REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION
CIVIL APPEAL NO.2317 OF 2011

THE STATE OF PUNJAB & ORS. ...APPELLANT(S)

VERSUS

DAVINDER SINGH & ORS. ...RESPONDENT(S)

WITH
C.A. NO.5593 OF 2010
S.L.P.(C) NO.8701 OF 2011
W.P.(C) NO.1477 OF 2019
W.P.(C) NO.21 OF 2023
W.P. (C) NO.562 OF 2022
C.A. NO.5586 OF 2010
C.A.NO.5597 OF 2010
C.A. NO. 5598 OF 2010
C.A.NO.5600 OF 2010
C.A. NO.5589 OF 2010
C.A. NO.5587 OF 2010
C.A. NO.5595-5596 OF 2010
C.A.NO.2324 OF 2011
C.A.NO. 6936 OF 2015
S.L.P.(C) NO.30766 OF 2010
S.L.P.(C) NO. 5454-5459 OF 2011
C.A. NO.2318 OF 2011
S.L.P.(C) NO. 36500-36501 OF 2011
C.A. NO.289 OF 2014
T.C.(C) NO.37 OF 2011
T.C.(C) NO.38 OF 2011
T.P.(C) NO.464 OF 2015

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J U D G M E N T

B.R. GAVAI, J.

I have gone through the erudite and scholarly judgment authored by Hon'ble the Chief Justice of India. I am in agreement with the views expressed by the Hon'ble the Chief Justice of India. Taking into consideration the importance of the matter, I find it apposite to express my opinion through this separate judgment.

Since the facts and submissions of the learned counsel appearing on behalf of the parties have been elaborately considered in the judgment of the Hon'ble the Chief Justice of India, in order to avoid repetition, I have not referred to them.

I. BACKGROUND

> "The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to

divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must

> remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

1. These are the words of warning, which Dr. B.R. Ambedkar, the Chief Architect of the Indian Constitution, gave in his speech on 25th November 1949, while replying to the debate on the final draft of the Constitution. This was the day prior to 26th November 1949, on which day, the Constituent Assembly adopted, enacted, and gave to our country the most cherished document for every Indian, "the Constitution of India".

2. He warned that we should not be content with mere political democracy but make our political democracy a social democracy as well. He emphasized that a social democracy would mean a way of life which recognizes liberty, equality, and fraternity as the principles of life. According to him, liberty, equality, and fraternity, not individually but a trinity of the three was necessary for converting our political democracy into social

democracy. He pointed out the contradictions in the country about the social and economic structure. He warned that if we continue to deny equality in social and economic life for long, we will do so only by putting our political democracy in peril. He therefore appealed to the nation to remove this contradiction at the earliest possible moment. He warned that if we do not do so, those who suffer from inequality will blow up the structure of political democracy which the Constituent Assembly had so laboriously built up.

3. Two months thereafter, the Constitution of India came into force on 26th January 1950. On 26th November 2023, we have completed 74 years from the date on which the Constitution of India was enacted, adopted, and given to ourselves. On 26th January 2024, we have completed 74 years from the date on which the Constitution of India came into effect. We are now in the 75th year of our Republic.

4. For the last 75 years, there has been a march towards achieving social and economic equality. There have been efforts to give social and economic justice to the millions of citizens who on account of centuries and centuries of discrimination and inhuman treatment were denied the legitimate right to come into the mainstream of life. The trinity of Articles 14, 15, and 16 along with Articles 46, 335, 338, 341 and 342 have provided a tool to march towards social and economic equality; emphasis on affirmative action so as to give a special treatment to the underprivileged so that they can march forward; providing reservations in the matters of education and in the matter of public employment have been used so as to provide a special treatment to these backward classes.

5. The present case raises a dispute amongst various classes in the group of Scheduled Castes who claim to be more underprivileged and therefore claim for a more differential treatment qua the more advantageous in that group. Per contra,

the rival classes inside them claim that once the classes are brought into the Presidential List of Scheduled Castes or Scheduled Tribes, they become a part of homogeneous group, and a further classification is not permissible under the Constitution.

6. This quest of the underprivileged for more preferential treatment as compared to the more advantageous in the larger group falls for consideration in the present reference.

7. The 5-Judge Bench of this Court in the case of ***E.V. Chinnaiah vs. State of A.P. and others***[1] has held that such a further classification on the ground of more backwardness among the backwards listed in the Presidential List is not permissible. However, another 5-Judge Bench of this Court in the case of ***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[2] has doubted the view in ***E.V. Chinnaiah*** (supra) and

[1] (2005) 1 SCC 394.
[2] (2020) 8 SCC 1.

referred the matter to a larger Bench. That is how these matters came up for consideration before us.

ARTICLE 341, ARTICLE 342 AND THE PRESIDENTIAL ORDER FOR SCHEDULED CASTES AND SCHEDULED TRIBES

8. For appreciating the rival submissions before us, it is to be noted that while on one hand the struggle for gaining freedom for India was going on; on the other hand, on account of social discrimination prevailing since centuries, a quest for social reforms was also going on.

9. In the beginning, a nomenclature often used by Christian Missionaries was 'depressed classes' to describe the poor and downtrodden section of the society. A wide array of untouchable castes, aboriginal tribes, and other backward communities were all lumped together under that label. In 1909, leaders like Gopal Krishna Gokhale and Annie Besant also referred to low caste or marginalized communities in India as the 'depressed classes'. Besant compared the 'depressed classes' in India to the

'submerged tenth' in England, i.e., unskilled labourers, scavengers, sweepers, casual dock labourers, etc., constituting 10% of the population of that country. However, by 1918, the term 'depressed classes' began to be used for only low-caste Hindus who suffered from the stigma of untouchability. The word 'class' in 'depressed class' was really a synonym for caste[3].

10. It would be apposite to start with the Census Report of 1891. It refers to the manner of enumeration of castes including castes, tribes and sub-divisions. It also refers to the scheme of classification based on occupation divided into 60 categories. Then the said report regroups these 60 categories into 21 groups. The said report refers to Rajputs and Jats as tribes, larger than castes. Class VII deals with "Leather Workers and Lower Village Menials" and it includes the following groups:

> "40. Leather workers
> 41. Watchmen and Village Menials
> 42. Scavengers"

[3] Abhinav Chandrachud, *These Seats are Reserved: Caste, Quotas and the Constitution of India* (Viking by Penguin Random House India 2023).

11. Thereafter comes the Indian Statutory Commission Report, 1930. The heading of Chapter 4 of Part I is "Caste and the Depressed Classes". The report specifically states that a Caste has been described as "the foundation of the Indian social fabric". It further states that every Hindu necessarily belongs to the caste of his parents, and in that caste he inevitably remains. It states that no accumulation of wealth and no exercise of talents can alter his caste status; and marriage outside his caste is prohibited or severely discouraged. It further states that in some cases, the application of the rule of caste seems almost to prescribe the means of livelihood of its members; indeed, many castes partake of the nature of occupational guilds. It states that the caste system, which may have originated in the preservation of ceremonial purity in social relations and in rules designed to limit admixture of blood, has during ages developed into an institution which assigns to each individual his duty and his position in orthodox Hinduism. However, the boundary which

brings members of the same caste together also serves to separate them from innumerable compartments embracing other castes. It further states that this has resulted in a rigid and detailed subdivision of Hindu society which strongly contrasts with the theory of equalitarian ideas among Moslems and Christians.

12. Paragraph 53 of the Report deals with "the depressed classes". It states that the depressed classes comprise about 20% of the total population of the British India or about 30% of the Hindu population. They constitute the lowest castes recognized as being within the Hindu religious and social system. It further states that in origin these castes seem to be partly "functional," comprising those who followed occupations held to be unclean or degrading, such as scavenging or leather working, and partly "tribal," i.e., aboriginal tribes absorbed into the Hindu fold and transformed into an impure caste. It further states that their essential characteristic is that, according to the tenets of

orthodox Hinduism, they are, though within the Hindu system, "untouchable," – that is to say, that for all other Hindus they cause pollution by touch and defile food or water. They are denied access to the interior of an ordinary Hindu temple. It states that they are not only the lowest in the Hindu social and religious system, but with few individual exceptions are also at the bottom of the economic scale and are generally quite uneducated. The Report shows that in the villages they are normally segregated in a separate quarter and very frequently eat food which would not be even touched by any other section of the community.

13. A large proportion of them are landless agricultural labourers employed by cultivators for small remuneration. It states that it was not uncommon for a particular shed in a factory to be reserved for depressed class workers.

14. Paragraph 54 of the Report deals with "Disabilities of the Untouchables". It states that the actual disabilities, other than

religious, suffered by the untouchables owing to their untouchability vary very greatly in different parts of India, not only from province to province, but also in different parts of the same province and even sometimes in different parts of the same district. It states that the two most widespread difficulties are about water and schools. It states that in many places it was customary for the untouchables to be denied access to the wells or tanks used by the other castes and great difficulty has often been found, when a new source of water supply has been provided from public funds by local authorities, in arranging for the untouchables to have use of it. The Report highlights that if any village draws its water from a river, the untouchables will be required to take their supply from a different point, lower down. In many places the children of untouchables are either excluded altogether from ordinary schools, although provided in whole or in part from public funds, otherwise they would be required to sit apart. In some cases, the untouchable children are required to

attend the classes standing outside the classroom. The Report highlights that the difficulty of the administrator or political reformer was much increased by the fact that the great body of the untouchables yet accept their destiny as natural and inevitable. The Report states that their state is indeed pitiable inside the Hindu fold and yet not of it living on the edge of starvation, and unaware of any hope of improving their lot.

15. Paragraph 55 of the Report highlights that the depressed classes were most severely felt in Madras, and especially in Malabar. In Malabar, is still found the phenomenon of "unapproachability," that is, the untouchable must not approach within a certain distance of a high caste Hindu and would have to leave the road to allow his passage, and even to shout to give warning of the risk of pollution. The Report states that the local authority in another part of Madras had preferred to leave the roads un-mended rather than employ untouchable labourers to repair them.

16. The Report further points out that in Bombay and the Central Provinces, the position was more or less comparable with that in Madras. The Report also refers to the telegrams from Nasik and Poona, in the Bombay Presidency, wherein organized action on the part of some untouchables was taken to assert a claim to enter Hindu temples.

17. It may not be out of place to mention that during the relevant period Dr. B.R. Ambedkar had also started a movement for opening waterbodies to the untouchables and even untouchables being permitted to enter the temples. One of such agitations was about a public tank called 'Chavder tank' in Mahad, held on 20th March 1927 and another was an attempt to enter Kalaram temple at Nashik on 2nd March 1930.

18. The Report further states that in Bengal, Bihar and Orissa and the United Provinces, although there were large numbers belonging to untouchable castes, in general they do not seem to suffer so universally or so severely as in the South. The Report,

however, states that the problem did exist in these areas also. The Report also gives approximate percentage of population of the number of untouchables. The Report excludes aboriginals who are outside the Hindu fold.

19. The next document that requires a mention is 'the Census of India 1931'. The said Report coins the phrase 'primitive tribes', who reside in hills, forests, and other nomadic groups. These primitive tribes provide a foundation for Scheduled Tribes. It also notes that the formerly depressed classes are now referred to as the Scheduled Castes.

20. It could thus be seen that while the primitive tribes who reside in hills, forests and remote areas provide a foundation for Scheduled Tribes, the so-called depressed classes which are so recognized on account of untouchability provide a foundation for Scheduled Castes. The Report also states that the 1931 Census Report remains the source material for present day Scheduled Castes and Scheduled Tribes.

21. Then comes the Government of India Act, 1935 (hereinafter referred to as "the 1935 Act"). Part II of the 1935 Act deals with "The Federation of India". Chapter I thereof deals with "Establishment of Federation and Accession of Indian States". Section 5 of the 1935 Act deals with "Proclamation of Federation of India" and Section 6 of the 1935 Act deals with "Accession of Indian States". Clause (a) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of States. Clause (b) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained, have acceded to the Federation.

22. Section 18 of the 1935 Act deals with "Constitution of the Federal Legislature". Sub-section (3) of Section 18 provided that representatives to be provided to the Council of States and the Federal Assembly shall be chosen in accordance with the provisions in that behalf contained in the First Schedule of the 1935 Act.

23. Similarly, Section 60 of the 1935 Act deals with "Constitution of Provincial Legislatures". Section 61 of the 1935 Act provides for "Composition of Chambers of Provincial Legislatures". Sub-section (1) of Section 61 provided that the composition of the Chamber or Chambers of the Legislature of a Province shall be such as is specified in relation to that Province in the Fifth Schedule to the 1935 Act.

24. The First Schedule to the 1935 Act provided for "Composition of the Federal Legislature". Clause 4 thereof *inter alia* provides for seats for representatives of the Scheduled Castes.

25. It will be relevant to reproduce Clause 8 of the First Schedule to the 1935 Act, which reads thus:

> "8. In any Province to which a seat to be filled by a representative of the scheduled castes is allotted, a person to fill that seat shall be chosen by the members of those castes who hold seats in the Chamber or, as the case may be, either Chamber of the Legislature of that Province."

26. It could thus be seen that the 1935 Act provided that in any Province where seat(s) is/are to be filled by the representatives of the Scheduled Castes where they are so allotted, shall be chosen by the members of those castes who hold seats in the Chamber or either Chamber of the Legislature of that Province.

27. Clause 18 of the First Schedule deals with "The Federal Assembly".

28. It could thus be seen that Clause 18 of First Schedule to the 1935 Act *inter alia* deals with seats reserved for members of the Scheduled Castes.

29. Clause 26 of the First Schedule to the 1935 Act is the interpretation clause. It defines "the Scheduled Castes" as under:

> ""the scheduled castes" means such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as "the depressed classes", as His Majesty in Council may specify;"

30. It is thus clear that the 1935 Act defines 'the Scheduled Castes" to mean such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as "the depressed classes", as His Majesty in Council may specify.

31. It could thus be seen that the definition of "the Scheduled Castes" can be traced to "the depressed classes", which were used in a generic sense earlier and again traced to the most backward people suffering untouchability.

32. Then comes the Government of India (Scheduled Castes) Order, 1936 (hereinafter referred to as "the 1936 Order"), notified on 30th April 1936. It will be relevant to refer to the said order, which is as under:

"**THE GOVERNMENT OF INDIA (SCHEDULED CASTES) ORDER, 1936**

AT THE COURT AT BUCKINGHAM PALACE

The 30th day of April, 1936

Present,

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL

Whereas by certain provisions in the First, Fifth and Sixth Schedules to the Government of India Act, 1935, His Majesty in Council is empowered to specify the castes, races or tribe or parts of or groups within castes, races or tribes which are to be treated as the scheduled castes for the purposes of those Schedules:

AND WHEREAS a draft of this Order was laid before Parliament in accordance with the provisions of subsection (1) of section three hundred and nine of the said Act and an Address has been presented by both

Houses of Parliament praying that an Order may be made in the terms of this Order :

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling Him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows :-

1. This Order may be cited as "The Government of India (Scheduled Castes) Order, 1936."

2. Subject to the provisions of this Order, for the purposes of the First, Fifth and Sixth Schedules to the Government of India Act, 1935, the castes, races or tribes, or parts of or groups within castes, races or tribes specified in Parts I to IX of the Schedule to this Order shall, in the Provinces to which those Parts respectively relate, be deemed to be scheduled castes so far as regards members thereof resident in the localities specified in relation to them respectively in those Parts of that Schedule.

3. Notwithstanding anything in the last preceding paragraph-

(a) no Indian Christian shall be deemed to be a member of a scheduled caste;

(b) in Bengal no person who professes Buddhism or a tribal religion shall be deemed to be a member of any scheduled caste;

and if any question should arise as to whether any particular person does or does not profess Buddhism or a tribal religion, that question shall be determined according to the answers which he may make, in the prescribed manner, to such questions as may be prescribed.

4. In this Order the expression "Indian Christian" has the same meaning as it has for the purposes of Part I of the First Schedule to the Government of India Act, 1935, and the expression "prescribed" means prescribed by rules made by the Governor of Bengal, exercising his individual judgment.

5. Any reference in the Schedule to this Order to any division, district, subdivision, tahsil or municipality shall be construed as a reference to that division, district, subdivision, tahsil or municipality as existing on the first day of July, nineteen hundred and thirty-six.

SCHEDULE

PART I – MADRAS

(1) Scheduled castes throughout the Province :-

Adi-Andhra	Gosangi	Paidi
Adi-Dravida	Haddi	Painda
Adi-Karnataka	Hasla	Paky
Ajila	Holeya	Pallan
Arunthuthiyar	Jaggali	Pambada

Baira	Jambuvulu	Pamidi
Bakuda	Kalladi	Panchama
Bandi	Kanakkan	Paniyan
Bariki	Kodalo	Panniandi
Battada	Koosa	Paraiyan
Bavuri	Koraga	Paravan
Bellara	Kudumban	Pulayan
Byagari	Kuravan	Puthirai Vannan
Chachati	Madari	Raneyar
Chakkiliyan	Madiga	Relli
Chalavadi	Maila	Samagara
Chamar	Mala	Samban
Chandala	Mala Dasu	Sapari
Cheruman	Matangi	Semman
Dandasi	Moger	Thoti
Devandrakulathan	Muchi	Tiruvalluvar
Ghasi	Mundala	Valluvan
Godagali	Nalakeyava	Valmiki
Godari	Nayadi	Vettuvan
Godda	Paga dai	

(2) Scheduled castes throughout the Province except in any special constituency constituted under the Government of India Act, 1935, for the election of a representative of backward areas and backward tribes to the Legislative Assembly of the Province :-

Aranadan	Kattunayakan	Kuruman
Dombo	Kudiya	Malasar
Kadan	Kudubi	Mavilan
Karimpalan	Kurichchan	Pano

PART II – BOMBAY

Scheduled Castes : -

(1)Throughout the Province : -

Asodi	Dhor	Mang Garudi
Bakad	Garode	Meghval, or Menghwar
Bhambi	Halleer	Mini Madig
Bhangi	Halsar, or Haslar, or Hulsavar	Mukri
Chakrawadya – Dasar	Holaya	Nadia
Chalvadi	Khalpa	Shenva, or Shindhava
Chambhar, or Mochigar, or Samagar	Kolcha, or Kolgha	Shingdav, or Shingadya
Chena – Dasaru	Koli Dhor	Sochi
Chuhar, or Chuhra	Lingader	Timali
Dakaleru	Madig, or Mang	Turi
Dhed	Mahar	Vankar
Dhegu-Mega		Vitholia

(2) Throughout the Province except in the Ahmedabad, Kaira, Broaoh and Panch Mahals and Surat districts – Mochi.

(3) In the Kanara district – Kotegar.

