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Case Comment: Jarnail Singh & Ors. vs Lachhmi Narain Gupta & Ors. - An Attempt to solve decades of caste-based oppression through one decision

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INTRODUCTION

Citation – 2018 SCC OnLine SC 1641

Decided on – September 26, 2018

Bench - Dipak Misra. (J), Kurian Joseph. (J), RF Nariman. (J), SK Kaul. (J), Indu Malhotra. (J).

Appellants - "Jarnail Singh and Ors."

Respondents - "Lachhmi Narain Gupta and Ors."

Provisions Involved - Article 14; Article 16; Article 341; Article 342 of the Constitution of India, 1950.

Reservation is an affirmative action scheme in India that ensures historically marginalized communities have representation in education, politics, and jobs. It permits the Indian government to create reserved quotas or seats based on provisions in the Indian Constitution, which decrease the standards required in examinations, job vacancies, and other situations for "socially and economically deprived persons." The Scheduled Castes (hereinafter, "SC"), Scheduled Tribes (hereinafter, "ST"), and Other Backward Classes (hereinafter, "OBC") are provided with reservations in the country. Reservation was formerly only available to SCs and STs, but after the Mandal Commission report (1987) was implemented, it was extended to OBCs.¹

India is perhaps the only democracy that has provided for explicit legal and constitutional provisions for "compensatory discrimination," to advance historically oppressed and socially disadvantaged groups.² These Caste-based reservations have historically been a result of intense social conflict in the country and have always remained controversial. The foundations of the same were laid when the demand for a separate electorate for the Dalits was made by Dr. BR Ambedkar during the Poona Pact in 1932. Even though he gave up the original request, he agreed that the "depressed classes" would be provided with jobs along with joint electorates in central and provincial legislatures.³ Thus, these backward classes were finally allowed to represent themselves local bodies and public services. However, the backward classes were not favored for promotions which led to the continuation of their exclusion.

RESERVATION IN PROMOTION

Reservation in promotion refers to the reservations available for people from backward castes for their promotions in government jobs. Between the Supreme Court and the Parliament, it was a hotly disputed subject. The *Indira Sawhney* decision⁴ ("Indira Sawhney") by the Apex

¹ Tejas Harad, 'How Mandal Changed, and Did Not Change, India' *Hindustan Times* (6 August 2020) <<https://www.hindustantimes.com/analysis/how-mandal-changed-and-did-not-change-india/story-K9gS9hXivYSKuX5lMYHPPI.html>> accessed 07 July 2021

² KC Suri, 'CASTE RESERVATIONS IN INDIA: POLICY AND POLITICS' [1994] 55 *The Indian Journal of Political Science* 37, 1

³ The Editors of Encyclopaedia Britannica, 'Poona Pact | History, Significance, & Facts |' (Encyclopaedia Britannica, 17 September 2020) <<https://www.britannica.com/event/Poona-Pact>> accessed 07 July 2021

⁴ *Indira Sawhney v Union of India & Ors* AIR 1993 SC 477

Court in 1992, held that there cannot be any reservation for promotion under Article 16(4)⁵. It was further held that any kind of reservation in the promotion will have a negative impact as it would diminish the zeal to work effectively and efficiently among the lower classes and would also decrease the morale of the general category employees. They further established the "creamy layer," which was extended to the SCs and STs. The 27% reservation for OBC was also held valid by the Court. After the judgement, the Parliament adopted a number of Constitutional amendments between 1995 and 2000, which allowed promotional reservation.

FACTS IN BRIEF

In 2006, the 5 judge bench of the Supreme Court in *M.Nagaraj & Others vs. Union Of India & Others*⁶ ("Nagaraj") passed its judgement by establishing rigorous requirements for granting a reservation of SC/ST for promotion by the State. They held that the State might give reservation regarding promotion where they have "quantifiable data" to prove that the Backward Class provided with the reservation is not represented adequately in public services. They further held that the "creamy layer" concept would be applicable when a reservation is given in promotions.

In this case, the constitutional validity of *Nagaraj*⁷ was questioned. The requirement to have "quantifiable data" for reservation in promotion contradicted the *Indira Sawhney*⁸ judgement. Even applying the creamy layer to SCs and STs looked odd, given that it was only applied to the OBCs. The introduction of the creamy layer idea to promotions also created issues of equity. Finally, a petition to review the *Nagraj*⁹ decision was filed.

