

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 for the State assisted by Mr. Paresh Tripathi, 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; Mr. M.C. Pant, Mr. Mahesh Chandra Pant; Mr. Siddhartha Sah; Mr. C.K. Sharma, Advocates for the interveners.

JUDGMENT

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

Per: U.C. Dhyani, J.

Those who have less in life, should have more in law. The underlying philosophy behind reservation can be summed up in this sentence. Some are born backward (*weak*), some 'become' backward and some have backwardness 'thrust' upon them. Women, physically challenged, Scheduled Castes and Scheduled Tribes, according to some, are born with relatively lesser credentials in life. Conferring of 'other backward class' status *sans* creamy layer, becoming physically challenged during the course of their life, dependents of freedom fighters and ex-servicemen come in the second category. If at any point of time, it is found that such status is 'thrust' upon any class, then, on being challenged, such reservation is struck down by the Constitutional Courts. Definition of Uttarakhand *Andolankaries* (who can loosely be termed as agitators or activists) depicts that it is a class carved out of those who participated in struggle for creation of Uttarakhand. It was a people's movement – a mass movement, in which, it can be said, that almost everyone participated directly or indirectly. It was a non-violent agitation for creation of Uttarakhand on peculiar demography, cultural and social ethos, which were quite distinct from plain areas of erstwhile State of Uttar Pradesh. Not all the people, who participated in the movement, have been defined as *Andolankaries*. Those, who sustained injuries, were caused hurt and went to jail for a certain period have been defined as *Andolankaries*.

2) The antagonists of such definition would propagate that what is so peculiar about the classification? Why seven day's imprisonment and hurt only? Why not to include all those who participated in such a movement? In the heart of their heart, the antagonists of such reservation want the scope of reservation for *Andolankaries* to be expanded. They want that the scope of reservation for such *Andolankaries* should not be confined to a narrow compass. The protagonists, on the other hand, would argue that there has to be some criteria, a classification, with the object sought to be achieved. If such criterion is found to be reasonable, then it will withstand the touchstone of the Constitution, otherwise not. I pose a question to myself – What is so special about the criterion that those obtaining 33 per cent marks in examination will be declared passed? Why not 34 per cent or 35 per cent? In some examinations, it is 50 per cent. Devil's Advocate will argue, why not 55 per cent? Well, it is left to the wisdom of the Legislature (in the instant case, Executive), who has carved out a definition that those undergoing jail for seven days or more and those sustaining injury etc. will be defined as *Andolankaries*. Legislature is the best body to adjudge the same.

3) Article 309 of the Constitution of India gives rule making power to the Executive. Otherwise, the service laws are framed and passed by the Legislature. The Court should not substitute its own discretion for the well-defined discretion exercised by the Executive. The Court should interfere only when it is violative of the Constitution. A law can also be read down if there is lack of legislative

competence and it does not withstand the test of scrutiny by Constitutional Courts. In the instant case, there is no lack of legislative competence. The State Government has issued Government Orders and framed the rules for reservation in respect of State services. The identification of *Andolankaries* is done by the District Magistrates on the basis of verified facts. True, these *Andolankaries* cannot be equated with freedom fighters, who fought for the independence of the country, but the *Andolankaries*, at the same time, cannot be termed as separatists. Their demand was for separate statehood within Indian Union and within constitutional framework, having full faith in the Constitution of India. Constitution of India provides for carving out new States. Our's is a federal polity. It is federal in character, although unitary in approach. The movement for separate statehood was a peaceful agitation, a movement on Gandhian path. A classification for those *Andolankaries*, who have served imprisonment for seven days or more and / or sustained injuries cannot be said to be unreasonable classification with the object sought to be achieved. The object is the same which is in the case of dependants of freedom fighters, ex-servicemen and physically challenged persons etc. Even project affected persons have been granted reservation in service in the State of Maharashtra. In some States, distinguished sportspersons are granted reservation in service.