PART III – Bengal

Scheduled castes throughout the Province : -

Agariya	Hari	Mal
Bagdi	Ho	Mallah
Bahelia	Jalia Kaibartta	Malpahariya
Baiti	Jhalo Malo, or Malo	Mech
Bauri	Kadar	Mehtor
Bediya	Kan	Muchi
Beldar	Kandh	Munda
Berua	Kandra	Musahar
Bhatiya	Kaora	Nagesia
Bhuimali	Kapuria	Namasudra
Bhuiya	Karenga	Nat
Bhumij	Kastha	Nuniya
Bind	Kaur	Oraon
Binjhia	Khaira	Paliya
Chamar	Khatik	Pan
Dhenuar	Koch	Pasi
Dhoba	Konai	Patni
Doai	Konwar	Pod
Dom	Kora	Rabha
Dosadh	Kotal	Rajbanshi
Garo	Lalbegi	Rajwar
Ghasi	Lodha	Santal
Gonrhi	Lohar	Sunri
Hadi	Mahar	Tiyar
Hajang	Mahli	Turi
Halalkhor		

PART IV – UNITED PROVINCES

Scheduled castes :-

(1)Throughout the Province :-

Agariya	Chamar	Kharot
Aheriya	Chero	Karwar (except Benbansi)
Badi	Dabgar	Khatik
Badhik	Dhangar	Kol
Baheliya	Dhanuk (Bhangi)	Korwa
Bajaniya	Dharkar	Lalbegi
Bajgi	Dhobi	Majhwar
Balahar	Dom	Nat
Balmiki	Domar	Pankha
Banmanus	Gharami	Parahiya
Bansphor	Ghasiya	Pasi
Barwar	Gual	Patari
Basor	Habura	Rawat
Bawariya	Hari	Saharya
Beldar	Hela	Sanaurhiya
Bengali	Kalabaz	Sansiya
Beriya	Kanjar	Shilpkar
Bhantu	Kapariya	Tharu
Bhuiya	Karwal	Turaiha
Bhuyiar	Khairaha	
Boriya		

(2)Throughout the Province except in the Agra, Meerut and Rohilkhand divisions – Kori

PART V – PUNJAB

Scheduled Castes throughout the Province : -

Ad Dharmis	Marija or Marecha	Khatik
Bawaria	Bangali	Kori
Chamar	Barar	Nat
Chuhra, or Balmiki	Bazigar	Pasi
Dagi and Koli	Bhanjra	Perna
Dumna	Chanal	Sapela
Od	Dhanak	Sirkiband
Sansi	Gagra	Meghs
Sarera	Gandhila	Ramdasis

PART VI – BIHAR

Scheduled Castes : -

(1)Throughout the Province :-

Chamar	Halalkhor	Mochi
Chaupal	Hari	Musahar
Dhobi	Kanjar	Nat
Dusadh	Kurariar	Pasi
Dom	Lalbegi	

(2)In the Patna and Tirhut divisions and the Bhagalpur, Mong Palamau and Purnea district:-

Bauri	Bhumij	Rajwar
Bhogta	Ghasi	Turi
Bhuiya	Pan	

(3)In the Dhanbad subdivision of the Manbhum district and the Central Manbhum general rural constituency, and the Purulia and Raghunathpur municipalities : -

Bauri	Ghasi	Rajwar
Bhogta	Pan	Turi
Bhuiya		

PART VII – CENTRAL PROVINCES AND BERAR

Scheduled Castes		*Localities*
Basor, or Burud Chamar Dom Ganda Mang Mehtar or Bhangi Mochi Satnami		Throughout the Province
Audhelia	:	In the Bilaspur district
Bahna	:	In the Amraoti district
Balahi, or Balai	:	In the Berar division and the Balaghat, Bhandara, Betul, Chanda, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nagpur, Nimar Saugor and Wardha districts
Bedar	:	In the Akola, Amraoti and Buldana districts.

Chadar	:	In the Bhandara and Saugor districts
Chauhan	:	In the Drug district
Dahayat	:	In the Damoh subdivision of Saugor district.
Dewar	:	In the Bilaspur, Drug and Raipur districts.
Dhanuk	:	In the Saugor district, except in the Damoh subdivision thereof.
Dhimar	:	In the Bhandara district
Dhobi	:	In the Bhandara, Bilaspur, Raipur and Saugor districts, and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Dohor	:	In the Berar division, and the Balaghat, Bhandara, Chanda, Nagpur and Wardha districts.
Ghasia	:	In the Berar division and in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur and Wardha districts.
Holiya	:	In the Balaghat and Bhandara districts.

Jangam	:	In the Bhandara district.
Kaikari	:	In the Berar division, and in Bhandara, Chanda, Nagpur and Wardha districts.
Katia	:	In the Berar division, in the Balaghat, Betul Bhandara, Bilaspur, Chanda, Drug, Nagpur, Nimar, Raipur and Wardha districts, in the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.
Khangar	:	In the Bhandara, Buldhana and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Khatik	:	In the Berar division, in the Balaghat, Bhandara, Chanda, Nagpur and Wardha

		districts, in the Hoshangabad tahsil of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.
Koli	:	In the Bhandara and Chanda district
Kori	:	In the Amraoti, Balaghat, Betul, Bhandara, Buldana, Chhindwara, Jubbulpore, Mandla, Nimar, Raipur and Saugor districts, and in the Hoshangabad district, except in the Harda and Sohagpur tahsils thereof.
Kumhar	:	In the Bhandara and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Madgi	:	In the Berar division, and in the Balaghat Bhandara, Chanda,

		Nagpur and Wardha districts.
Mala	:	In the Balaghat, Betul, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nimar and Saugor districts.
Mehra, or Mahar	:	Throughout the Province, except in the Harda and Sohagpur tahsils of the Hoshangabad district.
Nagarchi	:	In the Balaghat, Bhandara, Chhindwara, Mandla, Nagpur and Raipur districts.
Ojha	:	In the Balaghat, Bhandara and Mandla districts and the Hoshangabad tahsil of the Hoshangabad district.
Panka	:	In the Berar division, in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur, Saugor and Wardha districts and in the Chhindwara district except in the Seoni subdivision thereof.

Pardhi	:	In the Narsinghpur subdivision of the Hoshangabad district.
Pradhan	:	In the Berar division, in the Bhandara Chanda, Nagpur, Nimar, Raipur and Wardha districts and in the Chhindwara district, except in the Seoni subdivision thereof.
Rujjhar	:	In the Sohagpur tahsil of the Hoshangabad district.

PART VIII – ASSAM

Scheduled Castes : -

(1) In the Assam Valley : -

Namasudra	Hira	Mehtar, or Bhangi
Kaibartta	Lalbegi	Bansphor
Bania, or Brittial-Bania		

(2) In the Surma Valley :-

Mali, or Bhuimali	Sutradhar	Kaibartta, or Jaliya
Dhupi, or Dhobi	Muchi	Lalbegi
Dugla, or Dholi	Patni	Mehtar, or Bhangi
Jhalo and Malo	Namasudra	Bansphor

Mahara

PART IX – ORISSA

Scheduled castes : -

(1)Throughout the Province :-

Adi-Andhra	Godra	Mangan
Audhelia	Gokha	Mehra, or Mahar
Bariki	Haddi, or Hari	Mehtar, or Bhangi
Basor,or Burud	Irika	Mochi, or Muchi
Bavuri	Jaggali	Paidi
Chachati	Kandra	Painda
Chamar	Kantia	Pamidi
Chandala	Kela	Panchama
Dandasi	Kodalo	Panka
Dewar	Madari	Relli
Dhoba, or Dhobi	Madiga	Sapari
Ganda	Mahuria	Satnami
Ghusuria	Mala	Siyal
Godagali	Mang	Valamiki
Godari		

(2)Throughout the Province except in the Khondmals district, the district of Sambalpur, and the areas transferred to Orissa under the provisions of the Government of India (Constitution of Orissa)

Order, 1936, from the Vizagapatam and Ganjam Agencies in the Presidency of Madras:-

Pan, or Pano

(3)Throughout the Province except in the Khondmals district and the areas so transferred to Orissa from the said Agencies : -

Dom, or Dombo

(4)Throughout the Province except in the district of Sambalpur :

Bauri	Bhumij	Turi
Bhuiya	Ghasi, or Ghasia	

(5)In the Nawapara subdivision of the district of Sambalpur: -

Kori	Nagarchi	Pradhau

C. K. Rhodes,
Joint Secy. to the Govt. of India"

33. It could thus be seen that for the purposes of the First, Fifth and Sixth Schedules to the 1935 Act , the castes, races or tribes, or parts of or groups within castes, races or tribes specified in Parts I to IX of the Schedule to the 1936 Order were deemed to

be scheduled castes in the Provinces to which those Parts respectively relate.

34. A perusal of the 1936 Order would reveal that for different provinces different castes were notified as Scheduled Castes. In some of the provinces, a particular caste was to be considered as Scheduled Caste, except in the districts mentioned therein where it was not to be considered as Scheduled Caste. Similarly, in some of the cases, in particular areas or districts, the said castes were deemed to be Scheduled Castes in the same province.

35. It can thus be seen that a same caste in the same province could be a Scheduled Caste only in one or more districts and not in the other districts.

36. It could be seen that insofar as the Bombay Province is concerned, the caste 'Mochi' would be a Scheduled Caste throughout the Province except in Ahmedabad, Kaira, Broaoh and Panch Mahals and Surat districts. Similarly, a caste

'Kotegar' would be a Scheduled Caste only in the Kanara district and not in the rest of the Province.

37. It could thus be seen that the 1936 Order formed the basis of the Constitution (Scheduled Castes) Order, 1950 (hereinafter referred to as "the 1950 Order") issued under Article 341(1) after the commencement of the Constitution.

38. Then comes the most important event i.e. the debate in the Constituent Assembly on 17th September 1949, when Dr. B.R. Ambedkar moved two new draft Articles being Articles 300A and 300B, which read thus:

> "300A-Scheduled Castes
>
> (1) The President may, after consultation with the Governor or Ruler of a State, by public notification specify the castes, races or tribes or Scheduled Castes parts of or groups within castes, races or tribes, which shall for purposes of this Constitution be deemed to be Scheduled Castes in relation to that State.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued by the President under clause (1) of this article any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

300B-Scheduled Tribes

(1) The President may after consultation with the Governor or Ruler of a State, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for purposes of this Constitution be deemed to be scheduled tribes in relation to that State.

(2) Parliament may by law include in or exclude from the list of scheduled tribes specified in a notification issued by the President under clause (1) of this article any Tribe or Tribal community or part of or group within any Tribe or Tribal community but save as aforesaid a notification issued under the said

clause shall not be varied by any subsequent notification."

39. While moving the said new draft Articles, Dr. B.R. Ambedkar stated thus:

> "The object of these two articles, as I stated, was to eliminate the, necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have, the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution. The only limitation that has been imposed is this : that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

40. It could thus be seen that the idea behind draft Articles 300A and 300B, which are now Articles 341 and 342, was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It was proposed that the President, in consultation with the Governor or Ruler of a State shall have the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution.

41. It is thus clear that the purpose of draft Article 300A (now Article 341) and draft Article 300B (now Article 342) was for identifying the castes, races, or tribes, or parts of or groups within castes, races or tribes, which were entitled to the privileges which had been defined for them in the Constitution.

42. It is thus clear that the purpose of draft Articles 300A and 300B (now Articles 341 and 342) was not providing the privileges but only identifying the castes, races, or tribes, or parts of or groups within castes, races or tribes, which would be entitled for the privileges which were elsewhere provided under the Constitution.

43. Dr. B.R. Ambedkar further observed that the only limitation that has been imposed was that once a notification has been issued by the President, which he would be issuing in consultation with and on the advice of the Government of the State, thereafter, if any elimination or addition was to be made in the List so notified, the same can be done only by Parliament and not by the President. The purpose was to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President.

44. It is amply clear that the purpose behind the said provisions was that once an identification has been done in the List so

notified, the Executive should not tinker with it and any addition or deletion had to be made only by Parliament.

45. It will also be relevant to refer to the speech of Shri V.I.Muniswami Pillai, given on the same day i.e. 17th September 1949 in support of the amendment, which reads as under:

> **"Shri V. I. Muniswami Pillai :** Mr. President, I come to support the amendments that have been moved by the Honourable Dr. Ambedkar. These amendments deal with the definition of Scheduled Castes. As far as I can see he has made it clear that, according to the second part of it, the President on the 26th January 1950 will publish a list of such communities that come under the category of Scheduled Castes. But I would like to inform this House of the background which brought out the special name of Scheduled Castes. It was the intouchability, the, social evil that has been practised by the Hindu Community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu society. Going backwards to 1916 it was in that year when Government found that something had to be done for the untouchable

classes, (when they said untouchable classes, they were always understood to be Hindus,) and they had to be recognised. In Madras there were six communities that came under this classification. During the Montago Chelmsford reforms they were made ten. In 1930 when the great epoch-making fast of Mahatma Gandhi came about, then only the country saw who were the real untouchable classes. And in the 1935 Act, the Government thoroughly examined the whole thing and as far as the Province of Madras is concerned they brought 86 communities into this list or category, though there were some touchable classes also. Now, after further examination the Provincial Governments have drawn up a list and I think according to the amendment mover's suggestions, all those communities that come-under the category of untouchables and those who profess Hinduism will be the Scheduled Castes, because I want to emphasise about the religion. I emphasise this because of late there have been some movements here and there; there are people who have left Scheduled Castes and Hinduism and joined other religions and they also are claiming to be scheduled Castes. Such convert cannot come under the scope of this definition. While I have no objection to Government granting any concessions to these converts, I feel

strongly that they should not be clubbed along with Scheduled Castes.

Sir, I am grateful to the Drafting Committee and also to the Chairman of that Committee for making the second portion of it very clear, that in future, after the declaration by the President as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude, anybody or any community from the list of Scheduled Castes that must be by the word of Parliament. I feel grateful to him for bringing in this clause, because I know, as a matter of fact, when Harijans behave independently or asserting their right on some matters, the Ministers in some Provinces not only take note and action against those members, but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed.

I strongly oppose the amendment moved by Pandit Bhargava. The reason is that he wants to have the ten years period for observing these amendments. But he has entirely forgotten that under another article that we have already passed, or will pass the Constitution provides for the

> appointment of a Special officer at the Centre and also various officers in all the Provinces to go into the various disabilities of these communities and to submit a report to the President who will then be able to know whether the Scheduled Castes have reached a stage when the facilities now given to them could be withdrawn. I do not think that the reasons that he has advanced are fair and square for the uplift of the Harijans.
>
> With these few words, I support the amendment."

46. It can thus be seen that the Learned Member of the Constituent Assembly refers to the background which brought out the special name of Scheduled Castes. He refers to untouchability, the social evil that has been practiced by the Hindu Community for ages. He states that a section of people, though Hindus, were kept at the outskirts of the Hindu society and it was in the year 1916 when the Government found that something had to be done for the untouchable classes. He refers to the efforts made by Mahatma Gandhi. He identified as to who

were the actual untouchable classes. He refers to the 1935 Act and the efforts of the Government in thoroughly examining the whole thing and states that as far as the Province of Madras is concerned they brought 86 communities into the list or category. He states that according to the amendment mover's suggestions, all those communities that come-under the category of untouchables and those who profess Hinduism will be the Scheduled Castes. However, he opined that those people who have left Hinduism and joined other religions should not be entitled to claim the benefits of Scheduled Castes. He states that if the Government wants to grant any concessions to these converts, they should not be clubbed among the Scheduled Castes.

47. He acknowledges the vision of the Drafting Committee and its Chairman as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude anybody or any community from the list of Scheduled Castes that must

be by the word of Parliament. He states that he is grateful to the Chairman for bringing in this clause and that when Harijans behave independently or assert their right on some matters, not only the members of that community but their entire community is harassed.

48. Having referred to the history of as to how the concept of Scheduled Castes and Scheduled Tribes has emerged, I, now, for the sake of convenience, refer to the provisions in the Constitution of India dealing with the special treatment provided to the Scheduled Castes, Scheduled Tribes and Other Backward Classes. Since we are not concerned with political reservations, I do not find it necessary to refer to the provisions dealing therewith. Since Articles 341 and 342 are draft Articles 300A and 300B, which were approved by the Constituent Assembly on 17th September 1949, I do not repeat the same here.

Article 15, 16, 46, 335, 338, Clauses 24 and 25 of Article 366

"**15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) 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—

(*a*) access to shops, public restaurants, hotels and places of public entertainment; or

(*b*) 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.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this 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 classes of citizens

or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

(6) Nothing in this article or sub-clause (*g*) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent the State from making,—

(*a*) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(*b*) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) insofar as such special provisions relate to their admission to educational institutions

including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.

Explanation.—For the purposes of this article and Article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."

"**16. Equality of opportunity in matters of public employment**.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes

of employment or appointment to an office [14][under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such

class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category."

"**46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections**.—The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the

Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

"**335. Claims of Scheduled Castes and Scheduled Tribes to services and posts**.—The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

"**338. National Commission for Scheduled Castes**.—(1) There shall be a Commission for the Scheduled Castes to be known as the National Commission for the Scheduled Castes.

(2) Subject to the provisions of any law made in this behalf by Parliament, the

Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.]

(3) The Chairperson, Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.

(4) The Commission shall have the power to regulate its own procedure.

(5) It shall be duty of the Commission—

(*a*) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(*b*) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes ;

(*c*) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress

of their development under the Union and any State;

(*d*) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(*e*) to make in such report recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes; and

(*f*) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating any matter referred to in sub-clause (*a*) or inquiring into any complaint referred to in sub-clause (*b*) of clause (5), have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely:—

(*a*) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(*b*) requiring the discovery and production of any document;

(*c*) receiving evidence on affidavits;

(*d*) requisitioning any public record or copy thereof from any court or office;

(*e*) issuing commissions for the examination of witnesses and documents;

(*f*) any other matter which the President may, by rule, determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes.

(10) In this article references to the Scheduled Castes shall be construed as including references to the Anglo-Indian community."

"**366. Definitions**.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

****

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;"

49. It will be relevant to note that in the draft definition of 'the Scheduled Castes', the word used earlier was "specify". However, in the final clause (24) of Article 366, the word "specify" has been changed to "deemed".

III. JUDICIAL PRECEDENTS

50. In the last 74 years, the aforesaid constitutional provisions have been considered by this Court on a number of occasions. It will be relevant to refer to some of these judgments.

51. It will also be relevant to note that by the First Amendment to the Constitution in the year 1951 by which clause (4) was added to Article 15 was necessitated on account of the judgment of this Court in the case of ***State of Madras vs. Smt. Champakam Dorairajan***[4] wherein Government Order specifying reservation for Harijans was set aside.

[4] (1951) SCR 525.

A. M.R. Balaji vs. State of Mysore

52. In the case of ***M.R. Balaji and others vs. State of Mysore***[5], the subject matter of challenge before the Constitution Bench of this Court was an order issued by the State of Mysore under Article 15(4) of the Constitution of India. Vide the said order, the State reserved 68% of the seats in the engineering and medical colleges and other technical institutions for the educationally and socially backward classes and Scheduled Castes and Scheduled Tribes and only 32% seats were available for the merit pool.

53. The Constitution Bench of this Court held that the provisions contained in Articles 15(4) and 16(4) are similar provisions. It further held that Article 15(4) is an enabling provision and that it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.

