IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4562-4564 OF 2017

IN THE MATTER OF:

STATE OF TRIPURA & ORS. … APPELLANTS

Versus

SHRI. JAYANTA CHAKRABORTY & ORS. … RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT – STATE OF TRIPURA

1. That in exercise of power under Article 145 (3) of the Constitution, the present appeals have been referred to the Constitution Bench to examine the issue whether the decision in *M. Nagraj v. Union of India* [(2006) 8 SCC 212] (hereinafter referred to as "*Nagraj*") that each State is required to collect data to determine "backwardness" of Scheduled Castes and Scheduled Tribes as a prerequisite for introducing reservation in promotion, requires reconsideration or not.

2. That it is submitted that the amendments made to Article 16(4A) of the Constitution being the 77th Amendment and the 85th Amendment which had the effect of providing reservation in promotion, with consequential seniority, for members of the Scheduled Castes and Scheduled Tribes (hereinafter referred to as SCs/STs) was challenged before this Hon'ble Court, which challenge was referred to a Constitution Bench and ultimately answered by the judgment in *Nagraj*. The challenge to the vires of the amendments was rejected and the same were upheld. However, while doing so, the judgment records the following five conclusions which are also in the nature of prerequisites to be satisfied before the reservation in promotion in favour of SC/ST can actually be implemented by any state government:

i) That the amendment in Article 16(4A) is an enabling provision which enables the State to provide for reservation.

ii) Before any State provides for reservation, quantifiable data is required to be collected by the said State.

iii) The data must show 'backwardness' of the class (Para 123) i.e., backwardness of SC/ST's.

iv) The data must show inadequacy of representation of that class in public employment.

v) The data must also show that the overall efficiency of the system is not affected or, in other words, the reservation must be provided keeping in mind the overall administrative efficiency.

3. That the appellants submit that while all other parameters provided by *Nagraj's* judgment are legally justified, however, the requirement of providing data showing backwardness of SCs/STs, in the respectful submission of the appellants, runs contrary to the judgment of this Court in *Indra Sawhney vs. Union of India & Ors*, [(1992) Supp 3 SCC 217] (hereinafter referred as Indra Sawhney's case) and other Constitution Bench decisions referred herein below. The same is also against the mandate of Articles 341 and 342 of the Constitution of India, as also Art. 16(4A) itself. It is in these circumstances that the petitioners submit that the matter deserves to be examined by a larger Bench to reconcile the legal position emanating from the judgments of this Hon'ble Court in Indra Sawhney's case, *E.V. Chinnaiah vs. State of A.P & Ors.* [(2005) 1 SCC 394] *(*a Constitution Bench decision, hereinafter referred as *Chinnaiah's* case) and *Ashok Kumar Thakur vs. Union of India* [(2008) 6 SCC 1] (also a Constitution Bench decision,

hereinafter referred as *Ashok Kumar Thakur's* case). Additionally, this Hon'ble Court would also have to interpret and authoritatively pronounce upon the true scope of Articles 341 and 342 of the Constitution in the light of the enabling provision under Art. 16(4A) of the Constitution. The aforesaid is dilated herein under.

4. That it is submitted that under Article 341 the President may, in consultation with the Governor of a State, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of this Constitution be deemed to be a SC in relation to that State or Union Territory. Article 341 further mandates that it is the Parliament which may by law include or exclude from the list of SCs specified in a notification issued under Art. 341 and that inclusion or exclusion is relatable to even a part or a group within any such caste, race or tribe. Identical provision exists with regard to STs under Art. 342. Thus, it is the submission of the appellants that once a caste or tribe is included within lists envisaged by Articles 341 and 342, then it is *per se* a SC/ST and entitled to the concessions reserved by the Constitution for such castes/tribes. Mere inclusion in the list makes it implicit that the caste is backward and there can thereafter be no further determination of the backwardness of the said castes or for that matter, for the lack of backwardness of the said caste. Therefore, on first principles, it is respectfully submitted, that the requirement prescribed by *Nagraj* for determination of backwardness of SCs/STs is in the teeth of Articles 341/342 of the Constitution. In fact, the said provisions have not been taken note of by the Hon'ble Supreme Court in *Nagraj's* judgment.

