HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

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OWP no.2048/2017
IA no.01/2017

Date of order: 14.02.2019

Kashmiri Sikh Community and others

v.

State of J&K and others

Coram:

Hon'ble Mr Justice Sanjeev Kumar, Judge

Appearing Counsel:

For Petitioner(s): Mr Z. A. Shah, Senior Advocate with Mr A. Hanan, Advocate
For Respondent(s): Mr D.C.Raina, Advocate General with Mr N. H. Shah, AAG
Mr M. Usman Gani, GA
Mr Saleem Gupkari, Advocate

Whether approved for reporting? Yes

1. The petitioner no.1 claims to be a body of Kashmiri Sikhs, represented by one Shri Santpal Singh resident of Aloochi Bagh, Srinagar. The petitioners 2&3 claim to be the unemployed Kashmiri Sikh youth. The petitioners are aggrieved of special dispensation in the matter of employment given in favour of Kashmiri Pandits, living in Kashmir Valley, by amending J&K Migrants (Special Drive) Recruitment Rules 2009 (for short "*Rules of 2009*") in terms of SRO 425 dated 10th October 2017. They are also aggrieved by the subsequent Government Order, issued by respondent no.1, bearing no.96-DMRR&R of 2017 dated 13th November 2017. It is asserted that SRO 425 dated 10th October 2017, whereby the Rules of 2009 have been amended violates the equality clause, bedrock of Articles 14 and 16 of the Constitution, by treating the Sikh Community staying in Kashmir Valley differently than the similarly placed Kashmiri Pandits, for the purposes of extending the Prime Minister's Employment Package.

In essence, the petitioners seek mandamus to respondents to treat them at par with Kashmiri Pandits, staying in Valley, for the purposes of providing the employment pursuant to the Prime Minister's Package of Return and Rehabilitation.

2. Before adverting to the grounds of challenge urged in support of the claim made in the writ petition, it would be pertinent to briefly narrate the factual background leading to issuance of the impugned SRO.

3. It is a historical known fact that during the year 1990, there was a sudden spurt of militancy and terrorism in Kashmir Valley. There were stray instances of target killings of minority community (Kashmiri Pandits) and political workers. This led to scare in the minds of such people who feared for their life and honour in the wake of happenings which were taking place at the relevant point of time. The happenings created a sort of fear psychosis and instilled strong sense of insecurity in the mind of aforesaid community. In the result, the Nation witnessed large scale exodus of Kashmiri Pandits along with the political workers from Kashmir Valley. This was unprecedented situation witnessed by the Nation. The condition in the Valley at the relevant point was such that no authority of the State could prevent such mass exodus. There are different versions on the reasons for such mass exodus of a particular community. Different political parties hold different views. The Court may not be concerned as to what were actual reasons of the mass exodus of Kashmiri Pandits from Kashmir Valley but at the same time is not oblivious to the plight and miseries that befell on these migrants. They had to leave their home and hearth and settle in camps in Jammu, New Delhi and various other places of the country, where they felt sense of security.

4. There can be no dispute that sufferings all these Kashmiri Migrants, who had to leave their home and hearth in peculiar law and order situation in the State, were of high magnitude. The Government of India as also the Governments of various States came up with different measures of rehabilitation and provided relief and succour to these families by all possible means. Despite all efforts made by the Government of India at its level, there was no discernible improvement in the living standard of this migrant community. This led the Government of India to come up with a comprehensive package and policy of relief and rehabilitation in the year 2008. This package/policy was first announced by the then Prime Minister during his visit to the State on April 25-26, 2008. The package was meant to ameliorate the lot of Kashmiri Pandit Community, who had been forced to migrate from Kashmir Valley and to facilitate their return and rehabilitation. Apart from other incentives contained in the package formally announced in June 2008, it was also decided to provide the jobs to the educated among migrant youth in the State Government services and financial assistance (grant of loans to unemployed to help them engage in self-employment through vocational training). Accordingly, 3000 supernumerary posts were created in various Departments for providing employment to migrant youth who were willing to return and serve in Kashmir Valley. With a view to filling up these posts and providing employment exclusively to the unemployed youth from amongst the migrants, the Government came up with the Rules of 2009, which were notified by the Government vide SRO 412 dated 30th December 2009. These Rules, as is apparent from their recital, are statutory rules framed by the Governor under proviso to Section 124 of the Constitution of J&K. The

supernumerary posts created under the Prime Minister's package were, accordingly, filled up under the aforesaid Rules and the employment to several migrant youth, came to be provided.

