

Agenda Note for Agenda Item No. 3

For the meeting of the Commission on 22/02/2010

NATIONAL COMMISSION FOR SCHEDULED TRIBES

Sub: Grant of reservation to migrant SCs/ STs in civil posts under the Government of NCT of Delhi – Proposal of MHA received vide their letter dated 27.11.2009 for inclusion of all Scheduled Caste & Scheduled Tribe communities in the list of Scheduled Castes and Scheduled Tribes respectively in relation to the NCT of Delhi and all other Union Territories consequent to the judgment dated 04.08.2009 of Hon'ble Supreme Court of India in Civil Writ Petition No. 507/06 titled Sarv Rural & Urban Welfare Society Vs. Union of India -Analysis and proposed recommendations.

I. Background:

The background position stated in the letter on the above subject received from Ministry of Home Affairs is as given below:

(i). The Hon'ble Supreme Court of India in its judgment dated 04.08.2009 in SLP No. 24327/2005 titled 'Subhash Chandra & Anr. Vs. Delhi Subordinate Service Selection Board & Ors' clubbed with WP (Civil) No. 507 of 2006 titled 'Sarv Rural & Urban Welfare Society Vs. Union of India & Ors' in the matter of reservation to migrant Scheduled Castes and Scheduled Tribes in NCT of Delhi has held that reservation in State or UT under Article 15 (relating to education) and Article 16 (relating to employment) can be given only to those Scheduled Castes and Scheduled Tribes who figure in the notified list under Article 341 or 342 for the State or UT, as the case may be.

(ii). It may be added here that, even though certain castes are notified as Scheduled Castes in respect of Delhi, the Government of NCT of Delhi has been following the all India pattern for a long time now in respect of reservation to civil posts under that Government and thereby giving reservation to all categories of SCs and STs irrespective of nativity.

(iii). Since the implementation of the said Supreme Court judgment may involve a major shift in the policy decision, Ministry of Home Affairs has decided that the Govt. may approach Cabinet posing all options. Keeping in view the unique case of NCT of Delhi, being the national capital Territory attracting migrants, it was felt that the scope for inclusion of migratory Scheduled Castes and migratory Scheduled Tribes in the lists notified under Article 341 and Article 342 in respect of all UTs including Delhi may be explored in consultation with the National Commission for Scheduled Castes and National Commission for Scheduled Tribes while also looking for the possibilities for providing a common reservation policy in respect of migratory Scheduled Castes and Scheduled Tribes to be made applicable to all UTs including Delhi.

2. In view of above the Ministry of Home Affairs have requested the National Commission for Scheduled Tribes to look into the matter and furnish views in this regard to the Ministry expeditiously keeping in view the said judgment of Hon'ble Supreme Court.

II. **Examination of issues**

3. The Commission does not possess the legal expertise to debate the merit of judicial pronouncement in the case. However, the matter relating to reservation for Scheduled Tribes in services and posts under Government of NCT of Delhi has earlier been discussed in detail in Chapter 6 of the 1st Report of the Commission (copy at ANNEXURE). The issues involved in the proposal are also more extensive since they also involve the principles of identification of Scheduled Tribes; and are discussed below:

(i). **Tribal Characteristics**:- There is no definition of STs provided in Article 342 of the Constitution of India, which merely lists communities declared to be Scheduled Tribes. Traditionally, however, the criterion followed for specification of a community as ST are indications of primitive traits, distinctive culture and geographical isolation, shyness of contact with the community at large and backwardness. This criterion is broadly used for determining of a community or a group of people as ST or otherwise. Geographical isolation is a major consideration which is considered for establishing ST characteristics of a community or group of people. Therefore, a community listed as ST in a State or Union Territory may not be a ST in another State or Union Territory, because the disadvantages suffered by a community in a geographical area of State or Union Territory may not be so in another State or Union Territory.

(ii). There may also be significant differences in the relative backwardness of different tribal communities living in different geographical regions of the country. Unless stratified reservation is mandated, it will be difficult to prevent marginalization of indigenous tribals and monopolization of reservation benefits by more advanced tribal communities. Thus, a common Reservation Order, e.g. for Delhi & A&N Islands may well lead to a farce.

(iii). **Nativity**:- At present, nativity of the person is of critical importance for getting the benefit of reservation. This issue was discussed in detail by the Hon'ble Supreme Court while deciding the case of Marri Chandra Shekhar Rao on 02.05.1990. It was directed by the Hon'ble Supreme Court in this case that the petitioner is not entitled to be admitted to the medical college in Maharashtra on the basis that he belongs to the ST in Andhra Pradesh. Following points were deliberated in the judgment:-

(a) There is a circular dated 22.02.1985 issued by the Govt. of India, Ministry of Home Affairs which inter-alia states "It is also

clarified that a SC/ST person who has migrated from the State of origin to some other State for the purpose of seeking education/employment etc will be deemed to be a SC/ST of the State of his origin and will be entitled to derive benefits from the State of origin not from the State to which he has migrated.”

(b) In Article 342 of the Constitution it is mentioned that the President may with respect to any State or Union Territorywhich shall be for the purpose of this Constitution to be deemed to be STs in relation to that State or Union Territory.

(c) The SCs and STs in some States had to suffer the social disadvantages and did not have the facilities for development and growth. It is, therefore, necessary in order to make them equal in those areas where they have so suffered and are in the state of under development, to have reservation or protection in their favour so that they can compete on equal terms with the more advantageous or developed sections of the community.

