Sanjeet Shukla Vs State of Maharashtra

Court: Bombay High Court

Date of Decision: Nov. 14, 2014

Acts Referred: Constitution of India, 1950 â€" Article 10, 123, 123(2), 14, 15
Maharashtra State Commission for Backward Classes Act, 2005 â€" Section 15, 9(2)

Citation: (2015) 2 BomCR 267

Hon'ble Judges: Mohit S. Shah, C.J; M.S. Sonak, J

Bench: Division Bench

Advocate: Pradeep Sancheti, Senior Advocate, Ashish Mishra, Ameya Gokhale, Sanjeet Shukla, Party-in-Person, G.S. Godbole, Drupad S. Patil, Sumit S. Kothari, Gunratan Sadavarte, Arun D. Nagarjun, Deepak Waghmare, R.S. Apte, Senior Advocate, Sagar Ambedkar, Aparna Dhavale, Manoj Mane, Shridhar Patil, Chandrakant N. Chavan, J.G. Reddy, R.M. Kadam, Senior Advocate, Ajit Kenjale, Vishal Kanade, Rohan Kadam, Siddheshwar Biradar, S.D. Rupawate, Milind Ingole i/by Santosh Parad, Ashish Mehta, Akhlaque M.S. Solkar, Poonam Tiwari, Firoz A. Siddiqui, Ansari Tamboli, Syed Ejaz Abbas Naqvi and Shaziya Mukadam i/by Gayatri Singh, Vitthal B. Devkhile, Advocate for the Appellant; Sagheer Khan, Ravindra Adsule, Special Counsel, Geeta Mulekar, D.J. Khambata, Advocate General, Aditya Mehta, Advocate, A.B. Vagyani, GP, G.S. Rao and Geeta Shastri, AGPs, Advocate for the Respondent

Judgement

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Mohit S. Shah, C.J.
This group of writ petitions/public interest litigations under Article 226 of the Constitution of India challenge two

separate Ordinances promulgated by the Governor of Maharashtra on 9 July 2014 providing for reservation of seats for admissions in aided and

unaided educational institutions in the State and reservation of appointments/posts in public services under the State as under:-

(i) Separate 16% reservation for the Educationally and Socially Backward Category (ESBC) in which the Maratha community is included,

(Maharashtra Ordinance No. XIII of 2014).

(ii) Separate 5% reservation for a newly created Special Backward Category-A (SBC-A) consisting of 50 sub-castes amongst Muslim community

specified in the Schedule to the Ordinance, other than the categories of Muslims to whom reservation has already been given under other

categories of backward classes and other backward classes, (Maharashtra Ordinance No. XIV of 2014).

Each Ordinance excludes the creamy layer, but the impugned reservations are, over and above the reservations aggregating to 52% reservations

already provided by the Maharashtra State Public Services (Reservation for Scheduled Castes/Scheduled Tribes/Denotified Tribes (Vimukta

Jatis)/Nomadic Tribes/Special Backward Category/Other Backward Classes) Act, 2001 (for short ""the Reservation Act of 2001"").

The petitioners have also challenged the State Government Resolution dated 15 July 2014 specifying Maratha community as the only community

under Educationally and Socially Backward Category for 16% reservations under the above Ordinance No. XIII of 2014.

2. This group of matters is heard for admission and for interim relief. We may, at the outset, briefly indicate the structure of this order for the benefit

of those who do not propose to meander through the entire discussion:

(I) Common Grounds of Challenge

3. While the writ petitions/PILs raise different grounds of challenge to reservations in favour of Maratha community and reservations in favour of

Muslim community, there are some common grounds also. The common grounds of challenge are as under:

(i) Promulgation of the impugned Ordinances is a fraud on the Constitution. Article 213(b) permits the Governor to promulgate an Ordinance only

to deal with an emergent situation. There was no emergency situation in July 2014 when the Ordinances were issued. Rather, the promulgation was

motivated, which is evident from the circumstances that the same were issued on the eve of elections of the Legislative Assembly at Maharashtra.

(ii) Reservations under Article 15(4) and Article 16(4) of the Constitution of India cannot exceed the ceiling limit of 50%, whether for admission to

educational institutions or in matters of public employment. The impugned Ordinances, to the extent they increase the percentage of reservations

from existing 52% to 73%, are therefore ultra vires the Constitution of India.

Promulgation of impugned Ordinances-whether unconstitutional

4. We will first consider the challenge to the two separate Ordinances on the ground that issuance of these two Ordinances is a fraud on the

constitution. It is contended that Article 213(b) permits the Governor to promulgate an Ordinance only to deal with an emergent situation. The

matters of reservations in favour of the Marathas and the Muslims are being debated for the last several years, if not decades.

5. Learned counsel for the petitioners have vehemently submitted that the issuance of two separate Ordinances on 9 July 2014 is a fraud on the

Constitution. The last report of the Maharashtra State Backward Classes Commission (Justice Bapat Commission) was rendered as far back as in

2008. The Commission has negatived the claim of Maratha community for being treated as socially and educationally backward class. The report

of the said Commission is ordinarily binding on the State Government under section 9(2) of the Maharashtra State Commission for Backward

Classes Act, 2005 (State BC Commission Act). The exercise undertaken by the State Government by appointing a State Cabinet Minister for

reconsidering the entire issue and issuing Ordinance No. XIII of 2014 in the month of July, when elections to the State Legislative Assembly are

round the corner in the month of October 2014, is, therefore, not a bona fide exercise of the power under Article 213 of the Constitution, but is a

clear fraud on the Constitution. Similarly, the Sachar Committee had submitted its report in 2008 and Dr. Mehmood-ur-Rehman (Retd. I.A.S.)

Study Group had submitted its report in 2013. There was no such great urgency in July 2014 to suddenly issue an Ordinance providing for

reservation for Muslim community. Issuance of this Ordinance on the same day, i.e. 9 July 2014, being Ordinance No. XIV of 2014 in absence of

any urgency is also a fraud on the Constitution for the same reason.

6. Mr. Sancheti, learned senior counsel for the petitioners, has placed strong reliance on a decision of the Constitution Bench of the Supreme

Court in Dr D.C. Wadhwa and Others Vs. State of Bihar and Others, , particularly on the following observations:

The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is vested in the Governor for taking

immediate action where such action may become necessary at a time when the Legislature is not in session. The primary law making authority

under the Constitution is the Legislature and not the Executive but it is possible that when the Legislature is not in session, circumstances may arise

which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the

Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate ordinances....

It is submitted that no such emergent situation is shown by the respondents to justify promulgation of Ordinances in July 2014. It is submitted that

merely stating that the legislature is not in session cannot be a ground or justification for promulgation of the Ordinances.

7. On the other hand, learned Advocate General has submitted that the two Ordinances have been issued by the Government of Maharashtra in

exercise of the power conferred by Article 213 of the Constitution and that as per the settled legal position, the satisfaction of the Governor for

exercise of this power to promulgate Ordinances is subjective. Strong reliance has been placed on the decisions of Constitution Benches of the

Supreme Court in S.K.G. Sugar Ltd. Vs. State of Bihar and Others, and T. Venkata Reddy and Others Vs. State of Andhra Pradesh,

8. We have carefully considered the rival submissions. In M/s. S.K.G. Sugar Ltd. (supra), a Constitution Bench of the Supreme Court speaking

through Justice R.S. Sarkaria enunciated the law on the subject in the following terms:

15. ..... Barring those cases where the Governor has to obtain previous instruction from the President, the Governor''s power to promulgate

Ordinances under Art. 213 is subject to two conditions, namely:

(a) that the house or houses, as the case may be, of the State Legislature must not be in session when the Ordinance is issued; and

(b) the Governor must be satisfied as to the existence of circumstances which render it necessary for him take immediate action.

There is no dispute with regard to the satisfaction of the first condition. Existence of condition (b) only is questioned. It is however well-settled that

the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole

Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be

questioned on ground of error of judgment or otherwise in court-see State of Punjab Vs. Satya Pal Dang and Others and Baldev Parkash and

Others, .

(emphasis supplied)

9. Again in T. Venkata Reddy vs. State of Andhra Pradesh (supra), another Constitution Bench of the Supreme Court speaking through Justice

E.S. Venkataramiah held that an Ordinance promulgated under Article 123(2) or Article 123(2) of the Constitution has the same force and effect

as an Act of Parliament or an Act of the State Legislature, as the case may be. The Supreme Court thereafter laid down the following law:

14. ... When once the above conclusion is reached the next question which arises for consideration is whether it is permissible to strike down an

ordinance on the ground of non-application of mind or mala fides or that the prevailing circumstances did not warrant the issue of the Ordinance. In

other words, the question is whether the validity of an ordinance can be tested on grounds similar to those on which an executive or judicial action

is tested. The legislative action under our Constitution is subject only to the limitations prescribed by the Constitution and to no other. Any law

made by the legislature, which it is not competent to pass, which is violative of the provisions in Part III of the Constitution or any other

constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a

question of power of the legislature concerned, dependent upon the subject matter of the statute the manner in which it is accomplished and the

mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from

inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The

motives of the legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its

mind to the provisions of a statute before passing it. The propriety expediency and necessity of a legislative act are for the determination of the

legislative authority and are not for determination by the courts. An ordinance passed either under Article 123 or under Article 213 of the

Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an ordinance shall

have the same force as an Act, an ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents,

immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision.

10. We may now deal with the decision of another Constitution Bench of the Supreme Court in the case of Dr. D.C. Wadhwa (supra) relied upon

by learned counsel for the petitioners. That decision was rendered in the peculiar facts of that case where the Supreme Court found that the

Government had abused the power under Article 213 by re-promulgation of Ordinances by the Governor from time to time without getting them

replaced by Acts of the State Legislature. The Court found that the same Ordinances, which had ceased to operate, were re-promulgated

containing same provisions almost in a routine manner on prorogation of Session of the State Legislature. For instance, the Bihar Sugarcane

(Regulation of Supply and Purchase) Ordinance, 1968 was first promulgated on 13 January 1968 and re-promulgated 39 times till August 1981.

Thus, the life of Ordinance was continued for 14 years without placing it even once before the State Legislature.

It was in the above factual backdrop that the Supreme Court observed:

But every ordinance promulgated by the Governor must be placed before the Legislature and it would cease to operate at the expiration of six

weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative

Assembly and agreed to by the legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue

Ordinances is an emergent power exercisable when the Legislature is not in session, an Ordinance promulgated by the Governor to deal with

situation which requires immediate action and which cannot wait until the legislature reassembles, must necessarily have a limited life.

... It is settled law that a constitutional authority can not do indirectly what it is not permitted to do directly. If there is a constitutional provision

inhibiting the constitutional authority from doing an Act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That

would be clearly a fraud on the constitutional provision.

11. The above factual scenario compelled the Supreme Court to hold that re-promulgation of Ordinances for such long periods was a fraud on the

constitutional provision. In the facts of the present case, therefore, when the two separate impugned Ordinances are issued for the first time, there

can be no question of applying the decision in Dr. D.C. Wadhwa case. The present case is squarely governed by the law laid down in State of

Punjab Vs. Satya Pal Dang and Others and Baldev Parkash and Others, , M/s. S.K.G. Sugar Ltd. (Supra) and T. Venkata Reddy (supra) that the

Governor is the sole judge as to the existence of circumstances necessitating in making of an Ordinance and it is a matter purely for the satisfaction

of the Governor. His satisfaction is not a justiciable matter at all. We, therefore, reject the petitioners'' contention that the promulgation of the

impugned Ordinances was unconstitutional.