MAIN ISSUES

1. Whether the *Nagaraj*¹⁰ judgement of the Supreme Court requires reconsideration?

⁵ Constitution of India 1950, art 16(4)

⁶ *M Nagaraj & Others v Union of India & Ors* [2006] 8 SCC 212

⁷ *Ibid*

⁸ *Indira* (n 4)

⁹ *Nagaraj* (n 6)

¹⁰ *Ibid*

2. Whether the collection of "quantified data" by the State to prove the SC's and ST's backwardness is bad in law?
3. Should the "creamy layer" concept be applied to STs and SCs who receive reservations in promotion?

ARGUMENTS OF APPELLANT

1. Shri KK. Venugopal, who appeared on behalf of the appellants, contended that the need for the States to collect "quantifiable data" that shows the backwardness of communities is simply contradictory to the nine-judge Bench in the *Indira Sawhney*¹¹ case. In this case, it was held that the SCs and STs are the utmost depressed groups, and hence, if they are added to the "Presidential List" under Article 342¹² of the Constitution, there won't be a need to show their backwardness through "quantifiable data" all over again.
2. They further claimed that the "creamy layer" concept in the *Indira Sawhney*¹³ case is not to be applied to the SCs and STs, and the judges in the *Nagaraj*¹⁴ judgement have misread the former decision and applied the concept to the SCs and STs. According to the appellants, once SCs and STs are placed on the Presidential List under Article 342, they are considered SCs and STs. Under Articles 341¹⁵ and 342, only the Parliament has the power to modify the List.
3. It was contended that the *Nagaraj*¹⁶ judgement does not put forward any test that may set the "adequacy for representation in service."¹⁷ Thus, it is of prime importance that we put forward a test for the percentage of SCs and STs in India's population at every stage of promotion, and for this, the roster that finds a mention in *R.K. Sabharwal v. the State of Punjab*¹⁸ can be used.

¹¹ *Indira* (n 4)

¹² Constitution of India 1950, article 342

¹³ *Indira* (n 4)

¹⁴ *Nagaraj* (n 6)

¹⁵ Constitution of India 1950, article 341

¹⁶ *Ibid*

¹⁷ *Jarnail Singh & Ors v Lachmi Narain Gupta & Ors* [2018] SCC OnLine SC [1641] 3

¹⁸ (1995) 2 SCC 745

4. Ms. Indira Jaising claimed on behalf of the appellants that the Nagaraj judgement needs reconsideration on the ground that "*Article 16(4A) and 16(4B) do not flow from Article 16(4) but instead flow from Articles 14 and 16(1)*" of the Constitution. The claims made by the SCs and STs are based on the reading of Articles 16(4B), 16(4A)¹⁹, 16²⁰, 15²¹, 14²², and 335²³ of the Indian Constitution.
5. The Appellants concluded with the argument that the exercise which was done in Nagaraj²⁴ judgement, i.e., "*of reading down a constitutional amendment to make changes in the Presidential list by the States valid,*" is simply unconstitutional as the Parliament alone can amend the List under Article 341 and Article 342 of the Indian Constitution. Further, any kind of sub-grouping within SCs and STs is not acceptable, and the same has been held in *Indira Sawhney*'s²⁵ judgement and *E.V. Chinnaiah v. The State of AP*.²⁶

ARGUMENTS OF THE RESPONDENTS

1. Shri Shanti Bhushan, who appeared on behalf of the respondents, defended the Nagaraj²⁷ judgment by stating that it does not refer to the SCs and STs when the judgment talks about the backwardness of classes. It refers to the class of posts. Thus, the requirement for "quantifiable data" was for the class of posts. Reliance was placed on *Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North*²⁸, and if the parameters of the judgement as mentioned earlier are applied to the Nagaraj²⁹ case, then the same also needs not to be reconsidered.
2. On behalf of the respondents, Shri Rajeev Dhavan contended that the Nagaraj³⁰ decision should be interpreted as upholding the constitutional changes that introduced Provisions

¹⁹ *Ibid* article 16(4A)

²⁰ *ibid* article 16

²¹ *Ibid* article 15

²² *Ibid* article 14

²³ *Ibid* article 335

²⁴ Nagaraj (n 6)