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[5] 1963 Supp. (1) SCR 439:1962 SCC OnLine 147: AIR 1963 SC 649.

54. It will be relevant to refer to the following observations of this Court:

> "**20.** Article 15(4) authorises the State to make a special provision for the advancement of any socially and educationally backward classes of citizens, as distinguished from the Scheduled Castes and Scheduled Tribes. No doubt, special provision can be made for both categories of citizens, but in specifying the categories, the first category is distinguished from the second. Sub-clauses (24) and (25) of Article 366 define Scheduled Castes and Scheduled Tribes respectively, but there is no clause defining socially and educationally backward classes of citizens, and so, in determining the question as to whether a particular provision has been validly made under Article 15(4) or not, the first question which falls to be determined is whether the State has validly determined who should be included in these Backward Classes. It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and

Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them. Article 34(1) provides for the issue of public notification specifying the castes, races or tribes which shall, for the purposes of this Constitution, be deemed to be Scheduled Castes either in the State or the Union territory as the case may be. Similarly Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3), it is provided that references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other Backward Classes as the President may, on receipt of the report of a commission appointed under Article 340(1) by order, specify and also to the Anglo-Indian community. It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in

> Scheduled Castes and Tribes. That helps to bring out the point that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes."

55. This Court observed that the backward classes of citizens for whom special provision is authorized to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. It has been observed that the Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. However, it was realized that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less backward than the Scheduled Castes and Scheduled Tribes, and it was thought that some special provision ought to be made even for them. The Court observed that the Backward Classes for whose improvement special provision is

contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

56. It will also be apposite to refer to the following observations of this Court:

> "**21.** ……The backwardness under Article 15(4) must be social and educational. It is not either social or educational, but it is both social and educational; and that takes us to the question as to how social and educational backwardness has to determined."

57. It is thus clear that the Constitution Bench of this Court observed that the backwardness under Article 15(4) must be social and educational. It is neither social nor educational, but it has to be both social and educational.

58. The Court then considered the question as to whether caste can be made the sole basis for determining the social backwardness was permissible or not. The Court observed that

the group of citizens to whom Article 15(4) applies are described as "classes of citizens", not as castes of citizens. The Court observed that therefore in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It has been observed that though the caste of the group of citizens may be relevant, its importance should not be exaggerated. The Court further observed that social backwardness is, on the ultimate analysis, the result of poverty to a very large extent. It observed that the classes of citizens who are deplorably poor automatically become socially backward. It observed that they do not enjoy a status in society and have, therefore, to be content to take a backward seat. The Court therefore held that both caste and poverty are relevant in determining the backwardness of citizens.

59. The Court further observed that the occupations of citizens may also contribute to making classes of citizens socially

backward. It has been observed that there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. It has been observed that the place of habitation also plays a role in determining the backwardness of a community of persons. It therefore held that the problem of determining who are socially backward classes is very complex. It has been held that sociological, social, and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward. However, it observed, that is the function of the State which purports to act under Article 15(4) of the Constitution of India.

60. In the facts of the said case, the Court found that the State had applied the sole criteria of caste without regard to the other factors. It was therefore held that the criteria of social backwardness of the communities to whom the order impugned

therein was applied was not permissible under Article 15(4) of the Constitution of India.

61. Insofar as the educational backwardness of the classes of citizens is concerned, the State had applied the formula that all castes whose average student population in the last three High School classes of all High Schools in the State was less than the State average of 6.9 per thousand should be regarded as backward communities. Insofar as more backward communities are concerned, the criteria applied was that if the average of any community was less than 50% of the State average, it should be regarded as constituting the more backward classes.

62. The Court held that the State was not justified in including in the list of Backward Classes, castes, or communities whose average of student population per thousand was slightly above, or very near, or just below the State average.

B. *State of Kerala vs. N.M. Thomas*

63. Coming next to one of the most important judgments dealing with the affirmative action which is the 7-Judge Bench judgment of this Court in the case of ***State of Kerala and another vs. N.M. Thomas and others***[6]. In the said case, out of the 7 Learned Judges, 5 Learned Judges upheld the provisions made by the Kerala Government for providing affirmative action to ameliorate the situation of Scheduled Castes and Scheduled Tribes.

64. It will be apposite to refer to the following observation made by A.N. Ray, C.J.:

> "**21.** Articles 14, 15 and 16 form part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable

[6] (1976) 2 SCC 310.

classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment.

22. This Court in *State of Gujarat* v. *Shri Ambica Mills Ltd.*, *Ahmedabad* [(1974) 4 SCC 656 : 1974 SCC (L&S) 381] said: [SCC p. 675: SCC (L&S) p. 400, para 53]

> "The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. (*See* Joseph Tussman and Jacobusten Brook, *The Equal Protection of the Laws*, 37 California Rev. 341.)"

23. In *Ambica Mills case* [(1974) 4 SCC 656 : 1974 SCC (L&S) 381] this Court explained reasonable classification to be one which includes all who are similarly

situated and none who are not. The question as to who are similarly situated has been answered by stating that one must look beyond the classification to the purpose of law.

> "The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good." [SCC p. 675: SCC (L&S) p. 400, para 54]

24. Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

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27. There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (*State of Mysore* v. *V.P. Narasing Rao* [AIR 1968 SC 349 : (1968) 1 SCR 407 : (1968) 2 LLJ 120]).

28. This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).

29. The power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. In providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the Backward Classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. (*General Manager, S. Rly.* v. *Rangachari* [AIR 1962 SC 36 : (1962) 2 SCR 586] .) The present case is not one of reservation of posts by promotion.

30. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class. The Roadside Station Masters and Guards are recruited

> separately, trained separately and have separate avenues of promotion. The Station Masters claimed equality of opportunity for promotion vis-à-vis the guards on the ground that they were entitled to equality of opportunity. It was said the concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. The Roadside Station Masters and Guards were recruited separately. Therefore, the two form distinct and separate classes and there is no scope for predicating equality or inequality of opportunity in matters of promotion. (See *All India Station Masters and Assistant Station Masters' Association* v. *General Manager, Central Railway* [AIR 1960 SC 384 : (1960) 2 SCR 311].) The present case is not to create separate avenues of promotion for these persons."

65. It could thus be seen that in the opinion of Ray, C.J., Articles 14, 15 and 16 form part of a string of constitutional rights guaranteed by it, which supplement each other. His Lordship observed that Article 16, which ensures to all citizens

equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. In turn, Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus with the objects to be achieved.

66. Referring to the judgment of this Court in the case of ***State of Gujarat v. Shri Ambica Mills Ltd., Ahmedabad***[7], His Lordship explained the reasonable classification to be one which includes all who are similarly situated and none who are not. He further observed that discrimination is the essence of classification, and that equality is violated if it rests on an unreasonable basis. He observed that those who are similarly circumstanced are entitled to an equal treatment and that equality is amongst equals. He observed that the classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the

[7] (1974) 4 SCC 656.

groups. He further observed that such differential attributes must bear a just and rational relation to the object sought to be achieved. He further observed that there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. He observed that Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection. He observed that this equality of opportunity need not be confused with absolute equality. It is observed that power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. His Lordship observed that in providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the Backward Classes

consistently with the maintenance of the efficiency of administration.

67. His Lordship further observed thus:

> "**38.** The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2). The relevant touchstone of validity is to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it."

68. It is observed that the rule which provides that given the necessary requisite merit, a member of the backward class shall

get priority so as to ensure adequate representation and the said rule will not violate Article 14 or Article 16(1) and (2). The relevant consideration would be to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it.

69. His Lordship further observed thus:

> "**43.** Scheduled Castes and scheduled tribes are not a caste within the ordinary meaning of caste. In *Bhaiyalal* v. *Harikishan Singh* [AIR 1965 SC 1557 : (1965) 2 SCR 877] this Court held that an enquiry whether the appellant there belonged to the Dohar caste which was not recognised as a scheduled caste and his declaration that he belonged to the Chamar caste which was a scheduled caste could not be premitted because of the provisions contained in Article 341. No court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. Scheduled caste is a caste as notified under Article 366(25). A notification is issued by the President under Article 341 as a result of an elaborate enquiry. The object of Article 341 is to provide

protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Article 15(4) and 16(4) bring out the position of Backward Classes to merit equality. Special provisions are made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept equality is equality of opportunity for appointment. Preferential treatment for members of Backward Classes with due

> regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality."

70. His Lordship clearly observed that Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste. He observed that no court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. It is observed that the object of Article 341 is to provide protection to

the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

71. His Lordship (Ray, C.J.) further observed that our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. It has been held that if members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. It has been observed that special provisions have been made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. It has been emphasized that only such special provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). His Lordship goes on to say that preferential treatment for members of Backward

Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. It has been observed that equality of opportunity for unequals can only mean aggravation of inequality and that equality of opportunity admits discrimination with reason and prohibits discrimination without reason. His Lordship held that discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It has been held that Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. It has been held that the differential treatment in standards of selection is within the concept of equality.

72. I now refer to the following observations of K.K. Mathew, J.:

> "**53.** Formal equality is achieved by treating all persons equally: "Each man to count for one and no one to count for more

than one." But men are not equal in all respects. The claim for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallised privileges. Although the decision to grant equality is motivated prima facie by the alleged reason that all men are equal yet, as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, we realise that the opposite is the truth; for, we think that it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. We, therefore, have to resort to some sort of proportionate equality in many spheres to achieve justice.

54. The principle of proportional equality is attained only when equals are treated equally and unequals unequally. This would raise the baffling question: Equals and unequals in what? The principle of proportional equality therefore involves an appeal to some criterion in terms of which differential treatment is justified. If there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified. But what

is to be allowed as a significant difference such as would justify differential treatment?

55. In distributing the office of a State, not any sort of personal equality is relevant; for, unless we employ criteria appropriate to the sphere in question, it would turn out that a man's height or complexion could determine his eligibility or suitability for a post. As Aristotle said, claims to political office cannot be based on prowess in athletic contests. Candidates for office should possess those qualities that go to make up an effective use of the office. But this principle also does not give any satisfactory answer to the question when differential treatment can be meted out. As I said, the principle that if two persons are being treated or are to be treated differently there should be some relevant difference between them is, no doubt, unexceptionable. Otherwise, in the absence of some differentiating feature what is sauce for the goose is sauce for the gander. The real difficulty arises in finding out what constitutes a relevant difference.

56. If we are all to be treated in the same manner, this must carry with it the

important requirement that none of us should be better or worse in upbriging, education, than anyone else which is an unattainable ideal for human beings of anything like the sort we now see. Some people maintain that the concept of equality of opportunity is an unsatisfactory concept. For, a complete formulation of it renders it incompatible with any form of human society. Take for instance, the case of equality of opportunity for education. This equality cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. To remedy this, all children might be brought up in State nurseries, but, to achieve the purpose, the nurseries would have to be run on vigorously uniform lines. Could we guarantee equality of opportunity to the young even in those circumstances? The idea is well expressed by Laski:

> "Equality means, in the second place, that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal. Children who are brought up in an atmosphere where things of the mind are accounted highly

> are bound to start the race of life with advantages no legislation can secure. Parental character will inevitably affect profoundly the equality of the children whom it touches. So long, therefore, as the family endures — and there seems little reason to anticipate or to desire its disappearance — the varying environments it will create make the notion of equal opportunities a fantastic one. ["Liberty and Equality" in Special Problems and Public Policy : Inequality and Justice, Ed. Lee Rainwater, pp. 26 to 31]
>
> **57.** Though complete identity of equality of opportunity is impossible in the world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1)."

73. Mathew, J. observed that formal equality is achieved by treating all persons equally. Formally, it requires that all men have to be treated as the same. He observed that men are not equal in all respects. The claim for equality is in fact a protest

against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges. He observed that as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. He explains the theory of proportional equality and observed that the principle of proportional equality can be attained only when equals are treated equally and unequals unequally. He observed that if there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified. But if there is significant respect in which persons concerned are distinguishable, the same would justify differential treatment. His Lordship observed that if two people are being treated or are to be treated differently there should be some relevant difference between them. Otherwise, in the absence of some differentiating

feature what is sauce for the goose is sauce for the gander. He observed that the real difficulty arises in finding out what constitutes a relevant difference.

74. His Lordship observed that if we all were to be treated in the same manner, the same would carry with it the requirement that none of us should be better or worse in upbringing and education than anyone else. He observed that the equality of opportunity for education cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. His Lordship referred to Laski, who opined that parental character will inevitably affect the equality of the children whom it touches. His Lordship then observed that though complete identity of equality of opportunity is impossible in the world, compensatory measures in character calculated to mitigate surmountable obstacles to ensure equality of opportunity would not violate Article 16(1).

75. It will also be apposite to refer to the following observations of Mathew, J. in ***N.M. Thomas*** (supra):

> "**64.** It would follow that if we want to give equality of opportunity for employment to the members of the Scheduled Castes and scheduled tribes, we will have to take note of their social, educational and economic environment. Not only is the directive principle embodied in Article 46 binding on the law-maker as ordinarily understood but it should equally inform and illuminate the approach of the court when it makes a decision as the court also is 'state' within the meaning of Article 12 and makes law even though "interstitially from the molar to the molecular". I have explained at some length the reason why court is "State" under Article 12 in my judgment in *His Holiness Kesavananda Bharati Sripadagalavaru* v. *State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] .
>
> **65.** Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains insofar as, and only insofar as, each member of a community,

whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence. [See R.H. Tawney, "Equality", (1965) pp. 103-04]

66. The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. They mark off a world in which the Government should have no jurisdiction. In this realm, it was assumed that a citizen has no claim upon Government except to be left alone. But the language of Article 16(1) is in marked contrast with that of Article 14. Whereas the accent in Article 14 is on the injunction that the State shall not deny to any person equality before the law or the equal protection of the laws that is, on the

negative character of the duty of the State, the emphasis in Article 16(1) is on the mandatory aspect, namely, that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State implying thereby that affirmative action by the Government would be consistent with the article if it is calculated to achieve it. If we are to achieve equality, we can never afford to relax:

> "While inequality is easy since it demands no more than to float with the current, equality is difficult for it involves swimming against it. [R.H. Tawney, "Equality", (1952), p. 47] "

67. Today, the political theory which acknowledges the obligation of Government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty. The force of the idea of a State with obligation to help the weaker sections of its members seems to have increasing influence in constitutional law. The idea finds expression in a number of cases in America involving social discrimination

and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law. While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances. [See "Developments — Equal Protection", 82 Harv LR 1165]

68. The idea of compensatory State action to make people who are really unequal in their wealth, education or social environment, equal, in specified areas,

was developed by the Supreme Court of the United States. Rousseau has said:

> "It is precisely because the force of circumstances tends to destroy equality that force of legislation must always tend to maintain it. [Contract Social ii, 11] ""

76. His Lordship observed that if we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social, educational, and economic environment. His Lordship observed that the directive principle embodied in Article 46 is not only binding on the lawmaker, but it should equally inform and illuminate the approach of the court when it makes a decision. Referring to the exposition in the case of ***His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala***[8], His Lordship states that the Court is also a 'state' when it makes a decision within the meaning of Article 12.

[8] (1973) 4 SCC 225 : 1973 Supp. SCR 1.

77. His Lordship observed that 'equality of opportunity' is not simply a matter of legal equality and that its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It has been observed that the guarantee of equality is something more than what is required by 'formal equality'. It implies differential treatment of persons who are unequal. It has been observed that egalitarian principle requires that the Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claim Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. His Lordship observed that the emphasis in Article 16(1) is on the mandatory aspect that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It therefore implies that affirmative action by the Government would be consistent with the article if it is calculated to achieve it.

78. Referring to Article 14 of the Constitution, His Lordship observed that the State is under obligation to help the members of the weaker sections. His Lordship observed that under the constitutional law, the Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise. Referring to the concept of proportional equality, His Lordship states that the State is required to frame legislation, to consider the private inequalities of wealth, of education and other circumstances.

79. Referring to the judgments of the Supreme Court of the United States, His Lordship opined that the idea of compensatory State action was to bring about the equality for the people who are really unequal in their wealth, education or social environment.

80. After referring to certain judgments of the United States Supreme Court, Mathew, J. observed thus:

"**73.** There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.

74. The concept of equality of opportunity in matters of employment is wide enough to include within it compensatory measures to put the members of the Scheduled Castes and scheduled tribes on par with the members of other communities which would enable them to get their share of representation in public service. How can any member of the so-called forward communities complain of a compensatory measure made by the Government to ensure the members of Scheduled Castes and scheduled tribes their due share of representation in public services?

75. It is said that Article 16(4) specifically provides for reservation of posts in favour of Backward Classes which according to the decision of this Court would include

the power of the State to make reservation at the stage of promotion also and therefore Article 16(1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the Backward Classes which would derogate from strict numerical equality. If reservation is necessary either at the initial stage or at the stage of promotion or at both to ensure for the members of the Scheduled Castes and scheduled tribes equality of opportunity in the matter of employment, I see no reason why that is not permissible under Article 16(1) as that alone might put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. Whether there is equality of opportunity can be gauged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity.

76. Daniel P. Moynihan, one of America's leading urban scholars, spelled out the problem in a widely publicized study that

he prepared while he was Assistant Secretary of Labour. The Moynihan Report, as it came to be known, made the point in a passage that deserves full quotation:

> "It is increasingly demanded that the distribution of success and failure within one group be roughly comparable to that within other groups. It is not enough that all individuals start out on even terms, if the members of one group almost invariably end up well to the fore and those of another far to the rear. This is what ethnic politics are all about in America, and in the main the Negro American demands are being put forth in this new traditional and established framework.
>
> Here a point of semantics must be grasped. The demand for equality of opportunity has been generally perceived by White Americans as a demand for liberty, a demand not to be excluded from the competitions of life — at the polling place, in the scholarship examinations, at the personnel office, on the housing market. Liberty does, of course, demand that everyone be free to try his luck, or test his skill in such matters. But these opportunities do not necessarily produce equality: on the

contrary, to the extent that winners imply losers, equality of opportunity almost insures inequality of results.

The point of semantics is that equality of opportunity now has a different meaning for Negroes than it has for Whites. It is not (or at least no longer) a demand for liberty alone, but also for equality — in terms of group results. In Bayard Rustin's terms, 'It is now concerned not merely with removing the barriers to full opportunity but with achieving the fact of equality'. By equality Rustin means a distribution of achievements among Negroes roughly comparable to that among Whites. [The Moynihan Report and the Politics of Controversy, Eds. Lee Rainwater and William L. Yancey, p. 49]"

77. Beginning most notably with the Supreme Court's condemnation of school segregation in 1954, the United States has finally begun to correct the discrepancy between its ideals and its treatment of the black man. The first steps, as reflected in the decisions of the courts and the civil rights laws of Congress, merely removed the legal and quasi-legal forms of racial

discrimination. These actions while not producing true equality, or even equality of opportunity, logically dictated the next step: positive use of government power to create the possibility of a real equality. In the words of Professor Lipset:

> "Perhaps the most important fact to recognise about the current situation of the American Negro is that (legal) equality is not enough to insure his movement into larger society." ["The American Democracy", Mcgrath, Cornwell and Goodman, p. 18]

78. I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of Scheduled Castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation.