Whether percentage of reservations can exceed the ceiling limit of 50%? If so, under what circumstances?

12. In the State of Maharashtra, the Reservation Act of 2001 provided for 52% reservations, both in educational institutions as well as in matters

of public employment. The following tabulated chart indicates position of reservations, at the time when the impugned Ordinances came to be

promulgated.

13. In this regard, reference is required to be made to some constitutional provisions. Article 14 of the Constitution enjoins upon the State not to

deny any person equality before the law or the equal protection of the laws within the territory of India. Article 15(1) of the Constitution injuncts

the State from discriminating against any citizen ""on grounds only of religion, race, caste, sex, place of birth or any of them"". However, Article

15(4) of the Constitution provides that nothing contained in said Article or in Article 29(2) shall prevent the State from making special provisions

for the advancement of any socially and educationally backward classes of citizens. Article 15(5) of the Constitution provides that nothing

contained in the Article or in Article 19(1)(g) shall prevent the State from making any special provision, by law, for the advancement of any socially

and educationally backward classes of citizens in so far as admission to educational institutions, other than the minority educational institutions, is

concerned. Article 16(1) of the Constitution provides that there shall be equality of opportunity for all citizens in matters relating to employment or

appointment to any office under the State. However, Article 16(4) of the Constitution provides that nothing contained in said Article shall prevent

the State from making any provisions for reservation of appointments or posts in favour of backward class of citizens which, in the opinion of the

State, is not adequately represented in the services under the State. Article 340 of the Constitution provides for appointment of a Commission to

investigate the conditions of backward classes.

14. In the constitutional articles as aforesaid, there is no direct provision providing for any ceiling of 50% as such in the matter of reservations.

There is however, reference to such ceiling in Article 16(4B) of the Constitution, which reads thus:

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that

year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any

succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled

up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(emphasis supplied)

Article 16(4B) was introduced by the Constitution (Eighty-First Amendment) Act, 2000. This was in the context of carrying forward of unfilled

reserved vacancies of a year to the subsequent year or years. In such matters, issues always arose as to whether in such a process of carrying

forward, the ceiling of 50% reservation on the total number of vacancies of that year could be breached. Thus, Clause (4B) of Article 16, though

not directly relevant, does take notice of the ceiling of 50% reservation on the total number of reserved vacancies to be filled in each year.

15. Similarly, by the Constitution (Eighty-second Amendment) Act, 2000, the proviso was added to Article 335 of the Constitution.

335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.-The claims of the members of the Scheduled Castes and the

Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments

to services and posts in connection with the affairs of the Union or of a State.

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled

Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any

class or classes of services or posts in connection with the affairs of the Union or of a State.

(emphasis supplied)

Significantly, such provisions for relaxations apply to members of Scheduled Caste and Scheduled Tribes and not to the members of Other

Backward Classes (OBCs) or Socially and Educationally Backward Classes (SEBC). Further, this is to be consistent with maintenance of

efficiency of administration. The distinction made, is obviously on the basis of that the members of SC and S.T., to a great extent, have been

victims of social discrimination or social disabilities.

16. That the Constituent Assembly Debates can be relied upon as an aid to the interpretation of a constitutional provisions is borne out by a series

of decisions. The Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., has observed that the speech of Dr.

Ambedkar on the aspect of constitutional provisions pertaining to reservations stands, on a different footing as compared to others. This is

because, Dr. Ambedkar was not only Chairman of the Drafting Committee, but he was virtually piloting such draft articles.

Dr. Babasaheb Ambedkar, in the context of the issue with which we are presently concerned, made the following significant observations:

As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of

opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a ''proper look-in'' so to say into

the administration. If Honourable Members will bear these facts in mind--the three principles we had to reconcile,--they will see that no better

formula could be produced than the one that is embodied in sub-clause (3) of Article 10 of the Constitution; .... It is a generic principle. At the

same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now--for

historical reasons--been controlled by one community or a few communities, that situation should disappear and that the others also must have an

opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not

been so far employed in the public service to the fullest extent, what would really happen is, we shall be completely destroying the first proposition

upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance,

reservations were made for a community or a collection of communities, the total of which came to something like 70% of the total posts under the

State and only 30% are retained as the unreserved. Could anybody say that the reservation of 30% as open to general competition would be

satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my

judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority

of seats. It is then only that the first principle could find its place in the Constitution and be effective in operation. If Honourable Members

understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the

demand of communities which have not had so far representation in the State, then, I am sure they will agree 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. That I think if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing

the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly ....

(emphasis supplied)

17. This question arose before the Constitution Bench of the Supreme Court in M.R. Balaji and Others Vs. State of Mysore, , in the context of

Mysore State providing 68% reservation of seats for admission to any institution of technical education. The Constitution Bench speaking through

P.B. Gajendragadkar, J. observed thus :

32....The demand for technicians scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so

great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats

in all Technical, Medical or Engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the

community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Art. 15(4) can

be special provision which excludes the rest of the society altogether.

34. .... reservation should and must be adopted to advance the prospects of the weaker section"s of society, but in providing for special measures

in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other

communities. A special provision contemplated by Art. 15(4)) like reservation of posts and appointments contemplated by Art. 16(4) must be

within reasonable limits. The interests of weaker sections of society which are, a first charge on the states and the Centre have to be adjusted with

the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of

making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art.

15(4). In this matter again., we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a

special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case. In this

particular case it is remarkable that when the State issued its order on July 10, 1961, it emphatically expressed its opinion that the reservation of

68% recommended by the Nagan Gowda Committee would not be in the larger interests of the State.

35. .... The reservation of 68% made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Art.

15(4). Therefore, it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Art. 15(4).

(emphasis supplied)

18. However, when the question again came up for consideration before a Bench of Seven Judges of the Supreme Court in State of Kerala and

Another Vs. N.M. Thomas and Others, , a discordant note was struck by Justice Krishna Iyer and Justice Fazal Ali. Justice Fazal Ali made the

following observations:

191. As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard

and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this

Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is, however, a rule of

caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80%

of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them, can it be said that the

percentage of reservation is bad and violates the permissible limits of clause (4) of Art. 16? The answer must necessarily be in the negative. The

dominant object of this provision is to take steps to make inadequate representation adequate.

(emphasis supplied)

Similar view was taken by Justice Krishna Iyer, who observed as under:

143. I agree with my learned brother Fazal Ali J. in the view that the arithmetical limit of 50% in any one year set by some earlier rulings cannot

perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a

cadre. I agree with his construction of Art. 16(4) and his view about the "carry forward" rule.

19. The view of seven Judge Bench in N.M. Thomas (supra), came up for reconsideration before the nine-Judge Bench of the Supreme Court in

Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., . Three Judges (Thommen, J. Kuldip Singh, J. and Sahai, J.) held that 50% ceiling

limit applied in Balaji case was sacrosanct and could under no circumstances be breached. On the other end of the spectrum, Pandian, J. held that

the observation in Balaji case that reservation under Article 16(4) should not be beyond 50% was only an obiter dicta and any reservation in

excess of 50% for backward classes will not be violative of Articles 14 and/or 16 of the Constitution. But at the same, he held that such

reservations made either under Article 15(4) or 16(4) cannot be extended to the totality of 100%. The extent and proportion of reservation must

depend upon adequacy of representation in a given case.

20. In the middle of the spectrum, five Judges (four Judges speaking through Justice B.P. Jeevan Reddy and fifth Judge-Justice P.B. Sawant) took

the view that reservation contemplated in Article 16(4) should not exceed 50% but while 50% shall be the rule, there could be relaxation in

extraordinary situations. The exceptions contemplated by four Judges speaking through Justice Jeevan Reddy were indicated in the following

words:-

The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of

consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and

remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the

conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In

doing so, extreme caution is to be exercised and a special case made out.

(emphasis supplied)

The conclusion arrived at by Justice P.B. Sawant on this question was in following terms:-

552. Question 4:

Ordinarily, the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre

or service in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per

cent will have to be justified on valid grounds which grounds will have to be specifically made out.

.....

(emphasis supplied)

It is also necessary to note the following observations made by Justice P.B. Sawant in para 518 of the judgment:-

518. To summarise, the question may be answered thus. There is no legal infirmity in keeping the reservations under clause (4) alone or under

clause (4) and clause (1) of Article 16 together, exceeding 50%. However, validity of the extent of excess of reservations over 50% would depend

upon the facts and circumstances of each case including the field in which and the grade or level of administration for which the reservation is kept.

Although, further, legally and theoretically the excess of reservations over 50% may be justified, it would ordinarily be wise and nothing much

would be lost, if the intentions of the Framers of the Constitution and the observations of Dr. Ambedkar, on the subject in particular, are kept in

mind.

(emphasis supplied)

21. From the aforesaid, it would be seen that out of nine Judges, who decided the case of Indra Sawhney(supra), as many as eight Judges did fix

the ceiling limit of 50% on reservations, though out of them, five Judges agreed for relaxation of such ceiling, but only in extraordinary situations or

for extraordinary reasons.

22. Indra Sawhney (supra) also held that there can be no reservation at the stage of promotions. To overcome this, Article 16(4A) was introduced

by the Constitution (Seventy Seventh Amendment) Act, 1995 to provide that nothing in Article 16 shall prevent the State from making provisions

for reservations in matters of promotion in favour of SC & ST, which in the opinion of the State are not adequately represented in the services

under the State. This was followed by introduction of Article 16(4B) by the Constitution (Eighty First amendment) Act, 2000, which basically

concerns the carry forward rule. In this case, neither of the impugned Ordinances provide for reservations in the matter of promotions in public

services. Therefore, we may not be directly concerned with the provisions contained in Article 16(4A) and 16 (4B), except that, the Constitution

of India for the first time makes express reference to the ceiling limit of 50% reservations in Article 16(4B).

23. The effect of the aforesaid constitutional amendments came up for consideration before the Constitution Bench of the Supreme Court in M.

Nagaraj and Others Vs. Union of India (UOI) and Others, , where Justice S.H. Kapadia (as His Lordship then was) in the context of 50% ceiling

limit on reservations made the following observations:

56. However, the question of extent of reservation was not directly involved in Rangachari. It was directly involved in M.R. Balaji & Ors. V. The

State of Mysore & Ors. with reference to Article 15(4). In this case, 60% reservations under Article 15(4) was struck down as excessive and

unconstitutional. Gajendragadkar, J. observed that special provision should be less than 50 per cent, how much less would depend on the relevant

prevailing circumstances of each case.

57. But in State of Kerala and another v. N.M. Thomas and others Krishna Iyer, J. expressed his concurrence to the views of Fazal Ali, J. who

said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it

should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). If a State has 80%

population which is backward then it would be meaningless to say that reservation should not cross 50%.

58. However, in Indra Sawhney the majority held that the rule of 50% laid down in Balaji was a binding rule and not a mere rule of prudence.

59. Giving the judgment of the Court in Indra Sawhney, Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate

representation although proportion of population of backward classes to the total population would certainly be relevant. He further pointed out

that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of

every citizen of the entire society. They should be harmonised because they are restatements of principle of equality under Article 14.

(emphasis supplied)

Again in para 115, the Court observed as under:

In Indra Sawhney on the other hand this Court has struck a balance between formal equality and egalitarian equality by laying down the rule of

50% (ceiling-limit) for the entire BC as ""a class apart"" vis-Ã¯Â¿Â½-vis General Class.

