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Constitutional Impermissibility of Justice Gavai's Creamy Layer Concurrence in *Davinder Singh v State of Punjab*

Chinmayee Nayak^a

^aChanakya University, Bengaluru, India

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*This paper critically examines the constitutional impermissibility of Justice B.R. Gavai's concurrence in *Davinder Singh v State of Punjab* (2024), particularly his observation that the creamy layer principle applicable to Other Backward Classes should extend to Scheduled Castes and Scheduled Tribes. It argues that the observation is constitutionally unsustainable on three principal grounds. First, the issue of applying the creamy layer principle to SCs and STs was not before the Court and therefore constitutes an obiter dictum rather than binding ratio decidendi. Second, the concurrence raises concerns regarding judicial hierarchy by seeking to reopen a question addressed by the nine-judge Bench in *Indra Sawhney v Union of India*, which cannot ordinarily be reconsidered by a smaller Bench. Third, the concurrence bypasses the institutional safeguard contained in Article 338(9), requiring consultation with the National Commission for Scheduled Castes on matters concerning SCs. The paper further examines the practical consequences of an otherwise non-binding observation influencing legislative policy and litigation, thereby highlighting broader concerns regarding constitutional adjudication and institutional integrity.*

Keywords: *creamy layer, scheduled castes, bench hierarchy.*

INTRODUCTION

The Constitution Bench of seven judges, headed by the Hon'ble Mr Justice Arindam Prasad Singh, in *Davinder Singh v State of Punjab* (2024)¹, opened a new page in the law of reservations in India by allowing sub-classification within the Scheduled Castes ("SCs"), for the purpose of making reservations. The majority judgment referred to the narrow question of sub-classification, but Justice B.R. Gavai, in his concurring opinion, went beyond the referred question to say that the 'creamy layer' principle, which has been applied to Other Backwards Classes ("OBCs"), should also apply to Scheduled Castes ("SCs") and Scheduled Tribes ("STs").

The paper critically discusses the constitutional unacceptability of the creamy layer question concurrence by Justice Gavai. It does so on three grounds: First, an observation is only an obiter dictum and is not part of the answer; Second, it disregards the principle of bench hierarchy which emerged in *Indra Sawhney v Union of India*² where the nine-judge bench concluded that the question could not be reopened; and third, it ignores the institutional safeguards required by Article 338(9)³ of the Constitution of India that mandates consultation with the National Commission for Scheduled Castes on matters concerning SCs.

This is an inquiry that carries more meaning than just technical. Following *Davinder Singh*, state legislatures are now considering the creamy layer principle for SCs and petitions based on Justice Gavai's concurring opinion have already been presented before the Supreme Court. An observation without binding force has thus turned into a constitutional directive, and it's not only constitutionally troubling, but practically consequential. It is this disconnect between the legality of the concurrence and its effectiveness in practice that makes it opportune and essential to consider its impermissibility in a rigorous manner.

JUSTICE GAVAI'S CONCURRENCE AND CONSTITUTIONAL IMPERMISSIBILITY

The next segment considers in depth the unconstitutional nature of the creamy layer concurring opinion of Justice Gavai. This analysis will focus in turn on three aspects – the

¹ *Davinder Singh v State of Punjab* (2024) SCC Online SC 1860

² *Indra Sawhney v Union of India & Ors* (1992) Supp (3) SCC 217

³ The Constitution of India 1950, art 338(9)

issue of scope of the decision, the violation of the principle of hierarchy within the bench, and the bypassing of institutions.