> **79.** The State can adopt any measure which would ensure the adequate representation in public service of the members of the Scheduled Castes and scheduled tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration."

81. His Lordship observed that there is no reason why this Court should not require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens. His Lordship observed that whenever differing conditions and circumstances stand in the way of a class of citizens in their equal access to the enjoyment of basic rights or claims, the State would be required to adopt a standard of proportional equality.

82. He observed that no member of the forward classes or communities should complain against a compensatory measure

made by the Government to ensure that the members of Scheduled Castes and Scheduled Tribes get their due share of representation in public services.

83. His Lordship observed that if reservation is necessary either at the initial stage or at the stage of promotion or at both, to ensure for the members of the Scheduled Castes and Scheduled Tribes equality of opportunity, then this would be permissible under Article 16(1) as that alone would put them on a parity with the forward communities in the matter of achieving the result which equality of opportunity would produce. It is observed that the formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. He observed that the equality of result is the test of equality of opportunity.

84. Mathew, J. rejects the contention that Article 16(4) is an exception to Article 16(1). He states that such an interpretation

does not consider the social, economic, educational background of the members of the Scheduled Castes and Scheduled Tribes. He held that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1) and that it is only an emphatic way of putting the extent to which equality of opportunity could be carried i.e., even up to the point of making reservation.

85. His Lordship observed that the State can adopt any measure which would ensure the adequate representation in public service of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency of administration.

86. Mathew, J. further observed thus:

> "**83.** A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the

law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the principle laid down in *All India Station Masters and Assistant Station Masters Association* v. *General Manager, Central Railway* [(1960) 2 SCR 311 : AIR 1960 SC 384.] ; *S.G. Jaisinghani* v. *Union of India* and *State of J&K.* v. *Triloki Nath Khosa* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771.] has no application here."

87. It has been observed that a classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. It has been observed that the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule. It specifically observed that it is a mistake to assume *a priori* that there can be no classification within a class. He held that if there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, such a further classification within the class would be permissible in law. He observed that though in one sense classification brings about inequality it is promotive of equality if its object is to bring those who share a common characteristic under a class, for differential treatment for sufficient and justifiable reasons.

88. V.R. Krishna Iyer, J. in his concurring judgment observed thus:

> "**124.** A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell

the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, *most backward* classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).] , the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.

> **125.** The core conclusion I seek to emphasise is that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice — not enshrinement of great rights in Part III and good goals in Part IV. Otherwise, the solemn undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality". A clear vision of the true intendment of these provisions demands a deep understanding of the Indian spiritual-secular idea that divinity dwells in *all* and that ancient environmental pollution and social placement, which the State must extirpate, account for the current socio-economic backwardness of the blacked-out human areas described euphemistically as scheduled castes and scheduled tribes. The roots of our constitutional ideas — at least some of them — can be traced to our ancient culture. The noble Upanishadic behest of collective acquisition of cultural strength (**सह वीर्य करवावहे**) is involved in and must evolve out of "equality", if we are true to the subtle substance of our finer heritage."

89. His Lordship categorizes three-fold danger of reservation. According to him, firstly the benefits, by and large, are snatched

away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim of backwardness is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment. However, they wish to wear the "weaker section" label to score over their near-equals formally categorized as the upper brackets. Thirdly, according to him, a lasting solution to the problem would come only from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive State program.

90. His Lordship observed that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice. He observed that if this is not done, the solemn

undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality".

91. His Lordship further observed thus:

> "**136.** The next hurdle in the appellant's path relates to Article 16(4). To my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to. In the language of Subba Rao, J. (as he then was), in *Devadasan* [AIR 1964 SC 179: (1964) 4 SCR 680, 700 : (1965) 2 LLJ 560] .
>
> > "The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."
>
> True, it may be loosely said that Article 16(4) is an exception but, closely examined, it is an illustration of constitutionally sanctified classification. Public services have been a fascination for Indians even in British days, being a

symbol of State power and so a special article has been devoted to it. Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt (see, for instance, *CIT* v. *Shaw Wallace & Co.* [59 IA 206: AIR 1932 PC 138]).

137. "Reservation" based on classification of backward and forward classes, without detriment to administrative standards (as this Court has underscored) is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. Article 16(1) and (4) are concordant. This Court has viewed Article 16(4)as an exception to Article 16(1). Does classification based on desperate backwardness render Article 16(4) redundant? No. Reservation confers *pro tanto* monopoly, but classification grants under Article 16(1) ordinarily a lesser order of advantage. The former is more rigid, the latter more flexible, although they may overlap sometimes. Article 16(4) covers all backward classes; but to earn the benefit of grouping under Article 16(1) based on Articles 46 and 335 as I have explained, the twin considerations of terrible

> backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied."

92. Referring to the observation of Subba Rao, J. in the case of ***T. Devadasan vs. Union of India***[9], Krishna Iyer, J. observed that Article 16(4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to.

93. He observed that on a closer examination, it can be seen that clause (4) of Article 16 is an illustration of constitutionally sanctified classification. He observed that Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt.

94. It is observed that the "Reservation" based on classification of backward and forward classes, without detriment to administrative standards is an application of the principle of

[9] (1964) 4 SCR 680 : AIR 1964 SC 55.

equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. His Lordship further observed that Article 16(4) covers all backward classes. He however states that for earning the benefit of grouping under Article 16(1) based on Articles 46 and 335, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied.

95. His Lordship also held that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, whereas the other two applying it to sensitive areas which are historically important and politically polemical in a climate of communalism and jobbery.

96. Fazal Ali, J. in his concurring judgment observed thus:

> "**178.** The concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. Indeed if this artificial

interpretation is put on the scope and ambit of Article 16 it will lead to channelisation of legislation or polarisation of rules. Differences and disparities exist among men and things and they cannot be treated alike by the application of the same laws but the law has to come to terms with life and must be able to recognise the genuine differences and disparities that exist in human nature. Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification. In *Morey* v. *Doud* [354 US 457, 473] it was so aptly observed:

> "To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic."

179. Coming now to Article 16 it may be analysed into three separate categories so far as the facts of the present case are concerned:

Category I—clause (1) of Article 16

Category II—clause (2) of Article 16.

Category Ill—clause (4) of Article 16.

> **180.** Clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. It is important to note that the Constitution uses the words "equality of opportunity for *all citizens*". This inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. This, therefore, can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. The classification, however, must be a reasonable one and must fulfil the following conditions:
>
> (*i*) It must have a rational basis;
>
> (*ii*) it must have a close nexus with the object sought to be achieved;
>
> (*iii*) it should not select any person for hostile discrimination at the cost of others."

97. His Lordship observed that differences and disparities exist among men and things, and they cannot be treated alike by the application of the same laws. He observed that the law must

come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature. He observed that the Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification.

98. It has been observed that clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. His Lordship emphasized that the words "equality of opportunity for *all citizens*" used in the Constitution imply that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. According to the Learned Judge, this can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. He however culls out three conditions, viz., (i) it must have a rational basis; (ii) it must have a close nexus with

the object sought to be achieved; and (iii) it should not select any person for hostile discrimination at the cost of others.

99. Echoing the sentiments of the other Learned Judges, by holding that Article 16(4) is not a proviso to Article 16(1), the Learned Judge observed thus:

> "**187.** For these reasons, therefore, I respectfully agree with the observations of Subba Rao, J., as he then was, in *T. Devadasan* v. *Union of India* [AIR 1964 SC 179 : (1964) 4 SCR 680 : (1965) 2 LLJ 560] where he observed:
>
> > "That is why the makers of the Constitution introduced clause (4) in Article 16. The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."
>
> My view that Article 16(4) is not a proviso to Article 16(1) but that this clause covers the whole field of Article 16 is amply supported by the decision of this Court in *General Manager, Southern*

Railway v. *Ranga-chari* where it was observed: (p. 599)

> "It is common ground that Article 16(4) does not cover the entire field covered by Article 16(1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16(1) and (2) do not fall within the mischief of non-obstantive clause in Article 16(4)."

C. ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) vs. Union of India***

100. Next is the case of ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association vs. Union of India and others***[10], where a bench of 3 Learned Judges of this Court was considering the policy directives issued by the Railway Board introducing reservation in cases of selection as well as non-selection posts and other related issues regarding affirmative action.

[10] (1981) 1 SCC 246.

101. Krishna Iyer, J. in paragraph 12, observed thus:

> "**12.** Granville Austin [Granville Austin : The Indian Constitution — Cornerstone of a Nation] quotes profusely from the Constituent Assembly proceedings to prove the goal of the Indian Constitution to be social revolution. Radhakrishnan, representing the broad consensus, said that: [Ibid, p. 27]
>
> > "India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'."

102. The Learned Judge refers to the speech of Dr. Radhakrishnan, representing the broad consensus, wherein he said that India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'.

103. Explaining the inter-relation between Articles 16(1) and 16(4), the Learned Judge observed thus:

"**21.** The preamble which promises justice, liberty and equality of status and opportunity within the framework of secular, socialist republic projects a holistic perspective. Article 16 which guarantees equal opportunity for all citizens in matters of State service inherently implies equalisation as a process towards equality but also hastens to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Article 16(4) for this specific purpose. In a given situation of large social categories being submerged for long, the guarantee of equality with the rest is myth, not reality, unless it is combined with affirmative State action for equalisation geared to promotion of eventual equality. Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). The prescription of Article 16(1) needs, in the living conditions of India, the concrete sanction of Article 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung. To bury this truth is to

sloganise Article 16(1) and sacrifice the facts of life.

22. This is not mere harmonious statutory construction of Article 16(1) and (4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality belong alike to *bhangi* and *brahmin,* prince and pauper, if the *panchama* proletariat is to *feel* the social transformation Article 16(4) promises, the State must apply equalising techniques which will enlarge their opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception [Article 16(4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d'etre, to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article

16(1), to casteify "reservation" even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State.

23. The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the *pariah*, the *mlecha,* the bonded labour, the hungry, hard-working half-slave, whose liberation was integral to our independence. To interpret the Constitution rightly we must understand the people for whom it is made — the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities. This synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation if alienation from the people were not to afflict the justicing process: [J. Landis : Note on Statutory Interpretation, 43 Harv L Rev 886, 891 (1930)]

A statute rarely stands alone. Back of Minerva was the brain of Jove, and

behind Venus was the spume of the ocean."

104. The Learned Judge observed that the guarantee of equal opportunity provided under Article 16 for all citizens in matters of State service inherently implies equalization as a process towards equality. However, he also emphasizes the need to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing. He states that Article 16(4) has been devoted for this very specific purpose. He observed that the guarantee of equality to the large social categories being submerged for long, with the rest, would be myth and not reality, unless it is combined with affirmative State action for equalization geared to promotion of eventual equality. He observed that Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). He observed that the prescription of Article 16(1) needs the concrete sanction of Article 16(4) so that

those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung.

105. The Learned Judge observed that this is not mere harmonious statutory construction of Article 16(1) and (4) but an insightful perception of our constitutional culture. He emphasized that the State must apply equalizing techniques which will enlarge their opportunities and thereby progressively diminish the need for props. He further emphasized that to casteify "reservation" even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. He further emphasized that to interpret the Constitution rightly we must understand the people for whom it is made. He observed that the synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation.

106. Krishna Iyer, J. further observed thus:

> "**34.** Special provisions for depressed classes and even other *castes* have a pre-Constitution history. After the Constitution was enacted the legality of old rules based on caste became moot and the Central Government revised its policy. The post-Constitution reincarnation of the communal G.O. concentrated not on caste orientation but on elimination of socio-economic suppression and the diverse ways to achieve this objective.
>
> **xxx xxx xxx**
>
> **36.** Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. Nevertheless, our founding fathers were realists, and so did not declare the proposition of equality in its bald universality but subjected it to certain special provisions, not contradicting the soul of equality, but adapting that never-changing principle to the ever-changing social milieu. That is how Articles 15(4) and 16(4) have to be read together with Articles 15(1) and 16(1). The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination. Article 16(4)

imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16(1) or as an exception to it. The same observation will hold good for the sub-articles of Article 15. Thus we have a constitutional fundamental guarantee in Articles 14 to 16; but it is a notorious fact of our cultural heritage that the Scheduled Castes and the Scheduled Tribes have been in unfree India nearly dehumanised, and a facet of the struggle for Freedom has been the restoration of full personhood to them together with the right to share in the social and economic development of the country. Article 46 is a Directive Principle contained in Part IV. Every Directive Principle is fundamental in the governance of the country and it shall be the duty of the State to apply that principle in making laws. Article 46, in emphatic terms, obligates the State "to promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the *Scheduled Castes and the Scheduled Tribes*, and shall protect them from social injustice and all forms of exploitation".

Reading Article 46 together with Article 16(4) the luscent intent of the Constitution-framers emerges that the exploited lot of the *harijan-girijan* groups in the past shall be extirpated with special care by the State. The inference is obvious that administrative participation by SC & ST shall be promoted with special care by the State. Of course, reservations under Article 16(4) and promotional strategies envisaged by Article 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes. Article 335 enters a caveat in this behalf:

> "335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

The positive accent of this article is that the claims of SC & ST to equalisation of representation in services under the State, having regard to their sunken social status and impotence in the power system, shall be taken into consideration. The negative element, which is part of the

article, is that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

xxx xxx xxx

39. Article 341 makes it clear that a "scheduled Caste" need not be a "caste" in the conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). Scheduled Castes become such only if the President specifies any castes, races or tribes or *parts* or *groups within castes, races or tribes* for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotchpotch of many castes or tribes or even races, may still be a Scheduled Caste under Article 341. Likewise, races or tribal communities or parts thereof or part or parts of groups within them may still be Scheduled Tribes (Article 342) for the purpose of the Constitution. Under this definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be. It is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive. Conceptual errors creep in when

traditional obsessions obfuscate the vision."

107. The Learned Judge refers to the pre-Constitution history wherein special provisions for depressed classes and even other castes were made. He stated that after the Constitution was enacted the legality of old rules based on caste became moot and the Central Government revised its policy. He stated that the post-Constitution reincarnation of the communal G.O. concentrated not on caste orientation but on elimination of socio-economic suppression and the diverse ways to achieve this objective.

108. He then stated that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He then considered the interplay between Articles 15(4) and 16(4) on the one hand and Articles 15(1) and 16(1) on the other hand. He thereafter refers to the notorious fact of our cultural heritage that the Scheduled

Castes and the Scheduled Tribes have been in unfree India nearly dehumanized, and a facet of the struggle for freedom has been the restoration of full personhood to them together with the right to share in the social and economic development of the country. He thereafter refers to Article 46 and the importance of the said Directive Principle in the governance of the country and observes that it shall be the duty of the State to apply that principle in making laws. He stated that reading Article 46 together with Article 16(4) expresses the intention of the Constitution-framers that the exploitation of the *harijan-girijan* groups in the past shall be extirpated with special care by the State. For completeness, he then refers to Article 335 to state that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

109. Krishna Iyer, J. then observed that Article 341 makes it clear that a "Scheduled Caste" need not be a "caste" in the

conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). He states that Scheduled Castes become such only if the President specifies any castes, races or tribes or *parts* or *groups within castes, races or tribes* for the purpose of the Constitution. He observed that under the definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be and that it is the socio-economic backwardness of a social bracket, not mere birth in a caste, that is decisive.

110. In paragraph 73, he refers to Dr. Ambedkar's address to the Constituent Assembly, which has already been extracted by us in the beginning of the judgment. Paragraph 73 is reproduced hereunder:

> "**73.** A luminous preface to the constitutional values nullified by social realities is found in Dr Ambedkar's address to the Constituent Assembly earlier extracted, which draws poignant attention to the life of contradictions between the explosive social and economic

inequalities and the processes of political democracy. “How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?” was the interrogation before the framers of the Constitution and they wanted to enforce the principle of “one man, one value”. This perspective must inform the code of equality contained in Articles 14 to 16. Equality being a dynamic concept with flexible import this Court has read into Articles 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. But care must be taken to see that classification is not pushed to such an extreme point as to make the fundamental right to equality cave in and collapse (see observations in *Triloki Nath Khosa* v. *State of J&K* [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771] . Ray, C.J., in *Kerala* v. *Thomas* [(1976) 2 SCC 310, 331, 332, 333, 334 : 1976 SCC (L&S) 227, 248 249, 250, 251 : (1976) 1 SCR 906, 926-29] epitomised the position in a few passages: [SCC pp. 331, 332, 333 & 334: SCC (L&S) pp. 248, 249, 250 & 251, paras 21, 24, 27, 28, 30 & 31

> “Articles 14, 15 and 16 from part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in

matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to be the object to be achieved.

* * *

Discrimination is the essence of classification.... Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.

* * *

There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (*State of Mysore* v. *V.P. Narasing Rao* [AIR 1968 SC 349 : (1968) 1 SCR 407]).

This equality of opportunity need not be confused with absolute equality....

Under Article 16(1) equality of opportunity of employment means

equality as between members of the same class of employees and not equality between members of separate, independent class....

The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.... A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. *The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.*"

The learned Chief Justice relied upon earlier decisions to substantiate this proposition. In *Triloki Nath Khosa* v. *State of J&K* [(1976) 2 SCC 310, 337 : 1976 SCC (L&S) 227, 254 : (1976) 1 SCR 906, 932] this Court had held that the State may make rules guided by realities just as the

> legislature "is free to recognise degrees of harm and it may confine its restrictions to those classes of cases *where the need is deemed to be the clearest*". Thus we arrive at the constitutional truism that the State may classify, based upon substantial differentia, groups or classes and this process does not necessarily spell violation of Articles 14 to 16."

111. After referring to Dr. Ambedkar's speech, the Learned Judge observed that equality being a dynamic concept with flexible import, this Court has read into Articles 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. He, however, warns that classification should not be pushed to such an extreme point as to make the fundamental right to equality cave in and collapse.

112. The Learned Judge further observed as under:

> "**76.** Proceeding on this footing, the fundamental right of equality of opportunity has to be read as justifying the categorisation of SCs & STs separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally

> sanctioned in terms, as Articles 16 (4) and 46 specificate. The classification is just and reasonable. We may, however, have to test whether the means used to reach the end are reasonable and do not outrun the purposes of the classification. Thus the scope of the case is narrowed down."

113. His Lordship observed that the fundamental right of equality of opportunity must be read as justifying the categorization of SCs & STs separately for the purpose of "adequate representation" in the services under the State. He observed that the object is constitutionally sanctioned in terms, as Articles 16 (4) and 46 specificate.

114. While rejecting the argument that reservation in favour of Scheduled Castes and Scheduled Tribes could affect the efficiency in the administration, the Learned Judge observed thus:

> "**94.** It is fashionable to say — and there is, perhaps, some truth in it — that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom

and other professions. Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency. We are not impressed with the misfortune predicted about governmental personnel being manned by morons merely because a sprinkling of *harijans/girijans* happen to find their way into the services. Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the administration of the country. The malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes. ***Nor does the specious plea that because a few harijans are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren***."