(d) The decision in the case of Marri Chandra Shekhar Rao was also deliberated and cited in the judgment dated 11.02.2005, passed by a three Judge Bench consisting of Chief Justice of India (Justice R.C. Lahoti, Justice K.G. Balakrishnan, and Justice G.P. Mathur) in the Civil Appeal No. 6-7 of 1998 in the case of S. Pushpa & Ors. Vs. Sivachanmugavellu & Ors., which was made applicable in the matter relating to restoration of reservation of 7.5% for Scheduled Tribes in services and posts under Government of NCT of Delhi. The Court had held that the Union Territory of Pondicherry having adopted a policy of Central Govt. whereunder all Scheduled Castes or Scheduled Tribes, irrespective of their State were eligible for posts which were reserved for SC/ST candidates, no legal infirmity could be ascribed to such a policy and the same could not be held to be contrary to any provision of law.

(e) The same spirit was made applicable in restoring reservation for Scheduled Tribes in Delhi since Delhi, redesignated as National Capital Territory is primarily a Union Territory and the services under Government NCT of Delhi are also Central Services.

(f) The Hon'ble Supreme Court of India in its judgment in the WP(C) No. 507 of 2006 has differed with the judgment of the three Judges Constitutional Bench in the case of S. Pushpa & Ors. and opined in para 40 (page 50) of judgment that the Central/ State Governments "may lay down a policy decision in regard to reservation having regard to provisions under Article 15 & 16 of the Constitution, but such policy cannot violate other Constitutional provisions (Article 341 & 342)." The Hon'ble Court in para 41 (page 53) of the judgment has observed that "if the members of the SC and ST in other States are to be treated as backward classes for

Delhi intensive studies were required to be made in regard to question whether they would come within the purview of the definition of "Backward Classes" so as to answer the description of socially and educationally backward; and held in para 46 (page 74-75) as given below:

.....we are bound by a Constitution Bench decision. We have referred to Constitution Bench decisions, namely Marri Chandra Shekhar Rao and E.V. Chinnaiah, Marri Chandra Shekhar Rao, had been followed by this Court in a large number of decisions including Three Judge Bench decisions. Pushpa, therefore, could not have ignored either Marri Chandra Shekhar Rao or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the Constitutional scheme as contained in clause (1) of Article 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket .

Following Dayanand (supra), therefore, we are of the opinion that the dicta in Pushpa is an obiter and does not lay down any binding ratio.

(iv) It is a fact that Delhi is a National Capital Territory and large number of people had migrated to Delhi after independence in 1947. The population of Delhi in 1951 Census was 17.44 lakhs only. This included the population which had migrated from Pakistan during and after partition. The population of Delhi as per 2001 Census is 137.83 lakhs. This huge increase in population from 1951 to 2001 can not be attributed to normal growth only, but also combines the effect of continuous migration of people from other regions in search of opportunity or employment. Since services and posts under Union Government and its organisations/ offices and financial institutions, which are mainly located in Delhi, recruit personnel on an All-India basis, the Scheduled Castes, Scheduled Tribes as well as other population from all over the country have settled in Delhi after their appointments under the Central Government. While no STs have been specified in relation to Delhi, the number of ST migrants from other States who have settled in Delhi, is not available. However, the communities of many SC migrants is also included in the list of SCs specified in relation to Delhi and they may have been returned as SC of Delhi in various Census enumerations; and may also have secured Caste certificates issued from Delhi mentioning that they were ordinary residents of Delhi entitling them to the benefits of Scheduled Castes meant only for the original SC communities of Delhi. **This would tantamount to discriminatory treatment of ST migrants population.**

(v) While considering the draft Delhi Educational Institutions (Reservation in Admission) Bill, 2009 at its meeting held on 06.11.2009, the Commission had observed that "Delhi being the National Capital of the country and the fact that the educational facilities of a high order have been created through the use of Central revenues, it was quite desirable to extend the benefits of reservation to the STs, from all over the country". While a residence requirement may indeed be prescribed for employment under the Government, local authority within a State or UT [Article 15(3)], the position of Delhi is rather unique, as being a National Capital Territory, facilities and services are created/ supported with the Central funds and revenues and the services and posts under Government of NCT of Delhi are treated as Central services. Therefore, it is quite appropriate that migrant ST population settled in Delhi should not be discriminated while giving recognition to Scheduled Castes who have migrated from other States and settled in NCT of Delhi, whether it is a matter of services under Delhi Government or admission to Schools and Colleges under Delhi Government.

III. **Proposed recommendation of the Commission:**

4. In view of above the Commission may like to recommend as follows:-

- i) While refraining comment on the merit of the Hon'ble Supreme Court judgment since it does not have any legal expertise, the Commission may not recommend a common SC & ST list notified under Article 341 and Article 342 in respect of all UTs including Delhi as this may lead to marginalization of the indigenous tribal people beside compromising the sanctity of Article 341 and 342.
- ii) Keeping in view the unique status of NCT of Delhi being the National Capital and the fact that the employment opportunities and educational facilities of high order have been created through the use of central revenues in the NCT of Delhi, it is desirable to extend the benefit of reservation to the STs resident in Delhi irrespective of their nativity and period of residence retaining reservation level of 7.5% for Scheduled Tribes and 15% for Scheduled Castes as admissible at National level.
- iii) A constitutionally valid scheme of reservation may be evolved to extend benefits of reservation to migratory SCs & STs living outside their original place of nativity.