REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2317 OF 2011

THE STATE OF PUNJAB AND OTHERS …APPELLANT(S)

VERSUS

DAVINDER SINGH AND OTHERS …RESPONDENT(S)

WITH

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

J U D G M E N T

BELA M. TRIVEDI, J.

1. Though unanimity and consensus in the opinions expressed by the larger Benches on the Constitutional matters are desirable for the sake of certainty and strength of the law laid down, I for one, believe that the "dissent" for well-chosen reasons would be equally important for an effective adjudication in a democratic functioning of judiciary, which would have a potential to develop the law in future.

2. Justice William O. Douglas of the US Supreme Court[1], a great dissenter who had written as many as 486 dissenting opinions, had stated:

> "The right to dissent is the only thing that makes life tolerable for a Judge of an Appellate Court……. It is the right of dissent, not the right or duty to conform, which gives dignity, worth, and individuality to man".

3. Justice Oliver Wendell Holmes, another great dissenter, in his first dissent in the Supreme Court in ***Northern Securities Company Vs. The United States (1903)***[2] had stated:

> "I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule,

---

[1] Bernard Schwartz, A Book of Legal Lists: The Best and Worst in American Law P.283
[2] 193 U.S. 197 (1903)

to express dissent, I feel bound to do so in this case and to give my reasons for it……"

4. With somewhat similar feelings, and with due respect, I beg to differ from the erudite expression of opinions expressed by the Learned Chief Justice and my esteemed Brothers Justice B.R. Gavai and Justice Pankaj Mithal, and pen down my own opinion with reasons for my dissent.

5. For the sake of brevity and avoid repetition, the facts and the submissions made by the learned advocates for the parties as narrated in the opinion expressed by the learned Chief Justice, are not reiterated. At the outset, it may be noted that neither the Referral Order made in the ***State of Punjab and Others vs. Davinder Singh and Others,***[3] contains a formulation of precise questions nor the Order dated 12.10.2023 made in the Reference case sets out specific questions for consideration by this Bench. Hence, having regard to the opinions expressed in ***Davinder Singh*** and in ***E.V. Chinnaiah vs. State of Andhra Pradesh and Others***[4], and having regard to the submissions - oral and written - made by the learned advocates for the parties, following substantial questions of law are formulated for consideration.

---

[3] (2020) 8 SCC 65
[4] (2005) 1 SCC 394

(I) Whether the law laid down by the Five-Judge Bench in ***E.V. Chinnaiah*** could have been doubted and referred to the larger Bench by the Bench of three judges, without recording any cogent reasons for their disagreement with the said decision in ***E.V. Chinnaiah,*** more particularly when the said decision held the field for a long period of fifteen years?

(II) Whether the States should be permitted to tinker with or vary the Presidential List specifying the "Scheduled Castes" as notified under Clause (1) of Article 341, by sub-classifying or sub-dividing or re-grouping the castes conglomerated in the said list, under the guise of providing reservation for the weaker of the weakest, and thereby commit the breach of the mandate contained in Clause (2) of Article 341?

(III) Whether the decision in ***E.V. Chinnaiah*** is required to be revisited in view of certain observations made by the Nine-Judge Bench in ***Indra Sawhney Vs. Union of India and Others***[5] concerning the Other Backward Class?

---

[5] **(1992) Suppl. 3 SCC 217**

6. Before embarking on the issues involved, let us go through the trajectory of the Reference made by the Five-Judge Bench in the ***State of Punjab and Others vs. Davinder Singh and Others***[6] to this Bench.

TRAJECTORY OF THE REFERENCE TO SEVEN JUDGES

7. The State of Andhra Pradesh passed an enactment, namely the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000 on 02.05.2000 dividing 57 castes enumerated in the Presidential List prepared under Article 341(1) of the Constitution, into 4 groups based on inter-state backwardness, and fixed separate quotas in reservation for each of these groups. The validity of the said Act of 2000 came to be challenged in the Writ Petitions filed in the High Court of Andhra Pradesh at Hyderabad. The said Writ Petitions came to be dismissed by a Five-Judge Bench by a majority of 4:1. The High Court having certified the case as being fit for appeal to the Supreme Court, the Appeals were filed before this Court. The same having been referred to the Constitution Bench of Five-Judges. The Constitution Bench after considering the various issues allowed the said Appeals being Civil Appeal No.6758/2000 and Others (***E.V. Chinnaiah vs. State of Andhra***

[6] **(2020) 8 SCC 65**

Pradesh and Others)[*] declaring the impugned Act as *ultra vires* the Constitution. The Constitution Bench while considering the said Reference, had framed following three questions: -

(i) Whether the impugned Act is violative of Article 341(2) of the Constitution of India?

(ii) Whether the impugned enactment is constitutionally invalid for lack of legislative competence?

(iii) Whether the impugned enactment creates sub-classification or micro-classification of Scheduled Castes so as to violate Article 14 of the Constitution of India?

8. Justice Santosh Hegde (for himself and Justice S.N. Variava and Justice B.P. Singh), and Justice S.B. Sinha and Justice H.K. Sema concurring but by separate judgments, allowed the said Appeals by answering the above questions as under: -

(i) From the scheme of the Constitution, Article 341 and from the opinions in case of ***State of Kerala & Anr. vs. N.M. Thomas & Ors.***[7]**,** it was clear that the castes once included in the Presidential List, form a class by themselves. If they are one class under the

[*] **(2005) 1 SCC 394**
[7] **(1976) 2 SCC 310**

Constitution, any division of these classes of persons based on any consideration would amount to tinkering with the Presidential List. (Paragraph 26)

(ii) It is 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 include 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 having been fulfilled by the State, it was not open to the State to sub-classify a class already recognized by the Constitution and allot a portion of the already reserved quota amongst the State created sub-class within the list of Scheduled Castes. (Paragraph 31)

(iii) The primary object of the impugned enactment was to create groups of sub-castes in the list of Scheduled Castes applicable to the State and, apportionment of the reservation was only secondary and consequential. Whatever may be the object of such 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 pressing its legislative competence to Entry 41 of List II or Entry 25 of List III. In pith and substance, the enactment was not a law governing the field of education or the field of State Public Services. (Paragraph 31)

(iv) The conglomeration of castes given in the Presidential Order, should be considered as representing a class as a whole. 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 sub-divided or sub-classified further. If a class within a class of members of the Scheduled Caste is created, the same would amount to tinkering with the list. Such sub-classification would be violative of Article 14 of the Constitution. If the 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 could 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. (Paragraph 41)

(v) The Court therefore opined that the impugned legislation apart from being beyond the legislative competence of the State was also violative of Article 14 of the Constitution and hence was liable to be declared as *ultra-vires* the Constitution. The impugned Act therefore was declared as ultra-vires the Constitution. (Paragraph 44)

9. Justice H.K. Sema in his concurring opinion had observed in Paragraph 48 thereof* that in ***Indra Sawhney vs. Union of India and Others***[*], the discussion of creamy layer was confined to Other Backward Classes only, and had no relevance in the case of Scheduled Castes and Scheduled Tribes. Justice S.B. Sinha also in his concurring opinion referred to certain observations made in ***Indra Sawhney*** and observed in Paragraph 38 that the principle laid down in ***Indra Sawhney*** for sub-classification of Other Backward Classes cannot be applied as a precedent law for sub-classification or subgrouping Scheduled Castes in the Presidential List, because that very judgment itself has specifically

[*] **(1992) Supp. 3 SCC 217**

held that sub-division of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. The Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments. In Paragraph 93 thereof [*], it has been held that "Scheduled Castes", 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 groups within the castes, races, or tribes. They are not merely backward but the backward most. A person even does not cease to be a Scheduled Caste automatically even on his conversion to another religion. It was further observed that the two groups that is socially and educationally backward classes and Scheduled Castes were differentiated for the purpose of Clause (4) of Article 15 of the Constitution as therein Scheduled Castes had been recognized, in the nature of things, to be backward but it is also recognized that besides

[*] **(2005) 1 SCC 394**

them, there may be other groups of persons who are backward and deserve preferential treatment.