[emphasis supplied]

115. The Learned Judge rejected the contention that merely because a sprinkling of *harijans/girijans* happen to find their way into the services, the efficiency of the administration of the country would be affected. On the contrary, he states that the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes.

116. It is pertinent to note the observations made by the Learned Judge towards the end of paragraph 94 and in paragraph 98 are most important for the purposes of the present reference. Paragraph 98 reads thus:

> "**98.** The argument is that there are rich and influential *harijans* who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf."

117. Chinnappa Reddy, J. in his separate concurring judgment observed thus:

"**123.** Because fundamental rights are justiciable and directive principles are not, it was assumed, in the beginning, that fundamental rights held a superior position under the Constitution than the directive principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognised that the difference between the Fundamental rights and directive principles lies in this that Fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the directive principles are aimed at securing social and economic freedoms by appropriate State action. The Fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. So they are made justiciable. But, it is also evident that notwithstanding their great importance, the directive principles cannot in the very nature of things be enforced in a court of law. It is unimaginable that any court can compel a legislature to make a law. If the court can

compel Parliament to make laws then parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in that sense that the Constitution says that the directive principles shall not be enforceable by courts. It does not mean that directive principles are less important than Fundamental rights or that they are not binding on the various organs of the State. Article 37 of the Constitution emphatically states that directive principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and the laws. The directive principles should serve the courts as a code of interpretation. Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the directive principles or if it is not in discharge of some of the undoubted obligations of the

> State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the directive principles and other provisions of the Constitution.
>
> **124.** So, we have it that the constitutional goal is the establishment of a socialist democracy in which Justice, economic, social and political is secure and all men are equal and have equal opportunity. Inequality, whether of status, facility or opportunity, is to end, privilege is to cease and exploitation is to go. The underprivileged, the deprived and the exploited are to be protected and nourished so as to take their place in an egalitarian society. State action is to be towards those ends. It is in this context that Article 16 has to be interpreted when State action is questioned as contravening Article 16."

118. The Learned Judge discussed the interplay between the Fundamental Rights and the Directive Principles. He observed that the Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against

excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Learned Judge observed that merely because the Directive Principles are not enforceable by Courts, it does not mean that Directive Principles are less important than Fundamental rights or that they are not binding on the various organs of the State. Referring to Article 37 of the Constitution, the Learned Judge states that the Directive Principles are nevertheless fundamental in the governance of the country, and it shall be the duty of the State to apply these principles in making laws. He held that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and the laws; that the directive principles should serve the courts as a code of interpretation. He held that the Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former.

119. He observed that the constitutional goal is the establishment of a socialist democracy in which Justice, economic, social and political is to secure and all men are equal and have equal opportunity. He further observed that the inequality, whether of status, facility or opportunity, is to end, privilege is to cease, and exploitation is to go. He further observed that the underprivileged, the deprived and the exploited are to be protected and nourished to take their place in an egalitarian society.

120. Thereafter, the Learned Judge then while referring to interplay between Article 16(1) and Article 16(4) observed thus:

> "**125.** Let us now take a look at Article 16(1) and Article 16(4). Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. To the class of citizens who are economically and socially backward this guarantee will be no more than mere wishful thinking, and mere "vanity ... wind and confusion", if it is not translated into reality by necessary State action to protect

and nurture such class of citizens so as to enable them to shake off the heart-crushing burden of a thousand years' deprivation from their shoulders and to claim a fair proportion of participation in the administration. Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and the Scheduled Tribes in the Public Services at all levels are in our opinion necessary consequences flowing from the Fundamental Right guaranteed by Article 16(1). This very idea is emphasised further by Article 16(4). Article 16(4) is not in the nature of an exception to Article 16(1). It is a facet of Article 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom egalite de droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait. It recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. Equality of opportunity must be such as to yield “Equality of Results” and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when

the competition is itself otherwise equitable. John Rawls in *A Theory Of Justice* demands the priority of equality in a distributive sense and the setting up of the social system "so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return". His basic principle of social justice is: "All social primary goods — liberty and opportunity, income and wealth, and the bases of self-respect — are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured." One of the essential elements of his conception of social justice is what he calls the principle of redress: "This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for." Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that "Equality of Opportunity must yield Equality of Results" and if the fulfilment of Article 16(1) in Article 16(4) ever needed a philosophical foundation it is furnished by Rawls' theory of justice and the redress Principle."

121. The Learned Judge observed that reading Article 16(1) and Article 16(4) together would reveal that they recognize that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. It is observed that the equality of opportunity must be such as to yield "Equality of Results" and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when the competition is itself otherwise equitable.

122. The Learned Judge thereafter refers to "A Theory of Justice" by John Rawls. He also refers to the 'Principle of Redress' according to which underserved inequalities call for redress; and since inequalities of birth and natural endowment are *undeserved*, these inequalities are somehow to be compensated for.

D. ***K.C. Vasanth Kumar vs. State of Karnataka***

123. The next judgment of the Constitution Bench of this Court that requires consideration is the case of ***K.C. Vasanth Kumar and another vs. State of Karnataka***[11]. In the said case, the Court was invited not so much to deliver judgment but to express its opinion on the issue of reservations in the context of Articles 15(4) and 16(4), which would serve as a guideline to the Commission which the Government of Karnataka had proposed to appoint, for examining the question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Each of the 5 Learned Judges comprising the Constitution Bench of this Court rendered their separate opinions.

124. Y.V. Chandrachud, C.J. laid down certain propositions. It will be relevant to refer to paragraph 2, which reads thus:

> "**2.** I would state my opinion in the shape of the following propositions:

[11] 1985 (Supp) SCC 714.

(1) The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, there is, without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution, a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression, isolation and humiliation.

(2) The means test, that is to say, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period mentioned in (1) above. It is essential that the privileged section of the underprivileged society should not be permitted to monopolise preferential benefits for an indefinite period of time.

(3) Insofar as the other backward classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be

comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

(4) The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (*i*) to the State to rectify distortions arising out of particular facets of the reservation policy and (*ii*) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."

125. The Learned C.J. observed that for a further period of 15 years, the reservation in favour of Scheduled Castes and Scheduled Tribes must continue. He further observed that the means test, i.e., the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after the period of 15 years, as mentioned in clause (1).

Insofar as the Other Backward Classes are concerned, the Learned C.J. observed that the twin tests should be applied; one, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions. It is also observed that the policy of reservations in employment, education and legislative institutions should be reviewed every 5 years or so.

126. It will also be appropriate to refer to the observations of D.A. Desai, J. made in paragraphs 30 and 31, which read thus:

> "**30.** Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin

constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty.

31. Let me make abundantly clear that this approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying byrefusing preferred treatment to those amongst them who have already benefited by it and improved their position. And finally reservation must have a time span otherwise concessions tend to become vested interests. This is not a judgment in a lis in an adversary system. When the arguments concluded, a statement was made that the Government of State of Karnataka would appoint a Commission to determine constitutionally sound and nationally acceptable criteria for

> identifying socially and educationally backward classes of citizens for whose benefit the State action would be taken. This does not purport to be an exhaustive essay on guide lines but may point to some extent, the direction in which the proposed Commission should move."

127. It could thus be seen that the Learned Judge supports applying the economic criterion for the purpose of compensatory discrimination or affirmative action. According to the Learned Judge, it would strike at the root cause of social and educational backwardness. He further states that simultaneously it would be a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation.

128. Though he cautioned that such an approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes, however, even in their cases, economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position.

129. Rejecting the contention that the reservation is anti-imperialist, Chinnappa Reddy, J. observed thus:

> "**35.** One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between the *meritarian* principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences. Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and Society, who has no books and magazines to read at home, no radio to listen, no TV to watch,

no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40 per cent or 50 per cent of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90 per cent of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life. If spring flower he cannot be, autumn flower he may be. Why then, should he be stopped at the threshold on an alleged meritarian principle? The requirements of efficiency may always be safeguarded by the prescription of minimum standards. Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle be put against mediocrity when

we come to Scheduled Castes, Scheduled Tribes and backward classes?"

130. The Learned Judge observed that the disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. The Learned Judge compared a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and Society, who has no books and magazines to read at home, no radio to listen, no TV to watch, no one to help him with his homework, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance. The Learned Judge observed that with all these disadvantages, if he is able to secure the qualifying 40% or 50% of the marks at a

competitive examination, he cannot be said to have no merit, especially if he be compared with the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination and may secure 70, 80 or even 90% of the marks. The Learned Judge further observed that the requirements of efficiency may always be safeguarded by the prescription of minimum standards.

131. Emphasizing on the position of the Scheduled Castes, the Learned Judge observed thus:

> "**51.** .....Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them. There is no point in attempting to determine the

> social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes. Such a test would perpetuate the dominance of the existing upper classes. Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the "enlightened" classes will capture all the "open" posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the "enlightened" classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of imposing themselves."

132. The Learned Judge rejects the argument that insofar as Other Backward Classes are concerned, their social backwardness has to be ascertained by applying the test of nearness to the conditions of existence of the Scheduled Castes.

The Learned Judge observed that such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Scheduled Tribes. He observed that such a test would take a substantial majority of the classes, who are between the upper classes and the Scheduled Castes and Tribes, out of the category of backward classes and put them at a permanent disadvantage. He observed that only the "enlightened" classes will capture all the "open" posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. However, the bulk of those behind the "enlightened" classes and ahead of the near Scheduled Castes and Tribes would be left high and dry.

133. It will also be relevant to refer to the following observations of Venkataramiah, J. (as His Lordship then was) in the case of ***K.C. Vasanth Kumar*** (supra):

"**143**. This view is in conformity with the intention underlying clause (6) of the resolution regarding the aims and objects of the Constitution moved by Jawaharlal Nehru on December 13, 1946 which asked the Constituent Assembly to frame a Constitution providing adequate safeguards for minorities, backward and tribal areas and depressed and other backward classes and also with the provisions of Article 338 and Article 340 of the Constitution. Unless the above restriction is imposed on the Government, it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the State as backward even though in fact it may be an advanced caste or group or community but just below some other forward community. There is another important reason why such advanced castes or groups or communities should not be included in the list of backward classes and that is that if castes or groups and communities which are fairly well advanced and castes and groups and communities which are really backward being at the rock-bottom level are classified together as backward classes, the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit as more number of children of the

more advanced castes or groups or communities amongst them would have scored higher marks than the children of more backward castes or groups or communities. In that event the whole object of reservation would become frustrated. It is stated that it was with a view to avoiding this anomalous situation, the Government of Devaraj Urs had to appoint the Havanur Commission to make recommendations for the purpose of effectively implementing the objects of Article 15(4) and Article 16(4). Hence as far as possible while preparing the list of backward classes, the State Government has to bear in mind the above principle as a guiding factor. The adoption of the above principle will not unduly reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4) of the Constitution since over the years the level of the Scheduled Castes and Scheduled Tribes is also going up by reason of several remedial measures taken in regard to them by the State and Central Governments. At the same time, it will also release the really backward castes, groups and communities from the stranglehold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades. It is time that more attention is given to those castes, groups and communities who have been at the

lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many of the Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of the Scheduled Castes and the Scheduled Tribes.

144. Since economic condition is also a relevant criterion, it would be appropriate to incorporate a "means test" as one of the tests in determining the backwardness as was done by the Kerala Government in *Jayasree case*63. These two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). For the purpose of Article 16(4) however, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services."

134. The Learned Judge observed that two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). The Learned Judge observed that insofar as Article 16(4) is concerned, it should also be shown that the backward class in question is in the opinion of the Government not adequately represented in the Government services.

E. *Indra Sawhney vs. Union of India*

135. Then next comes the 9-Judge Bench judgment of this Court in the case of ***Indra Sawhney and others vs. Union of India and others***[12], which could be considered as an important milestone laying down the law about reservations for Other

[12] 1992 Supp (3) SCC 217.

Backward Classes. The extracts from the said judgment of 9-Judge Bench have in-extenso been reproduced in the referral judgment (***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[13]).

136. I will refer to some of the observations made by B.P. Jeevan Reddy, J., who has authored the judgment for himself and M.H. Kania, C.J., M.N. Venkatachaliah, J. and A.M. Ahmadi, J. (as Their Lordships then were).

> "**781.** At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes."

137. His Lordship (Jeevan Reddy, J.) observed that with regard to identification of 'backward class of citizens', we keep aside the

[13] (2020) 8 SCC 1.

Scheduled Tribes and Scheduled Castes. It will be relevant to note that in the said part of the judgment His Lordship (Jeevan Reddy, J.) was considering an issue with regard to identification of backward class of citizens. In this background, it was observed that the court was keeping aside Scheduled Tribes and Scheduled Castes since they are admittedly included within the backward classes. It was further observed that backward classes contemplated by Article 16(4) do comprise some castes since it cannot be denied that Scheduled Castes include quite a few castes.

138. From paragraph 790 onwards, His Lordship considered the 'Means-test' and 'creamy layer'. It will be apposite to reproduce paragraph 792, which reads thus:

> "**792.** In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class — a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them

from the others. 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. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line — how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory

owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India

Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. 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). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

139. His Lordship observed that if some of the members in a class are far too advanced socially, the connecting thread between them and the remaining class snaps. The Court observed that 'too advanced socially' means economically and may also mean educationally. It has been observed that they would be misfits in the class. The Court considered the difficulty in drawing the line. It is observed that it should not amount to taking away with one hand what is given with the other. The Court observed that the basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. The Court observed that the line to be drawn must be a realistic one. The Court posed a question as to whether such a line should be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. It has been observed that since it is difficult to assess income from agriculture, in the case of agriculturists, the line may have to be drawn with reference to

the extent of holding. It is observed that the income limit must be such as to mean and signify social advancement. The Court observed that at the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. It has been observed that if a member of a designated backward class would become a member of IAS or IPS or any other All India Service, his status in the society rises and he is no longer socially disadvantaged. The Court observed that clause (4) of Article 16 aims at group backwardness, the 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). No doubt, it has been specified that the said discussion was confined to Other Backward Classes only and had no relevance in the case of Scheduled Tribes and Scheduled Castes.

140. Then the question as to whether Backward Classes can be further divided into backward and more backward categories has been answered thus:

> "**802.** We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both

included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State — and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and

C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in *Balram* [(1972) 1 SCC 660 : (1972) 3 SCR 247] . This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say — we may reiterate

> — that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

141. The Court in unequivocal terms held that even among backward classes, there can be a sub-classification on a reasonable basis. The Court held that there can be backward and more backward classes and the State may think it advisable to provide a special benefit to the more backward among the backward classes. It has been observed that where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State, and so long as it is reasonably done, the Court may not intervene.

142. The Court observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It is observed that it does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). It has therefore been observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes

are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour.

143. It has also been observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, the OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. It has been observed that the same logic also warrants categorization as between more backward and backward. The Court, however, cautioned that it may not be construed as implying that the State should do it, but it was only saying that if the State chooses to do so, it is not impermissible in law.

144. Similar view has also been expressed by P.B. Sawant, J. in paragraphs 523, 524 and 525, which read thus:

> "**523.** As regards the second part of the question, in *Balaji [1963 Supp 1 SCR 439 : AIR 1963 SC 649]* it was observed that the backward classes cannot be further classified in backward and more backward classes. These observations, although made in the context of Article 15(4) which

fell for consideration there, will no doubt be equally applicable to Article 16(4). The observations were made while dealing with the recommendations of the Nagan Gowda Committee appointed by the State of Karnataka which had recommended the classification of the backward communities into two divisions, the Backward and the More Backward. While making those recommendations the Committee had applied one test, viz., "Was the standard of education in the community in question less than 50% of the State average? If it was, the community was regarded as more backward; if it was not, the community was regarded as backward." The Court opined that the sub-classification made by the Report and the order based thereupon was not justified under Article 15(4) which authorises special provision being made for 'really backward classes'. The Court further observed that in introducing two categories of backward classes, what the impugned order in substance purported to do was to devise measures "for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State". That, according to the Court, was not the scope of Article 15(4). The result of the method adopted by

the impugned order was that nearly 90% of the population of the State was treated as Backward and that, observed the Court, illustrated how the order in fact divided the population of the State into most advanced and the rest, putting the latter into two categories of the Backward and the More Backward. Thus, the view taken there against the sub-classification was on the facts of that case which showed that almost 90% of the population of the State was classified as backward, the backwardness of the Backward (as against that of the More Backward) being measured in comparison to the most advanced classes in the State. Those who were less advanced than the most advanced, were all classified as Backward. The Court held that it is the More Backward or who were really backward who alone would be entitled to the benefit of the provisions of Article 15(4). In other words, while the More Backward were classified there rightly as backward, the Backward were not classified rightly as backward.

524. It may be pointed out that in *Vasanth Kumar* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] Chinnappa Reddy, J after referring to the aforesaid view

in *Balaji* [1963 Supp 1 SCR 439 : AIR 1963 SC 649] observed that the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification into Backwards and More Backwards if both classes are not merely a little behind, but far far behind the most advanced classes. He further observed that in fact, such a classification would be necessary to help the more backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the more backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category. With respect, this is the correct view of the matter. Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a

substantial difference in backwardness, not only it is advisable but also imperative to make the sub-classification if all the backward classes are to gain equitable benefit of the special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in *Vasanth Kumar* [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] where the backward classes are grouped into five categories, viz., A, B, C, D and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly

stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case, and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

525. Hence, it will have to be held that depending upon the facts of each case, sub-classification of the backward classes into the backward and more or most

> backward would be justifiable provided separate quotas are prescribed for each of them."

145. His Lordship held that sub-classification of the backward classes into the backward and more or most backward would be justifiable provided separate quotas are prescribed for each of them.

146. The question as to whether Backward Classes can be further divided into backward and more backward categories has been answered by P.B. Sawant, J. as under (Paragraph 552):

> *"Question 5:*
>
> Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone.
>
> If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

> It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other consideration. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4)."

147. It could thus be seen that Sawant, J. observed that if the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).

F. *E.V. Chinnaiah vs. State of A.P.*

148. In the case of ***E.V. Chinnaiah***, the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act,

2000 (A.P. Act 20 of 2000) was challenged before the High Court of Andhra Pradesh at Hyderabad. The same was dismissed by the 5-Judge Bench by a majority of 4:1. Under the said Act, the castes in the Presidential List of Scheduled Castes came to be classified in 4 groups. The seats were apportioned in different proportions amongst the said 4 groups.

149. N. Santosh Hegde, J. for himself, S.N. Variava, and B.P. Singh, JJ. (as Their Lordships then were) observed thus:

> "**13.** We will first consider the effect of Article 341 of the Constitution and examine whether the State could, in the guise of providing reservation for the weaker of the weakest, tinker with the Presidential List by subdividing the castes mentioned in the Presidential List into different groups. Article 341 which is found in Part XVI of the Constitution refers to special provisions relating to certain classes which includes the Scheduled Castes. This article provides that the President may with respect to any State or Union Territory after consultation with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes,

races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. This indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any subclassification or division in the said list except, maybe, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of the People, which is not applicable to the facts of this case. It is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the Presidential List of Scheduled Castes. Therefore, it is clear that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be

> subdivided for any purpose. A reference to the Constituent Assembly in this regard may be useful at this stage."