5. (i) Secondly, apart from the above, *Nagraj* considers the Constitutionality of the amendments from paras 101 of the Judgment. In para 102 of the Judgment states that in every case where the State decides to provide reservation there must exist two circumstances, first being backwardness and second being inadequacy of representation apart from maintaining overall efficiency in the service.

It provides that the State must identify and measure backwardness, inadequacy and overall efficiency. In doing so, while prescribing the aforesaid conditions, it refers to Articles 14, 15 and 16 of the Constitution and goes on to state that Clause 16(4A) is derived from Article 16(4). Thereafter, it talks of exclusion of creamy layer from the protected group earmarked for reservation in para 120. This is done by relying upon the judgment in *Indra Sawhney's* case. The concept of exclusion of creamy layer as a prerequisite for providing reservation in promotion is then again reiterated in paras 121 and 123 of the judgment. It is important to note that this is done by specifically referring to *Indra Sawhney's* case both in para 120 and also in para 121. The appellants submit that in fact a reading of *Indira Sawhney's* judgment would show that the same categorically lays down that the concept of 'creamy layer' and 'means test' to exclude the affluent part of the OBCs, it is in fact, not applicable to SCs/STs at all. The entire judgment of *Indra Sawhney* is in the backdrop of providing for reservations for OBCs, which is quite distinct and separate from SCs/STs. In fact, in the main judgment of Jeevan Reddy, J. the discussion on identification of backward class of citizens begins at para 780. Para 781 at the outset states as hereunder:

> *"781. At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes for it cannot be denied that Scheduled Castes include quite a few castes."*

The discussion then continues and while discussing the concept of backward classes in relation to OBCs at para 788, the Court observes as hereunder:

> *"788.....The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness....."*

The discussion on means test and creamy layer commences from para 790. The second line of para itself makes it clear that exclusion is from the backward classes and at para 792 it has again expressly stated as hereunder:

> *"792.....This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes."*

The conclusions are summarized in paras 796-797 and again while doing so, the following is stated:-

> *"796-797....The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens".*

Thus, it is clear that the judgment in Indra Sawhney clearly lays down that the concept of creamy layer or the means test for exclusion of a part of the caste is not applicable to SCs/STs. Thus, it is submitted that since Nagraj in fact relies upon Indra Sawhney to introduce the concept of creamy layer for SC/ST in matters of reservations in promotion.

5. (ii) Still further in para 102 while talking of Article 16(4) and 16(4A) it overlooks the distinction between these two articles to the effect that while Art. 16(4) talks of reservation in appointments in favour of "any backward class of citizens", on the other hand, Article 16(4A) talks of reservation in favour of "the Scheduled Castes and Scheduled Tribes."

Therefore, while under Art. 16(4) backward class of citizens may need to be identified, under Art. 16(4A) SCs/STs are already identified and included in the list framed under Articles 341 and 342. Therefore, there can be no further determination of SC/ST under Article 16(4A).

6.(i) That in fact the issue whether the concept of creamy layer would apply to SCs/STs was directly raised before this Hon'ble Court in *Ashok Kumar Thakur v. Union of India & Ors.* [(2008) 6 SCC 1] and answered in the judgment rendered by Chief Justice Balakrishnan from paras 177 to 186. In para 184 it is categorically stated that so far this Court has not applied the creamy layer principle as a general principle of equality for the purpose of reservation. It is further held that the concept of creamy lawyer has so far been applied only to identify backward classes and therefore the judgment concludes that the principle cannot be applied to SCs/STs. Again this conclusion has been emphatically recorded in para 186.

6.(ii) That the argument that the judgment in *Ashok Kumar Thakur* has to be read confined to Art. 15(4), in the respectful submission of the appellants, is not well made as the entire discussion in the judgment of Chief Justice Balakrishnan is after noticing the judgment in *Nagraj's* case and stating that reference was made to paras 80, 110 and 120 to 123 of *Nagraj* case. Rather in para 182 the judgment clearly states that in *Nagraj* it has not been discussed or decided that creamy layer principle will be applicable to SCs/STs. The relevant observations in Para 182 are as here under:

> *"In Nagraj case it has not been discussed or decided that the creamy layer principle will be applicable to SCs/STs. Therefore, it cannot be said that the observations made in Nagraj case are contrary to the decision in Indra Sawhney case."*

Thus, this discussion cannot be understood or read to be confined to Art. 15(4) but clearly will be applicable in the case of Article 16 as well. Still further a reading of para 184 of the judgment also makes it clear that the Court, after considering the judgment in *Nagraj* holds that so far the principle of creamy layer has not been applied as a general principle of equality for the purpose of reservation.