24. The most important ratio laid down by the Constitution Bench in M. Nagaraj (supra) is as under:

Tests to judge the validity of the impugned State Acts:

110. As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of

creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not

obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for

reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its

discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of

representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make

reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to

be set aside.

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely backwardness, inadequacy of

representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in

Article 16 would collapse.

123. However, in this case, as stated, the main issue concerns the ""extent of reservation"". In this regard the concerned State will have to show in

each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency

before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make

reservation for SC/ST in matter of promotions. However if they wish to exercise their discretion and make such provision, the State has to collect

quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance

of Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation

provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation

indefinitely.

(emphasis supplied)

25. The constitutional validity of Article 15(5) inserted by Constitution (Ninety-third Amendment) Act, 2005 came to be challenged in Ashoka

Kumar Thakur Vs. Union of India (UOI) and Others, which also examined the constitutional validity of Central Educational Institutions

(Reservation in Admissions) Act, 2006 providing for reservation of 20% seats for OBCs in State aided institutions like IIMs and IITs but which

did not provide for any reservation of seats in private unaided institutions. While upholding the constitutional validity of the aforesaid Constitution

Amendment Act and the Central Act, the Court held that the provisions of Constitution have to be read harmoniously and no part can be treated to

be redundant. Finally, it was held that the Constitution (Ninety Third Amendment) Act, 2005 is valid and does not violate the basic structure of the

Constitution so far as it relates to the State maintained institutions and aided educational institutions. The question whether the Constitution (Ninety

Third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, the same

was left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however considered the issue and held that the Constitution

(Ninety Third Amendment) Act, 2005 not constitutionally valid so far as private unaided educational institutions are concerned.

26. The question of 50% ceiling for reservations in the context of elections to public bodies came up for consideration in Union of India (UOI) etc.

Vs. Rakesh Kumar and Others etc., . The Jharkhand Legislature enacted the Jharkhand Panchayat Raj Act, 2001 and also the Panchayats

(Extension to the Scheduled Areas) Act, 1996 which provided for 100% reservation of posts of chairperson of panchayat in scheduled areas for

Scheduled Tribes and upto 80% reservation of panchayat seats in scheduled areas at various levels for SCs, STs and OBCs. Those reservations

were made under Article 243-D of the Constitution.

The above reservations were challenged as violative of law laid down in Indra Sawhney case.

27. Negativing the challenge, a three Judge Bench of the Supreme Court held that the reservation under Article 243-D cannot be compared with

affirmative measures under Article 15(4) where balance is to be maintained between affirmative measures and merit. However, even if law laid

down in Indra Sawhney case were to be applied, Indra Sawhney case does recognize the exception where reservation exceeds 50% in certain

circumstances. Reservation in Panchayats in scheduled areas is a fit case where exception should be applied, because tribals in scheduled areas are

vulnerable to exploitation. The Supreme Court in the case of Rakesh Kumar (supra) observed thus:

48. This was necessary because it was found that even in the areas where Scheduled Tribes are in a relative majority, they are under-represented

in the government machinery and hence vulnerable to exploitation. Even in areas where persons belonging to Scheduled Tribes held public

positions, it is a distinct possibility that the non-tribal population will come to dominate the affairs. The relatively weaker position of the Scheduled

Tribes is also manifested through problems such as land-grabbing by non-tribals, displacement on account of private as well as governmental

developmental activities and the destruction of environmental resources. In order to tackle such social realities, the legislature thought it fit to depart

from the norm of ''proportional representation''. In this sense, it is not our job to second-guess such policy-choices.

(emphasis supplied)

It is also necessary to note that in the above decision, the Supreme Court quoted with approval the following observations of Madhya Pradesh

High Court:

49. Madhya Pradesh High Court in Ashok Kumar Tripathi Vs. Union of India (UOI) and Others, , where Dharmadhikari, J. made the following

observations (extracted from Para. 36, 37):

... To safeguard interests of Scheduled Tribes living in remote or hilly areas or forests with primitive culture of their own, the Constitution envisages

formation of Scheduled Areas for them, and application of laws to them with "exceptions and modifications", so that they are able to preserve their

culture and occupation and are not exposed to exploitation by forward classes of Urban Population. The protective discrimination in favour of such

deprived section of the Society can go to the extent of complete exclusion, if the circumstances so justify, of advanced classes in Local Self

Governance of Scheduled areas. The main object and purpose behind such reservations based on population, even in excess of 50% is with a

view that the exclusive participation of deprived and oppressed sections of the Society in Local Self-Government bodies in their areas is ensured

because in open competition with the advanced sections of the Society they can never have any share to participate in Self-Governance.

(emphasis supplied)

28. The above view of the three Judge Bench came to be confirmed by a Constitution Bench of the Supreme Court in Dr. K. Krishna Murthy and

Others Vs. Union of India (UOI) and Another, .

29. The learned Advocate General placed considerable emphasis upon the decision of the Supreme Court in the case of S.V. Joshi vs. State of

Karnataka & Ors. (2012) 7 SCC 41 to contend that once there is some quantifiable data, it is open to the State to provide for reservations in

excess of 50%. In the case of S.V. Joshi (supra) a three Judge Bench of the Supreme Court considered the reservations made in 1994 by the

States of Tamil Nadu & Karnataka in excess of 50% both in the matter of admissions to educational institutions and in the matter of recruitment in

public services by the relevant legislation/order. The Supreme Court noted the subsequent constitutional amendments and the decisions in M.

Nagaraj (supra) and Ashok Kumar Thakur (supra) and observed that in the above decisions, inter alia, it has been laid down that if the State wants

to exceed 50% reservation, then it is required to base its decision on the quantifiable data. In the cases before the Supreme Court, this exercise

was not done. The Court held that while reviewing the relevant statutory provisions, the State Government shall keep in mind the decisions of the

Supreme Court in M. Nagaraj (supra) pertaining to reservations in public employment and Ashok Kumar Thakur (supra) pertaining to reservation

of seats in educational institutions.

30. The last decision on the subject is rendered by the Constitution Bench as recently as on 15 July 2014 in Rohtas Bhankhar Vs. Union of India

(UOI), , where the Supreme Court reiterated the conclusions recorded by the Constitution Bench in M. Nagaraj (supra) in paras 122 and 123,

which are already quoted in para 24 of this Order.

31. From the conspectus of the aforesaid Constitutional provisions, Constituent Assembly debates and decisions of the Supreme Court, it appears

to us that the question of ceiling limit on reservations would have to be decided with reference to the area in which reservations are provided:

(i) Education : reservation of seats in educational institutions;

(ii) Employment : reservation of posts/appointments in public employment; and

(iii) Elections : reservation of seats in elections to public bodies.

Reservations in Education

32. Though Article 15 enables the State to provide for reservation of seats in educational institutions for the benefit of backward classes, the

Article by itself does not provide for or recognise ceiling limit on percentage of reservations, that is, what is the maximum number of seats which

the State can reserve for backward classes.

But, as per the law laid down by a nine-Judge Bench of the Supreme Court in Indra Sawhney case read with the decision of a five-Judge

Constitution Bench of the Supreme Court in Ashok Kumar Thakur vs. Union of India:

For State Owned and Aided Institutions

(a) The principle that constitutional reservations ought not to exceed ceiling limit of 50% is a binding rule and not a mere rule of prudence.

(b) However, in extraordinary situations and for extraordinary reasons, the percentage of reservations may exceed the ceiling limit of 50%.

(c) But every excess over 50% will have to be justified on valid grounds, which grounds will have to be specifically made out by the State and will

be amenable to judicial review.

For Private Unaided Institutions

In case of Ashok Kumar Thakur (Supra), the issue as to whether reservation policy can be imposed upon private unaided institutions has been left

open. However, Bhandari, J. at paragraph 636 of the judgment has held that imposing reservations of unaided institutions violates the basic

structure by stripping the citizens of their fundamental rights under Article 19(1)(g) to carry on an occupation, which includes the establishment and

running of an educational institution. The right to select students on the basis of merit is an essential feature of this right and reservation is an

unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institutions.

Reservations in Public Employment

33 (i) Article 16 by itself recognises ""ceiling limit of 50% reservations"" through insertion of clause (4B) in Article 16 of the Constitution (Eighty-first

Amendment) Act, 2000, after the decisions of the Supreme Court in Indra Sawhney case rendered in the year 1992, and in R.K. Sabharwal and

others Vs. State of Punjab and others,

(ii) As per the law laid down by a Constitution Bench of the Supreme Court in M. Nagaraj and Others Vs. Union of India (UOI) and Others, and

another Constitution Bench as recently as on 15 July 2014 in Rohtas Bhankhar Vs. Union of India (UOI), , the ceiling limit of 50%, the concept of

creamy layer and the compelling reasons, namely backwardness, inadequacy of representation and overall administrative efficiency are all

constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. Even if the State has compelling

reasons for providing reservations (backwardness of the concerned class, inadequacy of representation of such class in public employment and

overall administrative efficiency), the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling

limit of 50%.

(iii) As regards the submission of the learned Advocate General that the rigour of the mandate in M. Nagaraj case has been modified/watered

down by a three-Judge Bench of the Supreme Court in S.V. Joshi vs. State of Karnataka & Ors. (2012) 7 SCC 41, the following need to be

noted:

(a) S.V. Joshi case was not merely concerned with reservation of posts/vacancies in public employment but also with reservation of seats in

educational institutions.

(b) In S.V. Joshi case, the Supreme Court did not purport to modify the law laid down in M. Nagaraj case, but specifically directed the State to

follow the law laid down in M. Nagaraj case, and referred to the principles laid down therein regarding inter alia, collection of quantifiable data.

(c) In M. Nagaraj case, the Supreme Court directed the concerned State to show compelling reasons in the form of quantifiable data showing

backwardness of the class and inadequacy of representation of that class in public employment, in addition to compliance of Article 335 for

maintaining administrative efficiency. Thus, the direction in M. Nagraj case regarding collection of quantifiable data was with reference to showing

backwardness of the class and inadequacy of representation of that class in public employment for the purpose of justifying the extent of

reservations in favour of that class even within 50 per cent ceiling limit of reservations.

(d) Moreover, as recently as on 15 July 2014 in Rohtas Bhankhar Vs. Union of India (UOI), , another Constitution Bench of the Supreme Court

has reiterated the conclusions recorded in M. Nagaraj vs. Union of India (supra).

(iv) For the aforesaid reasons, we are prima facie of the view that in matters of reservations of appointments/posts in public services, after the

constitutional amendments in the year 2000, the Supreme Court has laid down a constitutional mandate that ""the State will have to see that its

reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% ....."" In view of the law laid down by the Supreme

Court in such emphatic terms, no exceptions are permitted.

Reservations of Seats in Elections to Public Bodies

34. Reservations in excess of 50% ceiling limit in matters of elections to public bodies may be permissible in extraordinary situations as per the law

laid down by the Constitution Bench in Dr. K. Krishna Murthy and Others Vs. Union of India (UOI) and Another, . However, in the present

group of matters, we are not at all concerned with this category.

35. The position with regard to reservations of 16 per cent for Marathas on the one hand and 5% in favour of certain Muslim communities on the

other hand, shall have to be separately considered. This is because the data relied upon in the two cases, is obviously different and distinct.

