SUPREME COURT OF INDIA

Ashoka Kumar Thakur

Vs

Union of India and Others

Writ Petition (Civil) 265 of 2006

(Arijit Pasayat and L. S. Panta, JJ)

17.05.2007

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. During the hearing of these petitions it was submitted by learned Solicitor General that in view of the mandate of Article 145(3) of the Constitution of India, 1950 (in short the 'Constitution') and Order 35 of Supreme Court Rules, 1966 (in short the 'Rules'), these cases should be heard by a Bench of at least five Hon'ble Judges. It was submitted that not only petitions raise substantial questions of law but also interpretation of the Constitution is involved.

2. Learned counsel for the petitioners on the other hand submitted that in the counter affidavit filed by the Union of India it has been specifically stated that, according to it, there was no question of law much less of substantial nature involved and the issues raised are covered by various decisions of this Court, more particularly, Indra Sawhney v. Union of India and Ors. Â . If that be so, learned counsel for the petitioners submitted, there is no substance in the present stand of learned Solicitor General that substantial questions of law are involved. According to him, the cases can be decided on the pleadings made and the acceptability of stands.

3. Mr. K. Parasaran and Mr. Ram Jethmalani, learned Senior counsel for one of the respondents, submitted that they support the stand of learned Solicitor General that the matter should be heard by

a Bench of at least five Hon'ble Judges. They, however, stated that the stand taken in the counter affidavit cannot be determinative. The interpretation of the provisions of the Constitution and/or the Central Educational Institutions (Reservation in Admission) Act, 2006 (in short the 'Act') fall for interpretation in these cases.

4. Learned counsel for the petitioners, however, stated that the complex issues relating to the scope and ambit of Article 15(5) of the Constitution and the validity of 93rd Constitution Amendment Act, 2005 are involved. It is pointed out that behind the so called anxiety which is nothing but a fagade, to provide better educational facilities for socially and educationally backward classes, the objective is to play a political game and what is commonly accepted as "Vote politics". The objective is not so much for social empowerment as creating a vote bank. In the name of social empowerment, what is intended to be done is to create a caste divide which shall have catastrophic implications. The object is not social empowerment and/or to extend help to the deprived. If that was really so, the stress should have been on social and economic backwardness. If any class needs protection, it is the socially and economically backward class of people. It is also pointed out that the framers of the Constitution had indicated a specific period for reservation. They had felt that the period is good enough to take care of any injustice they may have been hypothetically meted out to socially and educationally backward castes. But with oblique motives the period is being extended. It is submitted that the same cannot be the objective of the Constitution. It has also been submitted that there is no scope for reservation in higher education and the Act empowers reservation in educational institutions imparting higher education and that itself is unconstitutional. Further, the basic data for identifying the "backward classes" has not yet been placed before this Court though at the threshold the inadequacy and non-availability of such data was highlighted by this Court. It is submitted that this Court in Jagdish Negi, President, Uttarakhand Jan Morcha and Anr. V. State of U.P. and Anr. Â held that the State cannot be bound in perpetuity to treat some classes of citizens for all time as socially and educationally backward classes of citizens. In these circumstances, it is submitted that the writ petitions should be disposed of on the material as existing presently.

5. We shall first deal with the effect of the counter affidavit filed by the Union of India. In Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Ltd. and Anr. Â it was inter-alia held as follows:

"25. Shri Ashoke Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Limited and commented severely on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act, 1972. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the court. After Parliament has said what it intends to say, only the court may say what the Parliament meant to say, None else. Once a statute leaves Parliament House, the Court is the only authentic voice which may echo (interpret) the Parliament. Thus the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for

Parliament. No Act of Parliament may be struck down because of the understanding or mis-understanding of parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guaranteed by Article 14."

6. To quote Justice Holmes: The life of law has not been logic; it has been experience. The felt necessities of law, the prevalent moral and political theories, intuitions of public policy, avowed and unconscious, even the prejudices which Judges share with their followmen have had a good dear more to do than the syllogism in determining the rules by which the men should be governed.

7. Untrammeled by the effect of Article 145(3) and Order 35 of the Rules, considering considerable importance of the issues involved and its likely impact in the social life of the country as a whole and the complexities of the questions, it is appropriate that the matter should be heard by a larger Bench. The pivotal challenges in the writ petitions are as follows:

(1) Challenge to the Constitution 93rd Amendment Act, 2005 by which Article 15(5) has been inserted in Part III of the Constitution.

(2) Challenge to the policy of reservation as a form of "affirmative action".

(3) Challenge to the "caste based" reservation or the "caste based" affirmative action.

(4) Challenge to the Act.

8. The basic issues which need to be considered by the larger Bench, are as follows: 93rd Constitution Amendment Act, 2005

(1) Whether the 93rd Constitution Amendment Act, 2005 and Article 15(5) are unconstitutional as being violative of the basic structure of the Constitution?

(2) If the Amendment is valid, how is it to be interpreted and implemented?

(3) Whether the 93rd Amendment insofar as it empowers the government to make special provisions by way of reservations in educational institutions (including private educational institutions) is violative of the basic structure of the Constitution?

(4) Whether the 93rd Amendment confers on the State an unbridled power to make special provisions for "socially and educationally backward classes", without indicating the circumstances when such provision may be made, and without imposing any limit either on the contents or duration of such special provisions and is, therefore, wholly destructive of the right of equality of the citizens and thereby violative of basic structure?

(5) Whether depriving the protection of Art. 19(1)(g) to non-minority institutions (while excluding minority institutions from Art. 15(5)), after the decision in P.A. Inamdar v. State of Maharashtra Â which held that non-minority institutions enjoyed a similar protection, upsets the delicate balance of the Constitution, and is inconsistent inter-alia with the principles of secularism and thereby is violative of the basic structure?

