutory rules, shall not be operative to the extent it is contrary to the statutory provisions/rules."

43. In view of the above, the settled position of law is that reservations on posts and appointments in public service can be validly made by an executive order, provided it is not in conflict with any statutory Rules or Statute.

44. Now we come to the main question, which is whether classification of "andolankaris" for the purpose of reservation in government service is a valid classification and the reservations made in government service for the "andolankaris" and their family members or dependents can be legally sustained.

45. Reservation for "backward classes", or for any other class is a subject, which has to be examined under the Constitution of India and the relevant provisions would primarily be Article 14 and Article 16 of the Constitution. We have also to examine the course the law has taken so far on the subject of reservation in public service, under the Constitution of India, and where do the "andolankaris" stand in the light of the settled legal position, since Article 14 and Article 16 of the Constitution of India are the provisions which have constantly engaged the attention of the Hon'ble Apex Court, resulting in a plethora of judgments on the subject.

46. To my mind the right to equality lies at the root of the subject we have been called upon to deal with. Equality, or the concept of equality has a dominating presence in the entire body of our Constitution. If the Constitution of India is the cornerstone[3] of the nation, then equality is the cornerstone of the Constitution and the rule of law. The reason being that equality is not merely a fundamental right or a basic feature of our Constitution, but equality, unlike other rights, is also a facet of other basis features as well, such as secularism and democracy.

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3. Granville Austin – "The Indian Constitution: Cornerstone of a Nation"- Oxford University Press

47. The preamble of our Constitution proclaims to secure for all its citizens "EQUALITY of status and of opportunity". The "Right to Equality" under Article 14 of the Constitution of India mandates that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 16 (1) of the Constitution, proclaims that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State". Clause (4) of Article 16 of the Constitution of India, however, provides that "Nothing in this Article 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 service under the State".

48. Initially, in matters of reservation in public service, the accepted position was that appointments were to be made on the basis of merit alone and the only exception to this Rule was in clause (4) of Article 16, which enables the State to make provisions for reservation on "appointments or posts", in favour of backward class of citizens, in case the backward classes were not having adequate representation in service under the State. This continued to be the approach of Hon'ble Apex Court, and was reiterated in **T. Devdasan**[4], with the sole dissent of Justice Subba Rao. This dissent is important, as this later became the law of the land.

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4. T. Devadasan v. Union of India, AIR 1964 SC 179

49. Whereas the majority in T. Devdasan reiterated the settled view, which was that public employment is based on merit and reservation for backward classes is only an exception carved out under clause (4) of Article 16 of the Constitution, Justice Subba Rao was of the view that it is not clause (4) of Article 16 which enables the State to make reservations in public employment, but this power lies with the State under clause (1) of Article 16 and further that clause (1) of Article 16 is a facet of Article 14 of the Constitution of India and has to be given the same wide meaning as is being given to Article 14 of the Constitution of India under "equal protection of the laws".

50. The seminal judgment of the Apex Court came later in **N.M. Thomas**[5], which marks a watershed in our jurisprudence history, where the Hon'ble Apex Court by a majority of 3:2 held that Article 16 (4) is not in the nature of an exception to Article 16 (1), but it is merely a facet of Article 16 (1), which "fosters and furthers the idea of equality of opportunity with special reference to underprivileged and deprived class of citizens". Article 16 (1) again is also a facet of the principle of equality enshrined in Article 14, which like Article 14 permits reasonable classification. In the opinion of many jurists across the country, "Thomas" marks the beginning of a new era in judicial thought and process as regarding reservation in public employment. It was only after "Thomas" that reservations could be validly made for classes which were other than "backward classes". Without Thomas there could be no legitimacy for reservations in public employment, for freedom fighters, physically challenged or even dependants of defence personnels.

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5. State of Kerala v. N.M. Thomas, (1976) 2 SCC 310

51. Article 16(1) speaks of "equality of opportunity". The majority in the case of Thomas held that clause (1) of Article 16 mandates not a simple equality of opportunity but a meaningful i.e. proportional equality "which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the employment of basic rights or claims"[6]. It was emphasized that only if the concept of "equality of opportunity" is understood in the broad sense, taking into account the existing inequality in society that it can become meaningful. It was emphasized by Hon'ble Justice Mathew as under:-

> "I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of scheduled castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upon the point of making reservation."

52. The law as laid down in Thomas case is the law of the land, reiterated in 1992 by the majority in Nine-Judges

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6. Thomas, Per Mathew J. Para 73

Constitution Bench in the case of **Indra Sawhney and others v. Union of India and others** reported in **1992 Supp. (3) SCC 217**. Following were the questions formulated (in the majority opinion of Justice B.P. Jeevan Reddy), on this aspect.

