

CASE NO.:
Writ Petition (civil) 265 of 2006

PETITIONER:
Ashoka Kumar Thakur

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 10/04/2008

BENCH:
R. V. Raveendran

JUDGMENT:
J U D G M E N T

WRIT PETITION (CIVIL) NO.265 OF 2006
WITH
Writ Petition (C) No.269/2006
Writ Petition (C) No.598/2006
Writ Petition (C) No.29/2007
Writ Petition (C) No.35/2007
Writ Petition (C) No.53/2007
Writ Petition (C) No.33/2007
Writ Petition (C) No.313/2007
Writ Petition (C) No.335/2007
Writ Petition (C) No.231/2007
Writ Petition (C) No.425/2007
Writ Petition (C) No.428/2007
Contempt Petition (C) No.112/2007 in Writ Petition (C) No.265/2006

R. V. Raveendran J.

It has been my privilege to read the drafts of the Judgments proposed by the learned Chief Justice, learned brothers Pasayat J. and Bhandari J. I respectfully agree with them as indicated below :

A. Validity of 93rd Amendment to the Constitution of India.

I agree with the learned Chief Justice and Pasayat, J. that clause (5) of Article 15 is valid with reference to state maintained educational institutions and aided educational institutions; and that the question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions is left open. I have indicated an additional reason for rejecting the challenge to Article 15(5) on the ground that it renders Article 15(4) inoperative/ineffective .

B. Validity of Central Educational Institutions (Reservation in Admissions) Act, 2006 \026 Act No.5 of 2007 :

I agree with the learned Chief Justice and Pasayat J. that (i) identification of other backward classes solely on the basis of caste will be unconstitutional; (ii) failure to exclude the 'creamy layer' from the benefits of reservation would render the reservation for other backward classes under Act 5 of 2007 unconstitutional; and (iii) Act 5 of 2007 providing for reservation for other backward classes will however be valid if the definition of 'other backward classes' is clarified to the effect that if the identification of other backward classes is with reference to any caste considered as socially and economically backward, 'creamy layer' of such caste should be excluded. I have indicated briefly my reasons for the same.

I agree with the decision of learned Chief Justice that the Act is not invalid merely because no time limit is prescribed for caste based reservation, but preferably there should be a review after ten years to take note of the change of circumstances. A genuine measure of reservation may not be open to challenge when made. But during a period of time, if the reservation is continued in spite of achieving the object of reservation, the law which was valid when made, may become invalid.

(C). What should be parameters for determining the creamy layer in respect of OBCs?

I agree with the learned Chief Justice that OM dated 8.9.1993 of the Government of India can be applied for such determination.

(D) Whether reservation to an extent of 27% in regard to other backward class under Act 5 of 2007 is valid?

I agree with the decision of learned Chief Justice that reservation of 27% for other backward classes is not illegal.

I would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward classes under an enactment enabled by Article 15(5) of the Constitution, for consideration in an appropriate case.

2. Let me now briefly add a few words on two of the questions.

Whether Article 15(5) renders Article 15(4) ineffective?

3. This Court has held that clause (4) of Article 15 is neither an exception nor a proviso to clause (1) of Article 15. Clause (4) has been considered to be an instance of classification inherent in clause (1) and an emphatic restatement of the principle implicit in clause (1) of Article 15 (see : State of Kerala v. N.M. Thomas - 1976 (2) SCC 310, K.C. Vasanth Kumar v. State of Karnataka - 1985 Supp. SCC 714 and Indra Sawhney v. Union of India - 1992 Supp. (3) SCC 217). Clauses (1) and (2) of Article 15 bar discrimination. Clause (1) contains a prohibition that State shall not discriminate against any citizen on grounds only on religion, caste, creed, sex or birth. Clause (2) declares that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Clauses (3) to (5) enable the State to make special provisions in specified areas. While clause (3) is a part of the Article as originally framed, Clause (4) was added by Constitution (First Amendment) Act, 1951. Clause (5) was added by Constitution (Ninety-third Amendment) Act, 2005. Each of these three enabling provisions operate independent of each other. The opening words 'Nothing in this article' occurring in each of these clauses (3), (4) and (5) obviously refer to clauses (1) and (2) of Art. 15 and not to the other enabling clauses. Clauses (3), (4) and (5) of Article 15 are not to be read as being in conflict with each other, or prevailing over each other, but are to be read harmoniously.

The need for exclusion of creamy layer.