II. Challenge to 16% Reservations in Favour of Marathas

Contentions of parties

36. Mr. Sancheti and other counsel the petitioners raised the following contentions to question the reservations in favour of Marathas:

(i) The 16 % reservation favour of Marathas over and above 52% reservation in favour of Scheduled Castes/Scheduled Tribes and Other

Backward Classes takes it far above the permissible constitutional limit of 50 % laid down by the Constitution Bench decisions the Supreme Court

from 1963 onwards till as recently as in July 2014. The reservation as well as the Ordinance dated 9 July 2014 providing for 16 % reservation in

favour of educationally and socially backward category of Maratha community is patently unconstitutional and void ab initio.

(ii) Articles 15(4) and 16(4) of the Constitution permit reservation in favour of Scheduled Castes/Schedule Tribes and Other Backward Classes.

There is already 19 % reservation provided in favour of Other Backward Classes as provided by the Reservation Act of 2001. Hence, the

Ordinance providing for 16% further reservation in favour of the so-called educationally and socially backward class of Maratha community is, on

the face of it, unconstitutional.

(iii) Though the Ordinance providing for reservation in favour of educationally and socially backward class of Maratha community is mentioned as

one such community, the Government Resolution dated 15 July 2014 enumerates only for Maratha community as educationally and socially

backward class and no other community is included in the ESBC. Thus, the only purpose of promulgating the Ordinance was to provide 16%

reservation in favour of Maratha community only over and above 52% reservation in favour of Scheduled Castes/Scheduled Tribes/Other

Backward Classes.

(iv) The entire Maratha community has been shown as educationally and socially backward class without making any attempt whatsoever to show

any particular class or sub-caste of Maratha as socially and educationally backward class. The State Government has taken the population of

Maratha in the State of Maharashtra as 32% of the population in Maharashtra, but the 2001 census or 2011 census does not give any figures of

Maratha population. Hence, such a high percentage of population cannot be accepted to justify separate reservation of 16% in favour of Marathas.

(v) Maratha community is not a socially and educationally backward class. In fact, Commission after Commission-Mandal Commission in 1990,

National Backward Classes Commission in 2000 and the State Backward Classes Commission in 2008 have rejected representations of the

Maratha community to be considered as socially and educationally backward class. In the past, findings given by such National as well as State

Backward Classes Commissions which had been set up under the Acts of the Legislature and the recommendations of such Commissions are

binding on the State Government. The State Government has declared the Maratha community as educationally and socially backward class. The

ordinance is, therefore, arbitrary and violative of the fundamental rights of equality guaranteed by the Constitution.

(vi) For the purpose of promulgating the Ordinance, the State Government has relied on Rane Committee report, but the constitution of the

Committee is not justified by any law or provisions of the Constitution. The Committee has relied upon the so-called data which was hurriedly

collected in a few days through Government officers. The data collected by the Committee does not reflect the correct representative sample and

has been read and analyzed to suit the pre-conceived object of providing reservation for the Maratha community.

(vii) The State Government has not given any comparison of social, educational and economic indicators of the Maratha community or any

comparative figures of the study group or of the State average.

(viii) Marathas cannot be considered as a socially backward class when majority of members of the State Legislature are from Maratha community

right from the date of establishment of the State of Maharashtra. In the Legislative Assembly of Maharashtra State in the year 1960, out of 188

MLAs, 152 MLAs were from the Maratha community. This position of dominance has continued. Even Chief Ministers are generally from the

Maratha community. Out of 17 Chief Ministers of the State of Maharashtra from 1956 onwards, 12 Chief Ministers have been Marathas. The last

non-Maratha Chief Minister''s tenure was from January 2003 to October 2004. Maratha community controls lands and the cooperative sector,

particularly co-operative sugar factories. Most of the educational institutions are owned and run by the Maratha community.

37. Learned Advocate General and the other counsels defending the impugned Ordinances submitted that there is a presumption of

constitutionality in so far as the validity of the Ordinances is concerned. Further, as long as there is quantifiable data, the State is within its

constitutional powers to provide for reservations. The sufficiency or otherwise of such quantifiable data cannot be gone into by this Court in the

exercise of powers of judicial review. In such matters, this Court cannot and ought not to exercise any appellate powers as such. The Rane

Committee, upon a very thorough analysis has recorded conclusions that Marathas constitute socially, educationally and financially backward class,

meriting reservations to the extent of 20% in the matters of employment and admissions to educational institutions. The Rane Committee Report

has adverted to legal and valid parameters in the matter of record of such conclusion. The theory of lingering effects of past discrimination is an

irrelevant factor in matter of determination of backwardness. So also, the circumstance that the Maratha community may have been a politically

dominant community, is, also equally irrelevant in determining the issue of backwardness.

38. In view of the above constitutional position and submissions, the crucial questions to be determined are broadly as follows:

(a) Whether ''Marathas'' can be considered as backward classes eligible to the benefits of reservations under Articles 15 and 16 of the

Constitution of India ?

(b) If yes, whether there exist any exceptional circumstances or extraordinary reasons to grant reservations to the extent of 16% to the ''Marathas'',

thereby increasing existing percentage of reservations from 52% to 68% ?

39. If the first question is answered in the affirmative, then only the second question would arise, but considering the fact that we are at the stage of

interim relief and not at the final hearing, we will have to express our prima facie view on both the questions. In other words, we had made it clear

at the hearing that the issue is not merely whether Marathas are socially and educationally backward, but also whether there is any extraordinary

situation or extraordinary reason shown by the State to justify raising the existing 52 per cent reservations to 68 per cent reservations.

Whether any prima facie case made out for determination of backwardness of Marathas?

40. In the context of 16% reservation for Marathas upon their classifications as Educationally and Socially Backward Classes, the following

position emerges:

(a) The second Backward Class Commission Report (Mandal Report) dated 31 December 1980, whilst concluding that population of backward

class constitute nearly 52%, chose to include "Marathas" in the category of "Forward Hindu Castes and Communities";

(b) The National Commission for Backward Classes, by its Report dated 25 February 2000 not only specifically rejected the request for inclusion

of "Marathas" Caste/Community in the Central List of Backward Classes for Maharashtra, but gave a categorical finding that Maratha is a socially

advanced and prestigious community;

(c) The Maharashtra State Backward Class Commission (MSBCC), which is a statutory commission constituted under the Maharashtra State

Commission for Backward Classes Act, 2005 (""2005 Act""), by its 22nd report dated 25 July 2008 has categorically rejected the demand for

inclusion of "Marathas" as "Other Backward Class" for the benefits of reservation policy [Bapat Commission Report];

Despite, repeated entreaties from the State Government, the MSBCC declined to reconsider its position in the matter of reservations for

Marathas. The final rejection in this regard is contained in MSBCC letter dated 3 June 2013;

(d) There is no material placed on record that the Bapat Commission Report was placed before the Maharashtra Legislative Assembly in terms of

Section 15 of the 2005 Act. This was, despite the statements made by the State in Public Interest Litigation No. 126 of 2009, which are reflected

in the orders dated 12 February 2013 and 1 July 2014;

(e) The petitioner in Public Interest Litigation No. 140 of 2014 placed on record some statistics by reference to data compiled by Dr. Suhas

Palshikar in the book on ""Politics of Maharashtra : Local Context of the Political Process"", Editors: Suhas Palshikar and Nitin Birmal, Pratima

Prakashan, 2007 which suggest that-

(i) From 1962 to 2004, from out of 2430 MLAs, 1336 MLAs corresponding to 55% were Marathas;

(ii) Nearly 54% of the educational institutions in the State are controlled by Marathas.

(iii) Members of the Maratha community dominate the universities in the State with 60 to 75% persons in the management.

(iv) Out of 105 sugar factories, almost 86 are controlled by Marathas. About 23 district cooperative banks have Marathas as their Chairpersons.

(v) About 71.4% of the cooperative institutions in the State are under control of Maratha community.

(vi) About 75 to 90% of the land in the State is owned by Maratha community.

None of the aforesaid was disputed by or on behalf of the respondents in any of the affidavits or or at the hearing.

It was also stated by the petitioner at the hearing that ever since the establishment of the State of Maharashtra on 1 November 1956, out of 17

Chief Ministers, 12 have been Marathas. The last non-Maratha Chief Minister was during the period January 2003 to October 2004. This

statement was also not disputed.

Mandal Commission Report

41. The Mandal Commission Report in the context of determination of estimated population of OBC at paragraph 12.22 has, inter alia, listed

forward Hindu Castes and Communities, which includes the Marathas.

III. Forward Hindu Castes and Communities

(All India figures)

Report of National Commission for Backward Classes

42. The report dated 25 February 2000 from the National Commission for Backward Classes makes reference to the data furnished by the State

of Maharashtra, itself stating that the details about the Maratha caste, which is predominant in Maharashtra are set out in every district gazetteer

and other publications like the Tribes and Castes of Bombay by R.E. Enthoven, the Tribes and Castes of Central Provinces of India by R.V.

Russell, Castes and the Tribes of H.E.H. Nizam''s Dominions by Syed Siraj Ul Hassan etc. Copies of relevant extracts from some district

Gazetteer were also furnished by the State to the National Commission.

43. The National Commission Report, makes reference to the publication ""the Tribes and Castes of Bombay, first published in 1922"", in the

following terms:

13. According to R.E. Enthoven (The Tribes and Castes of Bombay, Asian Educational Services, New Delhi, Madras, 1990, first published

1922), ""the common belief in Maharashtra regarding the origin of Marathas is that there is little or no difference, so far as caste is concerned,

between Marathas and Kunbis. Some indeed, among whom are Marathas themselves, are of opinion that the two classes are one and the same.

The line of demarcation between the two communities is not a hard and fast one as inter-marriages between well-to-do Kunbi families and the

lower sections of Marathas are not infrequent. Such intermarriages usually take the form of a Maratha boy being married to Kunbi or Kulvadi girl.

Such marriages are common in remote parts of the Presidency. On the other hand, Maratha girls would not be given in marriage to Kunbi boys.

Thus the Marathas Proper assert their social supremacy, and though akin to Kunbis, they must be considered distinct. Kunbis prefer the

designation of Maratha to that of Kunbi, as more honourable. The Kunbis however do not lay any pretension to Kshatriya origin. They are as a

rule connected with field work, while the Marathas, though they may be mere cultivators, more often follow other avocations and regard cultivation

as a secondary profession on which they may fall back if they are unsuccessful in other lines. Hence, it would appear that Kunbis and Marathas are

differentiated rather by wealth and social status than by an hard and fast caste distinction. Socially the Maratahas is the superior of the Kunbi, and

this is evidenced by the facts that while Kunbi widows remarry, Maratha widows do not, that while Maratha ladies to recognised rank observed

purdah, Kunbi women do not observe it, and that while Martha ladies insist on gold in preference to silver ornaments, Kunbi women are content

with any that they can get.

.....

Marathas are mainly grant-holders, landowners, soldiers and husbandmen. A few are ruling chiefs. For the most part of the patils, or village

headmen, in the Central Deccan belong to this caste. Some are traders, and many are in the army or in other branches of Government service.

44. Although we agree with the learned Advocate General that group or section of people who are suffering from lingering effects of past

discrimination, cannot alone be designated as a backward classes, nevertheless, in determining social backwardness, past discrimination or the

lingering effects thereof, is certainly not an irrelevant factor. In fact, the absence of any past discrimination, particularly arising out of the dominant

social position held by a group or a community, is both a vital as well as the relevant factor, which ought to find consideration in the decision

making process. Just as taking into account an irrelevant consideration is a ground for judicial review, so also eschewing a vital and relevant

consideration, is equally a ground for judicial review.