6.(iii) That apart from Chief Justice Balakrishnan, this issue finds mention in the judgment of Justice Bhandari as well. However, Justice Bhandari in para 395 of the judgment clearly records that firstly in *Indra Sawhney* the entire discussion was confined to OBCs and similarly in *Ashok Kumar Thakur's* case also (referred to as "in the instant case") the entire discussion was confined only to OBCs. Therefore, Justice Bhandari states that he expresses no opinion with regard to the applicability of exclusion of creamy layer to SCs and STs. This has been reiterated by the learned Judge in para 633 of his Judgment. Reference was made by the counsel appearing for the respondents to paras 389/390 of the judgment of Justice Bhandari. However, if those paras are read in conjunction with paras 383, 386 and 388 of the same judgment, it becomes absolutely clear that the entire discussion in all these paragraphs is with reference to OBCs only and not in reference to SC/ST's. Similarly, paras 407, 665 and 666 also are with reference to OBCs. Thereafter, reference was made to pages 560 to 575 culminating with a pointed reference to para 296. However, it is submitted that this discussion is also in the background of OBCs and rather the judgment referred to in para 296, i.e. *Nair Service Society v. State of Kerala* is in relation to creamy layer in backward classes in Kerala and thus, has no application in the case of SC/ST who have a special status by virtue of Articles 341 and 342 of the Constitution.

6. (iv) That the judgments of Chief Justice Balakrishnan and Justice Bhandari as also the other judgments in *Ashok Kumar Thakur* are all concurring judgments and hence are the majority view. Thus, the aforesaid findings are binding ratio of the said judgment. It is therefore respectfully submitted that as the law stands today in *Ashok Kumar Thakur's* case it is firmly stated that the concept of creamy layer cannot be applicable to SCs/STs. Therefore, the said judgment, being of equal strength as that of *Nagraj*, would also have to be reconciled and therefore reference to a larger Bench, in the respectful submission of the appellants, is absolutely necessary.

7.(i) That the effect of the law laid down by this Hon'ble Court in the judgment in *E.V. Chinnaiah* is also very relevant. The action of the State of Andhra Pradesh in appointing a Commission and on that basis dividing reservation amongst SCs into separate quotas based on inter-se backwardness was challenged before the High Court of Andhra Pradesh. A 5-Judges Bench of the said Court rejected the challenge by a majority of 4:1. The said Judgment ultimately was brought before this Hon'ble Court where the issue was referred to a Bench of Five Hon'ble judges. The judgment of the High Court was reversed and the action of the Government quashed. The judgment is titled `*E.V. Chinnaiah v. State of A.P. & Ors*.' and reported as [(2005) 1 SCC 394]. The questions arising are framed in para 12 of the judgment. The first issue framed is whether the action violated Art. 341(2) of the Constitution of India. The Constitution Bench held that it did violate the said article. The relevant part of para 13 is as hereunder:

> *"13. This indicates that there can be only one List of Scheduled Caste in regard to a State and that List should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by the Parliament under Article 341(2) of the Constitution of India. In the entire Constitution wherever*

reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any sub-classification or division in the said list except, may be, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of People, which is not applicable to the facts of this case. It is also clear from the above Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to sub-divide, sub-classify or sub-group these castes which are found in the Presidential List of Scheduled Castes. Therefore, it is clear that the Constitution intended all the castes including the sub-castes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be sub-divided for any purpose. A reference to the Constituent Assembly in this regard may be useful at this stage."

Again the concluding lines of para 19 read as hereunder:

"19. Therefore any executive action or legislative enactment which interferes, disturbs, re-arranges, re-groups or re-classifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution."

Thereafter the second issue considered is whether the State Government can divide or classify SCs based on any consideration. That is answered in para 26, which reads as under:

"26. Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of N.M. Thomas (supra), it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List."

Thereafter is the issue of legislative competence of the State Government That is answered in para 31 as hereunder:

"31. It is a well settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if they so desire, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to sub-classify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the List of Scheduled Castes. From the discussion herein above, it is clear that the primary object of the impugned enactment is to create groups of sub-castes in the List of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this sub- classification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in

pith and substance the enactment is not a law governing the field of education or the field of State Public Services."