4. Section 3 of Act 5 of 2007 mandates reservation of seats in central educational institutions for other backward classes to an extent of 27%. The term 'other backward classes' is defined as meaning the class or classes of

citizens who are socially and economically backward, and are so determined by the central Government. The Act does not define the term 'socially and educationally backward classes', nor does it contain any norms or guidelines as to how the central Government should determine any class or classes as socially and educationally backward, so as to entitle them to the benefit of reservation under the Act. The petitioners contend that the Act vests unguided power in the executive to pick and choose arbitrarily certain classes for the benefit of reservation. The Central Government has however indicated that it intends to proceed on the basis that castes which have already been identified for the benefit of reservations under Article 16(4) by the Mandal Commission with the additions thereto made by the National Commission for Backward Classes, from time to time, will be considered, for the present, to constitute the socially and educationally backward classes for the purpose of availing the benefit of 27% reservation under the Act. This again is challenged by the petitioners on the ground that identification of any class of citizens as 'backward', for the purpose of Article 16(4), cannot be considered as identification of 'socially and educationally backward classes of citizens' under Article 15(5). It is contended that the term 'backward classes' in Article 16(4) is much wider than 'socially and educationally backward classes of citizens' occurring in clauses (4) and (5) of Article 15.

5. Article 15(4) provides that nothing in that Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes. Article 29(2) provides that no citizen shall be denied admission into any educational institution managed by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them. On the other hand, clause (5) of Article 15 provides that notwithstanding anything contained in that Article or in Article 19(1)(g), State may make a special provision for advancement of socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes by providing for reservation relating to admission in any educational institution either aided or unaided by the State, other than the minority educational institutions referred to in Article 30(1). It is submitted that as clause (5) of Article 15 does not override or exclude Article 29(2), any law made in exercise of power under Article 15(5) will be subject to Article 29(2), and consequently there cannot be any affirmative action by way of reservation on the ground of caste alone.

6. It is submitted on behalf of the petitioners that the object of the Constitution is to achieve an egalitarian society and any attempt to divide the citizens or the society on the ground of race, religion or caste should be straightaway rejected. It is further submitted that the Constitution nowhere recognizes or refers to 'caste' (except Scheduled Castes and Tribes) as a criterion for conferment of any right or benefit; that both clauses (4) and (5) of Article 15 refer to 'socially and educationally backward classes' and not 'socially and educationally backward castes'; that Constitution has always referred to caste in a negative sense, that is to prohibit any discrimination or affirmative action on the basis of 'caste' - [Vide Article 15(1) and (2), 16(2) and 29(2)]; and that when Constitution bars discrimination in admissions to educational institutions on ground only of caste, it is surprising that caste is sought to be made the criterion by the State for purposes of making a special provision for socially and educationally backward classes in regard to such admissions. It is submitted that there cannot be any special provision for any group of citizens merely on the ground that they belong to a particular caste or community (except Scheduled Castes and Tribes who are separately mentioned in Articles 15(4), 15(5), 16(4), 335, 341 and 342 etc.).

7. This Court in a series of decisions commencing from *M.R. Balaji v. State of Mysore* [1963 Supp. (1) SCR 439], *R.Chitralekha v. State of Mysore* [1964 (6) SCR 368], *State of Andhra Pradesh v. P.Sagar* [1968 (3) SCR 595], *Janki Prasad Parimoo v. State of Jammu & Kashmir* [1973 (1) SCC

420], State of Kerala v. N.M.Thomas [1976 (2) SCC 310] and K.C.Vasanth Kumar v. State of Karnataka [1985 Supp. SCC 714] has explained what is social and educational backwardness. All these decisions have laid down the principle that caste cannot be made the sole or dominant test to determine backwardness, and any classification determining backwardness only with reference to caste will be invalid. These decisions recognized the fact that caste is not equated to class and all backwardness, either social or educational, is ultimately and primarily due to poverty or economic conditions.

