

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL No. 2317 OF 2011

IN THE MATTER OF:

State of Punjab and Ors. ... Appellants

v.

Davinder Singh and Ors. ... Respondents

**ADDITIONAL WRITTEN SUBMISSION ON BEHALF OF
RESPONDENT NO. 1**

1. The present submissions are in addition to the written submissions already submitted by Sh. Sanjay R. Hegde on behalf the Respondents and the supplementary submissions submitted on behalf of the Respondents on 21.07.2020. The present submissions are limited to certain legal issues and aspect not already touched upon in the above-mentioned submissions.
2. The Respondents respectfully submit that that principle legal issue and question that arises for consideration of this Hon'ble Court in the present case is whether the State Government can give preference to certain castes, mentioned in the Presidential order issued under Article 341(1) of the Constitution of India, in the matter of grant of reservations for Scheduled Castes under Article 16(4) of the Constitution of India.
3. While considering the above-mentioned issue, the 5 Judge Constitution Bench, on 04.04.2020, had proposed the following questions:

- i. Whether the provisions contained under Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 are constitutionally valid?
 - ii. Whether the State had the legislative competence to enact the provisions contained under Section 4(5) of the Act?
 - iii. Whether the decision in E.V. Chinnaiah Vs. State of A.P. & Ors. Reported in (2005) 1 SCC 394 is required to be revisited?
4. The Respondents most respectfully submit that the main thrust of the submissions on behalf of the Appellants is that the grant of preference to a few castes from with the list of castes contained in the Presidential order/List, issued under Article 341, does not amount to an exercise of inclusion or exclusion of any caste from the List and therefore, cannot be held to amount to tinkering with the List issued under Article 341. Indeed, the Hon'ble 5 Judge Constitution Bench, while referring the above-mentioned questions to be decided by a 7 judge Bench vide order dated 27.08.2020, had also based its opinion on the above-premise. The relevant paras of the order dated 27.08.2020 are reproduced for the consideration of this Hon'ble Bench as below:

"22. On behalf of the State of Punjab, it was argued that preferential treatment given by the State to certain Scheduled Castes and Scheduled Tribes does not violate Article 14 but brings about proportional equality. The classification made based on intelligible differentia is

interse backwardness and share in population vis-à-vis proportion of representation in Government services. The differentia bears a reasonable nexus with the object sought to be achieved. Those who are unequal class of Scheduled Caste and Scheduled Tribe can be given the benefit of reservation to ensure that benefit reaches to them as guaranteed under [Article 14](#).

...

27. In Ashoka Kumar, no opinion was expressed concerning the creamy layer concept to Scheduled Castes and Scheduled Tribes. However, now Jarnail Singh is crystal clear in that regard and lays down that it can be applied to Scheduled Castes and Scheduled Tribes, and that would not amount to tinkering with lists under Articles 341 and 342. The question involved in the present matter is of classification and thereby preferential treatment without depriving any caste benefit of reservation. (emphasis supplied)

...

35. The question arising for consideration is whether sub classification made or preferential treatment within the class of Scheduled Castes, Scheduled Tribes and socially and educationally backward classes can be said to be an exercise of inclusion or exclusion particularly when the other castes in the list of Scheduled Caste persons are not deprived of the benefit of reservation in totality. All the castes included in the list of Scheduled Caste are given the benefit of reservation as per representation in service, but only specific percentage fixed for preferential treatment to a caste/class which was not able to enjoy the benefit of reservation on account of

their being more backward within the backward classes of Scheduled Castes. The preferential treatment would not tantamount to excluding other classes as total deprivation caused to any of the castes in the list of Scheduled Caste under Article 341(2). Caste is nothing but a class. It is the case of classification to provide benefit to all and to those deprived of the benefit of reservation, being the poorest of the poor. Whether the action based on intelligible differentia to trickle down the benefit can be said to be violative of Articles 14 and 16 of the Constitution and whether sub-classification can be said to be an act of inclusion or exclusion particularly when various reports indicating that there is inequality inter se various castes included within the list of Scheduled Castes. They do not constitute homogenous class have been relied upon. Based on the report and to give adequate representation to those who continue to remain the most backward of the downtrodden class, the provisions containing a certain percentage of preferential treatment subject to availability without depriving others in the list were made."