²⁵ Indira (n 4)

²⁶ (2005) 1 SCC 394

²⁷ Nagaraj (n 6)

²⁸ (1965) 2 SCR 908

²⁹ Nagaraj (n 6)

³⁰ *Ibid*

16(4A) and 16(4B) to the Indian Constitution on the grounds that these articles do not violate the basic structure. Equality is a crucial aspect of our basic structure. The *Nagaraj*³¹ decision upholds equality by prohibiting the indefinite extension of reservation, putting a cap of 50% on the reservation, and incorporating the idea of a "creamy layer" on SCs and STs. Therefore, the decision doesn't need to be reconsidered.

3. The "creamy layer" concept seeks to uphold the value of equality by excluding unequal within a particular class since they cannot be held to be equal to the rest. The entire premise is to ensure that those who genuinely deserve reservation receive it, while others who are undeserving are excluded.
4. The respondents further contended that the creamy layer concept only relates to excluding specific people from the class and has nothing to do with group rights. As a result, Articles 341 and 342 are not applicable. Furthermore, Articles 341 and 342 have nothing to do with reservations. They are exclusively concerned with identifying people who can be classified as SCs and STs.
5. Thus, even if the creamy layer is found to be within the scope of the aforementioned Articles, the High Court and the Supreme Court have the authority to enforce fundamental rights. Since *Nagaraj*'s³² judgement involved a constitutional amendment, Articles 341 & 342 cannot prevent a constitutional amendment from being put through the Basic structure test.
6. The respondents also felt that the SC/ST employees' ongoing social backwardness needed to be evaluated. When an SC/ST employee reaches a high level in public services, such as the post of Deputy Chief Engineer, it becomes clear that they have cast off their backwardness, at which point the State would be free to say, given the lack of presence of any backwardness of the SC/ST worker at the present stage, it would be the best to cancel any further reservations.

JUDGEMENT

³¹ *Ibid*

³² *Nagaraj* (n 6)

1. The Supreme Court analyzed all the judgments that were used in the arguments of the appellants and the respondents and finally held that the provision made in the *Nagaraj*³³ judgement that called for the State to collect "quantifiable data" is simply contradictory to the *Indira Sawhney*³⁴ judgement and thus, flawed in law till that point.
2. But the Apex Court also held that the "creamy layer" concept would be applied on reservation for promotion for the SCs and STs as given in the *Nagaraj*³⁵ judgment. The fundamental point of providing reservation to the backward classes is to ensure that they get equal opportunities just like the other Indian citizens, and this wouldn't be possible if only the topmost SCs and STs claim all the available opportunities for themselves. Thus, if we apply the "creamy layer" concept on the SCs and STs, the same would have no bearing on the Presidential List under Articles 342 and 341 of the Indian Constitution.
3. The Bench observed that the sub-groups, groups, and castes listed in the Presidential List continue to exist in the same way they did previously. Only those who fall within the classification of "creamy layer" are denied the benefit of reservation.
4. When Articles 16 and 14 are read along with Articles 342 and 341, it is apparent that Parliament will have entire discretion in deciding whether or not to include or omit people from the Presidential Lists depending on appropriate considerations. The Courts of our country have full authority to exclude those groups that fall within the "creamy layer" and deny them reservation.
5. The Bench also disagreed that the "creamy layer" concept is just an identifying principle rather than an equality principle. Thus, the Apex Court finally concluded that a seven-judge bench need not reconsider the *Nagaraj*³⁶ judgement.

CRITICAL ANALYSIS

In my personal opinion, the Apex Court has erroneously allowed the utilization of the "creamy layer" concept to the SCs and STs. Throughout the judgement, the Court has many times emphasized that the SCs and STs are the most backward compared to other classes. The

³³ *Ibid*

³⁴ *Indira* (n 4)

³⁵ *Nagaraj* (n 6)

³⁶ *Nagaraj* (n 6)

Bench agreed with the findings of the *Indira Sawhney*³⁷ decision that the backwardness of SCs and STs need not be proved. But, the Court, in its final verdict, ignored these positions and applied the “creamy layer” concept on the SCs and STs. The object of the “creamy layer” principle is to promote equality, and thus, not applying the same on the SCs and STs who have suffered decades of oppression will only be in furtherance of establishing equality in the Indian society. It is pertinent to observe that the Apex Court in the *Indira Sawhney*³⁸ decision held that the “creamy layer” principle only applies to the OBCs and has nothing to do with the SCs and STs since the backwardness and the oppression faced by them is much higher than the former.