> "2. (a) Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?
>
> (b) Whether clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of 'backward class of citizens'? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups?"
>
> (c) Whether reservations can be made under clause (1) of Article 16 or whether it permits only extending of preferences/concessions?"

53. As per the majority, Clause (4) of Article 16 is not an exception to clause (1) of Article 16, rather it is "an instance of classification implicit and permitted by clause (1). In other words, Article 16 (4) is not an exception to Article 16(1) but it only states more specifically for the backward classes, which is implicit in Article 16(1) itself. Even without there being any specific provision for reservation for the backward classes in Article 16(4), the State has such powers under Article 16(1). Article 16(4) only emphatically puts for the backward classes, what is already there in Article 16(1) of the Constitution of India.

54. As already stated above, it was in Thomas that for the first time it was ruled that Clause (1) of Article 16 is a facet of the doctrine of equality enshrined in Article 14, and like Article 14 it also permits reasonable classification. It was held that the powers to make reservations in public employment actually lie under Clause (1) of Article 16. The majority in Indra Sawhney agreed with the view taken in Thomas by the Hon'ble Apex Court and observed as under:

"In our respectful opinion, the view taken by the majority in Thomas is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16 (4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the service of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). The speech of Dr. Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly – referred to in para 693 – shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a

> provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms."

55. To the question – whether Article 16 (4) is exhaustive of the concept of reservations in faovur of backward class, the answer was that clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens" and that "Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16".

56. Question 2 (c), which is extremely important for us, was whether Article 16 (4) is exhaustive of the very concept of reservation. Since the answer given by the majority to this question has an extremely important bearing for us, we must reproduce the entire answer in toto, which reads as under:

> "**744.** The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of

> reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, - and not for all and sundry reasons – that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do."
>
> (Emphasis supplied)

57. The law as it stands on the subject, therefore, in my opinion can be stated as follows:

Reservation in public service for "backward classes" can be made only under clause (4) of Article 16 of the

Constitution. All the same, for other classes or class of citizens (with which we are presently concerned), State has powers to make reservation under clause (1) of Article 16 of the Constitution. Yet since these are exceptional powers, hence by necessary implication these must be used in "very exceptional situations". We must reiterate the point emphasized by the Apex Court that "It is in very exceptional situations, - and not for all and sundry reasons – that any further reservations, of whatever kind, should be provided under clause (1)". And further if such reservations are made then it must satisfy that such reservation was necessary and has been made in public interest.

58. What was the exceptional situation in 2004, which needed a redressal by way of reservation in public employment for the "andolankaris", and whether it was in public interest!

59. The State in its counter affidavit dated 20.09.2012, which is sworn by an Additional Secretary (Home) Government of Uttarakhand has given the sequences of events regarding the decision taken to grant reservation to the "andolankaris", which are as follows.

60. In para 5 of the counter affidavit, it has been stated as under:

> "5) That the State of Uttarakhand was created on 09/11/2000 after long agitation by the local peoples for creation of Hill State. After creation of the Hill State there was demand from various quarters of the State that those persons who have suffered during the agitation for creation of New State they be given appropriate treatment. On 04th August 2004 a meeting was held under the Chairmanship of the Chief Secretary, Government of Uttarakhand for taking a decision in respect of

giving facilities to the Uttarakhand Aandolakari a meeting was attended b the Principal Secretary Personnel, representative of Additional Chief Secretary, Additional Secretary Personnel and Additional Secretary Home. In the said meeting after exhaustive discussion it was agreed that following facilities would be provided to the Uttarakhand Aandolankari who were injured or have went to jail during agitation for creation of new State after they have been verified by the department of Home. It was also agreed that following facilities be provided to the agitators:-

1. The injured/agitators who were in jail for 7 or more days would be given appointment as per their educational qualification on Class III and IV posts which are outside the purview of the Public Service Commission.
2. The agitators who have remained in jail for less than 7 days would be given benefit of appointment upto the age of 50 years, 5% additional weightage and 10 % horizontal reservation for next 5 years in appointment.
3. The agitators who have remained in jail for less than 7 days will be given preference in self employment scheme.
4. The agitators will be given the identification card by the District Magistrate concerned.
5. The agitators holding the said identification card will be given preference in granting pass for entry in the Vidhan Sabha Secretariat of the State.

On the proceeding of the meeting held under the Chairmanship of the Chief Secretary the approval of the then Hon'ble Chief Minister was taken on 07th August 2004."

