

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. 28306 OF 2017

IN THE MATTER OF

THE STATE OF MAHARASHTRA & ANR. ...PETITIONERS

VERSUS

SHRI VIJAY GHOGRE & ORS. ...RESPONDENTS

**NOTE OF MR. SHEKHAR NAPHADE, SENIOR ADVOCATE ON
BEHALF OF RESPONDENT NO. 27 IN THE ABOVE MATTER**

1. The ratio of M. Nagaraj¹ case lays down the following proposition –

Article 16(4) and 16(4A) is an enabling provision and it permits the government to reserve some posts for Schedule Caste/Schedule Tribe/Other Backward Class. Such reservation however is conditioned by the following:

- a) The reservation is for the purpose of adequate representation in service;
- b) There must be adequate data;
- c) There must be appropriate enquiry into the question of backwardness.

2. The principle argument of the SLP Petitioners is that M. Nagaraj Judgment is required to be reconsidered on the following grounds:

- I. That there is no question of enquiry into the question whether SCs/STs as notified by presidential order and as amended by 1976 Act are backward?
- II. That if they are to be excluded, Parliament alone can do it?
- III. That the Judgment in Indira Sawhney² case does not lay down that for the purpose of making reservation for Schedule

¹ (2006) 8 SCC 212

² (1992) Suppl. 3 SCC 217

Caste/Schedule Tribe, any enquiry as regards their social backwardness is to be carried out?

- IV. That the M. Nagaraj judgment is contrary to E.V. Chinnaiiah v. State of A.P.³

Answer to Objection No. 1:

Article 16 (4) and 16 (4A) enable the state to make a provision for reservation. It is an enabling provision. The presidential order under Article 341, 342 of the Constitution or the Schedule Caste and Schedule Tribes Orders (Amendment) Act, 1976 enacted by the parliament do not contain any positive direction that such reservation must be made. The aforesaid provisions also do not involve any direction as regards the quantum or percentage of reservation. The Schedule Castes are not one homogenous social class and similarly Schedule Tribes are also not one homogenous class. The castes which are notified as Schedule Castes are different, their social and economic status is also different. Some of them may be very backward and some of them may be relatively advanced. In the state of Maharashtra, there is 13% reservation for Schedule Caste. Within that 13% reservation, reservation must be made for different Schedule Castes. The Schedule Castes are many and therefore it is necessary for the Government to enquire into the question as to which Schedule Caste is relatively socially backward and which one is relatively advanced and depending upon such enquiry, it is open to the government to separately prescribe a different percentage for different Schedule Castes within the overall limit of 13%. Such sub-classification is permissible. See Constitution bench Judgment in K.C. Vasanth Kumar & Anr. v. State of Karnataka⁴,

³ (2005) 1 SCC 394

⁴ (1985) Suppl. SCC 714

Para 55 at Page 715, this Hon'ble Court accepted that there can be sub-classification on the basis of relative backwardness. Even the judgment of Indra Sawhney v. Union of India, in Paragraphs 519-525, 552 and 801-803, Hon'ble Supreme Court accepted that such sub-classification is valid. The same logic applies in case of Schedule Tribes as well.

Hence, the first objection to judgment in M. Nagaraj case as regards the enquiry into backwardness of Schedule Caste/ Schedule Tribe is without any merit for reasons specified above.

Answer to Objection No. 2:

M. Nagaraj does not mandate that the Schedule Caste/Schedule Tribe as notified by the Presidential Order and as amended by the 1976 Act should be excluded from the list so notified. It only says that there should be an enquiry as regards their backwardness and the adequacy of their representation. The Constitution itself contemplates that some new castes and tribes can be added as Schedule Castes/Schedule Tribes and some notified Schedule Castes/Schedule Tribes can be excluded. Reservation of 13% for Schedule Caste and 7% for Schedule Tribe is not a permanent feature, it can be varied and for bringing about such variation, enquiry is necessary on both the aforesaid counts.

Answer to Objection No. 3:

Indira Sawhney case relates only to Other Backward Classes and some incidental observations are made in respect of Schedule Caste/Schedule Tribe. Indira Sawhney case does not prohibit an enquiry into the social backwardness of Schedule Caste/Schedule Tribe and also does not prohibit a review of such reservation from time to time in the light of the progress of such Schedule Caste/Schedule Tribe and in

the light of the adequacy of their representation. The M. Nagaraj Case therefore can't be said to be contrary to Indira Sawhney Case.

Answer to Objection No. 4:

The next objection of the SLP Petitioners is that the judgment of M. Nagaraj is contrary to the Judgment of E. V. Chinnaiah. In the first place E. V. Chinnaiah itself is contrary to K.C. Vasanth Kumar & Anr. v. State of Karnataka⁵. The entire judgment of E. V. Chinnaiah makes no reference to the judgment of K. C. Vasanth Kumar. In other words, it lays down a proposition without considering Vasanth Kumar's case. It is therefore respectfully submitted that the ratio of E. V. Chinnaiah loses its efficacy in view of non-consideration of ratio of Constitution Bench Judgment of Vasanth Kumar. In any case, sub-classification is permissible as per Indira Sawhney Case, Para 801-803 of the judgment of Hon'ble Justice Jeevan Reddy (On behalf of himself and three other Hon'ble Justices), Para 519-525 & 552 of Hon'ble Justice P.B. Sawant. It is therefore crystal clear that the majority judgment in Indira Sawhney accepts sub-classification. The SLP Petitioners therefore cannot contend that relative backwardness of Schedule Caste/Schedule Tribe cannot be looked into.

3. The aforesaid propositions are also required to be considered in the light of Articles 335, 338, 340, 341 and 342 of the Constitution of India. The aforementioned Articles clearly contemplate an enquiry. Obviously, such an enquiry takes in its compass collection of data and evaluation of relative backwardness and adequacy of representation in service. The SLP Petitioners proceed on an erroneous assumption that the existing reservations for Schedule Caste, Schedule Tribe and Other

⁵ (1985) Suppl. SCC 714

Backward Classes with existing percentages would continue forever. The very fact that the aforesaid Articles contemplates an enquiry indicates that the question of reservation must be reviewed from time to time and for such a review data showing relative backwardness and adequacy of representation is required to be collected. Hence, enquiry is necessitated.

4. It is further submitted that the judgements of Constitutional Bench cannot be revisited merely on the ground that some other view is possible. The parameters for reconsideration are well established by a catena of judgments of this Hon'ble Court (See Keshav Mills Case (1965) 2 SCC 908 pages 922 B-F and 923 B-D). The attention of this Hon'ble Court is also drawn to the case of Sajjan Singh v. State of Rajasthan (1965) 1 SCC 933 at page 948 wherein this Hon'ble Court have held that –

“It is universally recognised that in regard to a large number of constitutional problems which are brought before this court for its decision, complex and difficult questions arise and on many of such questions, two views are possible. Therefore, if one view has been taken by this court after mature deliberation, the fact that another bench is inclined to take a different view may not justify the Court in reconsidering the earlier decision or in departing from it.”

5. In view of the aforesaid, no case is made out by the SLP Petitioners for reconsideration of M. Nagaraj case.