

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
TRANSFER CASE (CIVIL) NO. 37 OF 2011

IN THE MATTER OF:

HARDIP SINGH & ORS.

.... PETITIONERS

VERSUS

STATE OF PUNJAB & ORS.

.... RESPONDENTS

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ADVOCATE FOR THE PETITIONERS : ROHIT KUMAR SINGH

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**WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS (THAT IS
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CLASSES (RESERVATION AND SERVICES) ACT, 2006**

That the main matter is titled as The State of Punjab & Ors. v. Davinder Singh & Ors. bearing Civil Appeal No.2317/2011.

In the main matter Respondents are challenging the validity of Punjab Scheduled Castes and Backward Classes (Reservation and Services) Act, 2006 (hereinafter referred to as 'Punjab Act, 2006').

Petitioners in the present transferred case are also challenging the validity of the said 'Punjab Act, 2006'.

I. **SCHEDULED CASTES AND SCHEDULED TRIBES CONSTITUTE A CLASS
BY THEMSELVES**

- i. In State of Punjab, Scheduled Castes have been notified by the President under Article 341(1) of the Constitution of India.

There are no Scheduled Tribes notified in the State of Punjab.

- ii. It is the submission of the Petitioners that Scheduled Castes are a class by themselves. They are not castes 'as otherwise understood'. It is a group. This group is constituted by the notification issued by the President under Article 341(1). This class is picked up from castes, races or tribes or parts of or groups within castes, races or tribes.
- iii. The moment President notifies this class, a new entity is formed. This new entity is called the Scheduled Castes for the purpose of the Constitution.
- iv. The process of consultation with the concerned State/Union Territory is embodied in Article 341(1). It has been held that an elaborate inquiry is held in consultation with the concerned State/Union Territory. It is thereafter that the list of Scheduled Castes for the concerned States is notified by the President.
- v. The list of Scheduled Castes prepared by the President under Article 341(1) is kept completely insulated from interference except by Article 341(2). Article 341(2) mandates that the power to include in or exclude from the said list of Scheduled Castes prepared as specified by the notification has been vested only with the Parliament, and that too by way of making a law to that effect.

No other authority except 'Parliament by law', thereby excluding all other avenues. State Government as an executive head and State Assembly as the legislative head in the State, get excluded when the source of power is given exclusively to 'Parliament by law'.

- vi. Similar is the scheme for Scheduled Tribes in Article 342.

Article 342-A which was inserted by the Constitution (102nd Amendment) Act, 2018 w.e.f. 15.08.2018, indicates similarly for socially and educationally backward classes.

- vii. There was a further amendment to Article 342-A by the insertion of Article 342-A(3) which reads thus:-

“(3) Notwithstanding any contained in clauses (1) and (2), every State or Union territory may, by law, prepare and maintain, for its own purposes, a list of socially and educationally backward classes, entries in which may be different from the Central List.”

This amendment was introduced by Constitution 105th Amendment Act, 2021, w.e.f. 18.08.2021.

The scheme under Article 342-A remains the same as the scheme of Articles 341 & 342. The Presidential List can be varied only by ‘Parliament by law’.

- viii. It is submitted that a reference to Article 366(24) reads thus:-

“(24) “Scheduled Castes” means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;”

Further, for reference, Article 366(25) reads thus:-

“(25) “Scheduled Tribes” means such tribes or tribal communities or parts of or groups within such tribes or tribal

communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;”

And further for socially and educationally backward classes, for reference, Article 366(26)(C) reads thus:-

“(26-C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342-A for the purposes of the Central Government or the State or Union territory, as the case may be];

- ix. That it is submitted that under Article 366(24), Scheduled Castes have been described as ‘such castes, races or tribes or parts of or groups within castes, races or tribes as are deemed under Article 341 to be Scheduled Castes’.

In all three definitions extracted above in Article 366, the expression ‘are deemed’ has been employed. Once such castes, races or tribes or parts of groups within, are ‘deemed’, this deeming fiction does not permit dissection of this group, which is called the ‘Scheduled Castes’ for that particular State.

It is respectfully emphasised that the language of Article 341(2) is clear, which reads thus:-

“(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.”

