

In the matter of the Indian Income Tax Act XI of 1922 and In the matter of the Income Tax Assessment of M^S Laxmi-chand Jaiporia Spinning & Weaving Mills Delhi for the year 1942-43. this loss shall be apportioned as between the partners constituting the firm. Where set off is to be given for different kinds of losses other than those due to depreciation it shall be first set off and then the loss due to depreciation.

For the reasons, which I have given above, the answer to the question must be in the affirmative. As the result is against the Commissioner the assessee shall have his costs in this Court. Counsel's fee Rs. 250.

Kapur J.

MISCELLANEOUS CIVIL

Before Falshaw and Kapur, JJ.

OM PARKASH DHRI AND OTHERS,—*Petitioners,*

versus

THE STATE OF PUNJAB, through THE CHIEF SECRETARY, PUNJAB CIVIL SECRETARIAT, SIMLA—E,—*Respondent.*

Civil Miscellaneous No. 731 of 1950.

Constitution of India Articles 13, 14, 15 (1), 16 (ii), 29 (2), 37 and 46 Fundamental Rights—Admission to Colleges—Rules governing whether laws as contemplated in Article 13 (3) (a)—Articles 14, 15 (i) and 16 (2)—Whether applicable.

A number of students who had obtained higher marks in the qualifying examinations than those who had been admitted to the Punjab Engineering College, Rorkee filed an application under article 226 of the Constitution praying for the issue of a Writ of mandamus or such other, Writ or Order as the High Court may deem fit in the circumstances to the State Government to admit them in the Engineering College by cancelling the nomination of the candidates already admitted.

Held, that the admission of the candidates by nomination to the Engineering College not strictly on the basis of the marks obtained in the qualifying examinations but on the basis of certain *criteria* e.g., being Harijans or sons of Ex-service men or being otherwise fit, did not offend against

1951

Jan. 15th

any fundamental right and the petitioners were not entitled to any relief under article 226 of the Constitution. But if exclusion had been based solely on the grounds of caste, religion, race or sex or any of them then it would have been against article 15 of the Constitution.

Om Parkash
Dhri and
others
v.
The State of
Punjab

Held further, that article 46 is an exception to article 29 (2) because of Article 37 which makes Article 46 a fundamental principle of the Governance of the country and it cannot be treated as non-existent because of its being in the Part relating to Directive Principles of State Policy.

Held also that rules made for admission into colleges are not laws as defined in article 13 (3) (a) of the Constitution.

Petition under Article 226 (1) of the Constitution of India, praying that the Hon'ble High Court may be pleased to issue a writ of mandamus or such order as to this Hon'ble Court may appear to be just and appropriate in the premises, directing the respondent to admit the petitioners to the Punjab Engineering College at Rorkee by cancelling the nomination of the candidates who were not admitted on merit, or in addition to them etc.

A, R, KAPUR, for Petitioners.

B. K. KHANNA, ADVOCATE-GENERAL, for Respondent.

ORDER

KAPUR J. This is a petition under Article 226 of the Constitution of India by six persons praying for a writ in the nature of Mandamus to be issued to the State of Punjab at Simla "to forthwith admit the petitioners to the First year class of the Punjab Engineering College, Roorkee, in place of the nominated candidates or in addition to the said nominated candidates. "According to the petition the Punjab Engineering College at Roorkee was established by the Government of the East Punjab in October 1947 and admission to the college was by merit, i.e., the basis of the admission was the results of the various applicants in B.A., B.Sc., or Intermediate Science Examinations of the Punjab University and that in the years 1948 and 1949, the selection has made on this basis alone. The State in its statement has pleaded that even in these two years some seats in the College were reserved

Kapur J.