10. Again, after referring to the observations made in ***Indra Sawhney*** regarding the "means-test and creamy layer test," it was observed by Justice Sinha in Paragraph 96 thereof that whenever such a situation arises in respect of Scheduled Castes, it will be Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution, and the States do not have the legislative competence therefor.

11. The aforesaid judgment in ***E.V. Chinnaiah**** held the field for about 15 years till the Three-Judge Bench of this Court in ***State of Punjab and Others vs. Davinder Singh and Others***[*] referred the matter to a larger Bench for consideration, opining that the judgment of Five-Judge Bench in ***E.V. Chinnaiah*** was required to be revisited in the light of Article 338 of the Constitution of India and exposition of law in ***Indra Sawhney***. The Three-Judge Bench passed the following Order on 20th August, 2014.[*]

---

[*] **(2005) 1 SCC 394**
[*] **(2020) 8 SCC 65**

“ORDER

1. The learned counsel for the respondents heavily relies upon the Constitution Bench decision of this Court 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] On the other hand, the learned Additional Solicitor General for the appellants, submits that *E.V. Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] has no application on the controversy in hand. Moreover, he submits that *E.V. Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is not in accord with the 9-Judge Bench decision of this Court in *Indra Sawhney* v. *Union of India* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] .

2. Having heard the learned Additional Solicitor General and the learned counsel for the parties, we are of the view that *E.V Chinnaiah* [*E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] needs to be revisited in the light of Article 338 of the Constitution of India and, inter alia, exposition of law in *Indra Sawhey* [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] . Moreover, the matter also involves interpretation and interplay between Article 16(1), Article 16(4), Article 338 and Article 341 of the Constitution of India as well.

3. In this view of the matter, we refer the matter for consideration of the above aspects by the larger Bench. Let the matter be placed before the Chief Justice on administrative side for appropriate order.”

12. In the said case of ***Davinder Singh and Others***, the Writ Petitions were filed in the High Court of Punjab and Haryana at Chandigarh for declaring Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 2006, which required 50% of the

vacancies of the quota reserved for Scheduled Castes in direct recruitment, to be offered to Valmikis and Mazhbi Sikhs, if available as a first preference from amongst the Scheduled Castes, as unconstitutional. The Division Bench of the High Court placing reliance on the decision in ***E.V. Chinnaiah***, vide the judgment dated 29.03.2010 in CWP No. 18290 of 2009, declared the said provision contained in Section 4(5) of the Act 2006 as unconstitutional. The said Judgment came up for consideration before the Three-Judge Bench of this Court. On the Reference made by the Three-Judge Bench to the larger Bench, the Five-Judge Bench of this Court in the ***State of Punjab and Others vs. Davinder Singh and Others***[*] framed the following issues.

(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?

(ii) Whether the State had the legislative competence to enact the provisions contained under Section 4(5) of the Act.

(iii) Whether the decision in ***E.V. Chinnaiah vs. State of Andhra Pradesh and Others*** is required to be revisited.

[*] **(2020) 8 SCC 1**

13. The Five-Judge Bench however, after extensively referring various paragraphs of the decision in ***Indra Sawhney*** opined that ***E.V. Chinnaiah*** is required to be revisited by a larger bench. It was observed by the Five-Judge Bench therein* that: -

> **"44.** The question arises whether sub-classification for providing benefit to all castes can be said to be tinkering with the list under Articles 341, 342 and 342-A, in view of the decisions in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] , permitting sub-classifications of backward classes and in Jarnail Singh [Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396 : (2019) 1 SCC (L&S) 86] , in which, it was opined that "creamy layer concept" for exclusion of benefit can be applied to the Scheduled Castes and Scheduled Tribes and it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution. The caste or group or sub-group continued exactly as before in the List. 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. The million dollar question is how to trickle down the benefit to the bottom rung; reports indicate that benefit is being usurped by those castes (class) who have come up and adequately represented. It is clear that caste, occupation, and poverty are interwoven. The State cannot be deprived of the power to take care of the qualitative and quantitative difference between different classes to take ameliorative measures.
>
> **45.** Reservation was not contemplated for all the time by the Framers of the Constitution. On the one hand, there is no exclusion of those who have come up, on the other hand, if sub-classification is denied, it would defeat right to equality by treating unequal as equal. In Chebrolu Leela Prasad Rao v. State of A.P. [Chebrolu Leela Prasad Rao v. State of A.P., (2021) 11 SCC 401 : 2020 SCC OnLine SC 383] , the necessity of revising lists was

* **(2020) 8 SCC 1**

pointed out relying on Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] and Union of India v. Rakesh Kumar [Union of India v. Rakesh Kumar, (2010) 4 SCC 50 : (2010) 1 SCC (L&S) 961] .

46. There is cry, and caste struggle within the reserved class as benefit of reservation in services and education is being enjoyed, who are doing better hereditary occupation. The scavenger class given the name of Balmikis remains more or less where it was, and so on, disparity within Scheduled Caste is writ large from various reports. The sub-classification was made under Section 4(5) of the Punjab Act to ensure that the benefit of the reservation percolate down to the deprived section and do not remain on paper and to provide benefit to all and give them equal treatment, whether it is violative of Article 14? In our opinion, it would be permissible on rationale basis to make such sub-classification to provide benefit to all to bring equality, and it would not amount to exclusion from the list as no class (caste) is deprived of reservation in totality. In case benefit which is meant for the emancipation of all the castes, included in the List of Scheduled Castes, is permitted to be usurped by few castes those who are adequately represented, have advanced and belonged to the creamy layer, then it would tantamount to creating inequality whereas in case of hunger every person is required to be fed and provided bread. The entire basket of fruits cannot be given to mighty at the cost of others under the guise of forming a homogeneous class.

47……

48……

49. Providing a percentage of the reservation within permissible limit is within the powers of the State Legislatures. It cannot be deprived of its concomitant power to make reasonable classification within the particular classes of Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes without depriving others in the list. To achieve the real purpose of reservation, within constitutional dynamics, needy can always be given benefit; otherwise, it would mean that

inequality is being perpetuated within the class if preferential classification is not made ensuring benefit to all.

50. The sub-classification is to achieve the very purpose, as envisaged in the original classification itself and based thereupon evolved the very concept of reservation. Whether the sub-classification would be a further extension of the principle of the said dynamics is the question to be considered authoritatively by the Court.

51. The Scheduled Castes as per Presidential List are not frozen for all the time, and neither they are a homogeneous group as evident from the vast anthropological and statistical data collected by various Commissions. The State law of preferential treatment to a limited extent, does not amend the List. It adopts the List as it is. The State law intends to provide reservation for all Scheduled Castes in a pragmatic manner based on statistical data. It distributes the benefits of reservations based on the needs of each Scheduled Caste.

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

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.

58. We endorse the opinion of a Bench of 3 Judges that E.V. Chinnaiah [E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] is required to be revisited by a larger Bench; more so, in view of further development and the amendment of the Constitution, which have taken place. We cannot revisit E.V. Chinnaiah [E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 : (2008) 2 SCC (L&S) 329] being Bench of coordinate strength. We request the Hon'ble Chief Justice to place the matters before a Bench comprising of 7 Judges or more as considered appropriate."