Parliament may by 'law include in and exclude from'. Further, the later part specifically mentions that the Notification issued under Article 341(1) shall not be varied by any subsequent Notification. Therefore, no variation is permitted except by Parliament by law.

For the above submissions, reliance is placed on:-

- State of Kerala v. N.M. Thomas, reported as (1976) 2 SCC 310 (*Seven Judges*)
- Indra Sawhney v. Union of India, reported as 1992 Supp. (3) SCC 217 (*Nine Judges*)

II. THE ASPECT OF LEGISLATIVE COMPETENCE: THE AUTHORITY COMPETENT UNDER ARTICLE 341(1) TO MAKE CHANGES IN THE PRESIDENTIAL LIST

It is submitted that the Punjab Act, 2006, seeks to give first preference to 'Balmikis' and 'Mazhbi Sikhs' in 50% of the vacancies in the quota reserved for Scheduled Castes, in direct recruitment.

It is submitted that the other members of the Scheduled Castes for Punjab, thereby, virtually stand excluded, when it comes to direct recruitment from the said 50% of the vacancies.

Further so, this benefit has been granted to these two categories, i.e. 'Balmikis' and 'Mazhbi Sikhs', in Punjab since 1975. The executive notification was issued in 1975.

This benefit is today being extended to these two categories by virtue of the Punjab Act, 2006.

The position on the ground is that the Government of Punjab notifies these two categories separately in its advertisements. Scheduled castes are notified separately with the number of available vacancies. These two categories, namely, 'Balmikis' and 'Mazhbi Sikhs', are notified separately, indicating the number of vacancies available for each. So also, backlog in this category is indicated.

It is submitted that once the backlog is also indicated, the implication is that 50% of the vacancies in direct recruitment are virtually being kept apart for 'Balmikis' and 'Mazhbi Sikhs'.

In regard to legislative competence, reference is made to Article 341(2), i.e. 'Parliament by law'. Reference to the 7th Schedule to the Constitution would show that none of the entries in List 1, List 2 and List 3 is regarding Scheduled Castes. Therefore, the residuary entry, i.e., entry 97 of List 1 would be attracted. This reads thus:-

“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”

For instance, for the State of Punjab, Parliament did step in and enacted the following changes:-

The relevant portion of The Schedule to the Constitution (Scheduled Castes) Order, (Amendment) Act No. 25 of 2002 is:-

“2. The Schedule to the Constitution (Scheduled Castes) Order, 1950 is hereby amended in the manner and to the extent specified hereunder, namely:-

XXX

(a) in PART XIV.-Punjab,-

(i) for entry 9, substitute-

“9. Chamar, Jatia Chamar, Rehgar, Raigar, Ramdasi,
Ravidasi, Ramdasia, Ramdasia Sikh, Ravidasia, Ravidasia
Sikh.”

(ii) after entry 37, insert-

“38. Mochi.”

XXX ”

The relevant portion of The Schedule to the Constitution (Scheduled Castes) Order,
(Amendment) Act No. 62 of 2002 is:-

“2. (1) The Schedule to the Constitution (Scheduled Castes) Order, 1950 is
hereby amended in the manner and to the extent specified in Schedule 1:-

XXX

10. In PART XIV.-Punjab,-

(i) for entry 5, substitute-

“5. Batwa, Barwala”;

(ii) for entry 23, substitute-

“23. Mazhabi, Mazhabi Sikh”.

XXX”

The relevant portion of The Schedule to the Constitution (Scheduled Castes) Order,
(Amendment) Act No. 31 of 2007 is:-

“2. The Schedule to the Constitution (Scheduled Castes) Order, 1950
is hereby amended in the manner and to the extent specified hereunder,
namely:-

XXX

(f) in PART XIV.-Punjab, after entry 38, insert -

"39. Mahatam, Rai Sikh";

XXX”

III. THE PERMISSIBLE ROUTE FOR FRESH EXPERIENCE AND FRESH DATA REQUIRING A CHANGE IN THE PRESIDENTIAL LIST

It is submitted that for fresh experience and fresh data which comes after the Presidential List has been notified, there are provisions in the Constitution to take them, on board.