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

for people belonging to the scheduled caste (Harijans) and for ex-servicemen. The petitioners then alleged that in accordance with the test of merit as given above they should have been admitted, because in the year 1949 the last candidate taken had obtained 338 marks in his B.A. Examination. In paragraph 4 of the petition it is alleged that the State Government had changed the rules of admission which were given in an advertisement published in *the Tribune*, dated the 29th of July, 1950, and that has been attached as annexure 'A' to the petition as well as to the written statement of the State; that the petitioners did not seek admission into other Colleges as they believed that the admission would be solely on the basis of merit; that according to the information received by them the procedure followed for admission in 1950 was that the Principal prepared a list of candidates "according to merit" and out of this list he was allowed to take first sixteen candidates in accordance with merit on the number of marks and 15 others were nominated by the Minister of Public Works Department, Captain Ranjit Singh, on the basis of personal recommendations of the Ministers and others and that these nominations were not based on education merit but on irrelevant and ulterior considerations. It is admitted in the petition that a Selection Board consisting of Chief Engineer (Buildings and Roads), Deputy Chief Engineer and Principal of the College was formed for selecting candidates by nomination and that they called 80 to 85 candidates for interview at Ludhiana on the 1st of November but it is alleged that they gave their approval to the nomination made by the Government without exercising their own judgment. It is not disclosed on what basis this allegation is made or how the petitioners came to know about this. But it is alleged that this was merely "an eye-wash as a result of protest raised by some members of the State Legislature". It is also alleged that the petitioners were not called for interview by this Board and that the petitioners would have been selected if the method of selection had been as it was in the years 1947 to 1949 i.e., in accordance with the principle of marks obtained in the University

examinations. The petitioners continue and allege that they are entitled to be admitted to the College according to their respective merit in the University examination and rely upon Article 16 of the Constitution of India that as the petitioners have been deprived of a valuable right of not being able to follow the carrier that they had chosen for themselves they are entitled to approach this Court for a writ of mandamus. In paragraph 15 the petitioners allege that there has been discrimination against them by the State, its Ministers and its Officers on the ground that the candidates belong to notified agricultural tribes and the petitioners 1, 3, 4 and 5 and several other candidates do not belong to those tribes and in paragraph 16 the petitioners rely on Article 15 and 16 " and other laws in force in the country."

In reply the State has pleaded that there has been no infringement of any of the Articles of the Constitution of India, that Harijans are a special responsibility under Article 46 of the Constitution, that the principle of marks obtained by a candidate at the University examination is not the only test and it was open to the Government to select candidates on the basis of "general intelligence, physical fitness and aptitude for out-door work." On the merits it is admitted that the petitioners have not been selected and that Government had notified that factors other than mere results in the examinations would be taken into considerations as is clear from the advertisement in *the Tribune* referred to in the petition and attached again to the written statement. It is admitted that the Principal prepared a list and submitted the same to Government for final selection and that 83 persons who were selected by nomination as provided for in the advertisement were interviewed by the Board constituted by the Government who took into consideration the academic qualifications of the candidates, their intelligence, personality and physical fitness and submitted the names of such candidates to Government for final decision. It was denied that the Board did not exercise their independent judgment or were "an eye-wash". It was also denied that the petitioners have any right for admission to the College

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

merely on the basis of the marks obtained by them as that is not the only criterion for judging the comparative merits of persons seeking to join the profession of engineering. It was denied also that nominations were made on any personal considerations. Finally, it is pleaded that the admission to the College is within the administrative discretion of the Government and that no writ or other order can issue against the State.

Om Parkash
Dhri and
others
v.
The State of
Punjab
Kapur J.

In annexure 'B' is contained the information for candidates seeking admission to the University Engineering Degree class for the year 1950-51. This contains information as to the basis on which students would be admitted into the College. In paragraph 3 it is stated that there would be 40 vacancies out of which thirty-three are reserved for the Punjab and Delhi Provinces, 3 for nominees of PEPSU, one for Himachal Pradesh and 3 for Jammu and Kashmir State. In paragraph 4 it is stated that 16 students would be selected on the basis of the marks obtained by them in the University examination as laid down in paragraph 9 of this information-sheet and 17 would be taken by nomination as follows :—

- (a) 6 seats reserved for ex-servicemen or their sons or daughters.
- (b) 9 by nomination.
- (c) 2 reserved for Harijans.

In paragraph 5 a limitation is imposed on the qualifications of persons to be nominated and it provides as follows :—

“The nomination will be subject to the condition that that the candidates selected possess the minimum qualifications required, i.e., F.Sc., First Class or failing that 2nd Class in order of merit.”

Paragraph 6 gives the conditions which all candidates for admission must fulfil. Paragraph 9 prescribes the educational qualifications required by those who have been taken in accordance with the merit,

and it runs as follows :—

“ Preference in selection to fill the vacancies will be given according to merit in the following order :—

- (a) Candidates who have passed the B.A. or B.Sc., Degree examination of recognised Indian University in the First Division taking two of the under-mentioned subjects in order of merit by total aggregate marks gained in that examination—

1. Mathematics A.
2. Mathematics B.
3. Physics.
4. Chemistry.

- (b) Candidates who have passed the Intermediate Examination of a recognised Indian University with English, Mathematics Physics and Chemistry in the First Division in order of merit by total aggregate marks gained in that examination.