14. In view of the above, the matters have been placed before us for consideration whether the ***E.V. Chinnaiah*** requires revisitation or not. In other words, for consideration as to whether the law laid down by ***E.V. Chinnaiah*** is the correct law in the light of certain observations made in ***Indra Sawhney***.

RELEVANT CONSTITUTIONAL PROVISIONS

15. In order to appreciate the rival contentions raised in the instant Reference, it would be beneficial to reproduce the relevant provisions of the Constitution for ready reference.

"Article 14. Equality before law. —The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. —

1 to 3….

(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 in so far 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.]

Article 16. Equality of opportunity in matters of public employment. —

1 to 3 ….

(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.

(4A) 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.

Article 162. Extent of executive power of State. — Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by,

the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof**.**

Article 166. Conduct of business of the Government of a State. -

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Advocate-General for the State. Conduct of business of the Government of a State.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States. —

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the “Union List”).

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State 1*** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

(3) Subject to clauses (1) and (2), the Legislature of any State 1*** has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the “State List”).

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State]

notwithstanding that such matter is a matter enumerated in the State List.

Article 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 or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

Article 341. Scheduled Castes. —
(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor 4 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, as the case may be.
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) 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.

Article 342. Scheduled Tribes. —
(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be

deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) 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.

Article 342A. Socially and educationally backward classes.

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify 6 [the socially and educationally backward classes in the Central List which shall for the purposes of the Central Government] be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.]

(3) Notwithstanding any contained in clauses (1) and (2), every State or Union territory may, by law, prepare and maintain, for its own purposes, a list of socially and educationally backward classes, entries in which may be different from the Central List.

Article 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;

(26) ……
****
(26A) ……..
(26B) ……..
(26C) "socially and educationally backward classes" means such backward classes as are so deemed under article 342A for the purposes of the Central Government or the State or Union territory, as the case may be;"

ANALYSIS

(I) WHETHER THE LAW LAID DOWN BY THE FIVE-JUDGE BENCH IN *E.V. CHINNAIAH VS. STATE OF ANDHRA PRADESH AND OTHERS*[*] COULD HAVE BEEN REFERRED TO THE LARGER BENCH BY THE BENCH OF THREE JUDGES, WITHOUT RECORDING ANY COGENT REASONS FOR DISAGREEMENT WITH THE SAID DECISION OF FIVE-JUDGE BENCH IN *E.V. CHINNAIAH* MORE PARTICULARLY WHEN THE SAID DECISION HELD THE FIELD FOR A LONG PERIOD OF FIFTEEN YEARS?

16. It may be noted that the Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000 has already been declared unconstitutional by the Five-Judge Bench in ***E.V. Chinnaiah*** as back as in 2005. Similarly, Section 4(5) of the Punjab Scheduled Caste and

[*] **(2005) 1 SCC 394**

Backward Classes (Reservation in Services Act, 2006) has also been declared unconstitutional by the Division Bench of the High Court of Punjab and Haryana vide the judgment dated 29.03.2010 in respect of which the present reference is made. Hence, both these Acts as on the date have been declared as unconstitutional. It is further required to be noted that ***E.V. Chinnaiah*** decided in 2005 was holding the field for about 15 years till the Five-Judge Bench in ***Davinder Singh,*** on the reference made by the Three-Judge Bench, further referred the matters to the Seven-Judge Bench in 2020.

17. It is noteworthy that the Three-Judge Bench had referred the matters to the larger Bench without assigning any reason much less cogent reason as to why it could not agree with the decision in ***E.V. Chinnaiah*** delivered by the Constitution Bench. The law which was settled by the Constitution Bench and was prevalent since 15 years was sought to be doubted and unsettled by a Three-Judge Bench by passing a very cryptic and perfunctory order not supported by any reason, as quoted hereinabove.

18. A Five-Judge Bench in ***Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others***[8]***,*** while examining the propriety

[8] **2002 (1) SCC 1**

of the Bench of two Judges doubting the correctness of a decision of a Bench of three Judges and directly referring the matter to the Bench of five Judges, had observed that judicial discipline and propriety demands that a Bench of two learned judges should follow a decision of a Bench of three learned judges, but if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances, can it be followed, the proper course for it to adopt would be to refer the matter before it to a Bench of three learned Judges setting out, the reasons why it could not agree with the earlier judgment.

19. The importance of the doctrine of binding Precedents in the administration of our judicial system hardly needs to be reiterated. The doctrines of Precedents and Stare decisis are the core values of our legal system. In series of cases, the Constitution Benches of this Court have time and again emphasized that when a decision is rendered by this Court, it acquires a reliance interest and the society organizes itself based on such legal order. When substantial judicial time and resources are spent on the References by the Constitution Benches, the same should not be further referred to the larger Bench by a smaller Bench, in a casual or cavalier manner, and without recording the reasons for disagreement.

20. As back as in 1974 a Seven-Judge Bench in ***Maganlal ChhaganLal (P) Ltd. vs. Municipal Corporation of Greater Bombay & Others***[9], H.R. Khanna, J. had remarked that certainty in the law, which was an essential ingredient of the Rule of Law, would be considerably eroded if the highest Court of the land lightly overruled the view expressed by it in earlier cases. One instance where such overruling could be permissible, according to him, was a situation where contextual values giving birth to the earlier view had subsequently altered substantially.

21. In ***Lt. Col. Khajoor Singh Vs. Union of India & Another***[10] a Seven-Judge Bench emphasized that the Court should not depart from an interpretation given in an earlier judgment of the Court unless there was a fair amount of unanimity that the earlier decision was manifestly wrong.

22. A more compendious examination of the issue was considered by another Seven-Judge Bench in ***Keshav Mills Co. Ltd. vs. Commissioner of Income Tax, Bombay North, Ahmedabad*** [11] wherein it was observed that frequent exercise by this Court of its power to review its earlier decisions on the ground that the view placed before

---

[9] (1974) 2 SCC 402
[10] AIR 1961 SC 532
[11] AIR 1965 SC 1636

it later appeared to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. It was further stated that before a previous decision is pronounced plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified.

23. In a more recent decision in case of ***Dr. Shah Faesal and Others vs. Union of India and Another***[12] a Five-Judge Bench reiterated the doctrines of Precedents and Stare decisis, and observed as under: -

> **"17**. This Court's jurisprudence has shown that usually the courts do not overrule the established precedents unless there is a social, constitutional or economic change mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the rule of law. As the Chief Justice of the Supreme Court of the United States, John Roberts observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record—Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]
>
> **"18.** Doctrines of precedents and stare decisis are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system.

[12] **(2020) 4 SCC 1**

> Arguably, Judges owe a duty to the concept of certainty of law, therefore they often justify their holdings by relying upon the established tenets of law."
>
> **"19.** When a decision is rendered by this Court, it acquires a reliance interest and the society organises itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench, or it is shown that the proposition laid down has become unworkable or contrary to a well-established principle, that a reference will be made to a larger Bench. In this context, a five-Judge Bench of this Court in Chandra Prakash v. State of U.P. [(2002) 4 SCC 234: 2002 SCC (Cri) 496: 2002 SCC (L&S) 496], after considering series of earlier rulings reiterated that: (SCC p. 245, para 22)
>
> > **"22.** … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."

