SC/ST Judgement

R F Nariman, J.

1) The present group of cases arises out of two reference orders – the first by a two-Judge Bench referred to in a second reference order, dated 15.11.2017, which is by a Three-Judge Bench, which has referred the correctness of the decision in M. Nagaraj v. Union of India, (2006) 8 SCC 212, ("Nagaraj"), to a constitution Bench

2) The controversy in these matters revolves around the interpretation of the following Articles of the Constitution of India:

16. Equality of opportunity in matters of public employment.–

(4-A) *Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.*

(4-B) *Nothing in this article shall prevent the State from considering any unfilled vacancies of a year, which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.*

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335. Claims of Scheduled Castes and Scheduled Tribes to services and posts – *The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:*

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

341. Scheduled Castes – *(1) The President may, with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution, be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.*

(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.

342. Scheduled Tribes – *(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall, for the purposes of this Constitution, be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.*

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

7) We may begin with the Nine-Judge Bench in Indra Sawhney (1) (supra). In this case, the lead judgment is of B.P. Jeevan Reddy, J., speaking on behalf of himself and three other learned Judges, with Pandian and Sawant, JJ., broadly concurring in the result by their separate judgments. Thommen, Kuldip Singh, and Sahai, JJ., dissented. The bone of contention in this landmark judgment was the Mandal Commission Report of 1980, which was laid before Parliament on two occasions – once in 1982, and again in 1983. However, no action was taken on the basis of this Report until 13.08.1990, when an Office Memorandum stated that, after considering the said Report, 27% of the vacancies in civil posts and services under the Government of India shall be reserved for the Socially and Economically Backward Classes. This was followed by an Office Memorandum of 25.09.1991, by which, within the 27% of vacancies, preference was to be given to candidates belonging to the poorer sections of the Socially and Economically Backward Classes; and 10% vacancies were to be reserved for Other Economically Backward Sections, who were not covered by any of the existing schemes of reservation. The majority judgments upheld the reservation of 27% in favour of backward classes, and the further sub-division of more backward within the backward classes who were to be given preference, but struck down the reservation of 10% in favour of Other Economically Backward categories. In arriving at this decision, the judgment of Jeevan Reddy, J., referred to and contrasted Article 16(4) with Article 15(4), and stated that when Article 16(4) refers to a backward class of citizens, it refers primarily to

social backwardness (See paragraph 774). Scheduled Castes and Scheduled Tribes, not being the subject matter before the Court, were kept aside as follows:

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.*

In the summary of the discussion contained in paragraphs 796-797, it is stated, -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. Jeevan Reddy, J. then went on to state that in certain posts, of specialities and super-specialities, provisions for reservation would not be advisable (See paragraph 838). Ultimately, the judgment decided that reservation would apply at the stage of initial entry only and would not apply at the stage of promotion.

8) It is important to note that eight of the nine learned Judges in Indra Sawhney (1) (supra) applied the creamy layer principle as a facet of the larger equality principle. In fact, in Indra Sawhney v. Union of India and Ors., (2000) 1 SCC 168 ("Indra Sawhney (2)"), this Court neatly summarised the judgments in Indra Sawhney (1) (supra), on the aspect of creamy layer as follows:

14. *The judgement of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an -advanced social level or status-, he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant,*

Thommen, Kuldip Singh, and Sahai, J J. in their separate judgments.

17. *Jeevan Reddy, J. dealt with the -creamy layer under Question 3(d) (paras 790, 792, 793 of* SCC*) and under Question 10 (paras 843, 844). This is what the learned Judge declared: there are sections among the backward classes who are highly advanced, socially and educationally and they constitute the forward section of that community. These advanced sections do not belong to the true backward class. They are (para 790) -as forward as any other forward class member.*