4) I have the privilege of enlightening myself with the well-composed judgment written by my learned senior brother, who has delineated entire facts leading to filing of present P.I.L. Learned brother has held that present P.I.L. is maintainable. I entirely agree with him. I also agree with my learned brother that reservation can be made in government services by executive orders. My learned senior brother has also taken pains to discuss the important question – Whether benefit of reservation can be granted to the *Andolankaries* and / or their dependents in public service, or not? I feel, I should discuss the same.

5) By means of Government Order no. 1269 of 2004, dated 11.08.2004, one time reservation in government service is given to those *Andolankaries*, who were either injured or were jailed for seven days or more. This was one time reservation for Class III and Class IV posts in government service, which are outside the purview of the State Public Service Commission. Under Government Order no. 1270 of 2004, which was passed on the selfsame date, 10 per cent horizontal reservation on the posts in government service was earmarked for those *Andolankaries*, who were jailed for less than seven days. It was applicable for five selection years, 2000-2005 and 2008-2009 only. Classification need not be scientifically or mathematically perfect. The State can make law when the classification has an intelligible differentia and a rationale with the object sought to be achieved. I agree with my learned senior brother that *Andolankaries* cannot be equated with freedom fighters, yet it cannot be denied that

an attempt has been made by the State Government to classify them as one class and while categorizing them as a class, has made an attempt to define as to who will be an *Andolankari*.

6) In Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, it was defined as to who will be the freedom fighter. Similar attempt has been made, in the instant case, by defining who will be an *Andolankari* and, therefore, it cannot be said that such definition is not based upon any reasonable criteria. At least, there is criteria, and the criteria cannot be said to be arbitrary. It is not an example of unreasonable classification. It is, therefore, acceptable. An argument that they are violative of provisions of the Constitution does not impress me. We have an example of the Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974, in which even compassionate appointment is permissible based on a reasonable criteria. Moreover, horizontal reservation has been made for such *Andolankaries* and not the vertical one. It does not eat the share of anyone else.

7) Needless to say that *Andolankaries* are not adequately represented in the service under the State. No quantifiable data seems to be required for the purpose at this stage. It is confined to the initial appointment only and has not been extended in the matters of promotion. Executive power of State extends while issuing such Government Order and formulating such Rules [Article

162]. State is empowered to make rules regulating the recruitment and the conditions of service of persons appointed to public service in connection with the affairs of State until the provision in this behalf is made by appropriate legislature [Article 309]. The classification distinguishes these *Andolankaries*, who are grouped together, from others. The State has legislative competence to formulate the same. Hence, the same cannot be termed as unreasonable.

8) Hon'ble High Court of Judicature at Bombay, Aurangabad Bench, in Writ Petition no. 5266 of 2008, ***Rajendra Pandurang Pagare and another vs The State of Maharashtra***, relying upon Constitutional Bench of the Apex Court in the case of ***Indra Sawhney and others vs Union of India and others, 1992 Supp (3) SCC 217***, has, in para 18 of its judgment held as follows:

“18. It can thus be clearly seen that the Apex Court has held that reservation for certain weaker sections other than Scheduled Castes / Scheduled Tribes and socially and economically backward classes may be varied, viz., flood, earthquake, cyclone, fire, famine and project affected persons, war and riot torn persons, etc.”

9) In *Indra Sawhney's case (supra)*, Hon'ble Apex Court has observed thus:

“the instances of such weaker sections other than Scheduled Castes / Scheduled Tribes and socially and educationally backward classes may be varied, viz., flood, earthquake, cyclone, fire, famine and project affected persons, war and riot torn persons, physically

handicapped persons, those without any or adequate means of livelihood, those who live below the poverty line, slum dwellers etc. Hence, the expression ‘weaker sections’ of the people is wider than the expression ‘backward class’ of citizens or ‘socially and educationally backward classes’ and ‘Scheduled Castes / Scheduled Tribes’. It connotes all sections of the society who are rendered weaker due to various causes. Article 46 is aimed at promoting their educational and economic interests and protecting them from social injustice and exploitation. This obligation cast on the State is consistent both with the Preamble as well as Article 38 of the Constitution.”