45. The observations in the concurring judgment of Justice P.B. Sawant also clearly show that a caste or community cannot be treated as socially

backward if it has not suffered any taboos and handicaps in the past or on account of geographical or other similar factors. In fact, Justice Sawant

has laid down in para 446 of the judgment the following test to provide reservations for backward class of citizens:

446. .... The expression ''backward class of citizens'', as stated earlier, has been used in Article 16(4) in a particular context taking into

consideration the social history of this country. The expression is used to denote those classes in the society which could not advance socially and

educationally because of the taboos and handicaps created by the society in the past or on account of geographical or other similar factors.

(emphasis supplied)

46. We must, therefore, turn to the social history as recorded in the National Backward Class Commission Report, which makes reference to the

publication ""the Tribes and Castes of the Central Provinces of India, first published in 1912 by R.V. Russell and Hiralal"", in the following terms:

14. R.V. Russel and Hiralal (The Tribes and Castes of the Central Provinces of India, Asian Educational Services, New Delhi, Madras, 1993,

first published 1916), under the head ""Maratha, Mahratta"" describe them as ""The military caste of southern India which manned the armies of

Sivaji, and of the Peshwa and other princes of the Maratha confederacy."" They further notes as follows:----""The Marathas are a caste formed

from military service, and it seems probable that they sprang mainly from the peasant population of Kunbis, though at what period they were

formed into a separate caste has not yet been determined. Grant-Duff mentions several of their leading families as holding offices under the

Muhammedan rulers of Bijapur and Ahmadnagar in the fifteenth and sixteenth centuries, as the Nimbhalkar, Gharpure and Bhonsla; and

presumably their clansmen served in the armies of those states. But whether or not the designation of Maratha had been previously used by them, it

first became prominent during the period of Sivaji''s guerrilla warfare against Aurangazeb. The Marathas claim a Rajput origin, and several of their

clans have the names of Rajput tribes, as Chauhan, Panwar, Solanki and Suryavansi. In 1836, Mr. Enthoven states, the Sesodia Rana of Udaipur,

the head of the purest Rajput house, was satisfied from inquiries conducted by an agent that the Bonslas and certain other families had a right to be

recognised as Rajputs. Colonel Tod states that Sivaji was descended from a Rajput prince Sujunsi, who was expelled from Mewar to avoid a

dispute about the succession about A.D. 1300... Similarly, the Bhonslas of Nagpur were said to derive their origin from one Bunbir, who was

expelled from Udaipur about 1541, having attempted to usurp the kingdom....

.... It seems then most probably that .... the Martha caste was of purely military origin, constituted from the various castes of Maharashtra who

adopted military service, though some of the leading families may have had Rajputs for their ancestors .....

47. Similarly, the Report refers to ""Castes and Tribes of H.E.H. Nizam''s Dominion"" by Sayed Siraj Ul Hassan, in the following terms:

15. Syed Siraj Ul Hassan in Castes and Tribes of H.E.H. Nizam''s dominions writes as follows:-

The term Maratha, ..., is the titular designation of a people embracing all classes of society in Maharashtra, from the high caste Brahmans and

Parbhus ..... to the lowest unclean classes of Mahars and Mangs. But within the people themselves the name is borne, as their special designation,

by the large fighting and landholding community; while the name ''Kunbi'' is popularly applied to those among them who are actually engaged in

agricultural operations.

..... The members of this {Maratha} class profess to practise infant marriage, forbid the marriage of widows and wear the sacred thread, being

entitled, as they say, to the rank of Kshatriyas. The common Kunbi, on the other hand, ...does not claim to be a Kshatriya, allows both adult

marriage and the remarriage of widows and wears no thread to indicate the twice born status"".

48. Further by reference to several Gazetteers and other factual materials made available to it, the National Commission for Backward Classes has

recorded findings that the Marathas separated and sealed themselves of from the Kunbis, several centuries ago by endogamy partly modulated, in

certain circumstances, by hypergamy. This emergence of Marathas as a separate caste/community from the Kunbis can be traced back to 1350

A.D. after the establishment of Bahmani dynasty in response to the opportunities for upward mobility provided by military service. The report

makes reference to Stewart Gordon''s well researched account of history of the Marathas which describes how the Marathas became a new elite

social class through their close association with different ruling dynasties which offered them many rights like watans and inams and important

positions like that of Deshmukhs and Patils who enjoyed grants from the State and involved in revenue collection and how, with the rise of the

great Shivaji from among their ranks, they became, for once, the ruling class themselves. Stewart Gordon''s account also refers to how the

Marathas after gaining considerable wealth through grants for military service sought to differentiate themselves from the peasant class of Kunbis by

adopting exclusive social customs not possible for ordinary peasants such as different patterns in dress and diet, seclusion of women, restriction on

widow remarriage etc. and closed their ranks by prohibiting marital relations with the ordinary Kunbis. The Marathas after acquiring wealth and

status also sought to assign themselves the Kshatriya status which seems to have been largely accepted by the society. The report records that a

community with a history of such origin and close association with the ruling classes, which has itself enjoyed important economical and political

rights, cannot be thought to suffer from any social disadvantage. The report after acknowledging that in what is identified as ruling class/caste, every

member of it does not rule, records that the fact that those who ruled come from a distinct caste/community imports a certain amount of courage

and self confidence even to this, from the same caste/community who personally do not belong to the ruling functionary to the totality of that

caste/community.

49. The report then records that in post independence period, the community provided the largest number of Chief Ministers. The report

concludes with the following :

22. In view of the foregoing facts, the Commission holds that ""Maratha"" is not a synonym of Kunbi but is a distinct and separate caste/community

which does not constitute a socially and educationally backward class but, on the contrary, is socially and educationally advanced. It is a matter for

appreciation that the Marathas played a pioneering role in the shaping of the socio-cultural and political history of modern Maharashtra and that

they have been in the forefront of heroic struggles wages against aggressions and invasions not only in Maharashtra but in many other theatres of

India. It would therefore be appropriate for the community with its glorious history and future capabilities to leave the insulated area of Backward

Class categorisation and consequent supportive measures to those who have not had such good fortune and hence need special help to advance

further so that they can also move to a stage of equality with the advanced sections of society wherefrom they can proceed on their own strength.

22. In view of the above facts and positions, the Bench finds that Maratha is not a socially backward community but is a socially advanced and

prestigious community and therefore the Request for Inclusion of ""Maratha"" in the Central List of Backward Classes for Maharashtra alongwith

Kunbi should be rejected. In fact, ""Maratha"" does not merit inclusion in the Central List of Backward Classes for Maharashtra either jointly with

Kunbi"" or under a separate entry of its own.

(emphasis supplied)

50. As against the aforesaid, the State, in support of its contention that Marathas indeed constitute backward classes, made reference to

Notification dated 26 July 1902 issued by Shahu Maharaj and a Resolution dated 23 April 1942 issued by the Government of Bombay which had

provided for some sort of reservations to backward classes for the purposes of recruitment to Government services. The term "backward classes"

was defined to mean all castes other than Brahmins, Prabhus, Shenwis, Parsees, and other advanced classes.

51. Apart from the aforesaid, very great emphasis was placed upon the Rane Committee Report and the findings recorded therein.

Rane Committee Report

52. The Rane Committee, was constituted by Government Resolution dated 21 March 2013, obviously in the wake of MSBCC refusing to

reconsider its position in the matter of Maratha reservations. The Rane committee, comprised the following:

53. Based inter alia upon survey in the form of a questionnaire carried out between the period 9 February 2014 and 19 February 2014 (eleven

days), Rane Committee has concluded that the "Marathas" constitute socially, educationally and financially backward class, meriting reservations

to the extent of 20% in matters of employment and admissions to educational institutions.

(A) The report, by reference to Imperial Gazetteer of India and based upon a survey covering approximately 18.5 Lacs persons, has concluded

that Marathas comprised around 32% of the population of the State of Maharashtra. (After 1932 Census, castewise population statistics are not

available except for Scheduled Castes and Scheduled Tribes).

(B) By reference to statistics collected from Government Departments, the report concludes that the representation of Marathas in public service,

is about 15% and therefore, there is a shortfall of about 17%, in comparison to their population.

(C) In so far as Universities, Colleges and Educational Institutions are concerned, about 12% of students belonging to the Maratha community are

availing higher technical education. The data/figures concerning medical education, agriculture or trade related universities were unavailable.

Similarly, in so far as schools, high schools and colleges in rural and urban areas are concerned, the data/figures concerning students from Maratha

community, were unavailable.

54. Although the Rane Committee Report dated 26 February 2014 recommended to State Government that the Bapat Commission Report of the

MSBCC be rejected, no cognizance appears to have been taken of the Mandal Commission Report dated 31 December 1980 and the

reports/advise dated 25 February 2000 of the National Commission for Backward Classes, which to say the least constituted both relevant and

vital material on the issue.

55. In so far as Rane Committee Report is concerned, there are several glaring flaws going to the root of the matter, which stare us in the face even

at the interim stage:-

In the first place, the very composition of the Committee was certainly not the type, which the Supreme Court had in contemplation, in Indra

Sawhney (supra), when it recommended the establishment of National and State Backward Classes Commission.

Secondly, we are of the prima facie opinion, that Rane Committee hurriedly conducted survey in just about eleven days between the period 9

February 2014 and 19 February 2014.

Thirdly, the Rane Committee proceeded entirely on an erroneous premise by adopting the view of Fazal Ali, J. in N.M. Thomas case in 1976

(quoted in paragraph 18 of this Order) (paragraph 191 of the report) which had already been overruled by the Nine-Judge Bench in Indra

Sawhney case in 1992, as discussed in paragraphs 18 to 24, 30 and 31 of this order.

The Rane Committee did not at all consider the legal position laid down by the majority in Indra Sawhney case in 1993 that 50 per cent ceiling limit

laid down in Balaji case is the binding rule and not merely a rule of prudence and that only in extraordinary situation the rule can be relaxed. The

Rane Committee report does not even purport to state that the case of Marathas is such an extraordinary situation as contemplated in Indra

Sawhney case. In fact, the Rane Committee report does not even refer to the subsequent Constitution Bench judgment of the Supreme Court in

M. Nagaraj case which laid down in emphatic terms that ""the State will have to see that its reservation provision does not lead to excessiveness so

as to breach the ceiling limit of 50%.

Fourthly, the Rane Committee Report does not deal with the Mandal Commission Report or the National Backward Class Commission Report, in

the context of Marathas, giving definite findings that for several centuries in the past, Marathas have held a dominant social position, on account of

their occupation and social customs. Early historical and social documentation suggests that though the Maratha castes/communities originated from

Kunbi castes/communities, from the 14th Century onwards the Marathas evolved into a separate caste/community with high social, educational and

political status.

Last, but not the least, it is interesting to note that after purportedly considering social, educational and financial backwardness of Marathas, the

Committee seems to have appreciated that it may be difficult to classify Marathas as a socially backward community and, therefore, the report

contains the following observations:

The Committee, therefore conclude and recommend as follows:

Taking into consideration the relevant factors for determining the social and educational backwardness, we are of the view that the Maratha

Community is entitled to be included in the Other Backward Classes. Assuming without admitting, for any reason, the Maratha community is

sought to be excluded from the Socially Backward Classes, they cannot be excluded from the Educationally and Economically Backward class.