150. His Lordship observed that from the perusal of Article 341 of the Constitution, there can be only one list of Scheduled Castes regarding a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. It has been observed that any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. It is observed that it is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the Presidential List of Scheduled Castes. It has been observed that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and that the said group could not be subdivided for any purpose.

151. In paragraph 26, it has been observed thus:

> "**26.** Thus from the scheme of the Constitution, Article 341 and above opinions of this Court in the case of *N.M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] it is clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List."

152. The Court, relying on Article 341 and the opinions expressed in the case of ***N.M. Thomas***, observed that it was clear that the castes once included in the Presidential List, form a class by themselves. It has been observed that if they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to 'tinkering' with the Presidential List.

153. In paragraph 31, the Court observed thus:

> "**31.** On a detailed perusal of the Act it is seen that Section 3 is the only substantive provision in the Act, rest of the provisions

are only procedural. Section 3 of the Act provides for the creation of 4 groups out of the castes enumerated in the Presidential List of the State. After the regrouping it provides for the proportionate allotment of the reservation already made in favour of the Scheduled Castes amongst these 4 groups. Beyond that the Act does not provide for anything else. Since the State had already allotted 15% of the total quota of the reservation available for the backward classes to the Scheduled Castes the question of allotting any reservation under this enactment to the backward classes does not arise. Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class, amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to redistribute the reservation already made by subclassifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the State concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which

includes the Scheduled Castes, to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to subclassify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State-created subclass within the list of Scheduled Castes. From the discussion hereinabove, it is clear that the primary object of the impugned enactment is to create groups of subcastes in the list of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this subclassification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in pith and substance the enactment is not a law governing the field of education or the field of State public services."

154. It can thus be seen that this Court held that whatever may be the object of the sub-classification and apportionment of the reservation, the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. The Court held that, in pith and substance the enactment is not a law governing the field of education or the field of State public services.

155. Then the Court posed a question as to whether the impugned enactment creates sub-classification or micro-classification of the Scheduled Castes so as to violate Article 14 of the Constitution. The same is answered as under:

> "**41.** The conglomeration of castes given in the Presidential Order, in our opinion, should be considered as representing a class as a whole. The contrary approach of the High Court, in our opinion, was not correct. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary

to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further. If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such subclassification would be violative of Article 14 of the Constitution. It may be true, as has been observed by the High Court, that the caste system has got stuck up in the society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld. It is also difficult to agree with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalising the reservation to

the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated.

42. Reservation must be considered from the social objective angle, having regard to the constitutional scheme, and not as a political issue and, thus, adequate representation must be given to the members of the Scheduled Castes as a group and not to two or more groups of persons or members of castes.

43. The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness. Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The

> logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained."

156. It has been held that the conglomeration of castes given in the Presidential Order should be considered as representing a class as a whole. It has been held that the very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further. It has been held that if a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such subclassification would be violative of Article 14 of the Constitution.

157. The Court also held that classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness.

158. S.B. Sinha, J. in his separate concurring opinion held thus:

> "**93.** Scheduled Caste, however, is not a caste in terms of its definition as contained in Article 366(24) of the Constitution. They are brought within the purview of the said category by reason of their abysmal backwardness. Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of or groups within castes, races or tribes. They are not merely backward but the backwardmost. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. (See *Punit Rai* v. *Dinesh Chaudhary* [(2003) 8 SCC 204] and *State of Kerala* v. *Chandramohanan* [(2004) 3 SCC 429 : 2004 SCC (Cri) 818 : AIR 2004 SC 1672].)"

159. It could thus be seen that His Lordship has also recognized that the Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of

or groups within castes, races or tribes and that they are not merely backward but the backwardmost.

160. After referring to the observations of this Court in ***Indra Sawhney*** (supra) regarding the applicability of 'means test' and 'creamy-layer test', the Learned Judge observed thus:

> "**96.** But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

161. It is further observed in paragraph 113 thus:

> "**113.** The power of the State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. But it cannot take away the said benefit on the premise that one or the other group

> amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. The impugned legislation, thus, must be held to be unconstitutional."

162. The Learned Judge observed that the State can lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. However, it cannot take away the said benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation.

G. ***M. Nagaraj vs. Union of India***

163. Next in line is the case of ***M. Nagaraj and others vs. Union of India and others***[14], where the Constitution Bench of this Court was considering, *inter alia*, the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the

[14] (2006) 8 SCC 212.

Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001. Answering the aforesaid, the Court observed thus:

> "**121.** The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal* [(1995) 2 SCC

745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481] .

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the "extent of reservation". In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of

> representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.
>
> **124.** Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001."

164. It could thus be seen that in ***M. Nagaraj*** (supra), the Court applied the test of creamy layer and the requirement for collection of quantifiable data showing backwardness of the class and inadequacy of representation of that class even insofar as the Scheduled Castes and Scheduled Tribes are concerned.

H. *Jarnail Singh vs. Lachhmi Narain Gupta*

165. The correctness of the decision in ***M. Nagaraj*** was referred to the Constitution Bench in the case of ***Jarnail Singh and others vs. Lachhmi Narain Gupta and others***[15]. The Constitution Bench in the said case considered two issues: firstly, with regard to the correctness of the view taken in ***M. Nagaraj*** about the requirement of collecting quantifiable data showing backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment; and secondly, with regard to applicability of the creamy layer principle even to the Scheduled Castes and Scheduled Tribes.

166. The Court, insofar as the first issue is concerned, held that the requirement of collection of quantifiable data on backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment is concerned, is contrary to the 9-Judge Bench judgment in the case of ***Indra***

[15] (2018) 10 SCC 396.

Sawhney and liable to be struck down to that extent. However, insofar as the second issue regarding making the creamy layer principle applicable even to Scheduled Castes and Scheduled Tribes is concerned, the Court observed thus:

> **"26.** The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons

who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

27. We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that constitutional courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341

and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in *Ashoka Kumar Thakur* [*Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1 : 3 SCEC 35] that the creamy layer principle is merely a principle of identification and not a principle of equality.

28. Therefore, when *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342. We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no

need to refer *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] to a seven-Judge Bench. We may also add at this juncture that *Nagaraj* [*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

28.1. *Anil Chandra* v. *Radha Krishna Gaur* [*Anil Chandra* v. *Radha Krishna Gaur*, (2009) 9 SCC 454 : (2009) 2 SCC (L&S) 683] (two-Judge Bench) (see paras 17 and 18).

28.2. *Suraj Bhan Meena* v. *State of Rajasthan* [*Suraj Bhan Meena* v. *State of Rajasthan*, (2011) 1 SCC 467 : (2011) 1 SCC (L&S) 1] (two-Judge Bench) (see paras 10, 50, and 67).

28.3. *U.P. Power Corpn. Ltd.* v. *Rajesh Kumar* [*U.P. Power Corpn. Ltd.* v. *Rajesh Kumar*, (2012) 7 SCC 1 : (2012) 2 SCC (L&S) 289] (two-Judge Bench) [see paras 61, 81(*ix*), and 86].

28.4. *S. Panneer Selvam* v. *State of T.N.* [*S. Panneer Selvam* v. *State of T.N.*, (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76] (two-Judge Bench) (see paras 18, 19, and 36).

28.5. *Central Bank of India* v. *SC/ST Employees Welfare Assn.* [*Central Bank of India* v. *SC/ST Employees Welfare Assn.*, (2015) 12 SCC 308 : (2016) 1 SCC (L&S) 355] (two-Judge Bench) (see paras 9 and 26).

28.6. *Suresh Chand Gautam* v. *State of U.P.* [*Suresh Chand Gautam* v. *State of U.P.*, (2016) 11 SCC 113 : (2016) 2 SCC (L&S) 291] (two-Judge Bench) (see paras 2 and 45).

28.7. *B.K. Pavitra* v. *Union of India* [*B.K. Pavitra* v. *Union of India*, (2017) 4 SCC 620 : (2017) 2 SCC (L&S) 128] (two-Judge Bench) (see paras 17 to 22)."

167. The Court in unequivocal terms held that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the

Presidential List under Articles 341 or 342 of the Constitution of India. It is observed that the caste or group or sub-group named in the said List continues exactly as before. It has been further observed that it is only those persons within that group or sub-group, who, on account of belonging to the creamy layer, have come out of untouchability or backwardness would be excluded from the benefit of reservation.

168. The Court observed that even if we assume that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within the lists notified under Articles 341 and 342, constitutional courts, applying Articles 14 and 16 of the Constitution would be entitled to exclude the creamy layer. It has been held that the Constitutional Courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-groups when applying the

principles of equality under Articles 14 and 16 of the Constitution of India.

IV. PRESENT REFERENCE

169. A 3-Judge Bench of this Court in the case of ***State of Punjab and others vs. Davinder Singh and others***[16] vide order dated 20th August 2014, doubted the correctness of the Constitution Bench decision of this Court in the case of ***E.V. Chinnaiah*** and referred it to the larger Bench. The larger Bench of 5-Learned Judges proposed the following issues[17].

> **"1.1.** (*i*) Whether the provisions contained under Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 are constitutionally valid?
>
> **1.2.** (*ii*) Whether the State had the legislative competence to enact the provisions contained under Section 4(5) of the Act?

[16] (2020) 8 SCC 65.
[17] (2020) 8 SCC 63.

> **1.3.** (*iii*) Whether the decision in *E.V. Chinnaiah* v. *State of A.P.* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is required to be revisited?"

170. Vide the judgment in ***The State of Punjab & Ors. vs. Davinder Singh & Ors.***[18], the Constitution Bench observed thus:

> "**52.** The State has the competence to grant reservation benefit to the Scheduled Castes and Scheduled Tribes in terms of Articles 15(4) and 16(4) and also Articles 341(1) and 342(1). It prescribes the extent/percentage of reservation to different classes. The State Government can decide the manner and quantum of reservation. As such, the State can also make sub-classification when providing reservation to all Scheduled Castes in the List based on the rationale that would conform with the very spirit of Articles 14, 15 and 16 of the Constitution providing reservation. The State Government cannot tamper with the List; it can neither include nor exclude any caste in the List or make enquiry whether any synonym exists as

[18] (2020) 8 SCC 1.

held in *Milind* [*State of Maharashtra* v. *Milind*, (2001) 1 SCC 4 : 2001 SCC (L&S) 117] .

53. The State Government is conferred with the power to provide reservation and to distribute it equitably. The State Government is the best judge as to the disparities in different areas. In our opinion, it is for the State Government to judge the equitable manner in which reservation has to be distributed. It can work out its methodology and give the preferential treatment to a particular class more backward out of Scheduled Castes without depriving others of benefit.

54. Apart from that, the other class out of Scheduled Castes/Scheduled Tribes/socially and educationally backward classes, who is not denied the benefit of reservation, cannot claim that whole or a particular percentage of reservation should have been made available to them. The State can provide such preference on rational criteria to the class within Lists requiring upliftment. There is no vested right to claim that reservation should be at a particular percentage. It has to accord with ground

reality as no one can claim the right to enjoy the whole reservation, it can be proportionate one as per requirement. The State cannot be deprived of measures for upliftment of various classes, at the same time, which is the very purpose of providing such measure. The spirit of the reservation is the upliftment of all the classes essential for the nation's progress.

55. In the federal structure, the State, as well as Parliament, have a constitutional directive for the upliftment of Scheduled Castes, Scheduled Tribes, and socially and (*sic* educationally) backward classes. Only inclusion or exclusion in the Presidential notification is by Parliament. The State Government has the right to provide reservation in the fields of employment and education. There is no constitutional bar to take further affirmative action as taken by the State Government in the cases to achieve the goal. By allotting a specific percentage out of reserved seats and to provide preferential treatment to a particular class, cannot be said to be violative of the List under Articles 341, 342 and 342-A as no enlisted caste is denied the benefit of reservation.

56. The "inadequate representation" is the fulcrum of the provisions of Article 16(4). In our opinion, it would be open to the State to provide on a rational basis the preferential treatment by fixing reasonable quota out of reserved seats to ensure adequate representation in services. Reservation is a very effective tool for emancipation of the oppressed class. The benefit by and large is not percolating down to the neediest and poorest of the poor.

57. The interpretation of Articles 14, 15, 16, 338, 341, 342 and 342-A is a matter of immense public importance, and correct interpretation of binding precedents in *Indra Sawhney* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and other decisions. Though we have full respect for the principle of stare decisis, at the same time, the Court cannot be a silent spectator and shut eyes to stark realities. The constitutional goal of social transformation cannot be achieved without taking into account changing social realities."

171. Recording the above observations, the Constitution Bench requested the Hon'ble Chief Justice to place the matter before the 7 Judges or more as considered appropriate. The matter was thus placed before the present Bench.

V. CONSIDERATION

172. At one stage, the atrocious caste discrimination in India had even surpassed the racial discrimination and the slave trade, premised on the colour of skin, in other parts of the world. For centuries the people belonging to certain castes were inhumanly treated by the upper classes in society. They have been treated worse than animals. They were not permitted to be touched by the upper classes. In some areas, even the upper classes did not permit the shadow of such people to fall on them. As such, while walking, they were required to maintain a distance so that their shadow does not pollute the upper caste. In some areas, they were required to tie a broom to their back so that they clean the path after they travel from the same.

173. These people were also denied water from the common places. In the villages where the water was drawn from the rivers, they were required to draw water from the downstream so that the water taken by the people from higher classes is not polluted. They were also denied the right to education. In schools, either they were required to sit separately or take their lessons standing outside their classroom.

174. While India was struggling to gain freedom from the colonial rulers, the country also witnessed a parallel movement for eradication of these inequalities and upliftment of the classes which were being treated inhumanly.

175. It would be apposite to refer to the statement by Dr. B.R. Ambedkar in 'Evidence before the Southborough Committee' (1919), where he gave several examples of the unjust treatment meted out to the untouchables by the oppressor castes as thus[19]:

[19] B.R. Ambedkar, 'Evidence before the Southborough Committee on Franchise' in Dr. Babasaheb Ambedkar: Writings and Speeches, ed. Vasant Moon, Ministry of Social Justice and Empowerment 2019, Vol.I, p. 255.

"From an untouchable trader no Hindu will buy. An untouchable cannot be engaged in lucrative service. Military service had been the monopoly of the untouchables since the days of the East India Company. They had joined the Army in such large numbers ... But after the mutiny when the British were able to secure soldiers from the ranks of the Marathas, the position of the low-caste men who had been the prop of the Bombay Army became precarious, not because the Marathas were better soldiers but because their theological bias prevented them from serving under low-caste officers. The prejudice was so strong that even the non-caste British had to stop recruitment from the untouchable classes. In like manner, the untouchables are refused service in the Police Force. In a great many of the Government offices it is impossible for an untouchable to get a place. Even in the mills a distinction is observed. The untouchables are not admitted in Weaving Departments of the Cotton Mills though many of them are professional weavers. An instance at hand may be cited from the school system of the Bombay Municipality. This most cosmopolitan city ruled by a Corporation with a greater freedom than any other Corporation in India has two different sets of schools ... one for the children of touchables and the other for those of the untouchables. This

> in itself is a point worthy of note. But there is something yet more noteworthy. Following the division of schools it has divided its teaching staff into untouchables and touchables. As the untouchable teachers are short of the demand, some of the untouchable schools are manned by teachers from the touchable class. The heart-killing fun of it is that if there is a higher grade open in untouchable school service, as there is bound to be because of a few untouchable trained teachers, a touchable teacher can be thrust into the grade. But if a higher grade is open in the touchable school service, no untouchable teacher can be thrust into that grade. He must wait till a vacancy occurs in the untouchable service! Such is the ethics of the Hindu social life."

176. Dr. Ambedkar in order to fight against the inhuman treatment of untouchables, who were not even allowed to draw water from the common place, held an agitation at Mahad known as "Mahad Satyagraha" on 20th March 1927 so that the untouchables could be permitted to draw water from a public tank at Mahad.

177. Dr. Ambedkar also led agitations for opening the doors of places of worship to the untouchables. One such agitation which he led was in Nashik and was popularly known as "Kalaram Temple Satyagraha".

178. Dr. Ambedkar was of the view that if untouchables come out of that stigma and participate in nation-building, they will only contribute to the progress of the nation. He was of the view that the movement for removal of untouchability is in true sense a movement for nation-building and fraternity.

179. I can gainfully refer to the collection of views of Dr. Ambedkar as put together lucidly by Anurag Bhaskar in the book appropriately titled as "The Foresighted Ambedkar"[20], which reads thus:

> "He asserted that the issue of temple entry or access to public resources is an issue of equality. He stated:
>
> > "Another argument these Touchables give is that even if they do not allow

[20] Anurag Bhaskar, *The Foresighted Ambedkar: Ideas that shaped Indian constitutional Discourse* (Viking by Penguin Random House 2024).

> the Untouchables into their temples, all are free to build a temple for themselves. I would like to ask those so-called learned ones why they object to Railways for having separate coaches for Whites and Indians? …There is only one answer to this and that is: it is not a matter of travel only, it is a matter of equality! … The Untouchables have the same reason for demanding the right to worship God in the same temple. They want to prove that the temple is not defiled by their entry ….. The Untouchables are not servants … On the basis of this alone they should accept the rights of the Untouchables. And when there are rights there is no question of custom of usage."[21]

He further added that public property cannot be used as the private property of the oppressor castes. He noted:

> "Legally, the right to public property is not required to be established by any deed; it is available automatically to everybody. Even if he has no usage or it was not continuous, it does not deprive him of that right. Suppose, somebody did

[21] Narendra Jadhav, *Ambedkar: Awakening India's Social Conscience*. (Konark Publishers Pvt. Ltd. 2014).

> not walk on a particular road, does that mean he can never use that road? Therefore, it would be quite idiotic to say that since Untouchables never went to the temple or never drew water from the public wells, so now they cannot do that."[22]

Dr. Ambedkar also dismissed the contention of the oppressor castes that the Untouchables should wait for them to change and allow equal rights. He referred to the Thirteenth Amendment to the American Constitution, which abolished slavery, to demand accountability and action from the oppressor castes. He stated:

> "I am aware that some Touchables are suggesting that the matter of equal rights for the Untouchables should be allowed to be resolved by the Touchables amongst themselves. It cannot be resolved by the movement of the Untouchables. The Untouchables should wait till the Touchables willingly allow them such equal rights. How can it be trusted that they will willingly grant such rights to the Untouchables? It will be sheer stupidity to wait for such a miracle to happen … Another section

[22] Ibid.

> of the Touchables tells us that even if we launch our movement, we will not succeed. If we launch a struggle, whatever few Touchables who have sympathy with our cause will feel offended and we will lose their sympathy. The progressive Touchables will then join the orthodox Hindus against us. I want to tell them that if they have sympathy for us, if they feel anguished about the injustice caused to us, then they should support us wholeheartedly like the Whites supported the Blacks in America to end slavery. Otherwise, it does not matter whether you have sympathy or hatred towards us.""[23]

180. Accordingly, when I consider the present issue, I will have to consider it in this background.

181. It is a matter of great coincidence that Dr. Ambedkar, who fought for the cause of social equality and eradication of inhuman treatment for generations, got an opportunity to work as the Chief Architect of the Constitution of India.