5. The Respondents most respectfully submit that a perusal of the above-reproduced paras of the order dated 27.08.2020, as also the written submissions submitted by the Appellants, shows that the entire premise of their stand is that grant of preference does not alter the constitution of the List issued under Article 341 as there is no new inclusion or exclusion from the same. Therefore, the same cannot be held to be tantamount to tinkering with the Presidential List.

6. The Respondents vehemently and strenuously dispute the above argument as being a gross over-simplification of the factual and legal scenario at hand. The respondents submit that the issue whether the grant of preference amounts to tinkering with the Presidential List must be adjudged and determined by applying *the direct impact and effects test*.
7. The Respondents submit that the issue of whether the grant of preference actually amends or alters the Presidential List under Article 341 can only be properly adjudicated by the application of the direct impact and effects test as the case in hand is an instance of exercise of executive and legislative power to secure ostensible equality to “perceivably” the weakest of the weak by excluding some benefit from the share of the rest of the members of the same class, i.e. Scheduled Castes as whole under the Presidential List. The nature and extent of such exclusion can only be properly and effectively adjudged by the application of the direct impact and effects test. [please see *I. R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1, paras 56, 106, 148 and 151]
8. The State of Punjab’s grant of preference to the “perceivably” weakest of Scheduled castes, out of the castes included in Presidential List issued under Article 341, is sought to be justified by the Appellants on the following grounds:
 - i. The list is not subjected to any new inclusion or exclusion by such an exercise of grant of preference;
 - ii. The grant of preference is an inherent element of securing equality recognized under Articles 14 and 16(4);

- iii. The data sought to be submitted by the State in 2020 allegedly supports the basis of its avowed objective to secure equality for Mazbi Sikhs and Balmikis it sought to uplift vide Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 [hereinafter referred to as the Act of 2006].
9. The Respondents submit that the none of the grounds invoked by the Appellants, as mentioned above, legally support the stand for reconsideration of the judgment in E.V._Chinnaiah Vs. State of A.P. & Ors (*supra*). It is submitted that the application of the direct impact and effects test would clearly show that sheer legal fallacy on the stand taken by the Appellants and the same is described as below.

Re: Grant of Preference does not tinker with the Presidential List under Article 341

10. The Respondents submit that vide Section 4(5) of Act of 2006 the State ostensibly seeks to give first preference to Balmikis and Mazbi Sikhs for 50% of seats available in the total quota for Scheduled Castes. While on the face of it such a scheme of preference may seem innocuous as it does not seem to introduce any new caste into the List or even exclude a caste from the List, in actuality it does something quite sinister.
11. The Respondents submit that in actuality the impact of the above mentioned grant of preference surreptitiously and indirectly seeks to undermine and restrict the scope and operation of Presidential List under Article 341. This it does in the following ways:

- i. The impugned statutory provision, by providing for a preference to be given to 2 castes/communities for 50% of the total seats reserved for Scheduled castes in the first instance, and leaving the rest 50% of the seats for the rest of the castes/communities in the Presidential List, interferes with the scheme of the Scheduled Castes order and disturbs the scheme of reservation sought to be implemented thereto.
- ii. It completely rearranges the scheme of reservation. It disproportionately increases the share of reservation available in favour of 2 castes/communities with a similar decrease in the share available for the rest of the castes mentioned in the Presidential List. While 2 castes/communities will now get a lion's share of the quota reserved for Scheduled Castes, the other castes/communities will have to fight it out for the rest 50%, which will hardly translate into any benefit at all, especially given the number of communities contained in the Presidential List i.e. 39. This amounts to an indirect wiping out of the benefit of reservations meant for the rest of castes/communities contained in the Presidential List.
- iii. The Respondents submit that *de hors* the innocuous form of the impugned statutory provision, the impugned provision contemplates a *de facto* regrouping and reclassification of the castes contained in the Presidential List in the matter of its implementation.