61. Consequent to the above meetings, two Government Orders dated 11.08.2004 (G.O. Nos. 1269 of 2004 and 1270 of 2004) were passed. Thereafter, on 25.08.2005, the Government issued a letter to all the District Magistrates explaining as to how the period of 7 days during which the

“andolankaris” remained in jail was to be counted and it was clarified that the effective date would be the date when the concerned Magistrate had passed an order for sending the person to judicial custody. Vide Government Order dated 08.11.2006, the benefit of horizontal reservation was extended to the dependants and family members of such “andolankaris” who were more than 50 years of age or for some reasons could not be appointed in Government service. Later, vide Government Order dated 13.12.2011 this benefit was extended to all the family members and dependants of “andolankaris”. On 22.10.2008, another Government Order was issued laying down criteria as to how an “andolankari” was to be identified. As per this Government Order, an “andolankari” was to be identified based on the report of the Local Intelligence Unit (L.I.U.) or on the basis of any other report available in the police department, which would include copy of the first information report, medical report and any other report which could be verified by the concerned District Magistrate.

62. The argument of the State before this Court, in justification of the appointments and the reservation made in favour of “andolankaris”, would be that the State took a policy decision to grant such a benefit to those who had suffered during the Uttarakhand movement, as there was a demand from various quarters that such reservation be made. The learned Advocate General of the State would argue that ultimately it was a policy decision taken by the Government, as the Government thought it best to grant such reservation in public service to the “andolankaris”. We do not dispute the powers of the Government to make reservation in public service. All that has to be seen is whether these appointments and reservations are constitutionally valid.

63. We live in an unequal society. There is an inequality of status, of opportunity, of circumstances and of class,

amongst other inequalities pervading in our society. This would mean that the same laws cannot protect all equally. A mere equality in law is hence not a real equality. Justice Mathew in case of "Thomas" had used a remark of Plato while explaining the broad concept of equality which is that, "a perfectly simple principle can never be applied to a state of thing which is the reverse of simple."[7] For this reason, the Constitution of India, taking into account, the *de facto* inequalities which exist in society made the right to equality a purposive, real and effective right by placing the weaker sections of society, through implementation of such laws that would create a level playing field. Equal protection of laws means precisely this. Article 14 embodies not merely an "equality before the laws", but more thoughtfully and meaningfully, it mandates, "equal protection of the laws". In short, the Constitution gives not a formal equality but a real, substantive and purposive equality, which tries to mitigate inequalities which arise out of the vast social and economic differences in our society.

64. Embodied in this concept of "the equal protection of the laws", lies the doctrine of classification. It means equal protection of laws only for such persons who are similarly situated. The law therefore discriminates between those who are similarly situated and those who are not. All the same, in order to make this distinction valid in law, two conditions must be met. The classification must be founded on an intelligible differentia, clearly distinguishing the group classified as one from the rest and secondly, classification must have a rationale to the object sought to be achieved. In other words, the classification must have a valid and lawful purpose as well. The classification must be permissible in law because an impermissible classification would violate the

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7. Thomas (supra) Para 52.

principle of equality and equal protection of the laws. In **Budhan Chaudhary v. State of Bihar** reported in **AIR 1955 SC 191,** the Apex Court explained the above concept of Article 14 as follows:

> "5.....It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

65. Since the source of reservation with which we are concerned lies in Article 16 (1) of the Constitution which is nothing but a facet of Article 14, what has to be seen is whether making "andolankaris" a separate class for the purposes of reservation is valid in law?

66. This reservation has been done primarily by means of two Government Orders in the year 2004, which we would refer to as G.O. Nos. 1269/2004 and 1270/2004. Under G.O. NO. 69, one time reservation in Government service is given to those “andolankaris” who were either “injured” or were jailed for 7 days or more. This was for one time reservation in class 3 and class 4 posts in Government service, which are outside the purview of the State Public Service Commission. Under G.O. No. 1270, which was passed on the same date as G.O. No. 1269 (i.e. 11.08.2004), 10 % reservations on the posts in Government service was made for those “andolankaris” who were jailed for less than 7 days. Barely a couple of years later, this reservation was extended not only for “andolankaris” but for their family members as well. In my humble but considered view, this classification itself is flawed in more ways than one. An “andolankari” who had remained in jail for 7 days gets a job without facing any selection or competition (as per G.O. No. 1269/2004 dated 11.08.2004), whereas “andolankari” who is similarly jailed for 6 days cannot get an automatic entry in Government service (G.O. No. 1270/2004 dated 11.08.2004). He will still have to face a competition. Moreover, an “andolankari” who has been injured gets the same benefit whereas an “andolankari” who had remained in jail for 6 days does not. Further what exactly do we mean by an “injury” has not been defined. An injury in law can have a wide definition indeed. Even if we presume that what was meant by the executive was an injury as defined under the Indian Penal Code, that too also does not help the matter. Under the Indian Penal Code “injury” is defined under Section 44, which reads as under :

> “**44. ‘Injury’. –** The word “injury” denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.”