24. The above exposition of law makes it clear that the doctrines of binding Precedents and *Stare decisis*, as also the judicial discipline and propriety, developed over the years, warrant that the decision of larger Bench should be followed by the smaller Bench. If the smaller bench had any doubt or disagreement with a decision of the larger bench, it could refer the same for reconsideration to the larger bench, however, after setting out the reasons and justification as to why it could not agree

or follow the decision of earlier larger Bench. Such disagreement also has to be based on some justifiable reasons, like where the earlier decision of larger Bench is found to be manifestly wrong or where the contextual values giving birth to the earlier view had altered substantially etc. A casual exercise of power to refer the matter to the larger Bench without recording any reason or on the ground that the view placed before it later seems to be more reasonable, may incidentally tend to make law uncertain and introduce confusion, which must be avoided.

25. In the instant case, the reference was made by Three-Judge Bench to the larger Bench for revisitation of the earlier decision of Constitution Bench in ***E.V. Chinnaiah,*** without assigning any reason and in a very casual and cavalier manner, and that too after fifteen years of its attaining finality. Such reference could not and should not have been countenanced by the subsequent Five-Judge Bench for reference to the Seven-Judge Bench. When a law was settled by the previous Constitution Bench in ***E.V. Chinnaiah*** after considering all the previous judgments including ***Indra Sawhney,*** and after investing substantial judicial time and resources, and when the same had held the field for a substantially long period of fifteen years, in my opinion, the very

reference by the Three-Judge Bench to the larger bench for reconsideration of the decision in ***E.V. Chinnaiah,*** that too without assigning any reason was inappropriate and not in consonance with the well settled doctrines of Precedents and *Stare decisis*. Having said that, let us proceed further with the other issues involved in the Reference.

(II) WHETHER THE STATES SHOULD BE PERMITTED TO TINKER WITH OR VARY THE PRESIDENTIAL LIST SPECIFYING THE "SCHEDULED CASTES," AS NOTIFIED UNDER CLAUSE (1) OF ARTICLE 341 BY SUB-CLASSIFYING OR SUB-DIVIDING OR RE-GROUPING THE CASTES CONGLOMERATED IN THE SAID LIST UNDER THE GUISE OF PROVIDING RESERVATION FOR THE WEAKER OF THE WEAKEST, AND THEREBY TO COMMIT BREACH OF THE MANDATE CONTAINED IN CLAUSE (2) OF ARTICLE 341?

26. The collateral issues which stem from the above question may be delineated as under: -

(a) Law on Constitution Interpretation.

(b) Object, Purpose and limits of Article 341.

(c) Etymology and Special Status of "Scheduled Castes" notified in the Presidential List.

(d) State's competence to sub-classify or sub-divide or re-group the Castes specified as "Scheduled Castes" in the Presidential List for providing reservation under Article 15 and 16.

(a) <u>Constitutional Interpretation</u>

27. Before examining the correctness of the law laid down by Five Judge Bench in ***E.V. Chinnaiah*** in the context of exposition of law in ***Indra Sawhney*** and in the light of the constitutional provisions more particularly Article 14, 15, 16 and 341 of the Constitution of India, let us have glance over the cardinal principles of interpretation of the Constitution laid down by this Court over the years in catena of decisions.

28. It cannot be gainsaid that the Constitution is construed to be a living and organic document, as it is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. It is required to be construed broadly and liberally however, in the words of Benjamin Cardozo, "a Judge is not a Knight errant roaming at will in pursuit of his own ideal of beauty and goodness. Judge is not to innovate at pleasure."***[13]***

---

[13] Benjamin Cardozo, The Nature of Judicial Process, (New Haven: Yale University Press, 13th Edition 1946) 141

29. As consistently held by this Court, it may be desirable to give a broad and generous construction to the Constitutional Provisions, but while doing so, the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind.

30. In ***GVK Industries Limited and Another vs. Income Tax Officer and Another***[14], a Five-Judge Bench on the interpretation of Constitution observed as under: -

> **"37.** In interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. However, in light of the serious issues it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation—they are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution.
>
> **38.** Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:
>
> > "To understand the Constitution as a legal text, it is essential to recognize the … sort of text it is: a *constitutive* text that purports, in the name of the people…, to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices." (See *Reflections on Free-*

[14] **(2011) 4 SCC 36**

Form Method in Constitutional Interpretation. [108 Harv L Rev 1221, 1235 (1995)])"

39. It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire document to see whether that meaning is validated by the constitutional values and scheme."

31. Following ***GVK Industries Limited***, another Five-Judge Bench in ***Dr. JaiShri LaxmanRao Patil vs. Chief Minister and Others***[15] observed as under: -

"113. In examining provisions of the Constitution, courts should adopt the *primary rule*, and give effect to the plain meaning of the expressions; this rule can be departed, only when there are ambiguities. In *Kuldip Nayar* v. *Union of India* [(2006) 7 SCC 1] after quoting from *G. Narayanaswami* v. *G. Pannerselvam* [(1972) 3 SCC 717] this Court held that: (*Kuldip Nayar case* SCC p. 88, para 201)

"*201*. … We endorse and reiterate the view taken in the above quoted paragraph of the judgment. It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal

[15] **(2021) 8 SCC 1**

> construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results.""

32. Thus, it is quite well settled that in interpreting any law, including the Constitution, the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. Sometimes as a matter of constitutional necessity, it may be prudent to widen the search for the true meaning, purport, and ambit of the provision under consideration, however, one has to bear in mind that no provision, no word or expression in the Constitution exists in isolation. They are necessarily related to, transforming and in turn being transformed by, other provisions, words and phrases in the Constitution. Even if a dynamic interpretation is necessary and the meaning necessary to fit the changed circumstances is found in the text itself, it would be always better to tread a path as close as possible to the text, by gathering the plain ordinary meaning, to see whether that meaning is validated by the constitutional values and the scheme. While giving a broad and generous construction to the constitutional provisions, the rule of "plain meaning," or "literal" interpretation, which remains "the primary rule" has to be kept in mind.

(b) <u>The Object, Purpose and Limits of Article 341: -</u>

33. Since the whole matter hinges on the interpretation of Article 341 of the Constitution of India, let us see the Object and Purpose of its insertion in the Constitution.

34. Article 341 states that the President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races and tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be. Clause (2) of the said Article 341 states that Parliament may by law include in or exclude from the list of Scheduled Castes specified in the notification issued under Clause (1) 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 which shall not be varied by any subsequent notification. Similar provision is made for Scheduled Tribes in Article 342. Article 342 (A) pertaining to the socially and educationally backward classes is slightly differently worded, which was inserted by the Constitution (102nd Amendment) Act, 2018 w.e.f 14.08.2018.

35. As transpiring from the extracts of the Constituent Assembly Debates placed on record, there was no Article similar to Article 341 as found in the present Constitution. Noticing the need for creating a list of Scheduled Castes and Scheduled Tribes, some amendments in the draft Constitution were moved by Dr. Ambedkar, Chairman of the Drafting Committee of the Constitution. The relevant part of the proceedings of the Constituent Assembly debate on September 17, 1949 is reproduced hereunder: -

> "The Honourable Dr. B. R. Ambedkar: Sir, I move:
> "That with reference to amendment No. 147 of List IV (Eighth Week), for sub-clause (w) of clause (1) of article 303, the following sub-clause be substituted: —
> (w) Schedule Castes' means such castes, races or tribes or parts or groups within such castes, races or tribes as are deemed under article 300A of this Constitution to be Scheduled Castes for the purposes of this Constitution.
> The only change is, the word 'specified' has been changed to 'deemed'. Sir, I move: "That with reference to amendment No. 148 of List IV (Eighth Week), for sub-clause (x) of clause (1) of article 303, the following sub-clause be substituted: —
> (x) scheduled tribes' means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 300B of this Constitution to be scheduled tribes for the purposes of this Constitution;'
> I am incorporating the other amendment which has also been tabled. Shall we take up, the two other articles also at the same time?
> Mr. President: Yes.
> New articles 300A and 300B. [COI Articles 341 and 342]
> The Honourable Dr. B. R. Ambedkar: Sir, I move:
> "That after article 300, the following articles be inserted: — 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 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. Schedule 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."
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.