- (c) Candidates who have passed B.A. or B.Sc., Degree Examination of a recognised Indian University in the 2nd Division taking two of the subjects mentioned in (a) above in order of merit by total aggregate marks gained in the examination.

- (d) Candidates who have passed the Intermediate Examination of a recognised Indian University with subjects mentioned in (b) above in the Second Division in order of merit by total aggregate marks gained in that examination.

NOTES. (i) The minimum educational qualification for admission is Intermediate with Mathematics, Physics and Chemistry which must be possessed by all candidates including those competing for admission on the basis of B.Sc., or B.A. Degree under (a) and (c) above.

- (ii) No account will be taken of the B.A. or B.Sc. degree in the 3rd division or taken without

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

Om Parkash
Dhri and
others
v.
The State of
Punjab

Kapur J.

the combination of subjects specified in (a) and (c) above, or of any other degree examination. Candidates with such qualifications will be placed in the list of consideration for selection on the basis of their Intermediate results.

- (iii) Candidates obtaining 60 per cent or more marks are considered First Division ; and candidates obtaining 50 per cent or more marks are considered Second Division.

Other conditions are not relevant for the purposes of this case.

Of the candidates selected by nomination under paragraph 4(a) above i.e., six ex-Servicemen three are non-agriculturists and three are agriculturists. They are all qualified in accordance with the requirements of annexure 'B'.

Of the candidates selected by nomination under paragraph 4(b) of annexure 'B' three are non-agricultural and six are agriculturists and each one of them possesses the qualifications required for admission to the College, so also the Harijan candidates two of whom were selected.

Counsel for the petitioners has submitted that his fundamental rights as contained in Articles 13, 14, 15(i), 16(ii) and 29(ii) have been infringed. According to him the nominating authority has discriminated against them on the ground of caste. He bases his arguments on the ground that if candidates had been taken on the ground of the principle of marks obtained in the University examination then his clients would have been selected. But his objection is that even the names of his clients were not submitted to the Selection Board, and because no principles were laid down on which the nominations were to be made, he submits that there has been an infringement of these various Articles.

I have tried to discover as to which of the fundamental rights of the petitioners has been infringed and

in spite of carefully listening to the arguments of the counsel for the petitioners and a careful reading of the petition and the affidavits in support of the petition I have not been able to discover exactly what fundamental right has been infringed.

Article 13 of the Constitution provides that laws shall not be inconsistent with or in derogation of the fundamental rights. In the present case I have not been able to discover what law is being impugned as being inconsistent or in derogation of the fundamental rights. As a matter of fact, what has been given in annexure 'B' to the written statement of the State may at the most be taken as the rules which were to be followed in the matter of admission of students and they cannot be classified as laws as defined in Article 13(3)(a) of the Constitution.

Article 14 provides for equality before the law and it says—

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

The first part of this Article has been taken from Ireland and the latter part from America. By not admitting the petitioners into the College it cannot be said that they have been denied equality before the law. Counsel for the petitioners strongly relied upon the second part of this Article. This part has been the subject-matter of interpretation in America and Willis on Constitutional Law has observed as to the meaning and effect of the guarantee given under this part. At page 579 he says—

“The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. (See *Barbier v. Connolly* (1), *Southern Railway v. Green* (2). It does not

Om. Parkash
Dhri and
others
v.
The State of
Punjab
Kapur J.

(1) (1885) 148 U. S. 27.

(2) (1910) 216 U. S. 400.

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'. (See *Hayes v. Missouri* (1). 'The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. ' (See *Pembina Mining Co. v. Pennsylvania* (2)."

But it has also been held in America that this clause does not take away from the State the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Again in Willis on Constitutional Law at page 579 it is stated—

"Mathematical nicety and perfect equality are not required. Similarly, not identity of treatment is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that State of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis. (See *Lindsley v. Natural Carbonic Gas Co.* (3) 78; *Plessy v. Ferguson* (4)."

In my opinion, Article 14 cannot have any application to the facts of this case.