5. It appears that despite all efforts made by the Central Government and issuance of the employment package under the name of the Prime Minister's package for relief and rehabilitation of Kashmiri Migrants, the things did not improve at the desired pace. This led the Government of India to do rethinking on the matter. With a view to going deep into the living conditions of the Kashmiri Migrants and to suggest better means and ways to improve upon their living standards, a joint Parliamentary Committee was constituted, which submitted its 137th report on the rehabilitation of J&K Migrants. Apart from the general suggestions, various measures for improving the pitiable condition of migrants were suggested. The Committee, in its observations/ conclusions / recommendations at serial no.4.2, expressed its deep concern over the pathetic condition of about 4000 Kashmiri Pandits, living in Kashmir Valley. The Committee felt that there should be special budgetary provision for Kashmiri Pandits left behind in the Valley for fulfilling their genuine needs of the housing, employment/self-employment, for improving their living conditions. Subsequently, the Parliamentary Standing Committee of Home Affairs submitted its 179th report on the action taken by the Government on the recommendations/observations contained in 137th Report on rehabilitation of the J&K Migrants. The report elaborately deals with the action on different aspects but with regard to the condition of Kashmiri Pandits living in the Valley. The Parliamentary Committee in paragraph 2.1.21 observed that a large number of Kashmiri Pandit families were

living in Kashmir Valley in a pathetic condition. A number of such families living in the Valley was pegged at 600. The Committee, thus, recommended that courage of such Kashmiri Pandit families, who continued to reside in the Valley despite the adverse conditions, needed to be appreciated and they should be provided appropriate security and other facilities as may be required. It appears that in light of the report of the Parliamentary Standing Committee on the rehabilitation of Kashmiri Migrants and also taking note of pathetic condition of Kashmir Pandit community, which had decided not to migrant because of many reasons as also to extend the Prime Minister's Package of Return and Rehabilitation, the Government of India sanctioned additional 3000 government jobs for Kashmir Migrants vide its communication dated 4th December 2015. This package of employment was meant for all Kashmiri Migrants and the category of Kashmiri Pandits, who had not migrated from the Kashmir Valley during the terrorist violence, was first time included for the benefit of the aforesaid employment package. As is apparent from the aforesaid communication, the Government of India desired that while providing the jobs to the Kashmiri Pandit families under the package, preferably the formula of one job per family be adopted. This sanction of the additional package of employment prompted the Kashmiri Pandits residing in the Valley to approach this Court by way of OWP no.1986/2013 titled *Kashmiri Pandit Sangarsh Samiti and others v. Union of India and others*. The petition was essentially filed to implement the package of incentive particularly its part pertaining to the benefit of jobs to be given to the Kashmiri Pandit families on the formula of one job per family. The petition was disposed of by this Court on 31st May 2016, with a direction to

the respondents to consider the claim of the petitioners therein in accordance with the rules. The decision was directed to be taken within a period of six weeks from the date of receipt of copy of the order. It appears that the State Government did not move in the matter, which made the petitioners in the aforesaid petition to file a contempt petition, seeking implementation of the directions passed on 31st May 2016. The notice in the contempt appears to have waken the State from its slumber, which immediately came up with Government Order no.58-DMRR&R of 2017 dated 29th July 2017, and created 3000 supernumerary posts in different departments. Since in the revised package of the employment and rehabilitation issued by the Government of India, the Kashmiri Pandit families residing in the Valley who had not migrated in the wake of onslaught of militancy in 1990, had also been included for the benefits, it was necessary for the Government to amend the Rules of 2009. It may be noted that under the Rules of 2009, as they then stood, the employment package was meant for all migrants, who had fled from the Valley leaving their home and hearth for settlement in safer places irrespective of their caste, community or religion. These migrants included the internally displaced persons as well, but this package of employment under Rules of 2009 was not available to the Kashmiri Pandit community, which had decided to stay back in the Valley despite the prevailing adverse security scenario and despite the fact that there was large scale exodus of their community from the Valley in the year 1990. The State Government, after going through the formal procedure, ultimately amended the rules of 2009 vide SRO 425 of 2017 dated 10th October 2017 and included such Kashmiri Pandit families also for the benefit under the Rules of 2009. Since the Government of

India, while sanctioning the additional 3000 supernumerary posts, had indicated that for the purposes of providing the employment to Kashmiri Pandit families, preferably the formula of one job per family, should be adopted, as such, the State Government decided to set apart 500 posts for Kashmiri Pandit families to be filled up by a different committee, constituted vide Government Order no.96-DMRR&R of 2017 dated 13th November 2017. A separate committee was necessitated as these posts could not have been filled up through J&K Services Selection Board, which is enjoined to make the selection on the basis of merit. It is worthwhile to notice that the State Government, instead of effecting appropriate amendment in the Rules of 2009, did so by executive fiat.