As such, in any case, they are entitled to be included in ""any Backward Class of citizens, which is not adequately represented in the Services under

the State."" As such, in any case, they will be entitled to reservations under Clause 16(4) of the Constitution.

If a new backward class namely ""Economically & Educationally backward Class"" is carved out for benefit under Article 16(4), then those who are

entitled to reservations in any other class such as SC, ST, VJ, NT, OBC, and SBC, should not be eligible to reservation under this new Backward

Class. The State Government has powers to create a new class of backwards under Article 16(4) of the Constitution.

(emphasis supplied)

56. It would be equally, if not more, interesting to note that though Article 15(4) provides for reservations for ""socially and educationally backward

classes"" and the Supreme Court has in Indra Sawhney case held that social backwardness being the cause is more important than educational and

financial backwardness, which may be consequences of poverty also, the State Government has on the basis of the Rane Committee Report,

chosen to classify the Maratha community as ""Educationally and Socially backward"";

57. We cannot help noticing that the State Government never placed Justice Bapat Commission report on the floor of the State Legislative

Assembly in spite of the mandate of section 15 of the Maharashtra Backward Class Commission Act, 2005 nor did the State Government placed

the Rane Committee Report before the State Legislative Assembly and, therefore, the fact that the State Government did not allow the State

Legislative Assembly to consider the issue of reservations becomes a relevant factor while examining the report of a Committee headed by a

Minister on the basis of which the impugned Ordinance no. XIII of 2014 came to be issued on the eve of elections to the State Legislative

Assembly.

58. Therefore, taking the totality of the circumstances into consideration, we are of the prima facie opinion that there was no case at all for

classifying the Marathas as Socially and Educationally Backward Classes by completely ignoring the Reports made by the National Commission

for Backward Classes and the Mandal Commission. The Justice Bapat Commission had also taken the same view.

Whether any prima facie case made out for justifying increase in percentage of reservations from 52% to 68% both in educational institutions and

public employment?

59. Now coming to the second question as to whether there exist any exceptional circumstances or extra ordinary reasons to grant reservations to

the extent of 16% to the Maratha Community, thereby increasing the existing percentage of reservation from 52% to 68%, we may reiterate the

legal position discussed in paras 31 to 33 herein above, that there is a ceiling limit of 50% of reservations under Article 15(4) and 16(4) of the

Constitution; that this is a binding rule and not merely a rule of prudence; but this rule may be relaxed in extra ordinary situation and for extra

ordinary reasons only for reservations of seats in State owned and aided educational institutions.

60. Further, even if we were to accept the submission of learned Advocate General that at the prima facie stage, necessary credence ought to be

given to the exercise of classification conducted by Rane Committee, we must at once note that neither the Rane Committee nor the State

Government has placed any material on record to justify the existence of any exceptional or extraordinary circumstances so as to enhance the

percentage of reservation from 52% to 68% by providing reservation to the extent of 16% for the Marathas. The burden of placing cogent material

in this regard, was certainly upon the State. As noted earlier, this issue of inclusion of Marathas in the List of Other Backward Classes was under

consideration for at least two to three decades. As many as three reports, have rejected such inclusion. There is material on record which suggests

that the Marathas, as a class belong to a socially and politically dominant class. In such circumstances, it can hardly be said that any case as to the

existence of exceptional or extraordinary circumstances can be said to have been made out by the State Government. Learned Advocate General

may be right in his submission that the instances of extra-ordinary circumstances referred to in Indra Sawhney may be only illustrative and not

exhaustive. However, all the decided cases illustrate the nature of extra-ordinary circumstances contemplated by the Supreme Court. There must

be some element of social oppression and/or social discrimination against, or at least social segregation of the community for whose benefit the

reservation is to be provided so as to take reservation beyond the 50% ceiling limit. In the present case, there has been no attempt on the part of

the State to establish the exceptional circumstances, if any, which prompted State Government to exceed reservation ceiling of 50% by such a

wide margin. As a matter of fact, in response to a specific query from the Court whether Marathas as a community in Maharashtra are facing any

social oppression, social discrimination or even social segregation, the answer from the learned counsel for the private respondents/intervenors

supporting the reservation in favour of Marathas was completely in the negative.

61. Only the following decisions were brought to our notice where the cases were considered as extraordinary situations justifying reservations in

excess of 50 per cent:

(i) Justice B.P. Jeevan Reddy''s observations in Indra Sawhney case that in far-flung and remote areas the population inhabiting those areas might

on account of their being out of mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in

a different way and therefore some relaxation in the 50% rule may become imperative. In doing so, extreme caution is to be exercised.

(ii) In Union of India (UOI) etc. Vs. Rakesh Kumar and Others etc., , the Supreme Court upheld the 100% reservation of post of office of

Sarpanch of Panchayats in Scheduled areas where Scheduled Tribes are in relative majority, on the ground that non-tribal population still

dominates the tribal by grabbing land of tribals, displacement of tribals on account of private as well as governmental developmental activities and

the destruction of environmental resources on which tribals are dependant.

(iii) In Rakesh Kumar case (supra), the Supreme Court also upheld the Madhya Pradesh High Court decision justifying 100% reservation for

tribals in local self-government on the ground that the tribals living in remote or hilly areas or forest continue to be exposed to exploitation by

forward classes of urban population.

(iv) In a slightly different context, the Supreme Court, in the case of Kailas and Others Vs. State of Maharashtra T.R. Taluka P.S., made reference

to the rationale for special provisions made in the Constitution to undo the effects of historical injustice inflicted upon disadvantaged and

marginalised (STs) living in terrible poverty with high rates of illiteracy, disease, early mortality. The relevant observations read thus :

26. However, giving formal equality to all groups or communities in India would not result in genuine equality. The historically disadvantaged

groups must be given special protection and help so that they can be uplifted from their poverty and low social status. It is for this reason that

special provisions have been made in our Constitution in Articles 15(4), 15(5), 16(4), 16(4-A), 46 etc. for the upliftment of these groups. Among

these disadvantaged groups, the most disadvantaged and marganlised in India are the Adivasis (STs), who, as already mentioned, are the

descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early

mortality, etc. Their plight has been described by this Court in Samatha Vs. State of A.P. and Others, . Hence, it is the duty of all people who love

our country to see that no harm is done to the Scheduled Tribes and that they are given all help to bring them up in their economic and social

status, since they have been victimised for thousands of years by terrible oppression and atrocities. The mentality of our countrymen towards these

tribals must change, and they must be given the respect they deserve as the original inhabitants of India.

62. At the hearing, therefore, we indicated to the learned Advocate General that some of the exceptional circumstances would be those where the

concerned backwardness needs affirmative action because of social oppression and exploitation of, or social discrimination against, or at least

social segregation of the class or community in whose favour reservations are to be extended so as to raise total percentage of reservations beyond

50%.

63. In response, the learned Advocate General submitted that this would amount to adopting the lingering effects test, but in Indra Sawhney case,

the Supreme Court has referred to the decisions of the American Supreme Court giving up the lingering effects test. The learned Advocate General

referred to paragraphs 733 and 785 of the judgment, which read as under:-

733. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable

classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under

Clause (1) of Article 16, appointments and/or posts can be reserved in favour of a class.
..... At the same time,

there are a series of decisions relating to school desegregation-from Brown to Board of Education v. Swann (28 L. Ed. 2nd 586)-where the court

has been consistently taking the view that if race be the basis of discrimination, race can equally form the basis of remedial action. The shift in

approach indicated by Metro Broadcasting Inc. is equally significant. The "lingering effects" (of past discrimination) theory as well as the standard

of strictest scrutiny of race-conscious programmes have both been abandoned. Suffice it to note that no single uniform pattern of thought can be

discerned from these decisions. Ideas appear to be still in the process of evolution.

785. Another contention urged is that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone

be designated as a backward class and not others. This argument, inspired by certain American decisions, cannot be accepted for more than one

reason. Firstly, when the caste discrimination is still prevalent, more particularly in rural India (which comprises the bulk of the total population), the

theory of lingering effects has no relevance. Where the discrimination has ended, does that aspect become relevant and not when the discrimination

itself is continuing. Secondly, as we have noticed hereinabove, the said theory has practically been given up by the U.S. Supreme Court in Metro

Broadcasting. In this case, it is held sufficient for introducing and implementing a race-conscious programme that such programme serves important

State objectives. In other words, according to this test, it is no longer necessary to prove that such programme is designed to compensate victims

of past societal or governmental discrimination. Thirdly, the basic premise of the theory of lingering effects is not accepted by all the learned Judges

of U.S. Supreme Court. If one sees the opinion of Douglas, J. in Defunis and of Marshall, J. in Bakke and Fullilove. It would become evident.

They also say that discriminatory practices against blacks and other minorities have not come to an end but are still persisting. In this country too,

none can deny-in the face of the material collected by the various Commissions including Mandal Commission-that discrimination persists even

today in India. The representation of the socially backward classes in the Government apparatus is quite inadequate and that conversely the upper

classes have a disproportionately large representation therein. This is the lingering effect, if one wants to see it.

(emphasis supplied)

64. The above observations make it clear that Justice Jeevan Reddy did not accept the lingering effect theory which provides for compensating

victims of past governmental or societal discrimination, because Justice Reddy observed that discrimination persists even today in India. Moreover,

the observations were made for evolving test to determine backwardness of a caste or a class and not in the context of crossing the 50% ceiling

limit. In fact the following observations in para 732 of the judgment clearly indicate that Justice Reddy was conscious of the fact that in India

backward classes certainly constitute a majority of the population; even then Justice Reddy adopted the 50% ceiling rule propounded in the Balaji

case:-

732. We have examined the decisions of U.S. Supreme Court at some length only with a view to notice how another democracy is grappling with

a problem similar in certain respects to the problem facing this country. The minorities (including blacks) in United States are just about 16 to 18%

of the total population, whereas the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country-by whichever

yardstick they are measured-do certainly constitute a majority of the population. The minorities there comprise 5 to 7 groups-Blacks, spanish-

speaking people, Indians, Purto Ricano, Aleuts and so on-whereas the castes and communities comprising backward classes in this country run

into thousands. Untouchability-and "unapproachability", as it was being practised in Kerala-is something which no other country in the world had

the misfortune to have-nor the blessed caste system. There have been equally old civilizations on earth like ours, if not older, but none had evolved

these pernicious practices, much less did they stamp them with scriptural sanction.

(emphasis supplied)

65. It is, therefore, clear that the observations in paragraphs 730, 733 and 785 of the judgment of Justice Jeevan Reddy in Indra Sawhney case

were made in the context of determining backwardness of a caste or a social group, not in the context of giving them benefit of reservation beyond

the 50% ceiling limit which is the general rule. In fact, having noted that backward classes in India constitute majority of the population, Justice

Reddy still held that ceiling limit of 50 per cent on reservations is a binding rule and not a rule of prudence.

66. We are, therefore, of the considered view that situations or circumstances to be considered extraordinary so as to justify providing reservation

in excess of 50% would be only those cases where the concerned class could not advance socially and educationally because of social oppression

or exploitation or social discrimination or at least social segregation.

