

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION
I.A. NO.130798 OF 2022

IN
CIVIL APPEAL NO.2317 OF 2011

IN THE MATTR OF

STATE OF PUNJAB ... APPELLANT

VERSUS

DAVINDER SINGH ... RESPONDENT

AND IN THE MATTER OF :

MAZHBI SIKH AND BALMIKI 12.5%
RAKHVANKARAN BACHAO MORCHA ... APPLICANT

AND IN THE MATTER OF :

TRANSFERRED CASE NO.37 OF 2011

(Arising out of T.P.(C) No.955 of 2009

(FOR RESPONDENT NOS.3 AND 4)

HARDIP SINGH & ORS. ... PETITIONERS

VERSUS

STATE OF PUNJAB & ORS. ... RESPONDENTS

INDEX

S. No.	Particulars	Page Nos.
1.	Additional Written Submissions on behalf of Mazhbi Sikh and Balmiki 12.5% Rakhvankaran Bachao Morcha and Respondent Nos.3 and 4 in T.C. No.37 of 2011 by Mr. Nidhesh Gupta, Senior Advocate.	2 to 12

G. BALAJI
ADVOCATE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

I.A. NO.130798 OF 2022

IN

CIVIL APPEAL NO.2317 OF 2011

IN THE MATTR OF

STATE OF PUNJAB

... APPELLANT

VERSUS

DAVINDER SINGH

... RESPONDENT

AND IN THE MATTER OF :

MAZHBI SIKH AND BALMIKI 12.5%

RAKHVANKARAN BACHAO MORCHA

... APPLICANT

AND IN THE MATTER OF :

TRANSFERRED CASE NO.37 OF 2011

(Arising out of T.P.(C) No.955 of 2009

(FOR RESPONDENT NOS.3 AND 4)

IN THE MATTR OF

HARDIP SINGH & ORS.

... PETITIONERS

VERSUS

STATE OF PUNJAB & ORS.

... RESPONDENTS

**ADDITIONAL WRITTEN SUBMISSIONS ON BEHALF OF MAZHBI
SIKH AND BALMIKI 12.5% RAKHVANKARAN BACHAO MORCHA**

AND RESPONDENT NOS.3 AND 4 IN TC NO.37 OF 2011

BY MR. NIDHESH GUPTA, SENIOR ADVOCATE

1. The judgment in Chinnaiah is contrary to the Constitutional Scheme which is apparent from the following factors:-

(i) Articles 15(4) and 15(5) refer to Scheduled Castes (SC), Scheduled Tribes (ST) and socially and educationally backward classes (SEBC). Article 46 refers to SC, ST and weaker sections. Article 164 refers to SC, backward classes and tribal welfare. Articles 243D, 243T, 330, 332, 334, 335 refer to Scheduled Castes and Scheduled Tribes. Article 339 refers to Scheduled Tribes. Article 340 refers to socially and educationally backward classes (which has been interpreted in para 787 of Indra Sawhney to mean that it refers to only socially and educationally backward classes and not Scheduled Castes and Scheduled Tribes). Articles 338, 338A and 338B refer to the National Commission for Scheduled Castes, Scheduled Tribes and Backward Classes respectively. Even Article 16(4)A refers to Scheduled Castes and Scheduled Tribes.

It is only Article 16(4) which refers to “backward class of citizens”. It is thus apparent that for the purpose of Article 16(4), Scheduled Castes, Scheduled Tribes and socially and educationally backward classes have been treated at par with each other and have been collectively termed as “backward class of citizens”. It thus shows the intent of the Constitutional framers to treat Scheduled Castes, Scheduled Tribes and socially and educationally backward classes at par and that is why they have been categorized together as “backward class of citizens”. If that were not so,

nothing prevented the Constitutional framers to refer to them separately and confer different rights on each, as has been done in the other Articles.

(ii) While Article 15(4) refers to “any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”.