6. From the sequence of events given hereinabove, it is clear that the amendment impugned has enured to the benefit of a particular community, i.e. Kashmiri Pandit community, which stayed back in the Valley despite adverse conditions. It does not make any provision for the petitioners' community, which claims to have suffered in the similar manner and which like the Kashmiri Pandit families also decided to stay back and did not migrate from the Valley. This deprivation appears to have led to heartburning in the petitioners' community. The petitioners feel that the State has ventured into class legislation and has treated persons in the same class differently. They claim that the similar benefit needs to be extended to them and the Rules of 2009 as amended vide SRO impugned are ultra vires the Constitution. It is in this background that the instant petition has been filed by the members of the Sikh community living in the Valley.
7. The respondents have filed their reply and have explained the reasons for coming up with the special package of employment in

favour of Kashmiri Pandit families staying in the Valley. Referring to some empirical data which respondents claim was analysed before grant of the package of employment to Kashmiri Pandit families, it is pleaded that two communities, i.e. Kashmiri Pandits and Sikhs living in the Valley do not form the same class and, therefore, classification made by the respondents for providing the benefit of employment to one person per family to the Kashmiri Pandits living in the Valley is a valid classification and meets the requirement of Article 14 and 16 of the Constitution.

8. Kashmiri Pandits living in the Valley too have intervened in the matter and have filed a separate set of objections raising several issues with regard to maintainability of the petition. In short, they too have sought to justify the classification made by the respondents for the purposes of employment on the formula of one job per family to the Kashmiri Pandit families living in the Valley. In their objections they have relied upon the Parliamentary Standing Committee reports and other material to demonstrate that Kashmiri Pandit community which decided against migration and stayed back due to various reasons viz. economical, security or the assurances by the community in the neighbourhood etcetera, have suffered more than those who migrated from the Valley. The Parliamentary Standing Committee, which went deep into the matter has clearly highlighted the pitiable and pathetic condition of the Kashmiri Pandit community living in the Valley. It is, thus, pleaded that the decision to extend the special benefit of employment to the Kashmiri Pandit community was on the basis of the empirical data collected by the Government with regard to the living conditions of the Kashmiri Pandit community living in the Valley. It is, thus, pleaded that looking to the empirical data, it

cannot be said that Sikh Community, which stayed in the Valley and did not migrate, suffered in the same manner.

9. Having heard the learned counsel for the parties and perused the record, it would be worthwhile to first crystallize and set out the controversy, which needs to be settled in this petition.

10. The impugned amendment to the Rules of 2009 has been assailed primarily on the ground that it amounts to class legislation and, therefore, flies on the face of provisions of Article 14 and 16 of the Constitution of India. It is urged that the Sikh Community, which also decided to stay back in the Valley despite turmoil and large-scale exodus of minority communities, is equally and similarly placed with Kashmiri Pandit community, which decided against migration and stayed back in the Valley. The two communities in the background situation, form a single class and, therefore, there cannot be further classification for the purposes of conferring the benefit of employment exclusively upon Kashmiri Pandit families and ignoring the similar claim of the Sikh Community. In the backdrop of aforesaid, the precise questions that fall for determination of this Court, can be delineated in the following manner:

    (I) Whether the impugned amendment to the Rules of 2009 has resulted in class legislation and, therefore, falls foul of Article 14 and 16 of the Constitution of India;

    (II) Assuming that the amendment is *intra vires* the Constitution, whether the impugned Government Order no.96-DMRR&R of 2017 dated 13th November 2017, which is issued purportedly with the approval of the Chief Minister and has the effect of amending the Rules of 2009 (as amended vide SRO 412) is sustainable in law.

11. With a view to appreciate the aforesaid formulations, it would be necessary to briefly survey the law and the legal position on the scope of right to equality embodied in various Articles, from Articles 14 to 18 of the Constitution of India. The Preamble of the Constitution provides that we the people of India have assured to ourselves, *inter alia*, the equality of status and opportunity. The principle of equality before law and equal protection of laws is a manifestation of rule of law, which pervades the entire Constitutional scheme.

Article 14

12. Article 14, which is one of the fundamental rights guaranteed to the citizens of India by the Constitution undoubtedly forms part of basic structure of the Constitution. It provides that "*the State shall not deny to any person equality before the law and equal protection of laws within the territory of India*". As is apparent from bare reading that Article 14 uses two expressions: (i) *equality before law*; and (ii) *equal protection of the laws*. Both these expressions though sound similar, yet they have different connotations. The "*equality before law*" has its origin in the English Common Law whereas "*equal protection of the laws*" has its source in Section 1 of the 14th Amendment of the U.S. Constitution. The former means that amongst equals, law shall be equal and shall be equally administered. It is a negative concept but the latter is a positive concept and ensures that laws of the land apply to all equally irrespective of their caste, creed, and colour. The doctrine of "*equality before the law*" is equally operative against the legislature itself. If the legislature dares to enact an enactment inconsistent

with the fundamental rights, the Constitutional courts are competent enough to declare it unconstitutional.