Article 338 constitute the National Commission for Scheduled Castes. The duty of the Commission has been mentioned in Article 338(5), which is to investigate and monitor all matters relating to safeguards provided for Scheduled Castes. Such reports of the National Commission for Scheduled Castes are required to be sent to the State Government. Furthermore, these reports are required to be laid before the legislature of the State. In this respect, Article 338(7) is extracted below:-

“338(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.”

This Commission has been given powers to investigate and discover.

Article 338(9) reads thus:-

“(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes.”

Similar provision is available for Scheduled Tribes in Article 338-A, which constitutes the National Commission for Scheduled Tribes. Article 338-B further establishes the National Commission for Backward Classes.

Therefore, the constitutional route for bringing in any change is indicated therein. It is submitted that, with this stipulated route, any other avenue is excluded.

This Hon'ble Court in *Jaishri Laxmanrao Patil v. State of Maharashtra*, reported as (2021) 8 SCC 1 (*5 Judges bench*) specifically held that the only route for change is through Article 342-A(2) i.e. Parliament by law.

IV. ON THE ASPECT WHETHER COURTS CAN BY JUDICIAL VERDICT INCLUDE OR EXCLUDE FROM THE LIST OF SCHEDULED CASTES

This Hon'ble Court clarified the position in law to hold that Courts could not include or exclude from the list of Scheduled Castes/ Scheduled Tribes, as notified by the President.

Courts could not entertain the exercise that a particular group is to be declared as included within a group already notified as a Scheduled Castes or that a particular group may be treated as a part of a group already notified as a Scheduled Castes.

This exercise is not done by the Courts or any other authority except 'Parliament by Law'.

In this respect the reference is made to:-

- (i) *Bhaiyalal vs. Harikishan Singh*, reported as (1965) 2 SCR 877

It was held that only the Scheduled Castes mentioned in the Presidential List under Article 341 would qualify for Scheduled Castes with regard

to that State. No plea can entertain that a particular group is part of the listed Scheduled Castes.

(ii) State of Maharashtra v. Milind & Ors., reported as (2001) 1 SCC 4

This Hon'ble Court held that Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes notified in Article 341(1). It further held that the State government or any other authority or courts or tribunals are not vested with any power to modify or vary the Presidential Orders issued under Article 341(1) and 342(1) of the Constitution.

(iii) Bir Singh v. Delhi Jal Board & Ors., reported as (2018) 10 SCC 312

It was held that no Court would alter the Presidential List of Scheduled Castes/Scheduled Tribes issued under Article 341, 342.

V. WHETHER CREAMY LAYER PRINCIPLE CAN BE APPLIED TO SCHEDULED CASTES/ SCHEDULED TRIBES

As has been submitted above, Scheduled Castes constitute a class by themselves. They have been held to be the lowliest.

First in point of time came an M. Nagaraj v. UOI, reported as (2006) 8 SCC 212 holding that creamy layer principle can be applied to Scheduled Castes/Scheduled Tribes. This conclusion was arrived at on the following reasoning:-

- Court in this matter was examining the constitutional validity of Clause 4A added to Article 16. The aspect of granting reservation in promotion to Scheduled Castes/Scheduled Tribes, with consequential seniority.

In para 104, the impugned amendments were upheld.

For the first time in this judgment in para 110, it was stated:-

“110. As stated above, the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments.”

Again in para 120, reference is made to the earlier judgment in Indra Sawhney to state that ‘means test’ should be adopted to exclude the creamy layer from the protected group earmarked for reservation.

And lastly in Para 122, it was stated:-

“122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.”

The rationale of M. Nagaraj was challenged specifically in Jarnail Singh v. Lachhmi Narain Gupta, reported as (2018) 10 SCC 396. In Jarnail Singh, it was again held that creamy layer principle can be applied to Scheduled Castes/Scheduled Tribes.

Para 25 of this judgment extracts para 124 of N.M. Thomas.

In para 26, the Hon'ble Court records conclusions that creamy layer would have to be removed from the Scheduled Castes/ Scheduled Tribes. It is held that by doing so, would not any manner tinker with the Presidential List.