It is imperative, first, to understand the exact nature of the creamy layer remark by Justice Gavai. The question put before the Constitution Bench was one of sub-classification, not extension of creamy layer among Scheduled Castes. Justice Gavai agreed with the majority view on the question referred and then went ahead to examine the issue of creamy layer apart from it. Thus, this remark cannot be included in the ratio decidendi of the case, the essential reasoning which is required to determine the question referred. At most, it can be said that this is an obiter dictum, an opinion expressed by the court in passing, unrelated to the immediate subject of the case. One may well wonder why an obiter should concern anyone. The significance of such remarks from a Constitution Bench lies in their special authority under Indian constitutional law. While observations made by benches other than those of the Constitution Bench have no precedential value, observations made by the Constitution Bench, even if not binding, guide future cases, inform decisions of the High Courts, and create a sense of policy obligation for legislators and executives. In the wake of *Davinder Singh*, states have already started deliberations regarding the application of creamy layer to SCs, and there have even been petitions filed in the Supreme Court based on the concurrence in Gavai. An observation that has no binding force has become a directive of the Constitution itself. This divergence between its actual force and its legal standing is precisely why the illegality of the concurrence is so perilous to the Constitution.

At the very beginning, it must be pointed out that this issue was not raised before the Court in the matters before it. It has come into the discussion in this matter only because the bench felt that the creamy layer principle may apply to SCs/STs as well, without any discussion or arguments on the point or any supporting evidence. This is certainly contrary to the *audi alteram partem*⁴ principle. Constitutionally, this is a serious matter in terms of procedural propriety and limitations of judicial decision-making.

The above-mentioned observation is contrary to precedent. In the case of *Indra Sawhney v Union of India*, a nine-judge bench has specifically refused to follow the doctrine of 'creamy layer' for Scheduled Castes and Scheduled Tribes as they have been distinguished from the

⁴ *Gandhi v Union of India* (1978) 1 SCC 248

Other Backwards Classes (“OBCs”) due to the inherent discrimination they face. Since the above- stated principle was held by a superior number of judges, it becomes binding in nature. It cannot be reconsidered by a smaller bench without referring it to an equal or superior bench of judges. This principle was categorically confirmed by the Supreme Court in *Central Board of Dawoodi Bohra Community v State of Maharashtra*⁵ that if the view taken by the bench of greater strength is adopted by a bench of less strength, then the latter cannot disagree or set aside the order of the greater quorum bench and can only refer the same matter to a bench of equal or greater strength to consider the matter.

The matter is made more complex by the consideration of the doctrine on which the cream layer doctrine was constructed by Justice Gavai. The opinion of the Supreme Court in *Jarnail Singh v Lachhmi Narain Gupta*⁶ on the question of reservations in promotion under Article 16(4A)⁷ was a five-judge Constitution Bench. The doctrine of the cream layer in *Jarnail Singh v Lachhmi Narain Gupta* was not unconstitutional in the case of Scheduled Castes, and this is what the opinion of Justice Gavai attempted to establish. What is interesting, however, is that the bench in *Jarnail Singh* was not bigger than the nine-judge bench in *Indra Sawhney*, which explicitly and purposefully ruled against a creamy layer doctrine among Scheduled Castes. The nine-judge bench has not left this issue silent; instead, it took into account the special nature of backwardness among the SCs, which stems from untouchability and stigmatisation, and held that this rationale does not apply to the SCs. This is not an open-ended matter but rather one with well-established principles based on constitutional arguments. Even though *Jarnail Singh* stated something to this effect, it must be noted that a five-judge bench cannot reopen what the nine-judge bench has already decided. In this regard, Justice Gavai’s concurrence with the judgment of a seven-judge bench adds even more uncertainty. This results in a sequential, hierarchical process of undermining the constitutionality of the process - a seven-judge concurring opinion being based on a five-judge observation that reopens and overturns a nine- judge reasoned judgment. It is not just a technical flaw. It highlights a trend of smaller benches incrementally altering doctrines created and approved by larger benches via a process of doctrinal evolution that fails to heed institutional protections put in place under the bench hierarchy system. If this trend

⁵ *Central Board of Dawoodi Bohra Community & Anr v State of Maharashtra & Anr* (2005) 2 SCC 673

⁶ *Jarnail Singh & Ors v Lachhmi Narain Gupta & Ors* (2018) 10 SCC 396

⁷ The Constitution of India 1950, art 16(4A)

continues, it would mean that the validity of the doctrine affirmed by larger benches no longer rests upon an absolute basis, but is constantly undermined by the cumulative effects of the observations issued by smaller benches.