10) The victims of Uttarakhand movement were directed to be given compensation by the State in the past. **One Government Order relates to posts outside the purview of Uttarakhand Public Service Commission, that too only for Group ‘C’ and Group ‘D’ posts. In fact, Government Order no. 1269 of 2004 was only meant for one time employment on Group ‘C’ and ‘D’ posts only, outside the purview of State Public Service Commission and does not exist any more. Government Order no. 1270 of 2004 was also meant for specific period for those who served imprisonment for less than seven days. Rules framed on 20.05.2010 encompass within its orbit only Group ‘C’ and Group ‘D’ posts, outside the purview of Uttarakhand Public Service Commission, for those who sustained injuries or who served jail for seven days or more, as verified by Competent Authority, according to their educational**

qualifications. This was done in supersession of earlier order issued in this behalf. They were given one time relaxation in direct recruitment. A deeming clause was also there that those who were employed before Notification of these Rules, shall be deemed to have been appointed under such Rules. Horizontal reservation cuts across the vertical reservation and it is also called interlocking reservation. Special reservations are *de hors* the social reservations. It is for the legislature / executive to evolve appropriate methodology to give effect to the reservations and, ordinarily, the courts do not interfere unless the action is *per se* illegal or unconstitutional. Article 14 condemns discrimination, but permits classification founded on intelligible differentia having a rationale with the object sought to be achieved. The government is legitimately empowered to frame rules of classification for securing the requisite standard and the classification need not scientifically be perfect or logically complete.

11) In *Rajendra Pandurang Pagare's* case (*supra*), a Full Bench decision of Hon'ble Bombay High Court has held that project affected persons can be appointed, but not without advertising the posts, ignoring their qualifications and merit. In the Government Orders and Rules under challenge, the first Government Order has given one time relaxation, that too only in Class III and Class IV posts outside the purview of Uttarakhand Public Service Commission and subsequent Government Order provides for ten per cent horizontal reservation after adopting normal

mode of recruitment, for a limited period. Rules supersede earlier Government Orders. They relate only to appointment on Group 'C' and Group 'D' posts outside the purview of State Public Service Commission, according to their educational qualifications. The verification was to be done by Competent Authority on the basis of relevant documents. Such Government Orders and Rules appear to be outcome of well informed decision taken by the State Government. It is learnt that DoPT, Government of India, is even contemplating quota in Government jobs for acid victims / persons with benchmark disabilities.

12) Needless to say that firing, lathi-charge was resorted to on the Uttarakhand activists, who were proceeding to Delhi and were pursuing peaceful demonstration. The activists sustained grievous injuries, some of them were so critical that they were awaiting their death at various hospitals at Muzaffarnagar, Roorkee, Dehradun and other places. More than 100 activists and citizens, including women, sustained injuries. Many of the activists even lost their lives. Khatima and Mussoorie incidents are still hovering around in the minds of the people, and, therefore, it is not illogical on the part of the State Government to have issued impugned Government Orders and Rules with a purpose, known to law.

13) We cannot deny the fact that the *Andolankaries*, who have been identified did participate in the movement for a separate State, they were recruited under valid Government Orders / Rules and, therefore, a great hardship will befall upon them and their families, in

case, as a consequence of quashing of the Government Orders and Rules (to which I respectfully disagree), such persons are removed from service. It is, not in dispute, that those persons had all the qualifications required for the posts on which they were appointed. It is a different thing if such facility of employment / reservation for *Andolankaries* may not be done for future, unlike freedom fighters whose second and third generations are getting benefit of reservation and, therefore, I leave it to the wisdom of the State, whether to exercise such discretion for future or not. No interference should, therefore, be called for in the appointments given in the past, which will include present recruitment exercise considering the human element and hardship.

14) I, therefore, in all humility, respectfully disagree with my learned senior brother and hold that the benefit of such horizontal reservation / employment can be granted to *Andolankaries* in public service.

15) I, therefore, hold that the Government Orders and Rules under challenge in present P.I.L. are not violative of any of the provisions of the Constitution of India. No interference is, therefore, called for in the same.

(U.C. Dhyani, J.)
23.06.2017