Mr. President: 218A.
Shri T. T. Krishnamachari: In reading it he has included that.
Mr. President: 224.
Pandit Thakur Das Bhargava: Sir, I move:
"That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300A the following be added at the end: — 'for a period of ten years from the commencement of this Constitution.'"
I also move:
"That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300B the following be added at the end: —
'for a period of ten years from the commencement of this Constitution.'" I agree with the principle that for ten years to come no variation of the notification originally made by the President should be possible. Because now that special privileges of reservation, etc., have been given to the Scheduled Castes, I do not like the idea that the Executive, President or Governor or any other person may be able to tamper with that right, but after a period of ten years, when this privilege will no longer be available to the Scheduled Castes, there will be no difference between the Scheduled Castes and other backward classes which will be declared under article 301 of the Constitution. At that time there will be no meaning in taking away this power from the President in consultation with the Governor. Therefore, my humble submission is that the proposed amendment be accepted to make the point absolutely clear and free from ambiguity. Unless we add these words for a period of ten years from the commencement of this Constitution, you will be taking away the power of the President to include or exclude proper classes from the purview of the notification which will be issued under 300A and B. After the first ten years the privileges which will be open to these classes are probably under article 10 and under articles 296 and 299. I do not know of any other privileges which have been specifically given to these Scheduled Castes. Whereas I am, very insistent and conscious that these provisions should not be tampered with, I do like that these castes may not become

stereotyped and may not lose the capacity of travelling out of the schedule when the right occasion demands it. I, therefore, submit that if you put these words you will be making the whole thing elastic and the President will have the power of including or excluding after the lapse of ten years such tribes or castes within the notification.

Mr. President: Mr. Chaliha—you have two amendments. Once is 205 and the other is 225. I do not know if 205 arises now.

Shri Kuladhar Chaliha (Assam: General): Mr. President, I move; "That in amendment No. 201 of List V (Eighth Week) in clause (2) of the proposed new article 300B after the words 'Parliament may' the words 'and subject to its decision the State Legislature' be inserted."

I have always been fighting that the Governor should have power to safeguard the rights of the Tribes. I am glad in some measure this has been conceded. Yet I find certain amount of suspicion in that the State Legislature is neglected. The Drafting Committee has not allowed the State Legislature to have a voice. In order to fill up that lacuna I have said that Parliament may and subject to its decision the State Legislature.

Shri. T. T. Krishnamachari: Then what is left to the State Legislature?

Shri Kuladhar Chaliha: Somehow or other I feel you have neglected it. In these you have covered a good deal which you had objected to in the past. The Governor has been given power I am glad to say. The only thing is provincial assemblies have no voice in this. Whatever Parliament says they are bound by it; but if there is anything which consistently with the orders of the Parliament they can do anything, they should be allowed to have the power. That is why I have moved this. However I am thankful this time that the Drafting Committee has assimilated good ideas and only provincial assemblies have been neglected. However, the Governor is there—that is an improvement—Parliament, is there and the President is there. Therefore, I thank the Drafting Committee for this.

Mr. President: Mr. Sidhva.

The Honourable Dr. B. R. Ambedkar: It is already covered.

Shri Brajeshwar Prasad (Bihar: General). There are some amendments seeking to add some more clauses.

Mr. President: 'That is a separate matter. These were all the amendments.

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.

Mr. President: Does anyone else wish to speak? Do you wish to say anything Dr. Ambedkar?

The Honourable Dr. B. R. Ambedkar: I do not accept the amendment of Pandit Thakur Das Bhargava.

Mr. President: Then I put the amendments. The first is the one with reference to amendment 147.

The question is: “That with reference to amendment No. 147 of List IV (Eighth Week), for sub-clause (w) of clause (1) of article 303, the following sub-clause be substituted: —

‘(w) ‘Scheduled Castes’ means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 300A of this Constitution to be Scheduled

Castes for the purposes of this Constitution; The amendment was adopted".

36. It is seen from the above Debate that ultimately the original draft Article-300A was approved by the Constituent Assembly, and was re-numbered as Article 341 in the present Constitution. From the bare reading of the Article 341 it is clearly discernible that power of the President is limited to specify the castes or the tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory as the case may be. Once the notification is issued under Clause (1) of Article 341, it is only the Parliament which can by law, include in or exclude from the list of Scheduled Castes specified in the notification, any caste, race or tribe or part of or group within any caste, race or tribe, and the notification issued under Clause (1) could not be varied by any subsequent notification. As transpiring from the Constituent Assembly Debates quoted hereinabove, the object of inserting Article 341 was to eliminate the necessity of burdening the Constitution with long list of Scheduled Castes and Scheduled Tribes. It was proposed that the President, in consultation with the Governor or Ruler of a State should have 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 put was that once a notification has been issued by the President, any elimination from or any addition in the list must be made by the Parliament and not by the President. In the words of Dr. Ambedkar, "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."

37. A Five-Judge Bench in ***B. Basavalingappa vs. D. Munichinnappa & others***[16] had held that the object of the provision contained in Article 341 was to avoid all disputes as to whether a particular caste is a Scheduled Caste or not, and only those castes can be Scheduled Castes which are notified in the Order made by the President under Article 341 after consultation with the Governor where it relates to such caste in a State. It further held that Clause (2) provides that the Parliament may by law include in or exclude from the list of the Scheduled Castes specified in the notification issued under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe.

[16] **AIR (1965) SC 1269**

The power was thus given to Parliament to modify the notification made by the President under Clause (1). A notification issued under Clause (1) could not be varied by any subsequent notification, thus making the notification by the President final for all times except for modification by law as provided by Clause (2).

38. The said law has also been reiterated by the Five-Judge Bench in case of ***Bhaiya Lal Vs. Harikishan Singh***[17] A similar view has been also taken by another Five-Judge Bench in case of ***State of Maharashtra vs. Milind and Others***[18]***,*** by holding that:

> **"11.** By virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification for the first time specifying the castes, races or tribes or part of or groups within castes, races, or tribes which shall, for the purposes of the Constitution be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be. The language and terms of Articles 341 and 342 are identical. What is said in relation to Article 341 mutatis mutandis applies to Article 342. The laudable object of the said articles is to provide additional protection to the members of the Scheduled Castes and Scheduled Tribes having regard to social and educational backwardness from which they have been suffering since a considerable length of time. The words "castes" or "tribes" in the expression "Scheduled Castes" and "Scheduled Tribes" are not used in the ordinary sense of the terms but are used in the sense of the definitions contained in Articles 366(24) and 366(25). In this view, a caste is a Scheduled Caste or a tribe is a Scheduled Tribe only if they are included in the President's Orders issued under Articles 341 and 342 for the

[17] **AIR (1965) SC 1557**
[18] **(2001) 1 SCC 4**

purpose of the Constitution. Exercising the powers vested in him, the President has issued the Constitution (Scheduled Castes) Order, 1950 and the Constitution (Scheduled Tribes) Order, 1950. Subsequently, some orders were issued under the said articles in relation to Union Territories and other States and there have been certain amendments in relation to Orders issued, by amendment Acts passed by Parliament.