67. Even if we take “injury” as synonyms to the word “hurt”, we find that this too has an extremely wide meaning.

Section 319[8] of the I.P.C. defines "hurt" and Section 320[9] of the I.P.C. defines "grievous hurt", which would be anything between a bodily pain to a fracture or dislocation of bone, permanent disfiguration of the head or face or anything causing permanent privation of the sight of either eye. Therefore, logically a person who has suffered "bodily pain", as an "andolankari" is entitled for Government service without facing a competition, whereas another "andolankari" who remained in jail for 6 days is not similarly entitled. Moreover, what exactly is the proof of a bodily pain! A classification need not be scientifically or mathematically precise, as held by the Apex Court in **Special Courts Bill, 1978,In re, (1979) 1 SCC 380,** yet it must be reasonable and not arbitrary.

68. Making a person eligible for a direct appointment in Government service on the basis of his being injured during Uttarakhand movement, without precisely or even reasonably defining as to what constitutes an "injury" makes the entire provision vague. It is also open to abuse. One does not have to go far, as even in the present case, Karunesh Joshi (petitioner in Writ Petition (S/S) No. 945 of 2007) was seeking appointment on the basis of his claim that he was

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8. "**319. Hurt. -** Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

9. "**320. Grievous hurt.** – The following kinds of hurt only are designated as "grievous": -

First. - Emasculation

Secondly. - Permanent Privation of the sight of either eye.

Thirdly. – Permanent privation of the hearing of either ear.

Fourthly. – Privation of any member or joint.

Fifthly. – Destruction or permanent impairing of the powers of any member of joint.

Sixthly. – Permanent disfiguration of the head or face.

Seventhly.- Fracture or dislocation of a bone or tooth.

Eighthly.- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

"injured" during Uttarakhand agitation on 29.09.1995. No details of the incident have been given but it has been stated that on the said day, the petitioner while participating in Uttarakhand agitation was injured during a "lathi" charge by the police. He thereafter states in para 5 of the writ petition that he was seriously injured in the "lathi" charge and was under treatment of a private doctor, namely, Dr. P.C. Harbola at Haldwani. In order to substantiate his argument, he has annexed a certificate of the doctor dated 28.10.1995, which reads as under:-

> "It is certified that Mr. K. Joshi, whose signature is given below, has been treated by me on 29-09-1995 at 6.00 P.M. He remained under my treatment from 29-09-1995 to 29-10-1995 for injury treatment. He is treated by me from upper and lower limbs and back injures."

69. What injury the petitioner had sustained has not been certified by the doctor. All it says is that Sri Karunesh Joshi was being treated for "upper and lower limbs and back injuries". Can this be a valid proof of an "injury"? Perhaps it may be since "injury" itself has not been defined! Not only this, although the Government Order is of 11.08.2004, and thereafter the Rules were framed on 20.05.2010, yet even in the Rules, no effort has been made by the State to precisely define as to what constitutes an "injury". Therefore, the classification of "andolankaris", which is based on an absolutely vague identification, cannot be called a reasonable classification.

70. The doctrine of classification is a judge made doctrine, built and incorporated in our Constitutional Jurisprudence by a series of judicial pronouncements. The State can make a law based on classification only when the classification has an intelligible differentia and a rationale with the object sought to be achieved. In my opinion, the very classification of an “andolankari” from the rest is not based on any reasonable criteria. The distinction made within the “andolankaris” of “7 days and more in jail” and “less than 7 days in jail” also is not reasonable.

71. As we have seen the first Government Order i.e. G.O. No. 1269/2004 does not even reserve the posts but straightaway declares that anyone who is an “andolankari” i.e. who has either sustained injury or remained in jail during the “andolan” for more than 7 days will straightaway gets a class 3 or class 4 post depending upon his qualifications, without having to face any competition or examination. In other words, all the class 3 and class 4 posts which were vacant on that given day could have been filled by only “andolankaris” had there been the required number of “andolankaris” for such posts. The actual reservation of 10 % is made in another Government Order i.e. G.O. No. 1270/2004, which makes 10 % horizontal reservation for all Government posts at all levels. It is important to note that here the reservation on 10% posts is not just for class 3 and class 4 posts, but is applicable for all class I to class IV posts, whether they are outside of the purview of State Public Service Commission or within its purview.

72. The “andolankaris” cannot be treated as a distinct class on the basis of any intelligible differentia for other reasons as well. Under the definition of “andolankari” a person who has remained in police custody for 24 hours or even for a

few hours or has received any bodily pain during the “andolan” is entitled for reservation, whereas many others who also participated in the movement, sat on “dharna” “hartals”, participated in long marches, precessions, etc. at the cost of their time, studies and work are not included within the definition of an “andolankari”, though they too have as much of right of being called an “andolankari” as the one who had remained in jail for few hours in the “andolan”, or was “hurt”, during the movement.