Thereafter the Court also considers whether such an action would violate Article 14 and that is answered in para 44 as hereunder:-

"44.For the reasons stated above, we are of the considered opinion that the impugned legislation apart from being beyond the legislative competence of the State is also violative of Article 14 of the Constitution and hence is liable to declared as ultra vires the Constitution."

Thus, it is clear from a reading of the judgment in *E.V. Chinnaiah's* case that there can be no interference, disturbance, re-arrangement, re-grouping or re-classification of the various castes in the list under Article 341. It is submitted that if a part of the caste is permitted to be excluded from the benefit of reservation in promotion conferred on all SCs/STs under Article 16(4A), the law laid down in *E.V. Chinnaiah* would also be violated. Thus, this judgment also will have to be reconciled with *Nagraj* and since both are Constitution Bench judgments.

7.(ii) That it is relevant to point out here, as had been brought to the notice of this Hon'ble Court by learned counsel appearing for the respondents that the judgment in *E.V. Chinniah* has been referred to a larger Bench by an order of this Court dated 20th August, 2014. On this ground also the present matter deserves to be heard by a Larger Bench.

8. That even apart from what has been stated hereinabove, it is submitted that the present matter involves interpretation of Articles 16(4), 16(4A), 341, 342 and 335. The issue in focus is as to whether or not any exclusion of a so called creamy layer is permissible in the case of SCs/STs or, in other words, whether a State Govt. can go into the question of backwardness of SC/ST.

9. That a reference was made to six earlier decisions of this Court being:-

   a. *Suraj Bhan Meena & Anr. vs. State of Rajasthan & Ors. (2011) 1 SCC 467.*

   b. *U.P.Power Corporation vs. Rajesh Kumar & Ors. (2012) 7 SCC 1.*

   c. *S. Panner Selvam & Ors. vs. State of Tamil Nadu & Ors. (2015) 10 SCC 292.*

   d. *Chairman & Managing Director, Central Bank of India & Ors. vs. Central Bank of India SC/ST Employees Welfare Association & Ors. (2015) 12 SCC 308.*

   e. *Suresh Chand Gautam vs. Sate of U.P & Ors. (2016) 11 SCC 113.*

   f. *B.K. Pavitra & Ors. vs. Union of India & Ors. (2017) 4 SCC 620*

It is submitted that all those were cases where admittedly either there was absolutely no exercise conducted in terms of *Nagraj* or in any case, no data had been collected post - *Nagraj*. However, in this batch of cases, for the first time, arises a situation where a State is claiming that it has collected data and in that background is raising the

submissions as are being raised herein above. The issue of reference of the matter to a larger Bench has been noticed in Para 2 of Suresh Chand Gautam's Case. However, a reading of the said para would show that the issues as have been raised in the present proceedings do not appear to have been raised and highlighted in that case. Thus, the facts and circumstances of those six cases were substantially different and therefore they would not have a bearing on the issues being raised here.

10. That so far as the appellant - State of Tripura is concerned, it is submitted that the present issues arise from a case of reservation in promotion for SC/ST in Tripura, some unreserved (UR) category employees had challenged the Reservation Act, 1991 and Rules, 1992, before the High Court of Tripura, but the Full Bench of the High Court did not quash the Reservation Act, 1991, though it had observed that after decision in *Nagraj*, the State did not collect the quantifiable data. Section 4(2) of the 1991 Act provides that SC/ST employees getting promotion on their own merit cannot be adjusted against SC/ST earmarked quota and they are to be adjusted against the unreserved vacancy. This provision in the Act, 1991 has not been disturbed or quashed by the judgement of the Full Bench of the High Court of Tripura. But the Full Bench directed to read down the proviso to Rule 9(2) of the SC/ST Rules, 1992, holding that once any SC/ST employee enjoyed the reservation quota in any stage, either in initial appointment or in promotion, he/she cannot claim UR category post in promotion, even if he is comparatively senior in feeder post and graded "Outstanding" or "Very Good" in ACR for his meritorious performance. This direction would to be contradictory to the principle decided by the Apex Court in *R.K. Sabharwal's* case and also principle of "consequential seniority" provided in Article 16 (4A) of the Constitution which has been declared valid in *Nagraj's* case.