We may argue that the social backwardness of the SCs and STs cannot be erased through economic upliftment. Thus, the “creamy layer” concept that only focuses on the financial aspect of backwardness shouldn’t be allowed to apply to the SCs and STs as mere economic advancement cannot serve as an efficient test to determine a community’s backwardness. Further, a general rule holds that if the Court disagrees with a bench of equal strength, it must refer the same to a larger bench for reconsideration.³⁹ Since the *Nagaraj*⁴⁰ judgement and the *Jarnail Singh*⁴¹ judgement were both held by constitutional benches, the Court should have sent the same for reconsideration in front of a seven-judge bench.

The need to collect “quantifiable data” to prove a group’s backwardness by the State as necessitated by the *Nagaraj* judgement caused significant confusion and ambiguity as the Court made no guidelines regarding the same. If a certain person could not be proved backward by the State, he would not be entitled to get a reservation in promotion. The “quantifiable data” can be erroneous, and the same results in denying the benefit of reservation to those who deserve it. By holding this exercise bad in law, the Supreme Court in the *Jarnail*⁴² case has tried to solve the issue of ambiguity as posed by the previous judgement.

³⁷ *Indira* (n 4)

³⁸ *Ibid*

³⁹ *Siddharam Satlingappa Mhetre v State of Maharashtra* [2011] 1 SCC 694

⁴⁰ *Nagaraj* (n 6)

⁴¹ *Jarnail* (n 17)

⁴² *Jarnail* (n 17)

This will help the backward citizens who could not receive the benefit of reservation in the promotion before and ensure that their next generations don't get unnecessary hurdles in their way that prevent them from getting the advantage of reservation.

The Court could have also addressed a frequently overlooked component: the right of the citizens who have overcome their backwardness to waive their benefit of reservation. At the present moment, an ST/SC applicant has no right to refuse reservations. They only need to specify if they fall within the SC or ST group, and an affirmative response immediately places her in the reservation line. Keeping one's caste status hidden when applying for government jobs is likewise illegal. Enabling the ST/SC applicants to content with the general class would help a lot of people and make room for those who truly need a reservation.⁴³ Further, it is crucial to observe that even though the Court gave the benefit of reservation in promotion to the SC and ST personnel, they negated this by imposing the "creamy layer" concept on them. Thus, even the "Group D" ST and SC personnel wouldn't receive reservations if the existing "creamy layer" ceiling of ₹ 8 lakh per year was imposed.⁴⁴

CONCLUSION

Discrimination based on caste and class has a long history in India. All backward classes were mistreated and denied chances in every sector, including employment and education. Reservations were necessary not as a welfare measure but as a right to representation, which they had been denied for many years. The situation did not improve by providing them with reservations in government jobs and positions as they continue to endure prejudice and never attain a high rank, regardless of their talent. The judiciary's decision to uphold reservation in promotion and hold the collection of "quantifiable data" to prove a community's backwardness was a significant step forward. But while it took a step forward, it took another backward by allowing the utilization of the principle of "creamy layer" to SCs and STs who

⁴³ D Shyam Babu, 'The Creamy Layer of Social Justice' (*The Hindu*, 4 October 2018)

<https://www.thehindu.com/opinion/op-ed/the-creamy-layer-of-social-justice/article25115370.ece> accessed 27 June 2021

⁴⁴ Aparajita Balaji, 'Jarnail Singh and Ors. vs Lachhmi Narain Gupta and Ors.' (*Law Times Journal*, 22 March 2019)

<https://lawtimesjournal.in/jarnail-singh-and-ors-vs-lachhmi-narain-gupta-and-ors/> accessed 14 July 2021

have historically been the victims of caste-based discrimination and oppression. Since reservation is a very controversial topic in India, the Apex Court should have shed more light and clarify how the application of the “creamy layer” concept supports equality. Thus, we can conclude that there is a dire need for the Supreme Court to clarify this aspect of the judgement and ensure that SCs and STs remain on equal footing with the rest of the citizens of our country.