



SCHEDULED CASTES : SOME UNRESOLVED PROBLEMS

IN A recently reported case¹ Justice P.A. Choudary has grappled with a very sensitive issue concerning scheduled castes arising directly out of article 341(1) of the Constitution. The issue here was whether the Namasudra caste, classified by the Presidential order promulgated under article 341 as a scheduled caste in West Bengal, was such for purposes of admission to an educational institution in Andhra Pradesh though the Presidential notification for this state did not classify it as scheduled caste.

The facts in this case were : The petitioner, belonging to a Namasudra family, which had migrated from Bengal to Andhra Pradesh, relied on freedom of movement and residence provided in article 19 and two circular letters² issued by the Central Government to claim that he should be regarded as a member of the scheduled caste in Andhra also. The government's letter of 1971 had maintained, that with reference to migrant scheduled castes, its status was an all India one. The letter of 1982 said, that with reference to the status of transferred Central Government employees belonging to scheduled castes, the states to which they were transferred should treat them as scheduled caste members. The letter of 1971 drew a distinction between articles 330 and 332 and articles 15 (4) and 16 (4) and said that continued residence was not necessary under the latter articles. Pursuing this line of reasoning the petitioner argued that to hold otherwise was to extract from him a price for exercising freedom of movement and residence enshrined in article 19.³ Justice Choudary rejected these arguments. He stated :⁴

The real question is not at all whether they have those basic constitutional rights nor whether a price is being extracted from them for the exercise of those rights.

According to the learned judge the crucial question was whether the petitioner carried with him the scheduled caste status when he migrated with his family from Bengal to Andhra Pradesh. Article 341 answered this question. It empowered the President, after consultation with the governor, to specify by public notification, the caste, races or tribes or parts of them or groups within them, "which shall for the purpose of the Constitution be deemed to be scheduled castes in relation to that state". So Justice Choudary held that the article enabled the President to prepare and notify a state-wide and not a country-wide list of scheduled castes. The

-
1. *Tapan Kumar v. A.P. University, Visakhapatnam*, AIR 1989 AP 132.
 2. See, *id.* at 136 for a summary of these letters.
 3. *Id.* at 138.
 4. *Ibid.*



Presidential notification, under the article, made Namasudra a scheduled caste in Bengal and not beyond, *i.e.*, not in Andhra.

Justice Choudary also rejected the contentions in the two letters of the Central Government. He pointed out that the “language of Article 341 thus makes it clear that the Presidential notification cannot notify an All India Scheduled Caste”⁵ and that the President “can declare a particular caste as a Scheduled Caste in relation to a particular state”. He held that as the article specifically said that the Presidential classification of castes into scheduled castes was for purposes of the Constitution including article 15(4), and in relation to a state, “the Presidential enumeration...is exhaustive”⁶ and so a state was not competent to add to or subtract from the list and it “becomes difficult for me to hold that the states can prepare their own lists under Article 15(4)”.⁷ The learned judge was fully alive to the anomaly arising out of his construction of the constitutional provisions. He observed:⁸

I regret to say that the children of central government servants belonging to Scheduled Castes will not be able to claim the benefits of Article 15(4) which are available to them in their parent state...unless the Presidential notification enumerates them as Scheduled castes [in relation to the state to which they were transferred].

Justice Choudary held that the constitutional status of a scheduled tribe member transferred from or migrating to another state, where his tribe was so classified by the President as a scheduled tribe under article 342, was similar to that of the petitioner in this case. He found that the Orissa and the Madhya Pradesh High Courts had come to a similar conclusion while the Supreme Court was yet to pronounce on this question.

A distinction between caste and scheduled caste was drawn by the learned judge to show that the former was a product of birth while the latter was a creature of Presidential order. So a person would retain his caste even after death. But the status of scheduled caste would not be available to a caste which was not notified as scheduled caste in relation to the state concerned. The degrading social status and the stigma of untouchability were not by themselves enough to “legally enable [an untouchable] to claim the status of scheduled caste”.⁹

The basic proposition in this case is indirectly supported by the *Gujarat Dalit*,¹⁰ case, which held that article 341 empowered the President to impose

5. *Id.* at 136.