- iv. This *de facto* regrouping and reclassification of the castes further demolishes the legal fiction implicit in the list issued under Article 341(1), by placing two favored castes/communities over and above the others in the Presidential List.
 - v. The Respondents submit that the exercise of power by the President under Article 341(1) gives rise to a legal fiction *vis-à-vis* the castes included in the said List. The purpose of the legal fiction is to ensure the upliftment of the castes so included in the Scheduled Castes Order by conferring upon them a homogeneity. This homogeneity is necessary for the purposes of their collective and simultaneous upliftment. Furthermore, this homogeneity is necessary to be maintained to insulate their benefits from unnecessary and arbitrary political interference, which is exactly what Dr. Ambedkar had referred to while discussing the Draft Article 300A (Article 341) in the Constituent Assembly.
12. The Respondents submit that the above-described real impact and effect of the impugned grant of preference by the State of Punjab to two castes/communities over and above the other castes/communities in the Presidential List amounts an alteration in the operation of the Presidential List by surreptitiously amending the percentage of reservation that will fall into the share of individual castes included in the Presidential List. This amounts to tinkering with the Presidential List in a manner contrary to Article 341(2) of the Constitution of India and as such is *ultra-vires* the Constitution.

Re: Grant of Preference even in case of Scheduled Castes is an inherent element of equality under Article 16(4)

13. *Vis-à-vis* the submission of the Appellants regarding the exercise of power to sub-classify being an inherent element of equality under Articles 14 and 16(4) of the Constitution of India – the Respondents submit that the said argument is premised observations made by the Supreme Court in the judgment in *Indira Sawhney v. Union of India*, 1992 Supp. (3) SCC 217. The respondents submit and reiterate that the said observations permitting sub-classification were specifically limited by the Hon'ble Court to the case of "Other Backward Classes" with a specific caution that none of its observations would apply to Scheduled Castes and Scheduled Tribes. This limitation has been consistently noted and approved by subsequent constitution benches of this Hon'ble Court, reference to which has already been given in the submissions submitted on behalf of respondents earlier.

14. The Respondents further submit that the mere fact that the language of Articles 341, 342 and 342-A are *pari-materia* cannot *ipso-facto* lead to the application and extension of the power of sub-classification available qua "Other Backward Classes" to the case of Scheduled Castes. This is because of the key feature of distinction between Scheduled Castes and Other Backward classes, i.e. the historical injustice of untouchability. As submitted in detail in the supplementary submissions dated 21.07.2020 submitted on behalf of the Respondents, the above-mentioned historical injustice of untouchability has granted a special status to the Scheduled Castes in the Constitution *vis-à-vis* the Other Backward

Classes. This feature formed the basis of the process of their identification and further, is the foundation of the legal fiction that arises upon their inclusion in the Presidential List under Article 341.

15. The Respondents submit that the above-mentioned key feature of distinction also is responsible for the deemed inclusion of Scheduled Castes within the scope of phrase "*backward class of citizens*" as used in Article 16(4) because of the above-mentioned historical injustice and its consequence is undeniable. It raises a presumption of law of their backwardness, which incidentally is not available in the case of the other classes. While other classes, communities or castes have to fulfill the criteria of *social backwardness* to get included in the list of OBC under Article 342-A and become entitled to benefits thereto, the element of social backwardness is presumed to exist in the case of Scheduled Castes included in the list prepared under Article 341.
16. Therefore, the *pari-materia* nature of the language of Article 341 and 342-A will not make the principles applicable to "Other Backward Classes" applicable to "Scheduled Castes" as the same relates only to the procedure for the preparation of Lists, but not to the constituent elements that will entitle a community to get included in the Lists so prepared. The Respondents further submit that the wholesale extension of the principles applicable to the case of "Other Backward Classes" to the case of "Scheduled Castes" will further adversely affect the legal fiction resulting from the exercise of power under Article 341(1), which is impermissible and unsustainable. The purpose of the legal fiction being specific and definite, it has to be allowed to take full effect.

Re: The data submitted by the State supports the basis of its avowed objective to secure equality for the Mazbi Sikhs and Balmikis through the impugned statutory provision

17. That without prejudice to the submissions made above, the Respondents submit that the State of Punjab, even on facts, did not have the necessary factual basis in the shape of quantifiable data to support the grant of preference to the two castes/communities of Balmiki and Mazbi Sikhs at the time it enacted the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006. The impugned provision, i.e. Section 4(5), is/was an instance of outright political appeasement effected to the detriment of other castes/communities contained in the Scheduled Castes Order. The same is completely impermissible and antagonistic to the very object and purpose of Article 341 of the Constitution of India.
18. The Respondents further submit that the mere fact that the State of Punjab has sought to place on record data in 2020 only, testifies to the fact that the State Government did not have any data to support the grant of preference to the two communities over and above the other communities. The Scheduled Castes Order annexed by the Appellants as Annexure A-1 (on CC5774) shows that there are 39 castes included in the list of Scheduled Castes for the state of Punjab. The State government has in 2020, for the first time sought to place on record statistics in an attempt to show that the representation of Balmikis and Mazbis vis-à-vis the other

castes mentioned in the Scheduled Castes Order in various government departments, autonomous statutory bodies, corporations and educational institutional is acutely underwhelming.