12. Plain language and clear terms of these articles show (*1*) the President under clause (1) of the said articles may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification specify the castes, races or tribes or parts of or groups within the castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes/Scheduled Tribes in relation to that State or Union Territory as the case may be; (*2*) under clause (2) of the said articles, a notification issued under clause (1) cannot be varied by any subsequent notification except by law made by Parliament. In other words, Parliament alone is competent by law to include in or exclude a caste/tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under clause (1) of the said articles. In including castes and tribes in Presidential Orders, the President is authorised to limit the notification to parts or groups within the caste or tribe depending on the educational and social backwardness. It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness. The States had opportunity to present their views through Governors when consulted by the President in relation to castes or tribes, parts or groups within them either in relation to the entire State or parts of State. It appears that the object of clause (1) of Articles 341 and 342 was to keep away disputes touching whether a caste/tribe is a Scheduled Caste/Scheduled Tribe or not for the purpose of the Constitution. Whether a particular caste or a tribe is Scheduled Caste or Scheduled Tribe as the case may be, within the meaning of the entries contained in the Presidential Orders issued under clause (1) of Articles 341 and 342, is to be

determined looking to them as they are. Clause (2) of the said articles does not permit any one to seek modification of the said orders by leading evidence that the caste/Tribe (A) alone is mentioned in the Order but caste/Tribe (B) is also a part of caste/Tribe (A) and as such caste/Tribe (B) should be deemed to be a Scheduled Caste/Scheduled Tribe as the case may be. It is only Parliament that is competent to amend the Orders issued under Articles 341 and 342. As can be seen from the entries in the schedules pertaining to each State whenever one caste/tribe has another name it is so mentioned in the brackets after it in the schedules. In this view it serves no purpose to look at gazetteers or glossaries for establishing that a particular caste/tribe is a Scheduled Caste/Scheduled Tribe for the purpose of Constitution, even though it is not specifically mentioned as such in the Presidential Orders. Orders once issued under clause (1) of the said articles, cannot be varied by subsequent order or notification even by the President except by law made by Parliament. Hence it is not possible to say that State Governments or any other authority or courts or Tribunals are vested with any power to modify or vary the said Orders. If that be so, no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Orders. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful".

39. In ***Bir Singh Vs. Delhi Jal Board and Others***[19]***,*** a Five-Judge Bench after referring to the relevant clauses of the Constitution (Scheduled Castes) Order 1950, and the Constitution (Scheduled Tribes) Order 1950, observed as under:

[19] **(2018) 10 SCC 312**

"36. The upshot of the aforesaid discussion would lead us to the conclusion that the Presidential Orders issued under Article 341 in regard to Scheduled Castes and under Article 342 in regard to Scheduled Tribes cannot be varied or altered by any authority including the Court. It is Parliament alone which has been vested with the power to so act, that too, by laws made. Scheduled Castes and Scheduled Tribes thus specified in relation to a State or a Union Territory does not carry the same status in another State or Union Territory. Any expansion/deletion of the list of Scheduled Castes/Scheduled Tribes by any authority except Parliament would be against the constitutional mandate under Articles 341 and 342 of the Constitution of India.

37…….

38. It is an unquestionable principle of interpretation that interrelated statutory as well as constitutional provisions have to be harmoniously construed and understood so as to avoid making any provision nugatory and redundant. If the list of Scheduled Castes/Scheduled Tribes in the Presidential Orders under Articles 341/342 is subject to alteration only by laws made by Parliament, operation of the lists of Scheduled Castes and Scheduled Tribes beyond the classes or categories enumerated under the Presidential Order for a particular State/Union Territory by exercise of the enabling power vested by Article 16(4)would have the obvious effect of circumventing the specific constitutional provisions in Articles 341/342. In this regard, it must also be noted that the power under Article 16(4) is not only capable of being exercised by a legislative provision/enactment but also by an Executive Order issued under Article 166 of the Constitution. It will, therefore, be in consonance with the constitutional scheme to understand the enabling provision under Article 16(4) to be available to provide reservation only to the classes or categories of Scheduled Castes/Scheduled Tribes enumerated in the Presidential Orders for a particular State/Union Territory within the geographical area of that State and not beyond. If in the opinion of a State it is necessary to extend the benefit of reservation to a class/category of Scheduled Castes/Scheduled Tribes beyond those specified in the Lists for that particular State, constitutional discipline would

require the State to make its views in the matter prevail with the central authority so as to enable an appropriate parliamentary exercise to be made by an amendment of the Lists of Scheduled Castes/Scheduled Tribes for that particular State. Unilateral action by States on the touchstone of Article 16(4) of the Constitution could be a possible trigger point of constitutional anarchy and therefore must be held to be impermissible under the Constitution."

40. From the afore stated legal position, there is no room for doubt that the Presidential List as notified under Article 341 assumes finality on the publication of the notification, and that the castes, races or tribes or parts of or groups within castes, races or tribes specified in the notification are, for the purposes of the Constitution, deemed to be the "Scheduled Castes" in relation to that State or Union Territory as the case may be. It is only the Parliament by law which can include in or exclude from the list of Scheduled Castes specified in the notification notified under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe. Such notification notified under Clause (1) cannot be varied even by the President by issuing any subsequent notification.

(c) Etymology and Special Status of "Scheduled Castes"

41. Since the arguments have been advanced before us, on the issue whether the Scheduled Castes specified in the Presidential List under

Clause (1) of Article 341 should be treated as a homogenous group or heterogenous group, let us peep into the etymology of the nomenclatures “Scheduled Castes” and “Scheduled Tribes”. Briefly stated, the practice of untouchability or caste-based discrimination was rampant particularly amongst Hindus in India during British era. Shri V.I. Muniswamy Pillai, in his speech (quoted hereinbefore) had informed the members of the Constituent Assembly about the background which brought out the special name of “Scheduled Castes”, and stated that it was untouchability, the social evil that was being 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. Such class of people were being discriminated on the basis of their castes and occupations they were engaged in, like Sweepers, Scavengers, Chamars, Mochis, etc. They were known as “depressed classes.” The term “depressed classes” however was not synonymous with “backward classes.” From the study material placed before us, it appears that the Census Commissioner J.H. Hutton who conducted Census in 1931 had explained that the “depressed castes” were those castes, ‘the contact with whom entailed purification on the part of high caste Hindus’. These

were the communities which suffered social disabilities such as being denied access to temples, use separate wells, and not being allowed to sit inside a school house etc. The term ‘depressed classes’ was being used only for low caste Hindus who suffered from the stigma of untouchability. The word “class” in “depressed class” was in fact referred to for “caste.” Eventually, the Government of India Act 1935 referred to the “depressed classes” as “Scheduled Castes”. The 1935 Act made it clear that “Scheduled castes” were none other than those who were previously known as “depressed classes”. Clause 26 of Schedule I appended to the said Act 1935 mentioned as under:

> “26(I) …….the ‘scheduled castes’ means such castes, races or tribes or parts of or groups within castes, races or tribes, being castes, races, tribes or parts or groups which appear to be His Majesty in Council to correspondence to the classes of persons formerly known as ‘depressed classes’, as His Majesty in Council may specify”.