13. Equal protection of laws means the right of equal treatment in similar circumstances, both in privileges conferred and liabilities imposed. The equal protection requires affirmative action by the State towards unequals by providing them facilities and opportunities. To this rule of law, there are certain well recognised exceptions. It does not prevent certain classes of persons from being subjected to different set of rules. Article 14 does not imply that the same laws should apply to all persons or that every law must have universal application. Not all persons are by nature, attainment or circumstances in the same position. What Article 14 prohibits is class legislation, which makes unintelligible discrimination by conferring particular privileges upon a class of persons arbitrarily selected but it does permit reasonable classification for the purpose of achieving specific ends. For classification to be reasonable and sustainable under Article 14 of the Constitution, the judicial precedents have evolved two conditions which must be fulfilled:

    (i) The classification must be based on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

    (ii) The differentia must have rational relation with the object sought to be achieved.

14. It is, thus, evident that for any classification to sustain and to be in consonance with Article 14, there must exist some nexus between differentia and the object which the classification intends to achieve. Needless to reiterate that Article 14 strikes at the

arbitrariness because any action which is arbitrary would necessarily involve the negation of equality. The doctrine of classification evolved by the Courts is not paraphrase of the Constitution nor is it objective and end of the Constitution. It is only a judicial formula evolved for determining whether a particular legislation or executive action is arbitrary and therefore denial of Constitutional equality. The concept of reasonableness and non-arbitrariness pervades the entire Constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. In the famous case of Maneka Gandhi v. Union of India, AIR 1978 SC 597, the Hon'ble Supreme Court had observed that Article 14 was not to be equated with principle of classification. It was primarily a guarantee against arbitrariness in the State action and the doctrine of classification was evolved only as a subsidiary rule for testing and determining whether a particular State action was arbitrary or not.

Article 16

15. The other significant Article of the Constitution, which embodies the principle of equality before law in the matter of public employment, is Article 16. It embodies command to the State to ensure that every citizen gets equal opportunity in the matter of employment or appointment to any office under it. It also prohibits discrimination by the State in relation to the employment or the appointment to any office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. The Article, however, does not prevent the State from laying down certain qualifications and reserve certain number of seats in favour of backward classes and citizens, which according

to the State are not adequately represented in the services of the State.

16. Initially there has been some debate as to whether Article 16 (4), providing for reservations in favour of some classes, is an exception to Article 16 (1) or is an independent clause. This was, however, set at rest by the Supreme Court in ***Indra Sawhney v. Union of India, AIR 1993 SC 477***. It was authoritatively held that Article 16 (4) is not an exception to Article 16(1), but is an independent clause. Article 16 (4) is exhaustive of the subject of reservation in favour of the backward classes. Though it may not be exhaustive of the very concept of reservation, the reservation for other classes may be under Article 16 (1).

17. From the foregoing discussion it can be well deducible that the equality before law in the Constitution in the shape of Articles 14 to 18 forms bedrock of our democratic setup. India as a nation is an incredibly diverse society and the values, like social justice, liberty, fraternity cherished by the Constitution, act as a binding force. For any civilised society to sustain and for any nation to progress, it is necessary that the rule of law prevails with all its rigours and nobody is discriminated on the ground of only his sex, creed, caste, colour or religion. It is in this context and background that each legislative or executive action of the State needs to be examined.

18. Coming to the case in hand and avoiding verbosity, it may be noted that with a view to giving effect to the Prime Minister's Package for Return and Rehabilitation announced in the year 2008 and to fill up the three thousand (3000) supernumerary posts created thereunder, the State Government came up with the Rules of 2009. The Rules of 2009, as is apparent from its short title and commencement, apply to the Kashmiri Migrants. The migrant has

been defined in Rule 2(d), which for facility of reference is reproduced hereunder:

> "(d) Migrant means a person:
> (i) who has migrated from Kashmir Valley after 1st November, 1989, and
> (ii) is registered as such with the Relief Commissioner or has not been so registered on the ground of his being in service of Government in any moving office, or having left the Valley or any other part of the State in pursuit of occupation or vocation or otherwise, and is possessed of immovable property at the place from where he has migrated but is unable to ordinarily reside there due to the disturbed conditions and includes an internally displaced person;
> Explanation.— For the purpose of this clause an internally displaced person means a person who had to migrant within valley from his original place of residence in Kashmir Valley for reasons of security and is registered as such with the Relief and Rehabilitation Commissioner Migrant."