67. The submission based upon the decision in S.V. Joshi (supra) does not appeal to us. As noted earlier, the said decision is not an authority for

the proposition that the moment some quantifiable data is available with the State Government, it is free to provide for reservation in excess of 50%

ceiling. In S.V. Joshi (supra), the Supreme Court used the expression ''inter alia'' in paragraph ''4'' of the judgment. Therefore, all that observations

in paragraph 4 of the said judgment means is that the existence of quantifiable data is certainly one of the essential pre-requisites, however, the

same cannot be construed as being the only prerequisite, in order to justify reservations in excess of ceiling of 50%. Incidentally, in S.V. Joshi

(supra), the Supreme Court after noting that the decisions of the State of Karnataka and State of Tamil Nadu were not based upon any

quantifiable data, stayed the implementation of reservations in excess of 50% and further directed the State Government to place the quantifiable

data before the respective State Backward Classes Commission for fresh consideration.

68. In the aforesaid position, we are of the opinion that the impugned Ordinances and Resolution to the extent they provide for 16% reservations

for Maraths for the Maratha Community are at least prima facie ultra vires the Constitution of India, on both the grounds i.e. Maratha Community

cannot be classified as a backward community and also because the percentage of reservation exceeds the ceiling limit of 50%, without there being

any exceptional circumstances or extra ordinary reasons to justify the same. Therefore, the impugned Ordinances and Resolution, to the extent,

they provide for 16% reservations for the Marathas are liable to be stayed pending the hearing and final disposal of the petitions.

III. Challenge to 50% Reservation in Favour of Specified Communities of Muslims

Whether any prima facie made out for determination of special backwardness in Specified Muslim Communities?

69. In so far as reservations for specified Muslim communities is concerned, Mr. Sancheti, Mr. Apte and other counsel appearing for the

petitioners raised the following contentions for challenging the reservations in favour of Muslims:-

(i) Providing for reservations in favour of Muslims is violative of Articles 15(1) and 16(1) which prohibit discrimination on the ground of religion

and, therefore, the impugned Ordinance, on the face of it, is unconstitutional and void ab initio.

(ii) The 5% reservation in favour of Marathas over and above 52% reservation in favour of Scheduled Castes/Scheduled Tribes and Other

Backward Classes takes it far above the permissible constitutional limit of 50% laid down by the Constitution Bench decisions of the Supreme

Court from 1963 onwards till as recently as in July 2014. Hence, providing separate 5% reservation for Muslims over and above 52% reservation

in favour of Scheduled Castes/Scheduled Tribes and Other Backward Classes is unconstitutional.

(iii) Sachar Committee Report, upon which reliance has been placed, also did not make any recommendation for providing reservations in favour

of Muslims in public services or in educational institutions, merely recommended measures for financial help and other concessions,

(iv) Dr. Mehmood-ur-Rehman Study Group''s report in 2013 does not have any statutory basis. The State Backward Classes Commission has not

given any recommendation in favour of Muslims and Dr. Mehmood-ur-Rehman Study Group does not have any statutory basis. The State

Backward Class Commission is not shown to have undertaken any exercise for classifying Muslims as socially and educationally backward class

from 2006 onwards. Dr. Mehmood-ur-Rehman Study Group''s report does not have the sanctity of a report of a Commission under Article 340

of the Constitution would have. Dr. Mehmood-ur-Rehman Study Group did not make any scientific study. Even the Minority Commission has not

recommended any percentage of reservation.

(v) The Ordinance purports to provide for reservation in favour of 50 sub-categories of Muslims over and above 79 sub-categories of Muslims

covered by the previous reservations. Muslims have thus been given the benefits of double reservations which is not permissible.

70. The following issues, therefore, arise for our consideration:-

(i) Whether there exists any quantifiable data for constituting certain communities of ''Muslims'' as ''Special Backward Classes'' thereby rendering

them eligible to the benefits of reservations under Articles 15 and 16 of the Constitution of India ?

(ii) In any case, whether there exists any exceptional circumstances or extraordinary reasons to grant reservations to the extent of 5% to the certain

communities of ''Muslims'', thereby increasing existing percentage of reservations from 52% to 57%, in both, educational institution and public

employment ?

71. The decision to constitute certain specified communities from out of the Muslims as Special Backward Classes, is based upon the following

material:

(a) The Sachar Committee Report dated 17 November 2006, which records that the social and economic status of the Muslims in India is almost

on par with the Scheduled Castes. This Report, after adverting to data relating to social, economic and educational status of the Muslims in

Maharashtra concluded that they are ''extremely backward'';

(b) The Report dated 10 May 2007 made by Justice Ranganath Mishra, National Commission for Religious & Linguistic Minorities, which again

reports that the Muslims in India have not been able to achieve the constitutional goal of equality like other citizens in India. On basis of statistical

data, this Commission has also supported the demand for categorisation of Muslims as backward class;

(c) The Report dated 7 December 2011, made by Maharashtra State Minority Commission constituted under the Maharashtra State Minority

Commission Act, 2004, which records that the Muslims are both socially and educationally most backward and 80% of their population carry out

traditional occupations. This Report recommends that Muslims should be referred to as ""Most Backward Class"" and special reservations carved

out for them;

(d) The Report dated 21 October 2012 prepared by Dr. Mehmood-ur-Rehman, Study Group, which reports that the population of Muslims in

Maharashtra is about 10.6% of the total population, but their share in public services is only 4.4%. Besides, representation in higher jobs is

extremely poor. This Report also very strongly recommends the inclusion of Muslims to the List of Other Backward Classes.

(e) The State Government forwarded, both the Maharashtra State Minority Commission Report dated 7 December 2011 and Dr. Mehmood-ur-

Rehman, Study Group Report dated 21 October 2012 to the MSBCC for its consideration. However, the said Commission, by letter dated 27

November 2013 reported to the State Government that the issue of inclusion of Muslims in the list of Other Backward Classes, is outside its

purview.

72. In Sanjiv G. Punalkar vs. Union of India, Ministry of Minority Affairs and ors. 1, a Division Bench of this Court had the occasion to consider

challenge to the ''Merit-cum-Means Scholarship Scheme for Students of Minority Communities"" issued by the Government of India in the Ministry

of Minority Affairs on 1 April 2008, on the ground that it discriminates against the students belonging to the majority community, only on the

grounds of religion. In that context, detailed reference was made to the Sachar Committee Report which highlighted the educational status of

Marathas in the following words:

Educational Status of Muslims (Sachar Committee Report Chapter 4)

Muslims lag behind most other communities both at the school level as well as at the graduation/post-graduation level. Muslims have not been able

to reap the benefits of planning and have gradually slipped further and further behind other socio-religious groups. (Report pages 15,84 and 85)

The following are a few important figures regarding the literacy and educational status of Muslims:

a) The literacy rate among Muslims is 59.1% which is below the national average of 65.1%. -(Report-page 52).

b) Muslim urban literacy levels are lower than all other socioreligious categories except SC/STs among both genders. (Report-page 53)

c) 25% of Muslim children between the ages of 6 to 14 years have either never attended school or have dropped out (Report-page 58)

d) The majority of Muslim children fail in their matriculation examination or drop out before that. (Report-page 244-245)

e) Less than 4% of Muslims are graduates or diploma holders compared to about 7% of the population aged 20 years and above. (Report-page

64)

f) Only 1 out of every 25 students enrolled in Undergraduate courses is a Muslim and only 1 out of every 50 students in post-graduate courses is a

Muslim (Report-page 68).

g) Muslims constitute only 1.3% of students studying in all courses in all IIMs in India and in absolute number, they were only 63 from out of 4743

(Report Page 68)

h) Muslim parents are not averse to modern or mainstream education for their children and do not necessarily prefer to send their children to

madarsas. (Report-page 85)

19. The following analysis in Chapter 4 of the Report of this High Level Committee headed by Justice Sachar gives further insight into reasons for

low levels of education in the Muslim community.

4.1 Low Levels of Education (Report pages 15-16)

As mentioned earlier, education is an area of grave concern for the Muslim Community. The popular perception that religious conservatism among

Muslims is a major factor for not accessing education is incorrect. The recognition of their educational backwardness is quite acute amongst a large

section of Indian Muslims and they wish to rectify it urgently. There is a significant internal debate about how this should be done. Private minority

institutions and Madarsas are seen as the only option available to the community for improving the educational status of the Muslim community.

However, others find these to be questionable alternatives pursued by the State neglecting its own responsibility. Relying predominantly on

Madarsa and denominational institutions for improving the educational status of Muslims was also seen by some as violating the spirit of the

Constitution

Poor Access to Schools

Many complained that only a few good quality schools, especially Government schools, are found in Muslim areas. The teacher pupil ratio is also

high in these schools. This forces Muslim children to go to private schools, if they can afford to, or else to drop out. Schools beyond the primary

level are few in Muslim localities. Exclusive girls" schools are fewer, and are usually at a distance from Muslim localities. This has its repercussions

because after any incident of communal violence parents pull out their girls from school fearing their security. Lack of hostel facilities is another

limiting factor, especially for girls. This problem gets compounded by the fact that people are unwilling to give rooms on rent to Muslim students. In

any case, spending on separate residential facilities, in the absence of hostels, is a great financial burden on Muslim families as rents for

accommodation are very high.

School-based Factors

Government schools that do exist in Muslim neighbourhoods are merely centres of low quality education for the poor and marginalized. The poor

quality of teaching, learning, absentee teachers, in turn, necessitate high cost inputs like private tuitions, particularly in the case of first generation

learners from the Muslim community. This has a negative impact on retention and school completion. Thus, poverty again has a causal link with

access to education among Muslims.

(emphasis supplied)

73. Dr. Mehmood-ur-Rehman Study Group submitted its Report dated 21 October 2012 by and large confirming the findings of the Sachar

Committee regarding social, educational and economic backwardness of Muslims in the State of Maharashtra in the following terms:

74. The response of the Maharashtra State Minority Commission to Dr. Mehmood-ur-Rehman Study Group Report dated 21 October 2012,

was, inter alia, as under:

(i) Educational backwardness is accepted. Govt. should look after their educational development. Like reservation given to SC, ST students,

muslim students should be given reservation for admission and financial facilities in education.

(ii) 60% drop out of Muslim students at the school level education is accepted and Govt. should take measures as above for their educational

upliftment. .....

(iii) Educational, social & economical benefits are actually not given to muslim community.

75. It is thus clear that if the Muslim youth belonging to socially and educationally backward class is to be drawn into the mainstream of secular

education in the State, herculean efforts will be required to be made. In this connection, it would be necessary to see the observations in the

Committee report regarding the availability of Government schools (i.e. schools run by the State Government and the local-Government

authorities) where Muslim children can take secular education.

76. We may indicate that at the hearing for admission and interim relief, there was not much debate that the question of social and educational

backwardness of the 50 sub-castes of Muslim community covered by Maharashtra Ordinance XIV of 2014. The learned counsel for the

petitioners vehemently submitted that the reservations provided by the said Ordinance are unconstitutional because they are granted only on the

basis of religion and, secondly, on the ground that the total reservations will go up from 50 per cent to 57 per cent, breaching the ceiling limit of 50

per cent laid down in Indra Sawhney vs. Union of India and in M. Nagaraj vs. Union of India.

77. Coming to the question of determining backwardness, there is quantifiable data based upon which the State Government has decided to

classify 50 sub-castes of Muslims as Special Backward Classes, in so far as the State of Maharashtra is concerned.