(1) (1887) 120 U. S. 68.
(2) (1888) 125 U. S. 181.
(3) (911) 220 U. S. 61, 78.
(4) (1896) 163, U. S. 537.

Then reliance was placed upon Article 15(1) which prohibits discrimination. It says—

“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

Discrimination is prohibited on the ground of religion, race, caste, sex, place of birth or any of them. It has not been shown in this particular case that the petitioners have been discriminated against on one or any of the grounds given in Article 15. From a list which has been supplied to this Court of the persons who have been taken by selection there are people belonging to all kinds of castes. The use of the word ‘only’ in Article 15(1) and Article 29(2) has been interpreted in *Srimathi Champakam Dorairajan v. The State of Madras* (1), in the following words :—

“The significance of the word ‘only’ is that, other qualifications being equal, the race, religion or caste of a citizen should not be a ground of preference or disability. The use of the words ‘or any of them’ in Article 15(1) and 29(2) after the words ‘religion, race, etc.,’ shows emphatically that not one of the enumerated grounds, namely, race, religion, caste etc., is a valid ground for admitting or refusing admission to students to educational institutions maintained by the State on with State aid.”

In my opinion, this Article would apply as indeed it was held to apply in the Madras case referred to above when a person is kept out from or is admitted into any College or educational institution on the ground solely of caste, religion, race, or sex or any of them. No such ground of exclusion has been made out in the present case. In the petition in paragraph 15 and allegation was made that the device of nomination has been used for the purpose of discriminating

(1) (1950) 11 M. L. J. 404-421.

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

in favour of candidates who belonged to what are known as notified agricultural classes, but an examination of the list supplied by the State shows that this allegation is not made out. Persons nominated seems to belong to all kinds of castes and are not statutory agriculturist only.

Before I come to the next Article I would respectfully refer to the import of Article 15(1) as it has been given by Kania, C.J., in *Gopalan v. The State of Madras* (1). Article 15(1) controls the "temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation."

Counsel then relied on Article 16. The submission was that according to this Article every citizen is guaranteed equal opportunity in matters relating to employment or appointment to any office under the State. I do not think that this Article has any application to the facts of the present case, but counsel wished to bring it by submitting that unless the petitioners were allowed admission into the State College of Engineering they would not be able to get employment as engineers in State service. To a certain extent this may be true that if a person is not allowed to qualify as an engineer he cannot be employed as one. But this is a far-fetched argument, and I am unable to agree with it. It is open to the petitioners to receive education in the science of engineering at any other college and it may be said that even the test of marks in University examination does create certain amount of preferences. It may well be asked why should man be admitted to the college merely because he gets more number of marks in an examination than another. The test of marks is also an arbitrary one. At any rate, Article 16 has nothing to do with the facts of the present case and even this Article in clause (4) specifically allows the State to make provisions for the preservation of posts in favour of classes of citizens who are not adequately represented.

Reliance was next placed on Article 29(2) which is a specific Article dealing with the admission of citizens into educational institutions. It provides—

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

“No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

Here again the exclusion which is based on the ground of religion, race, caste, language or any of them is prohibited. It would really be repeating myself if I were to say that not one of the grounds given in this Article has been used against the petitioners in the matter of admission to the Engineering College. It cannot be denied that under the Constitution race, caste, religion, language or any of them cannot be the basis of selection, but it cannot be said that other grounds cannot be taken into consideration when the question of admission of candidates is being decided.

Counsel strongly relied on the judgment of the Madras case in *Srimathi Champkam Dorairajan v. The State of Madras* (1), in support of his argument that at least Harijan candidates cannot be given preference because Article 46 which is in Part IV dealing with directive principles of State policy cannot override Article 29(2) of the Constitution. The argument raised by counsel was that according to Article 37 the provisions of Part IV cannot be enforced by any Court. That is correct, but it definitely says that the principles laid down in this part are nevertheless fundamental in the governance of the country. Article 46 provides—

“The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the

(1) (1950) 11 M. L. J. 404.

Om Parkash
Dhri and
others

v.

The State of
Punjab

—
Kapur, J.

Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

If it is incumbent on the State to promote the educational and economic interest of Scheduled castes then it appears to me that it can well do that by reserving certain seats in educational institutions for these castes. Indeed, when the draft constitution was introduced in the Constituent Assembly by Dr. Ambedkar he made the following speech—

“The Directive Principles are like the Instrument of Instructions which are issued to the Governor-General and the Governors of the Colonies and to those of India by the British Government under the 1935 Act. What are called Directive Principles is merely another name for instrument of Instructions. The only difference is that they are instructions to the Legislature and the Executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it he will have to respect these Instruments of Instructions which are called Directive Principles. He cannot ignore them.”

The whole of Part IV and particularly Article 46 would become nugatory if the interpretation placed upon Articles 29(2) and 46 by Rajamannar, C.J., and Viswanatha Sastri, J. were to be upheld. With very great respect I am unable to agree with the view taken by these two learned Judges, and am of the opinion that the minority view of Somasundaram, J., seems to be more in consonance with the object of the Constituent Assembly. If it is the duty of the State to promote the educational interests of the Scheduled Castes then Article 46 must be taken to be an exception to Article 29(2). It is true that the two are put in different parts but if article 37 makes Article 46 a fundamental principle of the governance of this country then a correct way of interpreting in my

opinion would be to read Article 46 as an exception to Article 29(2). The meaning of directive principles is clear from the speech of Dr. Ambedkar. That the Scheduled Castes and Scheduled Tribes were the object of special consideration of State policy is also supported by a reference to Part 16 of the Constitution which provides for special provisions relating to Scheduled Castes and Tribes. Article 338 provides for the appointment of a Special Officer for the Scheduled Castes and Scheduled Tribes whose duties are given in the Article and Article 340 makes provisions for a periodical appointment of a Commission to investigate the conditions of backward classes. All these things show that it could not have been the intention of the Constituent Assembly to make article 29(2) as an Article overriding Article 46.

Om Parkash
Dhri and
others
v.
The State of
Punjab
—
Kapur J.

Finally, it was submitted that nomination for admission into State aided or State educational institutions is against the fundamental rights. I have not been able to find out against which of the various articles this would be, and indeed none was pointed out by counsel for the petitioners specifically. It may be that nomination is not a very healthy method of taking students into colleges but it cannot be said that marks and marks alone is the most suitable method for taking students into colleges. It is not for me sitting as a Judge to criticise the method of admission into the Roorkee Engineering College. It may well be that nomination is likely to lead to all kinds of charges of favouritism, but that is not a matter for a Judge to decide. It is the high policy of the State for which the responsibility is of those who are in charge of the governance of the State. I may state here that the Madras case which was relied on by counsel for the petitioners, (1950) II M. L. J. 404 was a case which dealt with a government order which reserved seats in various medical colleges on the ground of castes and religions. It was this portion of the order which was the subject-matter of controversy in that case. According to that order out of 330 seats which were available for students 17 were reserved

Om Parkash for students coming from outside the State, 12 were
 Dhri and allotted to the recruited by government at their dis-
 others cretion in consultation with the Surgeon General and
 v. the rest were divided in accordance with the religions
 The State of and castes and communities and it was only this last
 Punjab portion which was impugned. Indeed it seems to
 — have been conceded even by the very eminent counsel
 Kapur J. who appeared for the petitioners in that case that³⁷
 “marks may not be the one and the only criterion.”
 “No attack in that case was made on that portion of
 the order which gave discretion to the Government.
 That case in my opinions has no applicaiton to the
 facts of the case now before us.

In my opinion, this application has no force and
 must be dismissed. I, therefore, discharge the rule,
 but in the circumstances of this case I leave the parties
 to bear their own costs.

The learned Advocate for the petitioners prayed
 that the case be certified under Article 132(1) of the
 Constitution for appeal to the Supreme Court. In
 my opinion it does not involve a substantial question
 of law as to the interpretation of this Constitution
 and I am therefore unable to grant any certificate.

1951

March 29th

REVISIONAL CIVIL

Before Kapur, J.

MESSRS NAGI BROTHERS, through L. DAULAT RAM,
 MANAGING PROPRIETOR,—*Plaintiff-Petitioner.*

versus

THE DOMINION OF INDIA, to be served through THE
 SECRETARY, MINISTRY OF RAILWAYS, CENTRAL
 SECRETARIAT, NEW DELHI,—*Defendant-Respondent.*

Civil Revision No. 6 of 1950.

*Displaced Persons (Institution of Suits) Act XLVII of
 1948—Section 4—Union of India—Whether “actually or
 voluntarily resides or carries on business or personally*