19. From reading of the expression "migrant", it is crystal clear that the Rules of 2009 provide that a person would qualify to be migrant if he or she fulfils three requirements:

(a) must have migrated from Kashmir Valley after 1st of November 1989;
(b) is registered as migrant with the Relief Commissioner or has not been so registered on the ground of his being in government service in moving office or having left the valley or any part of the State in pursuit of occupation or vocation;
(c) is possessed of immovable property at the place wherefrom he has migrated but is unable to ordinarily reside there due to disturbed conditions and include an internally displaced person.

20. These Rules are applicable to the posts referred to in Rule 2 (e) of the Rules of 2009, which reads as under:

> "(e) Post means the posts, under the Government, specially created from time to time in the valley under the Prime Minister's Special Package for return and rehabilitation of Kashmiri Migrants to the Valley."

21. It is, thus, clear that the posts under the Government, which are specially created from time to time in the Valley under the Prime

Minister's Special Package for return and rehabilitation of Kashmir Migrants are required to be filled as per the Rules of 2009. So far as the eligibility for recruitment against these posts is concerned, the same has been laid down in Rule 5, which is also noticed below:

> "5. Eligibility. – (1) The migrant unemployed youth shall be eligible for appointment against the posts referred to in clause (e) of the rule 2.
> (2) The candidates must be within the age prescribed for entry in Government services and possess the prescribed qualification and experience for the post.
> (3) The Relief and Rehabilitation Commissioner for Migrants shall be the designate authority for authentication of the migrant status of the applicant. The Relief and Rehabilitation Commissioner for Migrants shall ensure that the applicant is a bona fide migrant."

22. The posts are provided to be filled up through J&K Services Selection Board, which is declared as selection authority for the purpose under Rule 6 of the Rules of 2009. Apart from J&K SSB, for filling up the Class-IV posts under the Rules of 2009, the job is entrusted to the Committee to be constituted by the Revenue Department. The appointees under these Rules have been mandated to work within Kashmir Valley and would not be eligible for transfer outside the Valley under any circumstances. Such provision has been made to achieve the object of the Rules of 2009, which is return and rehabilitation of the Kashmiri Migrants to the Valley.

23. From reading of Rules of 2009, in their entirety, it is abundantly clear that the posts specially created from time to time in the Valley under the Prime Minister's Special Package are meant to be filled up from '*Migrants'* as defined in Rule 2(d). From the definition of migrant given in the Rules, it is evident that the benefit envisaged under the Rules is available to all migrants fulfilling the three conditions enumerated herein above irrespective of their caste, community or religion. The Rules of 2009 treat all migrants as a

class and do not make any discrimination on any ground whatsoever.

24. However, the amendment incorporated in the Rules of 2009, vide SRO 425 dated 10th October 2017, introduces a class of Kashmiri Pandits, who have not migrated from Kashmir Valley after 1st of November 1989, and are presently residing in Kashmir Valley. The Rules of 2009, which prior to amendment were called *J&K Kashmiri Migrants (Special Drive) Recruitment Rules, 2009*, now after amendment would be known as *J&K Kashmiri Migrants or Kashmiri Pandits (Special Drive) Recruitment Rules 2009*. The expression "Kashmiri Pandits" has been defined by inserting Clause (ca) after Clause (c) of Rule 2. Similarly, other necessary amendments have been made to give effect to the intendment of the amendment, which is to confer the similar benefit of the package of employment on Kashmiri Pandit community, who did not migrate during turmoil of 1989-90 and decided to stay back in the Valley. Interestingly, SRO 425 of 2017 does not make any amendment to the definition of post given in Rule 2 (e), which when read with Rule 3 would mean that amended Rules would apply to the posts which are sanctioned from time to time in the Valley under the Special Package for return and rehabilitation of Kashmiri Migrants to the Valley, issued by the Prime Minister. It would also mean that the posts becoming available on account of supernumerary creation under the Prime Minister's Special Package cannot be filled up otherwise than in accordance with the Rules of 2009 as amended vide SRO 425 of 2017.