8. However, in Minor P.Rajendran v. State of Madras [1968 (2) SCR 786], it was held that if a caste, as a whole, is socially and educationally backward then reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class within the meaning of Article 15(4). The decision followed Balaji and therefore proceeded on the basis that where the extent of social and educational backwardness of the caste in question is virtually the same as the social and educational backwardness of Scheduled Castes and Scheduled Tribes, reservation can be made on the basis of caste itself. In that case, it was found as a question of fact that members of certain castes as a whole, were socially and educationally backward, and therefore it was held that the reservation on the basis of caste was permissible in respect of those castes. In A.Periakaruppan v. Sobha Joseph [1971 (1) SCC 38], this Court referred to the cases starting from Balaji to Rajendran. It reiterated the principle stated in Rajendran that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). It also cautioned that the Government should not proceed on the basis that once a class is considered as a backward class, it will continue to be backward class for all times. Vasanth Kumar (supra) held that only a caste comparable to the Scheduled Castes and Scheduled Tribes in the matter of backwardness, could be considered to be a socially and educationally backward class in favour of which reservation could be made on the basis of caste. Vasanth Kumar therefore, reiterated Balaji.

9. What requires to be noticed is neither Rajendran nor Periakaruppan nor Vasanth Kumar really departed from or diluted the principle laid down in Balaji. On the other hand, the principle laid down in Balaji was reiterated. Rajendran and Periakaruppan only show that in extreme cases where it is found that the caste under consideration was, as a whole, socially and educationally backward, and therefore akin to a Scheduled Caste, reservation can be made on the basis of caste alone.

10. Then came to the decision of nine Judges in Indra Sawhney v. Union of India [1992 Supp. (3) SCC 217]. This Court held that the use of the word 'class' in Article 16(4) refers to social class, and that reservation under Article 16(4) is in favour of a backward class and not a caste. It held that 'backward class of citizens' contemplated in Article 16(4) is not the same as 'socially and educationally backward classes' referred to in Article 15(4), but much wider. It held that there was no reason to qualify or restrict the meaning of the expression 'backward class of citizens' by saying that it means only those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes (para 795). This Court held :

"If any group of class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a priori notions into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the

State, as the case may be. More than this, it is difficult to say."

In the context of Article 16(4) this Court also observed that a caste can be and quite often is a social class in India and if it is backward socially, it would be a 'backward class' for the purposes of Article 16(4). It held that the accent in Article 16(4) is on social backwardness, whereas the accent in Article 15(4) is on 'social and educational backwardness'. Ultimately, this Court held :

" Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people.

The Court however made it clear that a caste can be the starting point for determining a 'backward class of citizens' as it represents an existing, identifiable social group/class; and that if a caste should be designated as 'a backward class' then the creamy layer from such caste should be excluded. This Court observed :

"In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. .. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4)"

12. It is thus seen that Indra Sawhney certainly went a step further than Balaji and other cases in holding that a caste can be the starting point for determination of backwardness. But it is clear from the decision that caste itself is not the final destination, that is, a caste by itself, cannot be determinative of social and educational backwardness. A caste can be identified to be socially and economically backward, only when the creamy layer is removed from the caste and a compact class emerges which can be identified as a socially and educationally backward class. Thus the determination is not by first identifying a caste as a socially and educationally backward class and, thereafter, remove or exclude the creamy layer for the purpose of bestowing the benefits flowing to such class. On the other hand, until and unless, the creamy layer is removed from a caste, there is no compact class which can be termed as socially and educationally backward class at all. Thus, while the process of identifying socially and educationally backward class can conveniently start with a socially and educationally backward caste, remove the creamy layer therefrom results in the emergence of compact class which can be termed as a socially and educationally backward class. In this sense, it can be said that Indra Sawhney is only a development of the principles laid down in Balaji, R.Chitralekha and Vasanth Kumar, which pointed out that the advanced section of a backward caste constituting the creamy layer is virtually the same as forward class. If the creamy layer is not excluded the benefit of reservation will be appropriated by such advanced sections. Referring to this aspect, Indra Sawhney (supra) stated :

"To 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."

The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in Ashoka Kumar Thakur v. State of Bihar \026 1995 (5) SCC 403, Indra Sawhney v. Union of India (II) \026 1996 (6) SCC 506, M.Nagaraj v. Union of India \026 2006 (8) SCC 212. When Indra Sawhney has held that creamy layer should be excluded for purposes of Article 16(4), dealing with 'backward class' which is much wider than 'socially and educationally backward class' occurring in Article 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore when a caste is identified as a socially and educationally backward caste, it becomes a 'socially and educationally backward class' only when it sheds its creamy layer.

13. Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realization of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag -- either social or economical. But post reservation, there is a tendency even among those who are considered as 'forward', to seek 'backward' tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for 'backwardness' instead of 'forwardness' the country itself stagnates. Be that as it may. Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing an united society with diversity, we will end up as a fractured society for ever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society.

14. I agree that the petitions shall stand disposed of in the manner stated by the learned Chief Justice.