73. An over emphasis on this doctrine of “classification”, can also be counter productive, as emphasized by Hon’ble Apex Court in the case of **LIC of India v. Consumer Education & Research Centre** reported in **(1995) 5 SCC 482.** In the above decision, on over emphasis of “classification”, the Hon’ble Apex Court had to say as under:

> “….The doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality, overemphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality enshrined in Article 14 of the Constitution. The overemphasis on classification would inevitably result in substitution of the doctrine of classification to the doctrine of equality and the Preamble of the Constitution which is an integral part and scheme of the Constitution.”

74. Prior to this in **Mohd. Shujat Ali v. Union of India** reported in **AIR 1974 S.C. 1631**, the Hon'ble Apex Court on the over emphasis of doctrine of classification had to say as under:

> "Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the guarantee of equality of its specious content."

75. This concern expressed by the Hon'ble Apex Court is similar to what was raised by none other but Dr. B.R. Ambedkar, during Constituent Assembly Debates. While justifying the inclusion of the word "backward" in Clause (4) of Article 16 of the Constitution of India, Dr. Ambedkar had cautioned that "unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain". The rule being that "there shall be equality of opportunity for all citizens in matter relating to employment or appointment to any office under the State" (Clause 1 of Article 16).

76. Mr. Mahesh Chandra Pant, learned counsel for the interveners took pains to explain before this Court that agitation or the "andolan" for a separate State in the erstwhile State of Uttar Pradesh was not merely an agitation but it was an extremely wide-spread movement, which had cut across the entire length and breadth of present Uttarakhand. It was not limited to towns or urban areas, but had penetrated, sometimes even more deeply, in sub-divisions and villages. In the year 1994-95 when the movement was at its peak, "dharna", street march and public meetings were common place everywhere in Uttarakhand. Therefore, if the dream

called “Uttarakhand” could eventually become a reality, it was due to the combined efforts of all people in Uttarakhand. It has also been widely acknowledged that women were spearheading the movement everywhere in the hill districts of Uttar Pradesh. They not only faced “lathi charge” and police brutalities at several places but two of them, namely, Smt. Belmati Chauhan and Smt. Hansa Dhanai were gunned down at point blank range at “Jhoola Ghat”, in Mussoorie, during the peak of Uttarakhand movement. Surely if women had a wide participation in the movement, then it must be reflected in the list prepared by each District Magistrate for his district for such “andolankaris”.

77. In this writ petition, the counter affidavit has been filed by Sri Manjul Kumar Joshi, Additional Secretary (Home), Government of Uttarakhand, who has tried to explain that the benefit of reservation was not been given to all and sundry, but a criteria was laid down in Government Order Nos. 1269/2004 and 1270/2004. Informations were sent to all the District Magistrates of 13 districts and they were asked to prepare a list of only such “andolankaris” who were either injured or remained in jail during the Uttarakhand movement and in pursuance of these orders of the Government, the District Magistrates of each districts of Uttarakhand prepared a list of marked “andolankaris” and only such persons or their family members will be given the benefit of reservation. These lists which have been enclosed with the counter affidavit form part of Annexure No. 15 to 26, has a list of marked “andolankaris”, for each of the district of Uttarakhand.

78. A perusal of these lists shows how poorly have women been represented. These lists which have been prepared for the 13 districts of Uttarakhand, do not do justice to the level of their participation in the Uttarakhand

movement. For the districts of Pithoragarh, Pauri Garhwal, Uttarkashi, Haridwar and Udham Singh Nagar, there is no representation of women at all. Not a single name of any woman is there in these lists of "marked andolankaris". For the remaining districts as well, the representation of women is extremely poor. For example, out of 188 "andolankaris" marked for District Rudraprayag, there is only one woman. Similarly, out of 826 "andolankaris" marked for District Chamoli, there are only 74 women, for District Tehri Garhwal, out of 464 marked "andolankaris", there are only 26 women, for District Champawat, out of 249 marked "andolankaris", there are only 10 women, for District Bageshwar, out of 72 marked "andolankaris", there is only 1 woman, for District Almora, out of 220 marked "andolankaris", there are only 4 women. Similarly, in District Dehradun, out of total 164 persons employed under the quota of "andolankaris", there is not a single woman, in District Uttarkashi, out of 65 persons employed, there is not a single woman, in District Nainital, out of 15 persons employed, there is no representation of woman, and again in District Haridwar, out of 3 employed persons, there is no representation of woman.

79. The above figures show that women though were in the forefront of the Uttarakhand movement have been very poorly represented as "marked andolankaris", which only proves that the list which has been prepared for "andolankaris" is either arbitrary or is not based on reasonable criteria.

80. One must clarify here that a proper representation of women in the list would not by itself justify the classification. It nonetheless reflects the arbitrariness of the Government in this matter and more so shows that the "classification" is flawed.