25. From careful reading of the Rules of 2009 and amendments carried thereto vide SRO impugned in this petition, it is abundantly clear that a class different form the migrants has been created for

conferring the benefit of the Prime Minister's Package for return and rehabilitation of Kashmiri Migrants. The class identified under the impugned SRO is a community of Kashmiri Pandits, who did not migrate in the wake of turmoil in the Valley and stayed back despite adverse conditions perceivably prevailing for their community. This classification has been necessitated pursuant to the several representations received for and on behalf of this community, which was living in a very pitiable and pathetic condition in the Valley. The Government of India also took note of the fact that these handful families had not migrated due to reasons of their poverty, economic conditions, a sense of security instilled in them by their supporting neighbourhood, etcetera, etcetera. They stayed back and braved the adverse conditions in the Valley, which seriously impacted growth of their families educationally and economically. Taking note of their plight and the persistent pitiable conditions, a policy decision was taken to confer the benefit of the Prime Minister's Package of return and rehabilitation on this community as well. As noted above, this was not a hollow exercise by the Government of India. Not only it collected the relevant empirical data but also appointed a Standing Parliamentary Committee to go into all these aspects and make their recommendations. As is averred by the respondents in their affidavit that as per the records available with the Relief and Rehabilitation Commissioner (Migrant), Jammu, there are 15700 Hindu Relief families and 22062 Hindu Non-Relief families, consisting of 49859 souls and 82740 souls respectively. Besides there are 1336 Relief Sikh families and 353 Non-Relief Sikh families consisting of 5043 souls and 1502 souls respectively registered with the Relief Organisation. In the light of the aforesaid

data placed on record, the respondents have pleaded that the effect of migration in the wake of turmoil in the Valley was more on the Kashmiri Pandit community than other communities. It is though conceded that handful of Sikh families too migrated from the Valley but majority decided to stay back and has been residing peacefully. It is on the basis of this empirical data and the recommendations of the Parliamentary Standing Committee constituted for the purpose that the Government appears to have taken a policy decision to extend some helping hand to this distressed Kashmiri Pandit community.

26. From the aforesaid discussion and in view of the stand taken by the respondents, it cannot be said that the Sikh Community is similarly placed with the Kashmiri Pandits. There appears to be intelligible differentia, which distinguishes Kashmiri Pandits, who have stayed back in the Valley and did not migrate when lakhs of their community members left their home and hearth in view of the then prevailing security scenario in the Valley. The classification clearly distinguishes Kashmiri Pandit community from Sikh Community living in the Valley, which has been left out of group. This classification based on intelligible differentia has a definite nexus with the object sought to be achieved by the Rules of 2009 as amended vide impugned SRO, and is meant to ameliorate the lot of Kashmiri Pandits who preferred to stay back and did not flee despite unsavoury security conditions in the Valley in the year 1989-90. The target killings of members of their community instilled sense of fear and insecurity in their minds, which made their living in the Valley possible only at the cost of their lives. This sense of insecurity was all pervasive. In the milieu, there were certain families who decided not to migrate either because they

were poverty ridden or did not have resources to move out or that they were assured by the community in their neighbourhood not to be afraid of. Whatever be the reasons, they decided to stay back but suffered due to unsavoury and not too good conditions in the Valley for the community. As per 137th report of the Standing Parliamentary Committee, their condition continued to worsen. They lacked behind in education and fared very bad on the economic front. Taking into account all these factors and the historical background responsible for *en masse* exodus of the community, the Central Government decided to provide some relief and succour to these families of Kashmiri Pandits. It is in this background that a policy decision was taken by the Government to treat these families of Kashmiri Pandits, staying in the Valley, at par with the migrants for the purposes of providing the employment package. This necessitated the amendment in the Rules of 2009, so as to include Kashmiri Pandits, staying in the Valley, also as beneficiary of the Prime Minister's Package for return and rehabilitation of Kashmiri Migrants, issued from time to time.

Viewed thus, it cannot be said, by any stretch of imagination or reasoning, that the classification made by the impugned SRO is not based on intelligible differentia or that differentia has no nexus with the object sought to be achieved. If the object of the Rules of 2009 is return and rehabilitation of migrants, it would make no sense if the same does not provide for rehabilitation of those who have not fled from the Valley despite adverse conditions and have stayed back.

27. In view of the foregoing discussion, I find that the impugned SRO does not amount to class legislation but makes a valid classification which is permissible under Article 14 and 16 of the Constitution.