78. In view of the above findings in the report of the Sachar Committee and similar findings in the Report of Dr. Mehmood-ur-Rehman Study

Group, the State Government has clearly made out a prima facie case for providing for reservation of seats for admissions in educational

institutions in the State of Maharashtra, even by raising the existing percentage of reservations from 52 per cent to 57 per cent of seats for

admissions in educational institutions in the State. Interim stay of provisions in the impugned Ordinance providing for reservations of seats in

educational institutions will certainly impede the process of drawing the Muslim youths into the mainstream of secular education in the State.

79. We must deal with the submission of Mr. Apte that the reservations under Ordinance XIV of 2014 in the present case are based only on

religion. In the first place, the impugned Ordinance is clear, inasmuch as the reservation is for certain specified communities from out of Muslims

and not for members of the Muslim community in general or in entirety. Secondly, both Articles 15(1) and 16(2) prohibit discrimination against any

citizen on grounds only of religion. Since the State Government has relied upon the relevant indicators for the purposes of determining

backwardness of 50 sub-castes of Muslim community, we see no infringement of Articles 15(1) and 16(2) of the Constitution of India.

Whether any prima facie case made out for increase in percentage of reservations from 52% to 57% in favour of Specified Communities of

Muslims in educational institutions?

80. As we have noted earlier, in matters of reservation of seats in educational institutions, reservations ought not to ordinarily exceed the ceiling

limit of 50%. However, in extra ordinary situations and for extra ordinary reasons the percentage of reservation may exceed the ceiling limit of

50%. Any excess over and above 50% shall have to be justified on valid grounds to be specifically made out by the State Government.

81. In the present case, the material relied upon by the State Government for determining the backwardness of the Specified Communities of

Muslims, at least prima facie, spells out a case for the existence of an extra ordinary situation, in which the State Government was justified in

exceeding the ceiling limit of 50%, by another 5% in so far as reservations in educational institutions is concerned.

In the first place, all the Committee Reports are unanimous in determination of backwardness.

Secondly, this is not a case where reservation has been granted in favour of the entire Muslim Community across the board. The reservation

provided is in respect of 50 Specified Communities over and above the 79 Communities included in the previous reservations creamy layer is

excluded.

Thirdly, the material placed on record suggests a case of extreme backwardness and the consequent dire necessity to draw Muslim youth

belonging to socially and educationally backward classes into the mainstream of secular education in the State. The material placed on record

makes reference to the abysmally low levels of educational achievement which ails the community. The material placed on record makes reference

to high level of educational drop outs in the community. We had an occasion to consider such quantifiable data in the context of challenge to

''Merit-cum-Means Scholarship Scheme for Students of Minority Communities'' in the case of Sanjiv Punalkar (supra), we are accordingly

satisfied about the existence of exception of compelling or extra ordinary circumstances for exceeding the reservation ceiling limit of 50% by

another 5% in so far as reservations to State owned or aided educational institutions are concerned. But, in the case of Ashok Kumar Thakur

(supra), Bhandari, J. has, in terms held that imposing reservations on unaided institutions is an unreasonable restriction upon the fundamental right

guaranteed by Article 19(1)(g) to establish and run an educational institution.

Whether any prima facie case made out for increase in percentage of reservations from 52% to 57% in favour of Specified Communities of

Muslims in public employment?

82. As noted earlier, in so far as reservations in public employment is concerned, applying the law laid down by the Supreme Court in the cases of

Indra Sawhney (supra), M. Nagaraj (supra) and Rohtas Bhankhar (supra), the percentage of reservations cannot be excessive so as to breach the

ceiling limit of 50%. Even the decision of the Supreme Court in the case of S.V. Joshi (supra) is not an authority for the proposition that the

moment there exists quantifiable data to establish backwardness of classes, the percentage of reservation can exceed the ceiling of 50%,

particularly when it comes to reservations in public employment. Besides, there cannot be any general, blanket or omnibus reservation applied

across board to all grades, cadres or levels of administration where reservation is proposed to be in excess of the ceiling limit of 50%.

83. We have looked at the Cabinet note dated 25 June 2014 (Exh. R-11). The note refers to the judgment of Justice B.P. Jeevan Reddy in Indra

Sawhney vs. Union of India and the Constitution Bench judgment in M. Nagaraj vs. Union of India and thereafter the said Cabinet Note only

states that the ratio of Muslim community in Semi-Government/Government services is very less, compared to the ratio of population and there is

very much the need of reservation for bringing them in main flow (paragraph 15B, page 173 of the paper-book in PIL no. 149 of 2014).

The Cabinet Note or the revised Minutes of the Cabinet Meeting held on 25 June 2014 does not throw any light on the issue of justifying

reservation in excess of the ceiling limit of 50%. Paragraph 4 of the said Cabinet Note mentions that the main reason for poor representation of

Muslims in public services is ""..... opportunities of education are not being made available to them and because of not taking education,

opportunities of service also can (sic not) be made available."" Thus, it does appear that the thrust of the Cabinet Note leading to promulgation of

the Ordinance is the perception that because of lack of educational opportunities, the representation of Muslims in Government service is poor.

84. Taking into consideration all such circumstances, we are of the opinion that the petitioners have made out a case for grant of stay on the

implementation of the impugned Ordinances/Resolution reserving 50% seats to Specified Muslims Communities in the matter of public

employment.

IV. Summary of Findings

85. In light of the above discussion, we summarise our prima facie findings as under:

(A) Applying the law laid down by the Supreme Court in the cases of S.K.G. Sugar Ltd. Vs. State of Bihar and Others, and T. Venkata Reddy

and Others Vs. State of Andhra Pradesh, , we hold that motives for promulgation of Ordinances or the existence of circumstances necessitating the

promulgation of Ordinances are not justiciable issues. Therefore, the challenge to the impugned Ordinances upon such grounds is rejected. (paras

3 to 11)

(B) In so far as reservation of seats in State owned or aided educational institutions is concerned, applying the law laid down by the nine Judge

Bench of the Supreme Court in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., and the Constitution Bench decision in Ashoka

Kumar Thakur Vs. Union of India (UOI) and Others, , we hold that such reservations ought not to exceed ceiling limit of 50%. However, in extra

ordinary situation and for extra ordinary reasons the percentage of reservations may exceed the ceiling limit of 50%. But any excess over 50% shall

have to be justified on valid grounds to be specifically made out by the State Government. (para 32)

(C) Following the law laid down by Bhandari, J. in the Constitution Bench decision in Ashok Kumar Thakur vs. Union of India (supra), we hold

that imposing reservations on private unaided institutions constitutes an unreasonable restriction upon the fundamental right guaranteed by Article

19(1)(g) to establish and run educational institutions.

(D) In so far as reservation in public employment is concerned, applying the law laid down by the Constitution Benches of Supreme Court in the

years 2006 and in July 2014, in the cases of M. Nagaraj and Others Vs. Union of India (UOI) and Others, and Rohtas Bhankhar Vs. Union of

India (UOI), , we hold the percentage of reservations cannot be excessive, so as to breach the ceiling limit of 50%. (para 33)

(E) 52% reservation in public employment has already been provided to backward classes as per the provisions of the State Reservation Act of

2001. (Para 12)

(F) In light of clear and cogent findings recorded in the second backward class commission Report (Mandal Report 1990), National Commission

for Backward Classes Report dated 25 February 2000 and the Report of the Maharashtra State Backward Class Commission (Bapat Report)

dated 25 July 2008 and other material on record, we hold that the Maratha Community cannot be regarded as a backward class. Rather, the

National Commission for Backward Classes and the Mandal Commission have concluded that the Maratha Community is a ""socially advanced

and prestigious community"". (paras 59 to 68)

(G) The Rane Committee Report suffers from several glaring flaws, which go to the root of the matter. (para 55)

(H) In so far as reservations for specified Muslim Communities, is concerned, there exists sufficient material or quantifiable data to sustain their

classification as ''special backward class''. This material is in the form of Sachar Committee Report, Justice Ranganath Mishra Committee Report,

Report of the Maharashtra State Minority Commission and Dr. Mehmood-ur-Rehman Study Group Report. Therefore, the State has made out a

prima facie case for justifying 5% reservations in favour of specified Muslim Communities, in so far as admissions to State owned or aided

educational institutions are concerned, even though the overall percentage of reservations is thereby increased to 57%. This is because there is a

dire need to draw the muslim youth into the mainstream of secular education in the State.

(I) In so far as reservation in favour of specified Muslim Communities in public employment is concerned, applying the law laid down by the

Constitution Benches of Supreme Court in the cases of M. Nagaraj and Others Vs. Union of India (UOI) and Others, and Rohtas Bhankhar Vs.

Union of India (UOI), , we hold that the State has no power to breach the ceiling limit of 50% and therefore the State cannot be permitted to

implement Ordinance XIV of 2014 for reservations in favour of specified Muslim Communities, in matters of public employment.

V. Interim Order and Miscellaneous Directions

86. In the aforesaid circumstances, we issue Rule in each petition, make it returnable on 5 January 2015 and pass the following interim order in all

these petitions:

Interim Order

(1) Re: Maharashtra Ordinance XIII of 2014:

(a) The operation and implementation of the impugned Maharashtra Ordinance XIII of 2014 dated 9 July 2014 and Government Resolution dated

15 July 2014 providing for 16 percent reservations in favour of Marathas is hereby stayed, pending hearing and final disposal of these petitions.

(b) However, in case, any admissions have already been granted in educational institutions till today, based on the above impugned Ordinance XIII

of 2014 and the above Government Resolution, the same are not disturbed and those students will be allowed to complete their respective

courses.

(2) Re : Maharashtra Ordinance XIV OF 2014 :

(a) There shall be no stay on the implementation of Maharashtra Ordinance XIV of 2014 dated 9 July 2014 and Government Resolution dated 19

July 2014, in so far as the Ordinance and Resolution provide for 5 per cent separate reservation of seats in State owned or aided educational

institutions for the newly created Special Backward Category-A comprising 50 sub-castes from amongst the Muslim community during the lifetime

of the impugned Ordinance XIV of 2014 dated 9 July 2014, pending the hearing and final disposal of these petitions;

(b) However, in view of the law laid down by Bhandari, J. in the Supreme Court decision in Ashoka Kumar Thakur Vs. Union of India (UOI) and

Others, , there shall be a stay on implementation of Maharashtra Ordinance XIV of 2014 dated 9 July 2014 and Government Resolution dated 19

July 2014 providing for 5 per cent separate reservation of seats in private unaided educational institutions for the newly created Special Backward

Category-A comprising 50 sub-castes from amongst the Muslim community, pending the hearing and final disposal of these petitions;

(c) In view of the law laid down by two Constitution Benches of the Supreme Court in M. Nagaraj and Others Vs. Union of India (UOI) and

Others, and Rohtas Bhankhar Vs. Union of India (UOI), , there shall also be a stay on the implementation of Maharashtra Ordinance XIV of 2014

dated 9 July 2014 and Government Resolution dated 19 July 2014 in so far as they provide for 5% separate reservations for appointments/posts

in public services for the Special Backward Category-A comprising 50 sub castes from amongst the Muslim Community, pending the hearing and

final disposal of these petitions.

87. The parties are at liberty to file further affidavits, on or before 24 December 2014.

Parties to act upon a copy of this order duly authenticated by an Associate of this Court.

M.S. Sonak, J.

After the Order is pronounced, Ms Geeta Shastri, learned Additional Government Pleader prays for stay of operation of this Order for four

weeks.

In the facts and circumstances of these cases and having regard to the law laid down by the Supreme Court, we are not inclined to grant any stay

as prayed for. Prayer for stay is therefore rejected.