

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
**CIVIL APPEAL NO. 5597 OF 2010**

**IN THE MATTER OF:**

**SANT KABIR SHIKSHA DHANAK SAMAJ V. GAJEY SINGH MUWAL  
& ORS.**

**ADDITIONAL SUBMISSIONS BY MR. SALMAN KHURSHID**

**(For Respondent No. 5)**

**1. Welfarism viz-a-viz Article 16(4) of the Constitution of India:**

That Respondent No. 5 namely Haryana Bajigar Samaj which is a social organisation for the welfare of the ‘bajigar/bazigarh’ caste. The said caste has been made part of the Schedule due to their low level of education and nomadic lifestyle; considering none of them were graduates till the last survey as conducted in 1990 and only 11 people are matriculate out of its population of 1610 as per the data collected by the government in 1990.<sup>1</sup>

That the circular with respect to sub-classification of the SCs/STs shall be read as the principles or policies associated with the welfare state. Thus, the circular of the state may be read as ‘social welfare’ embarking and engulfing individual utility. That it has been stated by Dr. Ronald Dworkin in “What is Equality? : Equality of Welfare<sup>2</sup> that

*“We therefore have reason to consider with some care the alternative ideal of equality of resources. But it is worth stopping now to consider very briefly whether the arguments I have made against equality of welfare might be effective against other forms of welfarism and, in*

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<sup>1</sup> Vol III CC Pg 2335-2340 (Annx-P4, P5 and P6)

<sup>2</sup> Princeton University Press, Philosophy & Public Affairs, Vol. 10, No. 3 (Summer, 1981) pp 185-246

*particular, how far they might be effective against utilitarianism. (I am using Amartya Sen's account of welfarism as the general theory that the justice of distributions must be defined exclusively by stipulating some function of individual welfare.)”<sup>3</sup>*

*“The different versions of equality of welfare that we have been studying are varieties of welfarism. Utilitarianism, which calls for some maximizing function over some conception of welfare, is an-other, or rather, another group. Two kinds of justification are in principle available for any form of welfarism. A welfarist theory can be defended on the teleological ground that the stipulated function of the stipulated conception of welfare is something good in itself that ought to be produced for its own sake. Or it can be defended as a particular conception of equality, as a particular theory about when people are being treated as equals. The distinction between these two types of grounds is reasonably clear, I think, in the case of utilitarian-ism. That theory can be supported in a direct teleological way: not only is pain bad in itself but pleasure (or some other conception of positive welfare) is good in itself, and the more there is of it the better. Or it can be supported as a conception of equality. It is then understood as the theory that people are treated as equals when and only when their pleasures and pains (or components of some other conception of welfare) are taken into account quantitatively only, each in that sense to count as one and only one. Of course this egalitarian version of utilitarianism cannot, as the teleological version can, purport to supply all of a plausible general political or moral theory. The egalitarian utilitarian would have to explain why it is not as good to aim at maximum average misery as maximum average happiness, for example, or why there is anything to regret in a natural disaster that kills thousands though it*

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<sup>3</sup> A. K. Sen, "Utilitarianism and Welfarism," *The Journal of Philosophy* 76, no. 9 (September 1979): 463-489.

*improves the situation of a few. But he might find this explanation either in a further political principle, which holds that those who aim at others' misery or failure do not show these others the concern to which human beings, at least, are entitled, or in a distinct morality of outcomes which holds that death or pain or some other kind of suffering is bad in itself, but which uses neither the same conception nor the same metric of welfare as his egalitarian utilitarianism deploys.*

*The arguments we considered against equality of welfare would seem, at least on a first look, equally effective against utilitarianism when it is understood in that second way, that is, as a conception of equality. Once again we should proceed by stating different interpretations of utilitarianism composed by taking different conceptions of welfare as the maximands for a given community. And once again it will seem implausible only to take gains and losses in enjoyment. for example, or in relative success, as the measure of when people are being treated as equals, because people value welfare in these particular conceptions differently.*

2. That it is therefore submitted that 'sub-categorised' reservations can be implemented in the form of horizontal reservations as is done in the case of women, physically handicapped, transgenders, etc. That the state of Tripura vide its notification dated 28.06.2022 has provide for horizontal reservation in reserved category post and general reservation in unreserved category of 33% for women at all level of direct recruitment in all department. This was done in exercise of the powers conferred under Article 15(3) and 16(4) of the Constitution of India. That the state of Tripura has created 6 sets of horizontal reservations combined in the merit list. These six sets of horizontal reservation are as follows:
  - (i) Combined merit list including all categories of UR, ST & SC
  - (ii) UR (Women) merit list
  - (iii) ST (Men & women) merit list

- (iv) ST (Women)merit list
- (v) SC (Men & Women) merit list
- (vi) SC (Women) merit list

3. That the state of Madhya Pradesh vide its notification dated 03.10.2023 in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, hereby, makes the following further amendment in the Madhya Pradesh Civil Services (Special Provision for Appointment of Women) Rules, 1997, namely:

In the said rules, in rule 3, for sub-rule (1), the following sub-rule shall be substituted, namely:-

*“(1) Notwithstanding anything contained in any service rules, there shall be reserved thirty five percent of all posts in the service under the state (except Forest Department) in favour of women at the stage of direct recruitment and the said reservation shall be horizontal and compartment-wise.”*

4. That unlike vertical reservations that are implemented in the form of ‘set aside’, horizontal reservations are implemented in the form of ‘minimum guarantee’. Therefore, it is humbly submitted that the state of Haryana, vide its notification did not set aside any reserved number of seats for group A or group B, but rather it provided a minimum guarantee of 50% reservation to ensure proper percolation of the social upliftment benefits.

5. That the relevant paragraphs from the Indra Swahney<sup>4</sup> case have duly been extracted hereunder for the sake of brevity and convenience:

*"514.It is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15(3) cannot save the situation since all reservations in services*

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<sup>4</sup> 1992 Supp (3) SCC 217

*under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16(1) the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the posts, leaving those from the backward classes without any. It will amount to indirectly providing statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a vulnerable section of the society, whatever the strata to which they belong. They are more disadvantaged than men in their own social class.”<sup>5</sup>*

*"812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. To be more precise suppose 3% of vacancies are reserved in favour of physically handicapped persons; this would be a reservation relating to clause (1) of article 16. the persons selected against this quota will be placed in that quota by making the necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservation in favour of the backward class of citizens remains-and should remain- the same. This is how these reservations are*

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<sup>5</sup> Vol V @ page 523 (Pdf page 527)

*worked out in several states and there is no reason not to continue that procedure."*<sup>6</sup>

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<sup>6</sup> Vol V @ pg 708