Article 15(5) provides for making any special provision by law for the advancement of “any socially and educationally backward classes of citizens or for the Scheduled Castes or for the Scheduled Tribes....”.

Article 16(4)A speaks of making provision in matters of promotion in favour of “the Scheduled Castes and Scheduled Tribes...”.

It is in Article 16(4)A that the Constitution provides for making “any provision for the reservation of posts in favour of any backward class of citizens...”. The use of the word “any” in Article 16(4) in contradistinction to the use of the word “the” in Article 15(4), 15(5) and 16(4)A makes it clear that Scheme of the Constitution provides for greater discretion insofar as Article 16(4) is concerned to choose “any” of the backward classes.

(iii) The Scheme of the Constitution is also clear from the fact that the Lists under Articles 341 and 342 are already available at the time of consideration by the State under Article 16(4). Yet, discretion is given under Article 16(4) by the use of the word “any”. It shows that the Constitution intends to give the State greater leeway in deciding which of

the backward classes are to be given reservation by the use of the said word “any”. Any other interpretation would negate the very purpose for which the said expression has been used.

(iv) The intent of the Constitution to give greater discretion to the State is also apparent from the use of the word “law” in Article 16(3), Article 16(5) and in Article 19(2) to 19(6). However, Article 16(4), 16(4)A and 16(6), the expression used is “provision” which includes executive orders, circulars etc., which are issued by the executive (it has been so held in para 737 (page 688, 689 of Indra Sawhney”). It is relevant to note that even Article 15(5) provides for making “any special provision, by law”

(v) Since Indra Sawhney allows SEBC to be sub-categorised between backward and more backward and in view of the fact that backward classes have been treated at par under Article 16(4), therefore, necessarily the said application of backward and more backward is permissible qua SC and ST also.

2. The contention that the Scheduled Castes have to be considered in their entirety as a class within the meaning of “backward class of citizens” under Article 16(4) is misplaced and incorrect for the following reasons :-

(i) The consequence of the said submission would be that the discretion conferred on the State would be limited to giving a benefit only

to either the entire Scheduled Caste category or to the entire Scheduled Tribe category or to the entire socially and educationally backward class category or to any combination of two or three of the same. This could never have been the intent of Article 16(4) because it negates the very discretion conferred under Article 16(4). The discretion available in Article 16(4) is apparent from the use of the word “any”, “which” and “in the opinion of the State”.

(ii) Further, the consequence of the said interpretation would be that in case the quota for Scheduled Castes is completely occupied by some of the castes notified under Article 341, then the State would be incompetent to do anything more so as to achieve a balance inter se the Scheduled Castes or to provide something to those who are more backward amongst the said category. It would mean that the State has only the discretion to either give to all the Scheduled Castes or to none of them at all and similarly for the other categories of Scheduled Tribes and socially and educationally backward classes. Such an interpretation runs counter to the very basic tenets of Part III of the Constitution and the very basic principle of the Equality Doctrine.

(iii) Such an interpretation would also negate the purport and meaning of the expression “not adequately represented in the services under the State”. This is so because if the entire Scheduled Caste category is seen

as one conglomerate, then the State has only to see whether the Scheduled Castes in totality are adequately represented. It would then be rendered incompetent to examine whether there is a particular caste, race or tribe which is inadequately represented in the SC category. The said expression “not adequately represented in the services under the State” would be rendered meaningless if such an interpretation is to be given.

(iv) That if the expression “any backward class” were to mean Scheduled Caste or Scheduled Tribe or socially and educationally backward classes as a whole, then Article 16(4) could have very easily said so, as has been done in the other provisions mentioned in Para 1(i) above. The very fact that it has not been so done demonstrates that all the backward classes are treated at par for the purposes of giving benefits under Article 16(4). Since, as held in Indra Sawhney, discretion is available to the State insofar as grant of benefit to SEBC as backward or more backward is concerned, similar benefit is also necessarily available qua SC and ST.

(v) Further, it needs to be borne in mind that Scheduled Castes as defined under Article 366(24) means not only castes but also races or tribes. The contention that SC are to be treated as a single “class” and caste is not “class”, ignores the said fact.