19. The Respondents submit that the presentation of the documents first amounts to an admission of the absence of any fact finding and data collection exercise conducted by the State while enacting the impugned statute. The said defect cannot now be sought to be cured *ex post facto*. The validity of the legislation, both on account of competence and rationale must be adjudged as on the basis of the fact situation obtaining on the date of its enactment. On this ground alone, the impugned legislation has to be struck down as an exercise of legislative discretion without any justifiable basis and vitiated by the doctrine of *manifest arbitrariness*.
20. The Respondents further submit that even otherwise, a perusal of statistics produced by the Appellants does not lend any credence to the stand of the Appellants regarding the under-representation of Balmikis and Mazbis *vis-à-vis* the other castes included in the Scheduled Castes Order for State of Punjab. *Infact*, the data shows that the representation of Balmikis and Mazbis is more or less equal to that of the other castes, with certain instances where the representation of Balmikis and Mazbhis in a department is more than representation of other communities included in the Presidential List. Further, the instances of departments and institutions where the representation of Balmikis and Mazbis is less, in comparison to representation from other member communities of the List, are very few and due perhaps to the

nature of the population of the area where the department and institution is situate.

21. Moreover, the State has not provided any data as to the proportion of the population of Balmikis/Mazbis *vis-à-vis* other Scheduled castes district wise, so as to prove that the difference in their representation is due to the acute social backwardness *vis-à-vis* other castes contained in the said list. The Respondents submit that the data produced by the State is extremely vague and does not support the disproportionate quantum of preference sought to be given to Balmikis and Mazbis *vis-à-vis* other Scheduled Castes included in the Presidential List.
22. The Respondents submit that the absence of such data, both at the time of enacting the legislation in question and even now, attests to the *malafide* nature of the legislative exercise conducted by the State Government for purely political reasons in complete violation of the procedure prescribed by the Constitution of India and thus, is vitiated as a colorable exercise of power for a purpose not supported by the Constitution of India.

Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 is illegal and constitutionally invalid on the ground of being beyond the constitutional competence of the State Govt..

23. The Respondents reiterate that the whole purpose of vesting the power to alter the Presidential list notified under Article 341 exclusively with the Parliament is to insulate the list from

political interference at the State level. This purpose/object would be nullified if the State Governments are allowed to influence and alter the structure of the list in this indirect way. It is submitted that it is a settled principle of law that what cannot be done directly, cannot also be done indirectly.

24. The Respondents submit that the *de facto* re-grouping and re-classification of castes included in the Presidential list, which disturbs the scheme of reservation and rearranges the share of reservation available to the castes included in the Presidential List is an indirect way to amend, alter and tinker with the same. It is submitted that such an exercise of power is aimed at detrimentally affecting the scope of legal fiction attached to the Presidential List in a surreptitious and unconstitutional way and therefore, is unsustainable. The same cannot be upheld on the ground of being in violation of the mandate under Article 341(2). It is submitted that the exclusive competence to effect any change in the constitution of the Scheduled Castes Order under Article 341 or its scope or the manner of implementation of the legal fiction attached to the List lies only with the Parliament under Article 341(2).
25. The Respondents therefore, in conclusion submit that :
 - i. The judgment of the Hon'ble Court in E.V. Chinnaiah (*supra*) is in conformity with the judgment of the Constitution Bench in Indra Sawhney case (*supra*) and does not need reconsideration;
 - ii. The State Government of Punjab did not have the constitutional competence to enact Section 4(5) of the

Punjab Scheduled Castes and Backward Classes
(Reservation in Services) Act, 2006;

- iii. Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 is constitutionally invalid.

Settled by: Sh. Salil Sagar, Sr. Advocate

Drawn by: Mr. Samarth Sagar Adv. And Mr. Sankalp Sagar Adv.

Drawn on 14.12.2023

Filed on 14.12.2023

Place: New Delhi

Filed by