Scope of Articles 15(4) and 15(5)

(1) What is the true ambit and scope of Articles 15(4) and 15(5) of the Constitution?

(2) If Article 15(5) is valid, what is its true scope and ambit?

(3) What is the meaning of the term "special provisions" in Articles 15(4) and 15(5) of the Constitution? Does it include 'quotas' by reservation of seats especially in higher educational institutions and professional and technical education (particularly those of national stature or importance and in courses categorized as speciality or super speciality). Is it a permissible measure of advancement of socially and educationally backward classes?

(4) If the answers to above questions are in the affirmative, then what are the necessary ingredients of any "Affirmative Action" programme of the State including the "nature and extent" of the benefits proposed and the limitations thereon, in order to balance the rights between Articles, 14, 15, 29(2) and its "facet" in Articles 15(4) and 15(5)?

(5) Whether a rational policy of affirmative action that would ensure imparting free and compulsory education to the illiterate sections among all the citizens including the backward classes is absent and if so, whether affirmative action in favour of SEBCs is discriminatory and unconstitutional?

(6) What is the meaning of the words "for the advancement of any socially and educationally backward classes of citizens" in Articles 15(4) and 15(5)? What is the yardstick for measuring educational backwardness in Clauses (4) and (5) of Article 15?

(7) Whether substitution of the expression "socially and educationally backward classes of citizen" by "socially and economically backward classes" would result in fulfilling constitutional intentions and objectives?

Scope of Judicial Review

(1) Having regard to the fact that special provision by way of reservation in Central Educational Institutions has been made by law enacted by Parliament and the enabling provision of Article 15(5) vesting the power in the State to make such provision by law, is the scope of judicial review restricted or not?

(2) What are the parameters and limits of judicial review of a law enacted by the Parliament providing for reservation in pursuance of the mandate of Articles 15(4) and 15(5), having regard, inter-alia to the order of reference to the Constitution Bench on Subramanian Swamy (Dr.) vs. Director, CBI & Ors. Â

Listing of Socially and Educationally Backward Classes in terms of units of caste/communities

(1) Whether reservations based solely or principally upon the basis of caste are impermissible under Article 15?

(2) Whether a reservation that relies significantly on "caste" to identify its beneficiaries is inherently divisive and incompatible with the Unity and integrity of the Nation?

(3) If the answer to Questions (1) and (2) above is in the affirmative, then how, in what way and on what basis are the beneficiaries of "special provisions" to be identified, selected, included or excluded?

(4) Does the Union of India's method, manner and extent of identifying and compensating beneficiaries of 'special provisions' perpetuate caste and backwardness?

(5) Whether "caste based" reservations are a permissible form of affirmative action under Article 15? If the answer to the question above is in the affirmative, then what are the permissible criteria for the identification of the "class" to whom the benefits under an affirmative action programme are to be extended under Article 15?

(6) Whether the reservation policy of the State which lacks a Continuous Review Mechanism is violative of Articles 14, 15, 21 and 29(2)?

(7) Whether, after the judgment in Indra Sawhney's case (supra), the classification of backward classes on the basis of caste for the purposes of Article 16(4) would equally apply to Articles 15(4) and Article 15(5) of the Constitution?

Whether 27% reservation in Socially Educational Backward Classes/Other Backward Classes is justified

(1) Whether the Act insofar as it mandates reservation of 27% in all educational institutions (including private aided institutions) irrespective of and unrelated to the "compelling need" of the State and without any limit of time and without any computable data for identification of persons as OBCs, is violative of Articles 14, 15, 21A and 29(2) of the Constitution?

(2) Special provision by way of reservation of 27% for OBCs in Central Educational Institutions being within the percentage authorized by Indra Sawhney's case (supra) and it having been ensured that there will be increase of seats so as not to diminish the number of seats available for non reserved category, could such provision be held to be unconstitutional?

(3) Whether the Central Educational Institutions (Reservation in Admission) Act, 2006(Act No.5 of 2007) is violative of Articles 14, 15(1), 19, 21 and 29(2) of the Constitution?

Socially Advanced Persons/Sections or creamy layer of SEBC/OBC

(1) Would at all the concept of "creamy layer" propounded in the context of public employment in Indra Sawhney's case (supra) be applicable to special provision by way of reservation for education provided for by law made by the State?

(2) Whether in balancing formal equality vis-'-vis defacto equality under Article 14 and Article 15(5) "creamy layer" should or should not be excluded?

(3) Whether the concept of Socially Advanced Persons/Sections or creamy layer of SEBC castes/communities formulated in the Indra Sawhney's case (supra) for the purpose of exclusion from reservation of appointments or posts under Article 16(4) is applicable in relation to reservation in education including higher education and admission to seats in educational institutions under Article 15(4) and Article 15(5)?

(4) Whether the provisions of the Act insofar as it does not exclude or make provision for the identification and exclusion of the "creamy layer" from the beneficiaries of reservation fall foul of Articles 15 and 29(2)?

Constitutionality/Validity of the 2006 Act

(1) Whether the reasons given by the Union and the data furnished by it in order to justify and sustain Act No. 5 of 2007 satisfies the requirements of a valid exercise of affirmative action as laid down in various judgments (e.g. M. Nagaraj and Ors. v. Union of India and Ors. Â and can provide a valid basis for reservation of the kind sought to be attained by the impugned Act?

(2) Whether the Act is in violation of Article 26 of the Universal Declaration of Human Rights

which postulates that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit?

9. It is needless to say that the larger Bench hearing the matter can consider further issues or questions involved.

10. Let records be placed before the Hon'ble Chief Justice of India for appropriate orders.