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[23] Ibid.

182. I have already referred to his speech on draft Article 300A and draft Article 300B (now Articles 341 and 342). It will also be apposite to refer to the relevant part of Dr. Ambedkar's speech on 30th November 1948 on Article 16 (which was draft Article 10), which reads thus:

> **"Article 16 (Article 10 in Draft Constitution)**
>
> The Hon'ble Dr. B.R. Ambedkar: .....As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If honourable Members will bear these facts in mind–the three principles, we had to reconcile,–they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain

communities that the administration which has now–for historical reasons–been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If honourable Members understand this

> position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word `backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly……."

183. It could thus be seen that Dr. Ambedkar emphasized that a formula was required to be produced which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. Dr. Ambedkar states that the equality of opportunity as specified in clause (1) has to be reconciled with the demand made by certain communities. He

states that on account of historical reasons, the administration has been controlled by one community or a few communities, that such a situation should disappear and that the others also must have an opportunity of getting into the public services. However, he states that if the demand of such communities, in full, is accepted, it will destroy the first principle of equality guaranteed in clause (1). He gives an instance that if certain communities which are unrepresented or a group of communities have a population of 70% and if 70% reservation is provided for such communities, leaving only 30% for the open competition, it will destroy the very concept of equality of opportunity. He therefore advocates for confinement of reservation to a minority of seats. He therefore states that unless some qualifying phrase as "backward" is used for making reservation, the entire rule would be unworkable. He therefore justifies the efforts of the Drafting Committee in employing the word 'backward'.

184. It will further be apposite to refer to the following observation in the said speech.

> **Article 16 (Article 10 in Draft Constitution)**
>
> "The Hon'ble Dr. B.R. Ambedkar: ……..Somebody asked me: "What is a backward community"? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My honourable Friend, Mr. T. T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. ……"

185. Dr. Ambedkar observed that "what is a backward community" will have to be determined by each local Government. A backward community, in his view, is a community which is backward in the opinion of the Government. He also foresighted that if the local Government included in this category of reservations such a large number of seats, one could very well go to the Federal Court and the Supreme Court and contend that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed. He also foresighted that the court will then conclude whether the local Government or the State Government has acted in a reasonable and prudent manner.

186. His foresight as to the debate regarding the identification of the backward classes and the extent of reservations can be judged from the spate of litigations that this country has witnessed for last 74 years.

187. It could thus be seen that initially insofar as the issue regarding the identification of the backward classes except the Scheduled Castes and Scheduled Tribes was concerned, the same was left to the Executive. Insofar as the identification of Scheduled Castes and Scheduled Tribes is concerned, the Constitution of India under Articles 341 and 342 provided the issuance of a general notification specifying all the castes and tribes or groups thereof to be Scheduled Castes and Scheduled Tribes for the purposes of privileges which have been defined in the Constitution.

188. I have already referred to Dr. Ambedkar's speech about the introduction of the said provisions. He, however, stated that if any elimination was to be made from the list so notified or any addition was to be made then they must be made by Parliament and not by the President. He stated that the object behind the same was to eliminate any kind of political factors having play in the matter.

189. As already discussed herein above, the question insofar as identification of Other Backward Classes is concerned, was left to the State. Insofar as the identification of Scheduled Castes and Scheduled Tribes is concerned, the same was complete at the stage of enactment of the Constitution in view of Articles 341 and 342 and any addition or alteration to the said notified list was permissible only by an Act of Parliament. It is further to be noted that the foundation of the Presidential List issued under Articles 341 and 342 finds place in the 1936 Order issued under the provisions of the 1935 Act.

190. No doubt that by the Constitution (One hundred and Second Amendment) Act, 2018, Article 342A regarding socially and educationally backward classes has been inserted. Clause (26C) in Article 366 of the Constitution of India has also been inserted by the said Amendment insofar as socially and educationally backward classes are concerned. It was sought to be argued before us that in view of the Constitution (One hundred

and Second Amendment) Act, 2018, read with the law laid down by this Court in the case of ***Indra Sawhney*** regarding Other Backward Classes, the judgment of this Court in ***E.V. Chinnaiah*** needs a relook.

191. I do not find it necessary to go into that aspect of the matter, since I find that ***E.V. Chinnaiah*** does not correctly consider the provisions of Articles 46, 335, 14, 15 and 16 of the Constitution of India, as have been interpreted by the earlier precedents of this Court. I have discussed hereinbelow in depth as to how ***E.V. Chinnaiah*** incorrectly interpreted the earlier precedents.

192. This Court in ***E.V. Chinnaiah*** in paragraph 13, while considering the effect of Article 341 of the Constitution, held that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. It is further observed that any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the

Constitution. This Court held that there is no reference to any sub-classification or division in the said list in any of the provisions of the Constitution except, maybe, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of the People. This Court held that it was clear to it that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be subdivided for any purpose.

193. Thereafter, referring to the view expressed by Mathew, J., Krishna Iyer, J and Fazal Ali, J. in the case of ***N.M. Thomas***, it is held in paragraph 26 that castes once included in the Presidential List, form a class by themselves. Then the Court held that if they are one class under the Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List.

194. In paragraph 31, it is observed that once the State reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4) in fulfillment of its constitutional obligation, it is not open to the State to subclassify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State-created subclass within the list of Scheduled Castes.

195. In paragraph 38, this Court after referring to the case of ***Indra Sawhney*** held that the principles laid down in ***Indra Sawhney*** for sub-classification of Other Backward Classes cannot be applied for subclassification or subgrouping of Scheduled Castes in the Presidential List because that very judgment itself specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes.

196. In paragraph 41, this Court held that the conglomeration of castes given in the Presidential Order, in their opinion, should be

considered as representing a class as a whole. It is held that the very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggested that they were not to be subdivided or subclassified further. It goes on to hold that if a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list and would amount to violation of Article 14 of the Constitution. The Court then disagreed with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. The Court, taking note of the fact that the benefits of reservation are not percolating to them equitably, suggested that measures should be taken to see that they are given such adequate or additional training to enable them to compete with the others.

197. This Court in paragraph 43 observed that the very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented, a further classification by way of micro-classification was not permissible.

198. To ascertain if ***E.V. Chinnaiah*** is good law, I will have to first examine whether the finding in ***E.V. Chinnaiah*** that ***N.M. Thomas*** held the Scheduled Castes to be a homogeneous group is correct or not.

199. ***E.V. Chinnaiah*** relies on the judgment of Mathew, J. in ***N.M. Thomas***. In paragraph 82, what Mathew, J. observed is that it is by virtue of the notification of the President that the Scheduled Castes come into being. It has been observed that though the members of the Scheduled Castes are drawn from castes, races or tribes, they attain a new status by virtue of the Presidential Notification.

200. It cannot be disputed that there is no caste by the name of "Scheduled Castes". As has been discussed in earlier paragraphs, the term "Scheduled Castes" has come on account of the 1936 Order and the 1950 Order.

201. There can be no doubt that once the castes, races, tribes or part of or groups of such castes, races or tribes are included in the Presidential Notification they shall be deemed to be Scheduled Castes for the purposes of the Constitution.

202. Then ***E.V. Chinnaiah*** refers to the judgment of Krishna Iyer, J. in ***N.M. Thomas***. Krishna Iyer, J. in paragraph 135 observed that a bare reading of Article 341 and 342 shows that there are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President. The Learned Judge observed that to confuse this backwardmost social composition with castes is to commit a constitutional error.

203. The observations made by the Learned Judge are in the context of the arguments that any special treatment on the ground of caste is prohibited under Article 16(2). The Learned Judge observed that Article 16(2) was not coming in the way to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division. The Learned Judge further observed that the Indian jurisprudence has generally regarded Scheduled Castes and Scheduled Tribes not as caste but as a large backward group deserving of societal compassion.

204. ***E.V. Chinnaiah*** thereafter relies on Fazal Ali, J.'s judgment.

205. Again, the observations made by Fazal Ali, J. in paragraph 169, are with regard to the arguments based on prohibition of Article 16(2). It is observed that the Scheduled Castes and Scheduled Tribes do not fall with the purview of Article 16(2) of the Constitution, which prohibits discrimination between the

members of the same caste. It is observed that if, therefore, the members of the Scheduled Castes and the Scheduled Tribes are not castes, then it is open to the State to make reasonable classification to advance or lift these classes so that they may be able to be properly represented in the services under the State.

206. However, on reading of the majority judgments in ***N.M. Thomas*** it does not show that the Scheduled Castes are homogeneous group and sub-classification therein is not permissible.

207. In paragraph 44 of the judgment in ***N.M. Thomas***, Ray, C.J. observed that the equality of opportunity for unequals can only mean aggravation of inequality; equality of opportunity admits discrimination with reason and prohibits discrimination without reason; and discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It is observed that preferential representation for the Backward Classes in services

with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. He therefore held that the differential treatment in standards of selection is within the concept of equality.

208. Mathew, J. in paragraph 54, refers to the principle of proportional equality and held that it can be attained only when equals are treated equally and unequals unequally. He held that differential treatment would be allowed if there is significant difference among the persons who are treated differentially.

209. In paragraph 73, the Learned Judge observed that the State should adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.

210. In paragraph 75, the Learned Judge observed that such sort of preferential treatment would be permissible under Article 16(1)

as such a preferential treatment alone would put the backward class people on a parity with the forward communities. The Learned Judge observed that whether there is equality of opportunity can be gauged only by the equality attained in the result. He states that formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. It is observed that the equality of result is the test of equality of opportunity.

211. Krishna Iyer, J. in paragraph 119 refers to the concept of 'social engineering'. He quotes from a book that "One law for the Lion and Ox is oppression".

212. In paragraph 129, after considering the constitutional scheme, the Learned Judge observed that the Constitution itself demarcates harijans from others. That this is based on the stark backwardness of this bottom layer of the community. It is observed that the differentiation has been made to cover

specifically the area of appointments to posts under the State. He further held that the twin objects, blended into one, are the claims of harijans to be considered in such posts and the maintenance of administrative efficiency. The Learned Judge observed that the State has been obligated to promote the economic interests of harijans and like backward classes.

213. In paragraph 142, the Learned Judge observed that the genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. He observed that to treat sharply dissimilar persons equally is subtle injustice.

214. In paragraph 149, Krishna Iyer, J. while concluding observed that "the heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers".

215. Fazal Ali, J. in paragraph 165, referring to clauses (24) and (25) of Article 366 of the Constitution observed that the said provisions create a presumption in favour of Scheduled Castes and Scheduled Tribes that they are backward classes of citizens. It is observed that it is not disputed that the members of the Scheduled Castes and Scheduled Tribes are specified in the notifications issued under Articles 341 and 342 of the Constitution and, therefore, they must be deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the Constitution.

216. In paragraph 178, the Learned Judge observed that the concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. He observed that if this artificial interpretation is put on the scope and ambit of Article 16 it will lead to channelization of legislation or polarization of rules. It is observed that differences and disparities exist among

men and things, and they cannot be treated alike by the application of the same laws. He observed that the law has to come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature.

217. The Learned Judge also held that the equality enshrined in clause (1) of Article 16 of the Constitution inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. He observed that that this can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. He lays down the conditions for the classification to be a reasonable one.

218. It can thus be seen that in none of the judgments in ***N.M. Thomas*** it is held that the Scheduled Castes are a homogeneous class. It has been held that once the Scheduled Castes and

Scheduled Tribes have been identified and they find a place in the Presidential List, they will continue to be the Scheduled Castes and Scheduled Tribes. It has been held that by the very fact of they being included in the Presidential List, they are deemed to be backward and no further enquiry regarding their backwardness would be warranted.

219. In ***Akhil Bharatiya Soshit Karamchari Sangh*** (supra), Krishna Iyer, J., in paragraph 94, rejects the plea that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions and that a swallow does not make a summer. He further observed that maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren.

220. Again, in paragraph 98, he considered the argument that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. He advised

the Administration to innovate and classify to weed out the creamy layer of Scheduled Castes/Scheduled Tribes. However, he observed that the Court cannot force the State in that behalf.

221. In ***K.C. Vasanth Kumar***, Chandrachud, C.J. in paragraph 2, observed that the reservation in employment and education in favour of Scheduled Castes and Scheduled Tribes must continue without the application of a means test for a further period not exceeding 15 years. He observed that after the said period of 15 years, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes. Insofar as Other Backward Classes are concerned, he stated that two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State

Government may lay down in the context of prevailing economic conditions.

222. Desai, J. in paragraph 31, observed that the approach suggested by him does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes since thousands of years of discrimination and exploitation cannot be wiped out in one generation. However, he suggested that even in their cases economic criterion is worth applying by refusing preferred treatment to those amongst them who have already benefited by it and improved their position.

223. Chinnappa Reddy, J. in paragraph 51 did not agree with the view that while determining the social backwardness of other classes, the test to be applied is nearness to the conditions of existence of the Scheduled Castes. He observed that such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes.

224. Chinnappa Reddy, J. in paragraph 79, notes that a few members of those castes or social groups may have progressed far enough and forged ahead to compare favourably with the leading forward class economically, socially and educationally. He suggests that in such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.

225. As already discussed hereinabove, the 9-Judge Bench of this Court in ***Indra Sawhney*** has in unequivocal terms held that further classification of backward classes into more backward classes is permissible in law.

226. Jeevan Reddy, J. in paragraph 802, in the case of ***Indra Sawhney***, gives an illustration with regard to two occupational groups viz., goldsmiths and vaddes (traditional stonecutters in Andhra Pradesh). He stated that both are included within Other Backward Classes. He observed that none can deny that goldsmiths are far less backward than vaddes and so if both are

grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. The Learned Judge further observed that in such a situation, a State may think it advisable to make a categorization even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. He stated that where to draw the line and how to effect the sub-classification, however, is a matter for the Commission and the State and so long as it is reasonably done, the Court may not intervene.

227. It will also be relevant to note that in paragraph 803, the Learned Judge observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). The Learned Judge observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that

separate reservations can be provided in their favour. The Learned Judge observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. He states that the same logic also warrants categorization as between more backward and backward.

228. As has already been noted before, in paragraph 781 of ***Indra Sawhney***, Jeevan Reddy, J. states that for the purpose of the discussion in the judgment, the Scheduled Castes and Scheduled Tribes, which were admittedly included within the backward classes, were kept aside.

229. It is pertinent to note that the said discussion in the judgment was pertaining to "identification" of backward classes of citizens. As discussed hereinabove, insofar as the Scheduled Castes and Scheduled Tribes are concerned, identification is

already covered by the Presidential List issued under Artiles 341 and 342.

230. Sawant, J. in his judgment also held that Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only because of the degrees of social backwardness and not based on economic consideration alone. He held that if backward classes are classified into backward and more or most backward classes, separate quotas of reservations would be kept for each of such classes. In the absence of such separate quotas, the reservations will be illegal.

231. This Court in ***E.V. Chinnaiah*** has observed that the law laid down in the case of ***Indra Sawhney*** would not be applicable since Jeevan Reddy, J. in his judgment has himself stated that the same would not be applicable to Scheduled Castes and Scheduled Tribes in paragraph 781, which paragraph deals with identification of backward classes of citizens. Jeevan Reddy, J.

states that for the purpose of the said discussion, we keep aside the Scheduled Castes and Scheduled Tribes. He observed that this was done since they are admittedly included within the backward classes. However, in paragraph 803, he specifically observed that under Article 16(4) there is no mention of Scheduled Castes and Scheduled Tribes and that Scheduled Castes and Scheduled Tribes are also part of backward class of citizens.

232. Insofar as the observation in paragraph 792 wherein Jeevan Reddy, J. observed that the said discussion has no relevance in the case of Scheduled Tribes and Scheduled Castes is concerned, the said discussion was regarding applicability of the 'means test' or 'creamy layer test'.

233. That being the case, if the Scheduled Castes and Scheduled Tribes are a part of backward class of citizens under Article 16(4), then the question would be, as to why sub-classification which

is permitted in case of Other Backward Classes cannot be permitted in case of Scheduled Castes and Scheduled Tribes?

234. Though the initial view of this Court was that Article 16(4) is by way of exception to Article 16(1), the same has undergone a thorough change, particularly after the judgment of this Court in the case of ***His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala***[24] in relation to interplay between the Fundamental Rights and the Directive Principles. Shortly after the judgment in ***Kesavananda Bharati***, came the judgment of 7-Judge Bench of this Court in ***N.M. Thomas*** wherein the 5-Learned Judges took a view that Article 16(4) was not by way of exception to Article 16(1). It was held that the trinity of Articles 14 to 16 embodied the concept of equality. It was emphasized that equality does not mean equality to all. It was held that equality as enshrined under the Constitution did not mean formal equality but real equality. It was held that to

[24] (1973) 4 SCC 225 : 1973 Supp. SCR 1.

bring real equality unequal treatment to unequals was what was contemplated under the Constitution. It was held that if unequals are to be treated equally it will lead to nothing else but perpetuating inequality. It was held that only giving an unequal treatment to unequals so that they can march ahead can bring out real equality.

235. This Court in unequivocal terms held that preferential treatment for members of backward classes alone can mean equality of opportunity for all citizens. The Court held that clause (4) of Article 16 was an emphatic way of stating a principle implicit in Article 16 (1).

236. Ray, C.J. observed that all legitimate methods were available for equality of opportunity in services under Article 16(1). He stated that Article 16(4) indicates one of the methods of achieving equality embodied in Article 16(1)

237. Mathew, J. observed that the claim for equality is in fact a protest against unjust, underserved and unjustified inequalities.

It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges. He stated that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried i.e., even up to the point of making reservation.

238. In paragraph 83, he emphatically states that it is a mistake to assume *a priori* that there can be no classification within a class. He states that if there are intelligible differentia which separates a group within that class from the rest and that differentia has nexus with the object of classification, then there should be no objection to a further classification within the class.

239. Krishna Iyer, J. in paragraph 124 refers to the research conducted by the A.N. Sinha Institute of Social Studies, Patna which would reveal a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances

away from the special concessions. He observed that, for them, Articles 46 and 335 remain a 'noble romance', the bonanza going to the 'higher' harijans. He states in paragraph 136 that Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt. He observes in paragraph 142 that the genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. According to him, to treat sharply dissimilar persons equally is subtle injustice. He held that if Article 16(4) admits of reasonable classification, so does Article 16(1).

240. In ***K.C. Vasanth Kumar,*** Y.V. Chandrachud, C.J. observed that the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after a period of 15 years from the date of the judgment. Desai, J. in the said judgment observed that even in the case of Scheduled Castes and Scheduled Tribes the economic criterion

was worth applying by refusing preferred treatment to those amongst them who have already benefitted by it and improved their position.