28. Learned Advocate General, appearing for the State, has placed reliance on the Constitution Bench judgement of the Supreme Court in the case of ***Mahant Moti Das v. S.P. Sahi, AIR 1954 SC 942***. The observations of the Supreme Court in paragraph 07 are noteworthy, which reads as under:

> "(7).....The submission is that there is inequality of treatment as between Hindu religious trusts on one hand and Sikh religious trusts on the other, the latter having been excluded from the purview of the Act; secondly, there is inequality of treatment even as between Hindu religious trusts and Jain religious trusts, though both come under the Act. We do not think that there is any substance in this contention. The provisions of Article 14 of the Constitution had come up for discussion before this Court in a number of earlier cases (see the cases referred to in *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar, 1958 AIR 538*. It is, therefore, unnecessary to enter upon any lengthy discussion as to the meaning, scope and effect of the Article. It is enough to say that it is now well settled by a series of decisions of this Court that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (2) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases such as, geographical, or according to objects or occupations and the like. The decisions of this Court further establish that there is a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee ; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest..... In view of these differences it cannot be said that in the matter of religious trusts in the State of Bihar, Sikhs, Hindus and Jains are situated alike or that the needs of the Jains and Hindus are the same in the matter of the administration of their respective religious trusts; therefore, according to the well-established principles laid down by this court with regard to legislative classification, it was open to the Bihar Legislature to exclude Sikhs who might have been in no need of protection and to distinguish between Hindus and Jains. Therefore, the contention urged on behalf of the

appellants that the several provisions of the Act contravene Article 14 is devoid of any merit."

29. To the similar effect is the other judgement of the Supreme Court in the case of ***Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and others, AIR 1958 SC 538***. Paragraph 12 of the judgement which is relevant in the context of the controversy is reproduced hereunder:

> "(12) A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Art. 14 of the Constitution, may be placed in one or other of the following five classes:(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitlal Chowdhri v. Union of India (B) supra, State of Bombay v. F. N. Balsara (C) supra, Kedar Nath Bajoria v. State of West Bengal 1954 SCR 30: (AIR 1953 SC 404) (I), V. M. Syed Mohammad & Company v. State of Andhra 1954 SCR 1117 : (AIR 1954 SC 314) (J) and Budhan Choudhry v. State of Bihar (A) (supra).*
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> (ii)A statute may direct its provisions against one individual person or thing or to several individual persons or things but, no reasonable basis of classification may appear on the face of it or be deductible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum v. Mahboob Begum 1953 SCR 404 : (AIR 1953 SC 91) (K) and Ramprasad Narain Sahi v. State of Bihar 1953 SCR 1129 : (AIR 1953 SC 215) (L).*
>
> (iii)A statute may not make any classification of the persons or things for the purpose of applying its provisions but may -leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will

not strike down the law out of hand only because no Classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar Ali Sarkar (D) (supra), Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh 1954 SCR 803 : (AIR 1954 SC 224) (M) and Dhirendra Krishna Mandal v. Superintendent and Remembrancer of Legal Affairs 1955-1 SCR 224 : (AIR 1954 SC 424) (N).*

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the court will uphold the law as constitutional, as it did in Kathi Raning Rawat v. The State of Saurashtra (E) (supra).

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e. g., in Kathi Raning Rawat v. The State of Saurashtra (2) that in such a case the executive action but not the statute should be condemned as unconstitutional In the light of the foregoing discussions the question at once arises: In what category does the Act or the notification impugned in these appeals fall?"

30. Needless to say, that both the judgements cited by the learned Advocate General are *locus classicus*. These judgements, unequivocally, lend support to the view this Court has taken herein above. To counter the submission made on behalf of the

respondents on the question of law involved, Mr Z. A. Shah, learned senior counsel appearing for the petitioners, has placed his strong reliance on the judgement rendered in the case of ***Subramanian Swamy vs Director, CBI, 2014 (8) SCC 682***. Paragraph 38 of the aforesaid judgement, which was strongly relied upon by the learned senior counsel, is reproduced hereunder:

> "38. Article 14 reads:
>
> "14. Equality before law. — 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 Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances."

31. No less pertinent are the expositions made by the seven Judge Constitution Bench of the Supreme Court on the scope of Article 14 of the Constitution, on a reference made by the President of India under Article 143 (1) of the Constitution reported as ***Special Courts Bill, 1978, In re, (1979) 1 SCC 380***. Speaking for the majority, the then *Chief Justice Y. V. Chandrachud*, in paragraph 72 of the judgement exposited the following propositions:

> "(1) xxx xxx xxx
>
> (2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.
>
> (3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.
>
> (4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian

territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well- defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

(9) If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject- matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the Legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

(10) Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the

> assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.
> (11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.
> (12) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.
> (13) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

32. From what has been held by the Supreme Court in the aforesaid cases, does not change the position of law as laid down by the Supreme Court in the year 1958 and 1959, in the two Constitution Bench judgements (supra). There is no much debate on the propositions of law expounded by the learned counsel for the parties before me but the question is of their applicability to the fact situation of the case.