A line has to be drawn, said the learned Judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand, is not taken away by the other. The basis of exclusion of the creamy layer must not be merely economic, unless economic advancement is so high that it necessarily means social advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a case, his income is a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural landholding. While fixing income as a measure, the limit is not to be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. There are again some offices in various walks of life — the occupants of which can be treated as socially advanced, without further inquiry, such as IAS *and* IPS *officers or others in All India services. In the case of these persons, their social status in society rises quite high and the person is no longer socially disadvantaged. Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or sections above- mentioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The Central Government is, therefore, directed (para 793) to identify and notify the -creamy layer*

within four months and after such notification, the- creamy layer within the backward class shall cease to be covered by the reservations under Article 16(4). Jeevan Reddy, J. finally directed (see Question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on the basis of economic interest alone. Income or the extent of property-holding of a person is to be taken as a measure of social advancement — and on that basis — the -creamy layer, within a given caste, community or occupational group is to be excluded to arrive at the true backward class. There is to be constituted a body which can go into these questions as follows: (S C C p. 757, para 847)

- We direct that such a body be constituted both at Central level and at the level of the States within four months from today. … There should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be. (emphasis supplied)

- The creamy layer be excluded. Creamy layer has to be excluded and -economic criterion is to be adopted as an indicium or measure of social advancement [para 860, sub-para (5)]. The socially advanced persons must be excluded [para 861(b)]. That is how Jeevan Reddy, J. summarised the position.

In paragraph 27 of the said judgment, the Three-Judge Bench of this Court clearly held that the creamy layer principle sounds in Articles 14 and 16(1) as follows:

-(i) Equals and unequals, twin aspects

27. *As the -creamy layer in the backward class is to be treated -on a par|| with the forward classes and is not entitled to benefits of reservation, it is obvious that if the -creamy layer is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally. Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals, that is*

to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (S C C p. 553, para 520)

-[T]o continue to confer upon such advanced sections … special benefits, would amount to treating equals unequally…. Secondly, to rank them with the rest of the backward classes would … amount to treating the unequals equally.

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle.

10) The judgment in Chinnaiah (supra) has been referred by a Three- Judge Bench to a larger Bench by an order dated 20.08.2014. This is because, according to the Three-Judge Bench, Chinnaiah (supra) is contrary to Article 338 of the Constitution of India and Indra Sawhney (1) (supra). Since the correctness of Chinnaiah (supra) does not arise before us, we need say no more about this reference, which will be decided on its own merits.

11) Close on the heels of this judgment is the judgment in Nagaraj (supra). In this case, the addition of Articles 16(4-A) and 16(4-B) were under challenge, on the ground that they violated the basic structure of the Constitution. After referring to the arguments of counsel for both sides, the Court held that equality is the essence of democracy and accordingly, part of the basic structure of the Constitution (See paragraph 33). The working test in the matter of application of this doctrine was then applied, referring to Chandrachud, J.'s judgment in Indira Nehru Gandhi v. Raj Narain & Anr., 1975 Supp SCC 1 (See paragraphs 37 and 38). After dealing with reservation and its extent, the Court then went into the nitty-gritty of the constitutional amendments.

The Court then concluded as follows:

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.

123. *However, in this case, as stated above, the main issue concerns the -extent of reservation||. In this regard, the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for* SCs/ STs *in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.*

124. *Subject to the above, we uphold the constitutional validity of the Constitution (Seventy- seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.*

13) At this stage, it is necessary to deal with the argument that Nagaraj (supra) needs to be revisited as it conflicts with Chinnaiah (supra). It will be noticed that though Nagaraj (supra) is a later judgment, it does not refer to Chinnaiah (supra) at all. Much was made of this by some of the learned counsel appearing on behalf of the Appellants. It is important to notice that the majority judgment of Hegde, J. does not refer to the creamy layer principle at all. Chinnaiah's judgment (supra) in essence held