81. An attempt has been made to equate the "andolankaris", with "freedom fighters". The argument is that since reservation of appointments and posts, for freedom fighters in government service is valid so should it be for the "andolankaris". The closest citation before us on this point is that of **D.N. Chanchala Vs. the State of Mysore and others,** reported in **1971(2) SCC 293,** where a Three-Judges Bench of the Hon'ble Apex Court by majority (Justice I.D. Dua dissenting) had held reservations of seats in medical colleges, for the dependants of "political sufferers" (same as freedom fighters), to be valid.

82. In the above case, the erstwhile State of Mysore (present Karnataka), had made reservations, *inter alia*, for dependants of political sufferers in medical colleges. The petitioners by means of a writ petition had challenged the Rules by which these reservations were made. The reservations were made under Clause (4) of Article 15 of the Constitution of India, which is a provision enabling State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. The majority opinion in the above case was that dependants of political sufferers belong to a "backward class", because of the sufferings entailed by political sufferers during freedom struggle. The first argument of the petitioners before the Hon'ble Apex Court in the above case was that the definition of "political sufferer" was vague. This was rejected by the Hon'ble Apex Court on ground that a "political sufferer" has been defined as someone who has suffered incarceration, whether as imprisonment or detention, for a period of at least "six months" or been awarded capital punishment, or have died while actually in detention or undergoing imprisonment, or killed or incapacitated permanently by firing or Lathi charge by the police or by the military, or must have lost employment,

property or other means of livelihood. The definition of political sufferer was hence held not to be vague. As regards the rationality of the classification, the majority ruled in favour of the dependants of political sufferers, by equating them with the dependants of defence personnels and held as under:-

> "The principle underlying Article 15 (4) is that a preferential treatment can validly be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. It would not in any way be improper if that principle were also to be applied to those who are handicapped but do not fall under Article 15 (4). It is on such a principle that reservation for children of Defence personnel and Ex-Defence personnel appears to have been upheld. The criteria for such reservation is that those serving in the Defence forces or those who had so served are and were at a disadvantage in giving education to their children since they had to live, while discharging their duties, in difficult places where normal facilities available elsewhere are and were not available. In our view, it is not unreasonable to extend that principle to the children of political sufferers who in consequence of their participation in the emancipation struggle became unsettled in life; in some cases economically ruined, and were therefore, not in a position to make available to their children that class of education which would place them in fair competition with the children of those who did not suffer from that disadvantage. If that be so, it must follow that

> the definition of 'political sufferer' not only makes the children of such suffers distinguishable from the rest but such a classification has a reasonable nexus with the object of the rules which can be nothing else than a fair and just distribution of seats."

83. All the same, we must note that the above case relates to Article 15 (4) of the Constitution of India. Article 15(4) enables the State to make special provision for a socially and economically backward class and Scheduled Castes and Scheduled Tribes, as an exception of Article 15(1). The case before this Court, however, is not related to Article 15(4) of the Constitution of India but to Article 16(1) of the Constitution of India, where reservations claimed are not on ground of backwardness but on ground that the "andolankaris" constituting a separate and distinct class. Moreover, and what is more important is that the reservation is not being made for seats in educational institutions but reservation is being made in Government service. "Andolankaris" have not been treated as a "backward class" nor is it their claim, in fact this is also not the argument of the learned Advocate General or Mr. Raman Kumar Shah. Their case is of a special and separate category. Therefore, the said judgment (D.N. Chanchala v. the State of Mysore and others) is of no help to the "andolankaris".

84. In any case, in my considered opinion the comparison of "andolankaris" with "freedom fighters" is not a valid comparison. A freedom fighter is a one who was, *inter alia,* incarcerated during freedom struggle, as a consequence of his participation in the freedom struggle. This resulted in rupture of his normal family life and several disadvantages, including economic and financial in many cases. On the other hand, there is nothing on record to show that a similar disadvantage had befallen the "andolankaris". We must also remember that a protest by a subjugated community against the

colonial rule is characteristically different to a protest by free citizens in a democracy. Moreover, though incarceration for protest under a colonial rule can be a reasonable yardstick to gauge the disadvantage or sufferings, the same may not always be true in a free country. A protest for a popular cause in a democracy has various manifestations (as were there in Uttarakhand movement), yet all may not result in incarceration.

85. Mr. Raman Kumar Shah as well as Mr. S.N. Babulkar, learned Advocate General, who are for the "andolankaris" and the State respectively, then referred to Articles 38 and 46 of the Constitution of India, which are in Part IV i.e. Directive Principles of State Policy. They tried to build up a case for the "andolankaris" on grounds that it is a mandate for the State to promote the educational and economic interest of, *inter alia,* all the "weaker sections", of society. All the same, they have not been able to satisfy this Court as to how the "andolankaris" can be called a weaker section of the society and by giving them appointment in Government service and then making reservations for them in Government service, would mean a promotion of their educational and economic interest, and it is being done to protect them from social injustice and all forms of exploitation, as is the mandate of Article 46 of the Constitution of India.