33. Going by the aforesaid considerations, the respondents have carved out the classification on the parameters of data as well as the recommendation of Parliamentary Standing Committee. Such a decision is based on policy considerations. It cannot be said that this decision is manifestly arbitrary or unreasonable. It is settled law that policy decisions of the Executive are best left to it and a court cannot be propelled into the unchartered ocean of Government policy. [See: ***Benett Coleman & Co. v. Union of India, 1972 (2) SCC 788***]. Public authorities must have liberty and freedom in framing the policies. It is well accepted principle that in

complex social, economic and commercial matters, decisions have to be taken by governmental authorities keeping in view the several factors and it is not possible for the Courts to consider the competing claims and to conclude which way the balance tilts. The Courts are ill-equipped to substitute their decisions. It is not within the realm of the Courts to go into the issue as to whether there could have been a better policy and on that parameters direct the Executive to formulate, change, vary and/or modify the policy which appears better to the Court. Such an exercise is impermissible in policy matters. The scope of judicial review is very limited in such matters. It is only when a particular policy decision is found to be against a Statute or it offends any of the provisions of the Constitution or it is manifestly arbitrary, capricious or *mala fide*, the Court would interfere with such policy decisions. No such case is made out. On the contrary, views of the petitioners have not only been considered but accommodated to the extent possible and permissible.

34. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference

by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitation imposed by the Constitution. Reference in this regard may be made to ***Maharashtra State Board of Writ Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, 1984 (4) SCC 27;*** and ***Federation Haj PTOs of India v. Union of India, 2019 SCC Online SC 119***.

35. I have already elaborately discussed all the aspects in detail herein above and reaffirm that the impugned SRO only makes a valid classification which falls within the scope and purview of Articles 14 and 16 of the Constitution of India. The impugned SRO is affirmative action and a policy decision on the part of the State to bring a particular community, staying in the Valley under peculiar circumstances, at par with their counterparts, so that they could compete and avail of the employment opportunities after they are brought in a position to compete with them. Having said that, I hold the amendment to the Rules of 2009 *intra vires* the Constitution.

36. This brings me to the second question, which pertains to the competence of the Government to set apart 500 posts out of 3000 supernumerary posts created by the Government under the Prime Minister's Package for return and rehabilitation of Kashmiri Migrants. Although the issue was not well articulated and debated by the parties before this Court, yet while going through the records and appreciating their contentions, I have reached a conclusion that filling up of the posts as defined in Rule 2 (e) of the Rules of 2009 as amended vide impugned SRO, which are sanctioned by the State

from time to time under the Prime Minister's package for return and rehabilitation of Kashmiri Migrants, is regulated by the Rules of 2009, which are statutory in character, having been issued by the Governor in exercise of the powers conferred by proviso to Section 124 of the Constitution of J&K. The SRO, as amended, makes a provision for Kashmiri Pandit community by treating them at par with the migrants and, therefore, takes care of their rehabilitation. It is equally true that the implementation of the Rules of 2009 as amended would pose some difficulty in allocating one job per family for this community of Kashmiri Pandits, staying in the Valley. In this background, perhaps, it was advisable on the part of the Government to take out 500 posts out of the Package to be appropriated for achieving the aforesaid end but that could have been done by adopting proper process countenanced by law. Needless to say, that the Government Order can supplement, but cannot supplant the Statutory Rules and, therefore, without effecting appropriate amendment in the Rules and providing for a separate allocation of posts for Kashmiri Pandits, the respondents could not have set apart 500 posts to be filled up in the manner provided in the impugned Government order. If the Government Order impugned is allowed to stand, it would mean that not only Kashmiri Pandit community would be entitled to one job per family to be provided by the Government from out of 500 posts created under the Prime Minister's Package and set apart for the purpose, but it would also entitle them to compete with other migrants for rest of 2500 posts under the Rules of 2009. I am sure this is not intended by the Government.

37. In view of the aforesaid, I do not find the impugned Government Order no.96-DMRR&R of 2017 dated 13th November 2017

sustainable in law, for the same has the effect of modifying the Statutory Rules which is impermissible. All the posts created in pursuance to the Prime Minister's Package for Return and Rehabilitation are required to be filled up as per the Rules of 2009 and in no other manner.

38. In view of the aforesaid analysis, I find no merit in the petition so far as challenge to the vires of SRO 425 dated 10th October 2017 is concerned and the same is accordingly, ***rejected***. However, the impugned Government Order no.96-DMRR&R of 2017 dated 13th November 2017 is held unsustainable in law and is accordingly, ***quashed***. The respondents may proceed in the matter in accordance with law.

39. **Disposed of**.

40. Record be returned.

(Sanjeev Kumar)
Judge

Srinagar
14.02.2019
Ajaz Ahmad, PS