6. *Id.* at 137.

7. *Ibid.*

8. *Ibid.*

9. *Id.* at 138.

10. *Gujarat Dalit and C.C. Rights Pratipadan Samithi v. Union of India*, AIR 1989 Guj 197.



area as well as group restrictions while specifying the castes *deemed* to be scheduled castes. In other words, the President may proclaim that only a part of a caste or a caste in a particular district may be treated as a scheduled caste. The Supreme Court,¹¹ too, had held that the Dohar caste, a sub-caste of specified *Chamar* caste, was not a scheduled caste as it was not specified in the Presidential order. The Gujarat High Court, too, held that the President was entitled under article 341 to specify touchable as well as untouchable castes as scheduled castes. Although it conceded that one of the criteria for classification of castes as scheduled caste was untouchability and noted that the Supreme Court¹² had held that the communities mentioned against any entry are those which have mutual affinity, it rejected the argument based on the doctrine of affinity and the hurtful and humiliating disabilities suffered by the untouchables for generations that inclusion of touchables in the list of scheduled castes was repugnant to the doctrine of equality in article 14.

The constitutional position identified by Justice Choudary and the Gujarat High Court raises two social issues :

- (i) If touchable castes can be classified by the President under article 341 as scheduled castes, what is the criterion of the classification of castes into scheduled castes ?
- (ii) What is the impact of the area restriction conceived of in article 341 on the mobility of members of a scheduled caste entitled to freedom of movement and residence ?

In regard to the first question there might be sympathy for the argument that the untouchables subjected for centuries to social degradation and economic exploitation should alone be catalogued as scheduled castes under article 341. Otherwise the concessions accorded to them in the Constitution would be diluted and the all round advancement of untouchables would be delayed. Considering the fact that we have stagnant economy and stunted economic growth this argument is more than tenable. Further if we look at the history relating to separate electorates and the Ambedkar-Gandhi parleys resulting in acceptance of joint electorates by Ambedkar, it is not difficult to perceive the constituency of reservation of seats for scheduled castes in the Indian legislatures. The quantum of reservation for them under articles 15(4) and 16(4) is geared to the proportion of the population of untouchables in the total population of India. Further, reservation of seats in educational institutions and posts in public services is available to the backward classes also. So the socially and educationally backward groups, who are not untouchables, could be subsumed under this rubric. Thus, viewed from the social perspective, the judicial refusal to look upon untouchability as the sole basis of classification of castes as scheduled castes needs reconsideration.

11. AIR 1957 SC 207.

12. AIR 1980 SC 180. The Gujarat High Court did not, however, follow this case.



The second issue, unlike the first one, is a creature of article 341 as it conceives of area restrictions. The Presidential order of 1950 had restricted the area to a district or even a *taluk* in a district. This area restriction denies the concessions accorded in the Constitution to scheduled castes if the members migrate or are transferred from that area if in the latter area their caste is not catalogued as scheduled caste. The impact of this denial of concessions on freedom of movement and residence of members of the scheduled castes needs no emphasis. Further, in the case of an employee of a public or private enterprise transferred to a place where his caste is not a scheduled caste, the choice is between forfeiture of the concessions available under articles 15(4) and 16(4) by his children or loss of his own employment which he cannot afford.

In these circumstances what is constitutionally permissible is socially unjust. So article 341 may be amended and recast to see that what is socially just is constitutionally permissible. The President may specify the castes, races, tribes or parts of or groups within these which shall for the purposes of the Constitution be deemed to be scheduled castes.

If this amendment is not forthcoming, the Bar and the Bench may examine in depth the constitutional validity of the area restriction imposed by the Presidential order on freedom of movement and residence. Neither migration nor transfer of a member of a scheduled caste to an area where his caste is not a scheduled caste can make him a non-criterion not entitled to freedom of movement and residence. If this fact is accepted some questions arise. Is not the doctrine of unconstitutional condition relevant here? Is the state entitled to tell a transferred scheduled caste employee or a migrant member: You have freedom of residence, you have no fundamental right to be a member of a scheduled caste? The answer is obvious.

*Mohammad Aslam**

* Advocate, Andhra Pradesh High Court, Anantapur.