11. Being aggrieved by the said judgment, the Appellant - State had filed Special Leave Petition before this Court and was converted to the

present Civil Appeal No.4562-4564/2017. During initial hearing, vide the Order dated 27.7.2015, this Court had directed both the Parties to maintain 'status quo', for which during the last three years, no promotion could be provided by the Appellant - State and as a result, there have been total dislocation in smooth running of the administration due to acute shortage of officers in the State and also many employees retired, in the meantime, without getting any promotion facing huge financial loss in fixation of pensionary benefits.

12. That being allowed by this Hon'ble Court, the Appellant - State had set up three men SC/ST Commission to collect quantifiable data and accordingly the Commission submitted Report in seven volumes. From the Report, it appears that in case of direct recruitment, the SC employees have achieved only 12.52% against the prescribed 17% quota and in case of promotion only 13.43% against the prescribed 17% quota. At the same time, ST employees have achieved only 23.99% (in direct recruitment) and 23.42% (in the promotion) against the prescribed 31% quota.

Now, if the reservation is stalled or stopped on this or that ground, there will be further sudden decrease of percentage from SC or ST category people in services under the State including autonomous bodies etc.

13. That if the principle of "unreserved to unreserved" is finally maintained, it would amount to negation of "reservation in promotion" and "consequential seniority" as provided in Article 16(4A) of the Constitution.

The situation can be fully explained by the following ***illustration*** which would make the situation clear as to how it would negate the settled principles:-

A) For instance, in the year 2010, the following 6(Six) UDC have been promoted, maintaining reservation roster and accordingly seniority fixed as follows.

i) A - UR Category (Promoted on merit).
ii) B - UR Category (Promoted on merit).
iii) C - UR Category (Promoted on merit).
iv) D - ST Category (Promoted on quota).
v) E - SC Category (Promoted on quota).
vi) F - ST Category (Promoted on quota).

In the year 2015, **'A' 'B' 'C'** have been promoted in the post of "Head Clerk" against UR vacancies and **'D'** has been promoted against reserved quota. Because of non-availability of more reserved vacancies in "Head Clerk post" in the year 2015, **'E'** and **'F'** could not be promoted and they are still in UDC posts. **'E'** and **'F'** are altogether excellent in performance and graded "outstanding" in ACR for the last 4(four) years.

B) In the year 2012, the following 6(six) UDC have further been promoted maintaining reservation roster and accordingly seniority is fixed as follows:-

i) G - UR Category (Promoted on merit).
ii) H - UR Category (Promoted on merit).
iii) I - UR Category (Promoted on merit).
iv) J - SC Category (Promoted on quota).
v) K - ST Category (Promoted on quota).
vi) L - ST Category (Promoted on quota).

'G', 'H', and **'I'** are graded **"very good"** in their ACR during the last 4 years.

C) In the year 2017, 3 (three) UR vacancies have arisen in the department for the "Head Clerk Posts". No reserved vacancy is available.

D) Now, if principle decided by the Full Bench of the High Court of Tripura i.e. (if one SC/ST employee enjoyed reservation quota in any stage, he cannot claim UR vacancy anymore in future and he is to be promoted and adjusted against reserved quota only) is finally nominated **'E'** and **'F'**, though being 2010 batch in UDC are senior to **'G' 'H'** and **'I'** being 2012 batch in UDC and also, **'E'** and **'F'** being better candidate (Outstanding holders in ACR) than those of **'G', 'H'** and **'I'** (Very good holders in ACR), can not be promoted to the posts of "Head clerk", since **'E'** and **'F'** can not be promoted and adjusted against the UR vacancies and in fact, Junior **'G', 'H', 'I'** (UR Category) have to be promoted, though they are junior and less meritorious to **'E'** and **'F'**.

This Principle amounts to negation of 'consequential seniority' as provided in Article 16(4A). Also equal right of **'E'** and **'F'** to be considered with **'G', 'H'** & **'I'** based on merit as provided in Article 16(1), has been denied. In fact, this principle has resulted in providing for reservation for the non-SC / non-ST people against the UR vacancies, which is not constitutionally permissible and also against the principle decided by the Apex Court in *R. K. Sabharwal's* Case.

Submitted by

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