86. Mr. Raman Kumar Shah has also relied upon a decision of High Court of Judicature at Bombay, Aurangabad Bench in the case of **Rajendra Pandurang Pagare and another v. The State of Maharashtra and others (Writ Petition No. 5266 of 2008)** and has argued that in the said case the reservation made in favour of "project affected" persons was held to be valid. However, since I am of a considered view that an "andolankari" cannot be equated with the "project affected" person, the above judgment is of no help to Mr. Raman Kumar Shah.

87. Can “andolankaris” be called a “weaker section” as is the case of the learned Advocate General Sri S.N. Babulkar as well as Sri Raman Kumar Shah? What is a weaker section has not been defined in the Constitution of India. All the same, it is a wide term, which would include not only Scheduled Castes, Scheduled Tribes and Other Backward Classes but also many other sections of our society, such as, physically challenged persons, displaced persons, project affected persons, slum dwellers, etc. It is again true that a particular section may not be educationally and economically weak yet may belong to a weaker section. In other words, a “weaker section” is a segment of society which has been rendered weak by circumstances and, therefore, the State must come to rescue of such a section.

88. But, under no stretch of imagination can “andolankaris” be called a “weaker section” of our society. This is so logically, as well as factually. Without taking anything away from the selfless deeds performed by the “andolankaris” at the relevant time, which was for a cause, yet less than 7 days of imprisonment cannot make a person count amongst the weaker sections of our society. Secondly, there has been no empirical study before us, none done by the State, which can show that due to their incarceration the “andolankaris” suffered any kind of disadvantage and handicap in life and in society, and consequently they have to be counted as a weaker section of the society. If we closely look at the provisions of Article 46 of the Constitution of India, we shall find that the provision is there primarily to protect a weaker section from “social injustice and all forms of exploitation”. It is the Schedule Castes, Scheduled Tribes, O.B.Cs., physically challenged persons, slum dwellers and all other marginal segments which need protection from social injustice and all forms of exploitation, not an “andolankari”. That the “andolankaris” forms a “weaker section” of a society has never

been explained to us to our satisfaction, either by Mr. Raman Kumar Shah or by the learned Advocate General. Hence, resorting to Article 46 of the Constitution of India and thereby giving cover of a weaker section to the “andolankaris” is rejected.

89. In order to enforce Directive Principles of the State Policy, the State cannot violate the fundamental rights of its citizens. I have absolutely no doubt in my mind that firstly giving appointment to the “andolankaris” in government service without holding any kind of competition amongst them (in view of the Government Order No. 1269 of 2004 dated 11.08.2004) is clearly violative of Article 14 and 16(1) of the Constitution of India. In fact this is not even a reservation but a form of gratuitous or compassionate appointment. That it is in clear violation of Articles 14 & 16 of the Constitution of India is not in doubt. Consequently, the Order No. 1269 dated 11.08.2004 and all other orders in furtherance of the said order are hereby quashed and set aside. Similarly, “Uttarakhand Rajya Andolan Ke Ghayal/Jail Gaye Andolankariyon Ki Sewayojan Niyamawali, 2010” is set aside as unconstitutional and *ultra vires*.

90. The horizontal reservations granted first by Government Order No. 1270 dated 11.08.2004, later extended to the family members of the dependants of “andolankaris”, fares no better. The sole explanation given by the State for granting reservation to the “andolankaris” is that they had participated in the movement for a separate State of Uttarakhand. To justify the “andolankaris” from the rest i.e. those who did not participate in the movement, is the incarceration an “andolankari” suffered, which can be in certain cases less than 24 hours. I find that this classification of “andolankaris” is firstly not based on any intelligible differentia which can distinguish “andolankaris” from the

many left out of the group, and secondly the classification has no rational relation with the object sought to be achieved.

91. It is true that an argument can always be made that since this classification had to be done on the basis of at least some tangible criteria to distinguish an “andolankari” from the rest, and therefore imprisonment being one such criteria was adopted. Assuming that those who had been defined as an “andolankari”, who are now called as “marked andolankaris”, form a well defined category and class, yet the question would be what is the purpose of it all. A reservation in public employment for an “andolankari” can only be justified and held valid if the State satisfies the Court that an “andolankari” as well as his dependants (as the reservation is now extended to the dependants of “andolankaris” as well), have suffered some kind of disability or disadvantage, a kind of handicap, and hence the purpose of reservation was to bring such class of persons at par with the rest. Can a detention in police custody for less than 6 days be called a disability or handicap, so as to justify reservation in public employment? This could have been so if the imprisonment itself would have cast a further disadvantage to such persons. This Court has been informed that the State has withdrawn all cases against “andolankaris” and, therefore, a detention for less than 6 days in police custody cannot be treated at par or in the same footing as the incarceration suffered by a freedom fighter. Similarly, it cannot be held to be at par with the disability suffered by the dependants of defence personnel, who by the very nature of their service work in difficult terrains are not able to give the same kind of care and attention to their family, as is possible for a civilian. I, therefore, hold that the classification of “andolankaris” is not based on any reasonable criteria and it has no nexus with the objects sought to be achieved.