42. The identification of the different castes for inclusion as Scheduled Castes in the said Schedule was based on an elaborate exercise conducted for each of the provinces as could be seen from the Schedule consisting of nine parts, to the 1935 Act. Thereafter, a gazette notification was published on 06.06.1936 promulgating the Government of India (Scheduled Castes) Order 1936 notifying the list of castes that

were to be considered as “the Scheduled Castes” across the territory of India. The post constitutional exercise by the Constitution (Scheduled Castes) Order 1950 and Constitution (Scheduled Tribes), Order 1950, as originally enacted under Articles 341 and 342 of the Constitution was basically an exercise in recasting the Schedule to the 1935 Act. The relevant clauses of the said two Presidential Orders were in the following terms:

> “*Clause 2 of the Constitution (Scheduled Castes) Order, 1950*
>
> **2.** Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes specified in Parts I to XXV of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards member thereof resident in the localities specified in relation to them in those Parts of that Schedule.
>
> *Clause 2 of the Constitution (Scheduled Tribes) Order, 1950*
>
> **2.** The Tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in Parts I to XXII of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof residents in the localities specified in relation to them respectively in those Parts of that Schedule”.

43. The subsequent amendments to the aforesaid two Orders, from time to time were made to bring the position in tune with the amendments to the First Schedule to the Constitution made at different points of time by

creation of new States and alterations in the area and boundaries of existing States.

44. As discussed earlier, the Presidential Orders made under Article 341(1) or Article 342(1) enumerating the lists of castes/races, tribes recognized as “Scheduled Castes/Scheduled Tribes” cannot be altered or varied by any State or any authority including the Court. It is Parliament alone which has been vested with the powers to so act, that too, by law made, as well settled by catena of decisions discussed hereinabove.

45. The very language employed in Article 341 that “the castes, races or tribes or parts of or groups within castes, races or tribes, shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be”, mandates that each caste, each race, each tribe or each part of or group within the castes, races or tribes shall by the deeming fiction be the “Scheduled Castes” for the purposes of the Constitution, irrespective of the parameters by which such caste/ race or tribe is recognised as “Scheduled Caste” in relation to that State. Though the members of “Scheduled Castes” are drawn from different castes, races and tribes, they attain special status by virtue of Presidential Notification under Article 341. Thus, the etymological and evolutionary history and

background of the nomenclature “Scheduled Castes,” coupled with the Presidential Orders published under Article 341 of the Constitution, make the “Scheduled Castes”, a homogenous class. The necessary corollary would be that all the members of all the castes, races and tribes enumerated in the Presidential List are deemed to be “Scheduled Castes” for the purposes of the Constitution and they all would be entitled to all the benefits granted or reserved for the “Scheduled Castes”.

46. A very pertinent observations in this regard have been made by a Seven-Judge Bench in ***State of Kerala and Another vs. N.M. Thomas and Other***[20] which deserve to be reproduced. The issues involved in the said case *inter alia* were whether Article 16(1) permits preferences to Scheduled Castes, Scheduled Tribes and weaker sections on the basis of reasonable classification, or whether Article 16(4) is an exception to Articles 16(1) and 16(2). The majority of five Judges in their separate but concurring opinions opined as under: -

> ***Per A.N. Ray, J.***
>
> “**40.** The Constitution makes a classification of Scheduled Castes and scheduled tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them. Article 46 contains a directive principle of State policy — fundamental in the governance of the country enjoining the State

[20] **(1976) 2 SCC 310**

to promote with special care educational and economic interests of the Scheduled Castes and scheduled tribes and to protect them from any social injustice and exploitation. Article 335 enjoins that the claims of the members of the Scheduled Castes and scheduled tribes to the services and posts in the Union and the States shall be taken into consideration. Article 338 provides for appointment by the President of a Special Officer for the Scheduled Castes and scheduled tribes to investigate all matters relating to the safeguards provided for them under the Constitution. Article 341 enables the President by public notification to specify castes, races or tribes which shall be deemed to be Scheduled Castes in the States and the Union Territories. Article 342 contains provision for similar notification in respect of scheduled tribes. Article 366(24) and (25) defines Scheduled Castes and scheduled tribes. The classification by the impugned rule and the orders is with a view to securing adequate representation to Scheduled Castes and scheduled tribes in the services of the State as otherwise they would stagnate in the lowest rung of the State services.

41. to 42…….

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.

Per Methew, J.

82. The word “caste” in Article 16(2) does not include “scheduled caste”. The definition of “Scheduled Castes” in Article 366(24) 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."

This shows that it is by virtue of the notification of the President that the Scheduled Castes come into being. 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. Moreover, though the members of tribe might be included in Scheduled Castes, tribe as such is not mentioned in Article 16(2)."

Per Krishna Iyer, J.

"135. We may clear the clog of Article 16(2) as it stems from a confusion about *caste* in the terminology of scheduled castes and scheduled tribes. This latter expression has been defined in Articles 341 and 342. A bare reading brings out the quintessential concept that they (*sic 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. To confuse this backwardmost social composition with *castes* is to commit a constitutional error, misled by a compendious appellation. So that, to protect harijans is not to prejudice any *caste* but to promote citizen solidarity. Article 16(2) is out of the way and to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division is not to compromise with the acceleration of castelessness enshrined in the sub-article. The discerning sense of the Indian Corpus Juris has generally regarded scheduled castes and scheduled tribes, not as caste but as a large backward group deserving of societal compassion."

47. The above observations made in ***N.M. Thomas*** leaves no room of doubt that "Scheduled Castes" are not a caste within the ordinary meaning of caste. It is by virtue of the notification of the President under Article 341

that the “Scheduled Castes” come into being. Though, the members of the Scheduled Castes are drawn from different castes, races or tribes, they attain a new Special Status by virtue of the Presidential notification. A bare reading of Article 341 brings out the quintessential concept that “Scheduled Castes” is an amalgam of castes, races, groups, tribes, communities or parts thereof, and is a homogenous group, and that once notified by Presidential List, they acquire Special Status of “Scheduled Castes” which cannot be varied except by the Parliament by law.

(d) State’s Competence to sub-classify or sub-divide or re-group the Castes specified as “Scheduled Castes” in the Presidential List for providing the reservation under Article 15 and 16: -

48. It may be noted that the terminology “Backward Class” has not been defined or described anywhere in the Constitution, however the said terminology finds place in the various provisions in the Constitution. Part XVI of the Constitution deals with special provisions relating to certain classes, i.e. for Scheduled Castes, Scheduled Tribes, Anglo-Indian Community, Backward Class, Socially and Educationally Backward Class etc. Articles 330 and 332 provide for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the People

and in the Legislative Assemblies of the States. Article 335 states that the claims of the member 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 and of a State. Article 338, 338(A) and 338(B) provides for the constitution of the National Commissions for the Scheduled Castes, Scheduled Tribes and for Backward Classes respectively. As per the definition of "Scheduled Castes" contained in Article 366(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 the Constitution. Similar definitions are contained in Article 366(25) for the "Scheduled Tribes" and in Article 366(26C) for the "socially and educationally backward classes".

49. Article 15(4) enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The newly added Clause (5) in Article 15 (w.e.f. 20.01.2006) enables the State, by law to make special provisions for the advancement of any socially and

educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes, so far as such provisions relate to their admission to educational institutions. Article 16(4) enables the State to make 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. Subsequently inserted Clause (4A) in Article 16 (w.e.f. 17.6.1995) enables the State to make provision for reservation in the matters of promotions in the posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State. Article 16(6) inserted by the Constitution (One Hundred and Third Amendment) Act, 2019 enables the State to make provision for the reservation in favour of any economically weaker sections of citizens other than the classes mentioned in Clause 4 i.e. backward class of citizens. Article 46 states that 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.