Para 27, it was argued that the creamy layer can be excluded by the Parliament under Article 341. Thereafter, Court concluded that constitutional Courts by applying Article 14 & 16 can exclude the creamy layer.

It is submitted that both the above judgments run contrary to binding precedents in:-

- i. State of Kerala v. N.M. Thomas, reported as (1976) 2 SCC 310 (*Seven Judges*)
- ii. Indra Sawhney v. Union of India, reported as 1992 Supp. (3) SCC 217 [*Nine Judges*)]

This Hon'ble Court in Ashoka Kumar Thakur v. Union of India, reported as (2008) 6 SCC 1 (*5 Judges*) held that creamy layer principle is inapplicable to Scheduled Castes/Scheduled Tribes as it applied only to identify socially and educationally backward classes.

VI. REFERENCE BY FIVE HON'BLE JUDGES TO SEVEN JUDGES BENCH IN STATE OF PUNJAB V. DAVINDER SINGH & ORS., REPORTED AS (2020) 8 SCC 1

Reference was made to the larger bench on the following reasons:-

“44.....The million dollar question is how to trickle down the benefit to the bottom rung; reports indicate that benefit is being usurped by those castes (class) who have come up and adequately represented. It is

clear that caste, occupation, and poverty are interwoven. The State cannot be deprived of the power to take care of the qualitative and quantitative difference between different classes to take ameliorative measures.”

“46. In our opinion, it would be permissible on rationale basis to make such sub-classification to provide benefit to all to bring equality, and it would not amount to exclusion from the list as no class (caste) is deprived of reservation in totality. In case benefit which is meant for the emancipation of all the castes, included in the List of Scheduled Castes, is permitted to be usurped by few castes those who are adequately represented, have advanced and belonged to the creamy layer, then it would tantamount to creating inequality whereas in case of hunger every person is required to be fed and provided bread. The entire basket of fruits cannot be given to mighty at the cost of others under the guise of forming a homogeneous class.”

“49. Providing a percentage of the reservation within permissible limit is within the powers of the State Legislatures. It cannot be deprived of its concomitant power to make reasonable classification within the particular classes of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes without depriving others in the list. To achieve the real purpose of reservation, within constitutional dynamics, needy can always be given benefit; otherwise, it would mean that inequality is being perpetuated within the class if preferential classification is not made ensuring benefit to all.”

“52. The State has the competence to grant reservation benefit to the Scheduled Castes and Scheduled Tribes in terms of Articles 15(4) and 16(4) and also Articles 341(1) and 342(1). It prescribes the extent/percentage of reservation to different classes. The State Government can decide the manner and quantum of reservation. As such, the State can also make sub-classification when providing reservation to all Scheduled Castes in the List based on the rationale that would conform with the very spirit of Articles 14, 15 and 16 of the Constitution providing reservation. The State Government cannot tamper with the List; it can neither include nor exclude any caste in the List or make enquiry whether any synonym exists as held in Milind.”

“55. Only inclusion or exclusion in the Presidential notification is by Parliament. The State Government has the right to provide reservation in the fields of employment and education. There is no constitutional bar to take further affirmative action as taken by the State Government in the cases to achieve the goal. By allotting a specific percentage out of reserved seats and to provide preferential treatment to a particular class, cannot be said to be violative of the List under Articles 341, 342 and 342-A as no enlisted caste is denied the benefit of reservation.”

VII. SUBMISSION E.V. CHINNAIAH V. STATE OF A.P. & ORS., REPORTED AS (2005) 1 SCC 394, LAYS DOWN THE CORFECT LAW

This Hon'ble Court in E.V. Chinnaiah arrived at the following conclusions:-

- i. Para 13 & 20: The conclusion of this Hon'ble Court that all the members of the Scheduled Castes List constitute one group for the purpose of the Constitution and this group could not be subdivided for any purpose.
- ii. Para 27: On the aspect of legislative competence the Court held that the subject of Scheduled Castes is not referable to Entry 41 of List-II or Entry 25 of List-III. These two entries are in regard to education and services in the State.
- iii. Para 31: This Hon'ble Court found that the primary object of the impugned enactment in that case was to create groups of sub-castes in the list of Scheduled Castes.

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