92. I also find no justification, public interest or public purpose in the grant of reservations for “andolankaris” in

public service. An arbitrary classification made under Article 16(1) of the Constitution of India cuts at the very root of the concept of equality. Dr. B.R. Ambedkar had cautioned in the Constituent Assembly that while enabling the State in making reservations in public employment powers of the State must be limited and not unbridled. His almost prophetic words, which have already referred in the preceding paragraph of the present order, were – "unless you use some such qualifying phrase as 'backward' the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain".

93. Right from Thomas, great significance has been led as to the very concept of classification and that such classification cannot be made lightly. It was observed in Thomas as follows:

> "54. The principle of proportional equality is attained only when equals are treated equally and unequals unequally. This would raise the baffling question: Equals and unequals in what? The principle of proportional equality therefore involves an appeal to some criterion in terms of which differential treatment is justified. If there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified. But what is to be allowed as a significant difference such as would justify differential treatment?"
>
> (Emphasis provided)

94. The note of caution given in Indra Sawhney would also be necessary to reiterate here. In Indra Sawhney, while holding that clause (4) of Article 16 is not exhaustive of the power to grant reservation and further classification can be made under clause (1) of Article 16 of the Constitution of

India, it had cautioned excessive classification and the fatal dangers which lie therein:

> "On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, - and not for all and sundry reasons – that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do."
>
> (Emphasis supplied)

95. At another place, in the same judgment the Hon'ble Apex Court had placed its note of caution regarding the pitfalls of over classification.

> "..Due regard to legislative measures or executive action directed towards welfare measures has never been disputed but when they are overshadowed with extraneous compulsions or are arbitrary, the higher courts in the country are obliged to exercise the power of "judicial review". (Indra Sawhney as referred by Datar, page 272).

96. Earlier in Ram Krishna Dalmia[10] , the Constitution Bench of Five-Judges while laying down the principles of a proper classification had held that wherever the classification itself is irrational and where there is evidently no nexus with the objects sought to be achieved and when such classifications are challenged, they have to be quashed and set aside if they are discriminatory and violative of the equal protection of laws.

97. There is another aspect of the matter which must also be noted. Reservations on posts or appointments in special categories once made have a tendency to stay even when initially a time limit for such reservation has been prescribed. Reservations made initially for the sons and daughters of the freedom fighters was extended to their grandchildren and it still continues. In the case at hand, the initial reservation was only for the "andolankaris" which was later extended to the family members of a limited category of "andolankaris", such as those who were either more

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10. Ram Krishna Dalmia v. S.R. Tendolkar, AIR 1958 SC 538

than 50 years of age or were incapacitated. This again was extended to the family members of all the “andolankaris”.

98. In any case, the classification of “andolankaris” into a separate class for the purposes of reservation in public employment is violative of both Article 14 and 16 of the Constitution of India. I find no justification for the grant of reservation to “andolankaris” in Government service. What political compulsions the Government of the day had in making such reservation is something that is outside our purview of enquiry, but I must record that this was totally an arbitrary exercise of power. The classification of “andolankaris” as a separate class for the purposes of reservation in Government service does not satisfy any objective or social criteria. I, therefore, quash and set aside the Government Order Nos. 1270/2004 dated 11.04.2008 and the subsequent orders dated 08.11.2006, 22.10.2008, 13.12.2011 and all other subsequent orders by which such reservations have either been granted or extended from time to time.

99. In view of the above matter, all consequential orders of the Government making appointments in pursuance of the above Government Orders and Rules shall also stand quashed and set aside.

100. Before parting with the judgment, I must place on record the efforts put in by all the Counsels, Mr. S.N. Babulakar, learned Advocate General, Sri V.B.S. Negi, Senior Advocate, Sri M.S. Pal, Senior Advocate, Sri S.K. Jain, Senior Advocate, Sri Arvind Vashishta, Senior Advocate (Amicus Curiae), Sri Paresh Tripathi, Chief Standing Counsel, Sri M.C. Pant, Sri Mahesh Chandra Pant, Sri Siddhartha Sah, Sri C.K. Sharma Advocates. A special mention needs to be made of Sri

Raman Kumar Shah, who argued in person for the "andolankaris". Sri Raman Kumar Shah (who is a practicing Advocate before this Court), has taken up this matter *pro bono*. Though I was not persuaded by his arguments yet his efforts are praiseworthy.

(Sudhanshu Dhulia,J.)

23.06.2017

Avneet/-