that the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, which it considered, could not further sub-divide Scheduled Castes into four categories, as that would be violative of Article 341(2) of the Constitution of India for the simple reason that it is Parliament alone that can make any change in the Presidential List and not the State Legislatures. That this is the true ratio of the judgment is clear from a reading of the paragraphs that have been set out hereinabove. This being the case, as Chinnaiah (supra) does not, in any manner, deal with any of the aspects on which the constitutional amendments in Nagaraj's case (supra) were upheld, we are of the view that it was not necessary for Nagaraj (supra) to refer to Chinnaiah (supra) at all. However, it was further contended that, apart from this ratio, Chinnaiah (supra) also decided that the sub-classification of Scheduled Castes, created by the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, also violated Article 14 of the Constitution of India. This was stated by Chinnaiah (supra) to be violative of Article 14 as the same would amount to tinkering with the List, which, as was held, could be done only by Parliament and not by State Legislatures. In our opinion, the true ratio of the judgment flows from a construction of Article 341. It is true that the Andhra Pradesh Act in question was also found to be violative of Article 14. We may only state that Chinnaiah (supra) dealt with a completely different problem, apart from dealing with a State statute and not a constitutional amendment, as was dealt with in Nagaraj (supra).

14) This brings us to whether the judgment in Nagaraj (supra) needs to be revisited on the other grounds that have been argued before us. Insofar as the State having to show quantifiable data as far as backwardness of the class is concerned, we are afraid that we must reject Shri Shanti Bhushan's argument. The reference to class is to the Scheduled Castes and the Scheduled Tribes, and

their inadequacy of representation in public employment. It is clear, therefore, that Nagaraj (supra) has, in unmistakable terms, stated that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes. We are afraid that this portion of the judgment is directly contrary to the Nine-Judge Bench in Indra Sawhney (1) (supra). Jeevan Reddy, J., speaking for himself and three other learned Judges, had clearly held, -[t]he 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 (See paragraphs 796 to 797). Equally, Dr. Justice Thommen, in his conclusion at paragraph 323(4), had held as follows:

323. Summary

(4) Only such classes of citizens who are socially and educationally backward are qualified to be identified as backward classes. To be accepted as backward classes for the purpose of reservation under Article 15 or Article 16, their backwardness must have been either recognised by means of a notification by the President under Article 341 or Article 342 declaring them to be Scheduled Castes or Scheduled Tribes, or, on an objective consideration, identified by the State to be socially and educationally so backward by reason of identified prior discrimination and its continuing ill effects as to be comparable to the Scheduled Castes or the Scheduled Tribes. In the case of the Scheduled Castes or the Scheduled Tribes, these conditions are, in view of the notifications, presumed to be satisfied.

15) In fact, Chinnaiah (supra) has referred to the Scheduled Castes as being the most backward among the backward classes (See paragraph 43). This is for the reason that the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables. Similarly, the Presidential List of

Scheduled Tribes only refers to those tribes in remote backward areas who are socially extremely backward. Thus, it is clear that when Nagaraj (supra) requires the States to collect quantifiable data on backwardness, insofar as Scheduled Castes and Scheduled Tribes are concerned, this would clearly be contrary to the Indra Sawhney (1) (supra) and would have to be declared to be bad on this ground.

However, when it comes to the creamy layer principle, it is important to note that this principle sounds in Articles 14 and 16(1), as unequals within the same class are being treated equally with other members of that class. The genesis of this principle is to be found in State of Kerala & Anr. v. N.M. Thomas and Ors., (1976) 2 SCC 310. This case was concerned with a test-relaxation rule in promotions from lower division clerks to upper division clerks. By a 5:2 majority judgment, the said rule was upheld as a rule that could be justified on the basis that it became necessary as a means of generally giving a leg-up to backward classes.

The whole object of reservation is to see that backward classes of citizens move forward, so that they may march hand-in- hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a Court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not, in any manner, tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-

group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

19) We have already seen that, even without the help of the first part of Article 16(4-A) of the 2012 Amendment Bill, the providing of quantifiable data on backwardness when it comes to Scheduled Castes and Scheduled Tribes, has already been held by us to be contrary to the majority in Indra Sawhney (1) (supra). So far as the second part of the substituted Article 16(4-A) contained in the Bill is concerned, we may notice that the proportionality to the population of Scheduled Castes and Scheduled Tribes is not something that occurs in Article 16(4-A) as enacted, which must be contrasted with Article 330. We may only add that Article 46, which is a provision occurring in the Directive Principles of State Policy, has always made the distinction between the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people. Article 46 reads as follows:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections – *The State shall promote with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*