(vi) Indra Sawhney in paras 782 and 784 held as follows :

782. Coming back to the question of identification, the fact remains that one has to begin somewhere — with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice.

.....

784. The only basis for saying that caste should be excluded from consideration altogether while identifying the backward class of citizens for the purpose of Article 16(4) is clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of clause (2). It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word "any" cannot be minimised [In *Air India v. Nargesh*

Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599 this Court held: "What Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer res integra but is covered by several authorities of this Court." Reference was then made to Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930 : AIR 1954 SC 321 and C.B. Muthamma (Miss) v. Union of India, (1979) 4 SCC 260 : 1979 SCC (L&S) 366.] . Reservation is not being made under clause (4) in favour of a 'caste' but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of clause (2) of Article 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in school desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born heathen, by baptism, it becomes a Christian — to use a simile. Baptism here means passing the test of backwardness.

[Emphasis Supplied]

It is submitted that the said reasoning applies on all fours to categorization within Scheduled Castes as well. There is no rationale or basis as to why it should not be so done.

(vi) The use of the expressions "any", "which" and "in the opinion of" show the discretion vested in the State. The said discretion would be rendered completely illusory if the stand of the opposite side is accepted.

(vii) The said submission also deserves to be rejected for the reasons given in para 1 above.

(viii) The discretion available to the State is also noticed at at least six places in the judgment of Justice Jeevan Reddy in Indra Sawhney. In this regard reference may be made to :-

- (a) Page 670 of SCC (page 647 of pdf in Volume V), para 709 concerning allegations that the Backward Class Commission was not scientific and had chosen those were above the educational average.
- (b) Page 694, 695 of SCC (page 671, 672 of pdf), paras 744, 745 concerning reservation being provided not only under Article 16(4) but also under Article 16(1).
- (c) Page 717 of SCC (page 694 of pdf), para 783 with regard to identification of backward class of citizens.
- (d) Page 727 of SCC (page 704 of pdf), para 796 (Placitum B, C) where it is held that it not for the Court to lay down the procedure and it is for the authority to decide how to identify the backward classes.
- (e) Page 727 of SCC (page 704 of pdf), para 798 where the expression “in the opinion of” has been considered and test laid down in Barium Chemicals has been accepted. Detailed submissions in this regard have been made in the Written Submissions already filed (which are

dated 13.12.2023 filed by Mr. Nidhesh Gupta which are at serial no.1 in Written Submissions Volume 1).

- (f) Pages 729, 730, 731 of SCC (page 706, 707, 708 of pdf), paras 802, 803 where it has held in Indra Sawhney that the State can classify as backward or more backward.

It is submitted that once it has been held that such discretion is available with the State, it would run completely counter to the Scheme of the Constitution (as accepted by Nine Judges of this Hon'ble Court) to hold to the contrary, as is sought to be contended by the opposite party.

3. That the contention that observations in Indra Sawhney are concerning SEBC only and not qua SC or ST is misleading in view of the following :-

- (a) Because the case which was being considered by this Hon'ble Court was the case of backward classes.
- (b) The rationale provided in paras 792, 793 concerning backward classes as also in other paragraphs is squarely applicable to SC, ST also.
- (c) The Constitution Bench judgments in Nagaraj and Jarnail have accepted that the said principles applied to SC and ST also.

- (d) The factum of the creamy layer principle which was applied to SEBCs having also been applied to SC and ST (in Jarnail and Nagaraj) completely establishes the said fact.

The present Written Submissions are in addition to the Written Submissions filed by Mr. Nidhesh Gupta, Senior Advocate, which are at serial no.1 in Volume I of the Written Submissions and start from pdf page 4 of the said Volume I. The said Written Submissions dated 13.12.2023 may also kindly be perused.

NEW DELHI
DATED : February 09, 2024.

(NIDHESH GUPTA)
SENIOR ADVOCATE