241. Fazal Ali, J., after referring to all the judgments of the Learned Judges in ***Kesavananda Bharati*** with regard to interplay between Part III and Part IV of the Constitution, held that Fundamental Rights guaranteed by the Constitution has to be read in harmony with the Directive Principles contained in Part IV. He also reiterates that Article 16(4) is not a proviso to Article 16(1).

242. M.H. Beg, J. concurs with the views expressed by the aforesaid Learned Judges.

243. Further, Krishya Iyer, J. in ***Akhil Bharatiya Soshit Karamchari Sangh*** reiterates that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He states that Article 46, in emphatic terms, obligates the State "to

promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the *Scheduled Castes and the Scheduled Tribes*, and shall protect them from social injustice and all forms of exploitation". He states that reading Article 46 together with Article 16(4), the inference is obvious that administrative participation by the Scheduled Castes and Scheduled Tribes shall be promoted with special care by the State.

244. While considering the criticism that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever, he suggested that the Administration may well innovate and classify to weed out the creamy layer of SCs/STs. However, records a caution that the Court cannot force the State in that behalf.

245. Chinnappa Reddy, J. in the same judgment states that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. He states that the

Directive Principles should serve the courts as a code of interpretation. He states that the Fundamental Rights should be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former.

246. Chinnappa Reddy, J advocates that the State action should be towards protection and nourishment of the underprivileged, the deprived and the exploited so that they can take their place in an egalitarian society.

247. In ***Indra Sawhney***, 7 Learned Judges affirmed the position as laid down in ***N.M. Thomas*** that clause (4) of Article 16 is not by way of an exception to clause (1) of Article 16, but it is an emphatic way of stating a principle implicit in Article 16(1).

248. As already discussed hereinabove, it has been held that further classification of backward classes into backward and more backward classes is permissible under the Constitution. The only caveat put by Sawant, J. is that if it is done there has to be a reservation for both backward as well as for more or most

backward classes. It has been held in ***Indra Sawhney*** that under Article 16(4) the Scheduled Castes are also included in the term 'backward class of citizens'.

249. If that be so, I find no justification in ***E.V. Chinnaiah*** holding that the State is not empowered to do the exercise of sub-classification among the Scheduled Castes.

250. The basic error that appears to have been committed in ***E.V. Chinnaiah*** is that it proceeds on the understanding that Article 341 has to do with the reservation of the seats.

251. As already discussed hereinabove, Articles 341 and 342 are only with regard to identification of the Scheduled Castes and Scheduled Tribes. Articles 341 and 342 read with clauses (24) and (25) of Article 366 of the Constitution provide that those castes included in the Presidential List shall be deemed to be Scheduled Castes and Scheduled Tribes for the purposes of the Constitution. However, at the cost of repetition, I reiterate that Articles 341 and 342 do not deal with reservation.

252. The provisions of affirmative action including reservations in the matter of public employment are contained in Article 16 of the Constitution of India.

253. As already discussed herein above, this Court in ***Indra Sawhney*** has held that further classification of backward classes into backward and more backward classes is permissible in law.

254. By that corollary, if a State finds that any of the castes, races, tribes or part of or groups within the castes, races or tribes are not adequately represented, could the State be denied its right to make a special provision for that?

255. In a catena of decisions, this Court held that the State must resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It has been held that State should take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously

placed, to bring about real equality. Reference in this respect may be made to the Constitution Bench judgment of this Court in the case of ***Marri Chandra Shekhar Rao vs. Dean, Seth G.S. Medical College and others***[25], wherein this Court observed thus:

> "**20.** …. Reservations should and must be adopted to advance the prospects of weaker sections of society, but while doing so care should be taken not to exclude the legitimate expectations of the other segments of the community."

256. Some startling facts have been brought to our notice. Though the Presidential List for the State of Andhra Pradesh has a list of 60 Scheduled Castes, Justice Usha Mehra Commission Report[26] shows that out of these 60 Scheduled Castes, only 4 or 5 had availed the benefits of reservation, leaving the rest of the Scheduled Castes in the Presidential List high and dry. The

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[25] (1990) 3 SCC 130.

[26] Report of Justice Usha Mehra National Commission on Sub-Categorization of Scheduled Castes in Andhra Pradesh (submitted to Ministry of Social Justice and Empowerment, Government of India on 1st May 2008).

Report shows that the same has resulted in an anomaly that none of the majority caste despite their inclusion in the Presidential List for the State of Andhra Pradesh, have been able to seek reservation benefits including entry into Government service under the State except for the job of Sweepers and/or Farash.

257. Insofar as the State of Punjab is concerned, it is sought to be urged on behalf of the State of Punjab that though Balmikis and Mazhabi Sikhs constitute 41.9% of the total population of the Scheduled Castes, the percentage of these categories in public employment is totally disproportionate to their population among the Scheduled Castes. In any case, it is urged that what is provided under the Act[27] was only differential treatment insofar as 50% of the vacancies reserved for Scheduled Castes is concerned. Only if the candidates from these categories are

[27] Section 4(5) of The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 (Punjab Act No. 22 of 2006).

available, the seats would go to these categories. On account of non-availability of the candidates from these categories, the seats would fall into the other categories of the Scheduled Castes.

258. I find that, as has been observed by this Court in various judgments, it is the duty of the State to give preferential treatment to the backward class of citizens who are not adequately represented. If the State while discharging that duty finds that certain categories within the Scheduled Castes and Scheduled Tribes are not adequately represented and only the people belonging to few of the categories are enjoying the entire benefit reserved for Scheduled Castes and Scheduled Tribes, can the State be denied its right to give more preferential treatment for such categories? In my view, the answer would be in the negative, since the same would not amount to tinkering with the Presidential List.

259. No doubt that if the State decides to provide 100% of the reservation for Scheduled Castes to one or more categories

enlisted in the Presidential List in that State to the exclusion of some categories, it may amount to tinkering with that list because, in effect, it would amount to denial of benefit of reservation to those Scheduled Caste categories which have been excluded. In my view, that would, in effect, amount to deletion of the said categories from the Presidential List notified under Article 341 of the Constitution, which power is exclusively reserved with Parliament, in my opinion, such an exercise would not be permissible.

260. In this respect, I may take support from the observations made by Sawant, J. in ***Indra Sawhney***. He held that if the reservation is provided only for the more or most backward classes, then the people belonging to higher echelons would grab the open seats whereas the people from more or most backward classes would eat up the entire reservation, leaving the other backward classes high and dry. He therefore held that the sub-classification of backward classes would be permissible provided

the reserved seats are available for backward classes as well as more or most backward classes. I am therefore of the considered view that merely because more preferential treatment is provided to the more backward or more inadequately represented among the Scheduled Castes, it would not amount to tinkering with the Presidential List. In my view, the same would be permissible in view of the law laid down by the 9-Judge Bench in the case of ***Indra Sawhney***.

261. The ground realities cannot be denied. Even among the Scheduled Castes, there are some categories who have received more inhuman treatment for centuries and generations as compared to the other categories. The hardships and the backwardness which these categories have suffered historically would differ from category to category. In my view, therefore, merely because they are part of a single or a combined Presidential List, it cannot be said that they form part of a

homogeneous group. I therefore have no hesitation in holding that ***E.V. Chinnaiah*** has been wrongly decided.

262. The concept of sub-classification was sought to be attacked on the ground that this would lead to giving reservation for political reasons. It was argued that a political party in power to gain political advantage may provide special treatment to a particular class in the list of Scheduled Castes. I see no merit in the argument.

263. Dr. Ambedkar had foreseen such a difficulty. In his speech in the Constituent Assembly, Dr. B.R. Ambedkar said that 'backward community" will have to be left to be determined by each local government. On a query by Shri T.T. Krishnamachari, as to whether this rule will be justiciable, he observed that it would be a justiciable matter. He stated that if the local Government included in this category of reservations such a large number of seats, one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a

magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

264. Various judicial pronouncements referred to hereinabove have emphasized that a reasonable classification is implicit in the trinity of Articles 14 to 16. Therefore, if somebody approaches the Court, the Court can always examine as to whether such a classification is reasonable or not.

265. For a classification to be reasonable, it will have to be established that any group or sub-group carved out in the larger group is significantly different than the larger group and that the classification has a nexus with the object to be achieved.

266. In a case, like the present one, if a classification is made, it will have to be established that the group carved out from the larger group is more disadvantageous and not adequately represented. The result of classification would be to provide more

preferential treatment to this more disadvantageous and less represented group. The ultimate object would be to achieve real equality among all the sub-groups in the larger group.

267. In any case, as has been held by judicial pronouncements, when the State does such an exercise, it will have to be supported by an empirical data. Unless the State or the Commission comes to a finding that the group carved out needs special treatment is more disadvantageous and not adequately represented as compared to the other categories in the group, such a sub-classification would not stand the scrutiny of the law. I, therefore, find that the fear that is posed is not substantiated.

268. I find that the attitude of the categories in the Presidential List opposing such a sub-classification is that of a person in the general compartment of the train. Firstly, the persons outside the compartment struggled to get into the general compartment. However, once they get inside it, they make every attempt

possible to prevent the persons outside such a compartment from entering it.

269. In fact, what the people belonging to the categories who are availing of large chunk of reservations and denying a special treatment to the less privileged among them are doing, is what the people from the higher castes have done to these people for centuries as a result of which backward classes were kept away from the mainstream of society for ages, for no fault of theirs. Only on account of the principle of social and economic justice as enshrined under the Constitution, they have availed themselves of the benefits of special treatment. However, when the State endeavours to ensure that the said benefit percolates to the more underprivileged and less adequately represented, the sections from the Scheduled Castes who oppose them, stand in the shoes of those who oppressed them.

270. The categories in the Presidential List who have already enjoyed a major chunk of reservations should not object to the

State providing a special treatment to those who have been deprived of such a benefit and particularly when such a benefit is not being taken away from them. Only part of that benefit is being reserved for percolating the same to the more disadvantageous and less represented.

271. I find that to achieve real equality as envisaged by this Court in various judicial pronouncements, sub-classification amongst the Scheduled Castes for giving more beneficial treatment is wholly permissible under the Constitution.

VI. THE WAY FORWARD

272. That leaves us with the question regarding the applicability of creamy layer principle to the Scheduled Castes and Scheduled Tribes.

273. No doubt that in ***Indra Sawhney***, Jeevan Reddy, J. while considering the applicability of 'means test' and 'creamy layer' has observed that the discussion therein is confined only to Other

Backward Classes, and it has no relevance in the case of Scheduled Castes and Scheduled Tribes.

274. In paragraph 792, Jeevan Reddy, J. observed thus:

> "**792.** In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class — a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. 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. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line — how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not

merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become — say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of

holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual

> backwardness. 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). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

275. It has been observed that the very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. It is observed that 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. He observed that they would be misfits in the class. It is further observed that after excluding them alone, would the class be a compact class. It is observed that in fact, such exclusion would benefit the truly backward.

276. His Lordship gave an example that, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status in society rises; he is no longer socially disadvantaged. His children would get full opportunity to realize their potential. They are in no way handicapped in the race of life. It is observed that it is logical that in such a situation, his children are not given the benefit of reservation. It is further observed that by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

277. Rejecting the argument of 'one swallow doesn't make the summer', i.e. merely because few members of a caste/class become socially advanced the caste/class as such does not cease to be backward, the Learned Judge answered that though clause (4) of Article 16 aims at group backwardness, he was of the view 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) of Article 16.

278. As early as in 1981, in ***Akhil Bharatiya Soshit Karamchari Sangh***, Krishna Iyer, J., in paragraph 94, while rejecting the argument that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions, had observed that the State may, when social conditions warrant, justifiably restrict *harijan* benefits to the *harijans* among the *harijans* and forbid the higher *harijans* from robbing the lowlier brethren.

279. Again, in paragraph 98, he observed that the Administration may well innovate and classify to weed out the creamy layer of Scheduled Castes and Scheduled Tribes. However, he cautioned that the Court cannot force the State in that behalf.

280. Chinnappa Reddy, J. also records that a few members of those castes or social groups may have progressed far enough

and forged ahead so as to compare favourably with the leading forward class economically, socially and educationally. He observed that in such cases, perhaps an upper income ceiling would secure the benefit of reservation to such of those members of the class who really deserve it.

281. In ***M. Nagaraj***, the Court also applied the principle of quantifiable data and creamy layer even in the case of Scheduled Castes and Scheduled Tribes. The correctness of the same was considered in ***Jarnail Singh***.

282. Though ***Jarnail Singh*** held that insofar as applicability of quantifiable data on backwardness insofar as Scheduled Castes and Scheduled Tribes is concerned, ***M. Nagaraj*** was not correct, however, insofar as the applicability of creamy layer principle even to Scheduled Castes and Scheduled Tribes is concerned, it upheld the view taken in ***M. Nagaraj***. In doing so, ***Jarnail Singh*** is basically relying on the judgment of 7-Judge Bench of this

Court in ***N.M. Thomas***. The view taken in ***Jarnail Singh*** has also been approved in ***Davinder Singh***.

283. The correctness of the view taken in ***Jarnail Singh*** and ***Davinder Singh*** is not questioned. However, since in the present reference we are dealing with the question about equality among the group of unequals, I find it appropriate to consider the said issue also.

284. I have already referred hereinabove to the observations made by Krishna Iyer, J. in ***N.M. Thomas*** and the observations made by Chinnappa Reddy, J. in ***K.C. Vasanth Kumar*** regarding applicability of creamy layer principle. It is worthwhile to note that the 7-Judge Bench in ***N.M. Thomas*** was considering the question about affirmative action in case of Scheduled Castes and Scheduled Tribes.

285. In ***N.M. Thomas***, Krishna Iyer, J., in more than one place, had observed that the State is entitled to take steps for weeding out the socially, economically and educationally advanced

sections of the Scheduled Castes and Scheduled Tribes from the applicability of reservation.

286. Krishna Iyer, J. has again reiterated this position in paragraphs 94 and 98 in ***Akhil Bharatiya Soshit Karamchari Sangh***.

287. When the 9-Judge Bench in ***Indra Sawhney*** held that applicability of such a test insofar as Other Backward Classes are concerned would advance equality as enshrined in the Constitution, then why such a test should not also be made applicable to the Scheduled Castes and Scheduled Tribes.

288. As observed hereinabove, there are stark ground realities, and we cannot be ignorant of them. Nearly 75 years have elapsed from the day on which the Constitution was brought into effect. Special provisions have been made for the advancement of the Scheduled Castes and Scheduled Tribes and backward class of citizens. By judicial interpretation, the equality enshrined in the trinity of Articles 14 to 16 of the Constitution has been

considered to be equal treatment among equals and unequal treatment among unequals. The question that will have to be posed is, whether equal treatment to unequals in the category of Scheduled Castes would advance the constitutional objective of equality or would thwart it? Can a child of IAS/IPS or Civil Service Officers be equated with a child of a disadvantaged member belonging to Scheduled Castes, studying in a Gram Panchayat/Zilla Parishad school in a village?

289. The education facilities and the other facilities that would be available to a child of a parent of the first category would be much higher, maybe the facilities for additional coaching would also be available; the atmosphere in the house will be far superior and conducive for educational upliftment.

290. *Per contra*, the child of parent of the second category would be having only the bare minimum education; the facilities of coaching, etc., would be totally unavailable to him. He will be

living in the company of his parents who do not have education and have not even been in a position to guide such a child.

291. As observed by Chinnappa Reddy, J., in ***K.C. Vasanth Kumar***, a child studying in the St. Paul's High School and St. Stephen's College cannot be equated with a child studying in a rural school. He observed that if a child of the first category secures 90% marks and the child of the second category secures 50% of the marks, would treating both by the same standard achieve real justice.

292. It is also commonly known that disparities and social discrimination, which is highly prevalent in the rural areas, start diminishing when one travels to the urban and metropolitan areas. I have no hesitation to hold that putting a child studying in St. Paul's High School and St. Stephen's College and a child studying in a small village in the backward and remote area of the country in the same bracket would obliviate the equality principle enshrined in the Constitution.

293. I may note that some of the officers from the Scheduled Castes and Scheduled Tribes categories, who after receiving the benefit of reservation under the Constitution have reached high positions, are doing their bit to pay back to society. They are providing coaching and other facilities to the less advantaged so that they can compete and come up in their life. However, putting the children of the parents from the Scheduled Castes and Scheduled Tribes who on account of benefit of reservation have reached a high position and ceased to be socially, economically and educationally backward and the children of parents doing manual work in the villages in the same category would defeat the constitutional mandate.

294. However, I may observe that taking into consideration that the Constitution itself recognizes the Scheduled Castes and Scheduled Tribes to be the most backward section of the society, the parameters for exclusion from affirmative action of the person belonging to this category may not be the same that is applicable

to the other classes. If a person from such a category, by bagging the benefit of reservation achieved a position of a peon or maybe a sweeper, he would continue to belong to a socially, economically and educationally backward class. At the same time, the people from this category, who after having availed the benefits of reservation have reached the high echelons in life cannot be considered to be socially, economically and educationally backward so as to continue availing the benefit of affirmative action. They have already reached a stage where on their own accord they should walk out of the special provisions and give way to the deserving and needy. I may gainfully refer to the observations of Dr. B.R. Ambedkar as under:

> "History shows that where ethics and economics come in conflict, victory is always with economics. Vested interests have never been known to have willingly divested themselves unless there was sufficient force to compel them."[28]

[28] What Gandhi and Congress have done to Untouchables, Chap. VII.

295. I am therefore of the view that the State must evolve a policy for identifying the creamy layer even from the Scheduled Castes and Scheduled Tribes so as exclude them from the benefit of affirmative action. In my view, only this and this alone can achieve the real equality as enshrined under the Constitution.

VII. CONCLUSION

296. I, therefore, hold:

(i) that ***E.V. Chinnaiah***, which held that sub-classification amongst the Scheduled Castes for the purpose of giving more beneficial treatment to a group in the larger group of the Scheduled Castes is not permissible, does not lay down a good law;

(ii) that sub-classification amongst the Scheduled Castes for giving more beneficial treatment is permissible in law;

(iii) that for doing so, the State will have to justify that the group for which more beneficial treatment is provided is

inadequately represented as compared to the other castes in the said List;

(iv) that while doing so, the State will have to justify the same on the basis of empirical data that a sub-class in whose favour such more beneficial treatment is provided is not adequately represented;

(v) that, however, while providing for sub-classification, the State would not be entitled to reserve 100% seats available for Scheduled Castes in favour of a sub-class to the exclusion of other castes in the List;

(vi) that such a sub-classification would be permissible only if there is a reservation for a sub-class as well as the larger class;

(vii) that the finding of ***M. Nagaraj***, ***Jarnail Singh*** and ***Davinder Singh*** to the effect that creamy layer principle is also applicable to Scheduled Castes and Scheduled Tribes lays down the correct position of law;

(viii) that the criteria for exclusion of the creamy layer from the Scheduled Castes and Scheduled Tribes for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes.

297. Before I part with the judgment, I place on record my deep appreciation for the valuable assistance rendered by learned counsel appearing for the parties.

.....J.
[B.R. GAVAI]

NEW DELHI;
AUGUST 01, 2024