This being the case, it is easy to see the pattern of Article 46 being followed in Article 16(4) and Article 16(4-A). Whereas-backward classes in Article 16(4) is equivalent to the -weaker sections of the people in Article 46, and is the overall genus, the species of Scheduled Castes and Scheduled Tribes is separately mentioned in the latter part of Article 46 and Article 16(4-A). This is for the reason, as has been pointed out by us earlier, that

the Scheduled Castes and the Scheduled Tribes are the most backward or the weakest of the weaker sections of society, and are, therefore, presumed to be backward. Shri Dwivedi's argument that as a member of a Scheduled Caste or a Scheduled Tribe reaches the higher posts, he/she no longer has the taint of either untouchability or backwardness, as the case may be, and that therefore, the State can judge the absence of backwardness as the posts go higher, is an argument that goes to the validity of Article 16(4-A). If we were to accept this argument, logically, we would have to strike down Article 16(4-A), as the necessity for continuing reservation for a Scheduled Caste and/or Scheduled Tribe member in the higher posts would then disappear. Since the object of Article 16(4-A) and 16(4-B) is to do away with the Nine-Judge Bench in Indra Sawhney (1) (supra) when it came to reservation in promotions in favour of the Scheduled Castes and Scheduled Tribes, that object must be given effect to, and has been given effect by the judgment in Nagaraj (supra). This being the case, we cannot countenance an argument which would indirectly revisit the basis or foundation of the constitutional amendments themselves, in order that one small part of Nagaraj (supra) be upheld, namely, that there be quantifiable data for judging backwardness of the Scheduled Castes and the Scheduled Tribes in promotional posts. We may hasten to add that Shri Dwivedi's argument cannot be confused with the concept of creamy layer which, as has been pointed out by us hereinabove, applies to persons within the Scheduled Castes or the Scheduled Tribes who no longer require reservation, as opposed to posts beyond the entry stage, which may be occupied by members of the Scheduled Castes or the Scheduled Tribes.

20) The learned Attorney General also requested us to lay down that the proportion of Scheduled Castes and Scheduled Tribes to the population of India should be taken to be the

test for determining whether they are adequately represented in promotional posts for the purpose of Article 16(4-A). He complained that Nagaraj (supra) ought to have stated this, but has said nothing on this aspect. According to us, Nagaraj (supra) has wisely left the test for determining adequacy of representation in promotional posts to the States for the simple reason that as the post gets higher, it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards. This is for the simple reason that efficiency of administration has to be looked at every time promotions are made. As has been pointed out by B.P. Jeevan Reddy, J.'s judgment in Indra Sawhney (1) (supra), there may be certain posts right at the top, where reservation is impermissible altogether. For this reason, we make it clear that Article 16(4-A) has been couched in language which would leave it to the States to determine adequate representation depending upon the promotional post that is in question. For this purpose, the contrast of Article 16(4-A) and 16(4-B) with Article 330 of the Constitution is important. Article 330 reads as follows:

330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People – *(1) Seats shall be reserved in the House of the People for—*

(a) the Scheduled Castes; (b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and (c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as maybe, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State

or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.

Explanation.—In this article and in Article 332, the expression -population means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.

It can be seen that when seats are to be reserved in the House of the People for the Scheduled Castes and Scheduled Tribes, the test of proportionality to the population is mandated by the Constitution. The difference in language between this provision and Article 16(4-A) is important, and we decline the invitation of the learned Attorney General to say any more in this behalf.

21) Thus, we conclude that the judgment in Nagaraj (supra) does not need to be referred to a seven–Judge Bench. However, the conclusion in Nagaraj (supra) that the State has to collect quantifiable data showing backwardness of the Scheduled Castes and the Scheduled Tribes, being contrary to the Nine-Judge Bench in Indra Sawhney (1) (supra) is held to be invalid to this extent.

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