One such objection, which must be squarely addressed, relates to the argument above made in support of the hierarchical nature of the bench argument. It could be argued that while it is true that the ratio decidendi of the nine-judge bench cannot be overruled by a smaller bench, there was no decision by the former in relation to the SC creamy layer question. As a result, this question became open to be decided by the latter. However, this objection is built on an incorrect reading of *Indra Sawhney* itself. The fact remains that the nine-judge bench did not leave the SC creamy layer question open; rather, it decided the matter. Indeed, far from leaving the question open, the bench dealt with it, analysed it, considered the nature of backwardness of the SCs as being inherently different from that of the OBCs, and on this basis, concluded that creamy layer should not apply to Schedule Castes and Tribes. This is not a matter that can be argued as an open point. The distinction is critical here. An open point is a question that has not been decided by a larger bench. On the other hand, a closed point is a matter that has been deliberated upon, discussed, and decided by a larger bench. While the concurrence by Justice Gavai seeks to address an open point, it fails to do so because it attempts to reverse a matter that has been closed by a larger bench. This cannot be done merely by way of a concurrence in a case heard by a smaller bench. In fact, even leaving aside the erroneous characterisation of the matter, there are two other reasons why the objection fails. In the first place, Gavai's remarks are mere obiter dicta and not the holding of the seven-member bench as a majority. Despite the doctrine that benches of fewer judges may settle issues which larger benches have left unresolved, it must be remembered that such a doctrine only applies to majority holdings arising from arguments put forth adversarial - and not to obiter dicta made by individual judges when no arguments were even raised regarding the issue. In the second place, the lack of adversarial argument concerning the creamy layer issue by the Davinder Singh bench would independently render it indefensible.

From an institutional point of view, the finding fails to follow the usual constitutional process. The Constitution of India under Article 338⁸ provides that there should be consultation with the National Commission for Scheduled Castes regarding policies

⁸ The Constitution of India 1950, art 338

concerning these communities. The obligation to consult under Article 338(9) of the Constitution is not merely procedural but substantive in nature and reflects the considered judgment of the Constitution-makers that matters about SCs should be deliberated upon by a specialised and accountable institution instead of being determined unilaterally by any other institution, including the judiciary.

CONCLUSION

Justice Gavai's concurring opinion in *Davinder Singh* is constitutionally unsustainable for three independents, but reinforcing, reasons. It is obiter dictum, with no legal effect, but its impact on state policy and subsequent litigation has far exceeded its legal standing. It is an exercise in judicial reasoning, and stands in violation of the principle of bench hierarchy by attempting to reopen, through a concurrence on a seven-judge bench, a question which was finally and deliberately decided by a nine-judge bench in *Indra Sawhney*. Moreover, as a matter of the institutional process, it runs around the constitutional requirement for consultation of the National Commission for Scheduled Castes under Article 338(9), making it a formality.

The combination of this weakness and the overweening power it has come to wield in reality is what makes it so threatening. Its actual effect and impact on the law is an illustration of a far more widespread and regrettable phenomenon, the piecemeal stripping away of doctrines established by higher courts by the cumulative effect of the observations of lower courts. Failure to deal with this effect could undermine the very principles of constitutional adjudication.

The constitutional safeguards to SCs are based on the recognition of the discrimination faced by the SCs, which the nine-judge bench in *Indra Sawhney* has been able to put into action with careful and thoughtful deliberation. The consideration is to be accorded and not circumvented. The unacceptability of Justice Gavai's assent is not just a question of formal legalism; it is a question of fidelity to the structure of the Constitution and integrity of judicial practice.