50. Thus, the terms “Scheduled Castes” and “Scheduled Tribes” are used in Article 15(4) along with the “socially and educationally backward classes of citizens”, used in Article 16(4A) exclusively and used in Article 46 along with “weaker sections of people”. However, the term “backward class” is used in Article 16(4) only. Further, Article 340 empowers the President to appoint a Commission to investigate the conditions of Socially and Educationally Backward Classes within the territory of India and to make recommendations as to the steps that should be taken by the Union or any State to remove the difficulties of the members of such class. As discussed in detail earlier, Article 341 empowers the President to issue notification specifying the Scheduled Castes in relation to the States and Union Territory. Similar provision is found in Article 342 for the Scheduled Tribes. Article 342A inserted by the Constitution (One Hundred and Second Amendment Act, 2018) with effect from 14th August, 2018, empowers the President to specify the Socially and Educationally Backward Classes in the Central List which are deemed to be Socially and Educationally Backward Classes in relation to that State or Union Territory as the case may be. By virtue of the Constitution (One Hundred and Fifth) Amendment Act, 2021, an explanation to Clause (2) and new Clause (3) have been added to

Article 342(A). The difference between the Article 341, 342 and 342A is that, whereas the notifications issued under Article 341 and 342 cannot be varied except by the Parliament by law, the newly added Clause (3) of Article 342A permits the State or Union Territory by law, to prepare and maintain for its own purposes a list of Socially and Educationally Backward Classes entries which may be different from the Central List.

51. The mandate contained in Clause (2) of Article 341 specifically prohibits any variation in the notification issued under Clause (1) thereof, except by Parliament by law. There is no provision in the Constitution which would empower the States to make any variation in such notification issued under Clause (1) of Article 341, for the purpose of reservations under Article 15 or 16. It cannot be gainsaid that as per Article 162, the executive power of a State would extend to the matters with respect to which the Legislature of the State has power to make laws. The Proviso to the said Article states that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. The source of legislative power of the State is found in Article 246, by virtue of which

the Legislature of any State has power to make laws with respect to any matters enumerated in List III of the Seventh Schedule along with the Parliament, and has exclusive power to make laws with respect to any of the matters enumerated in List II of the said Schedule.

52. As held in ***Bharat Coking Coal Ltd. vs. State of Bihar and Others***[21]

> **"19……..** …. Article 162 prescribes the extent of executive power of the State, it lays down that the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws. Thus, the executive power of the State Government is co-extensive with the legislative power of the State legislature. If the State legislature has power to enact laws on a matter enumerated in the State List or in the Concurrent List the State has executive power to deal with those matters subject to other provisions of the Constitution……. Moreover, the proviso to Article 162 itself contains limitation on the exercise of the executive power of the State. It lays down that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of State shall be subject to limitation of the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authority thereof. The limitation as contained in the proviso to Article 162 was necessary to avoid conflict in the exercise of executive power of State and the Union Government in respect of matters enumerated in List III of the Seventh Schedule. ..……."

53. Though the executive power of the State Government is co-extensive with the legislative power of the State Legislature, none of the entries, either in List II or List III of the Seventh Schedule confers any legislative

---

[21] **(1990) 4 SCC 557**

power upon the State to rationalize the reservations, by sub-classifying or sub-dividing the castes enumerated in the Presidential List prepared under Article 341(1), as was sought to be done by the State of Andhra Pradesh by passing Andhra Pradesh Scheduled Castes (Rationalization of Reservations), Act 2000, nor does it confer any power to provide or reserve the quota for a particular caste or castes from amongst the "Scheduled Castes" enumerated in the Presidential List prepared under Article 341(1) of the Constitution, as was sought to be done by the State of Punjab and Haryana by passing the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006. In absence of any executive or legislative powers, the States are not competent to divide/ sub-divide/ sub-classify/ regroup the castes, races or tribes from amongst the "Scheduled Castes" nor could they give any preferential treatment by reserving a quota for a particular caste, race, tribe out of the quota reserved for the entire "Scheduled Castes".

54. Though sub-classification or sub division of castes from amongst the Scheduled Castes by the State for the purpose of reservation *per se* may not amount to inclusion or exclusion of any caste from the Presidential List of Scheduled Castes, it would certainly amount to tinkering with or varying the notification notified under Clause (1), which

is clearly prohibited under Clause (2). When all castes, races or tribes enumerated in the Presidential List are deemed to be the “Scheduled Castes” for the purposes of the Constitution, any preference given to or any quota reserved for a particular caste or race or tribe out of the quota reserved for the entire class of the Scheduled Castes for the government jobs by the State, would certainly deprive the other members of the “Scheduled Castes” from having the benefit of reservation to the extent the quota is reserved for such particular caste or castes. Any such action on the part of the State would not only tantamount to discrimination in reverse and violation of Article 14 but would also tantamount to tinkering with Article 341 of the Constitution.

55. As per the settled legal position, every word or expression used in the Constitution has a purpose, and all the provisions of the Constitution have to be read in harmony so that the meaning of such word or expression is validated by the Constitutional values and the scheme. A person belonging to any of the castes, races or tribes enumerated in the Presidential List acquiring special status as the member of the “Scheduled Caste” in relation to a particular State, would be entitled to all the rights including the fundamental rights enshrined under the Constitution, and therefore would also be entitled to be treated equally

from amongst the other members of the “Scheduled Castes” enumerated in such Presidential List, in that particular State. If any State makes special provision of reservation by fixing quota for the entire “Scheduled Castes” for admission to educational institutions or for the appointments on the posts in the public services as permitted under Article 15 and 16, such quota of reservation should be made available to all the members of the “Scheduled Castes” specified in the Presidential List, as all the members of the castes, races and tribes specified in such List are deemed to be “Scheduled Castes” for the purposes of the Constitution, and the State has no power to further sub-classify or sub-divide the “Scheduled Castes” for giving preferential treatment to a particular caste from the said list of “Scheduled Castes”. As stated earlier, the very object of Article 341 is to give new special status to the “Scheduled Castes” for the purposes of the Constitution and to keep the political interference of the States outside the purview of the said provisions. Therefore, under the guise of providing reservation for the weaker of the weakest castes, the State could not be permitted to make any variation in the notification nor could it be permitted to indirectly tinker with such notification published under Article 341(1).

56. Article 15(4) is an enabling provision which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, and Clause (5) thereof enables the State to make special provisions for them in respect of the admission to educational institutions. Similarly, Article 16(4) enables the State to make 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. These provisions under Article 15 and 16 are merely enabling provisions, and could not be treated as the source of power to legislate the law for sub-dividing or reclassifying/ sub-classifying or regrouping the castes, races or tribes enumerated as the "Scheduled Castes", which have acquired special status by virtue of Article 341 of the Constitution.

57. Under the guise of providing reservation or under the pretext of taking affirmative action for the weaker of the weakest sections of the society, the State cannot vary the Presidential List and tinker with Article 341. Such power if exercised by the State in absence of any executive or legislative power would be colourable exercise of powers. It hardly needs to be reiterated that the idea conveyed by the 'doctrine of

colourable legislation' is that although apparently a legislature in passing a statute, purports to act within the limits of its powers, yet in substance and in reality, it transgresses its powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As well-settled, the whole doctrine of "colourable exercise" is based on the maxim - "you cannot do indirectly what you cannot do directly."* Any action of the State in the name of affirmative action, if not permitted by the Constitution, could not be validated or vindicated by the Courts by moulding or tinkering with the specific provisions of the Constitution.

(III) **WHETHER E.V. CHINNAIAH IS REQUIRED TO BE REVISITED IN VIEW OF CERTAIN OBSERVATIONS MADE IN INDRA SAWHNEY CONCERNING "OTHER BACKWARD CLASSES"?**

58. Much reliance has been placed by the Five-Judge Bench in ***Davinder Singh*** for making reference to this Bench, on the decision of ***Indra Sawhney*** for opining that the view taken in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** however, in my opinion, ***Indra Sawhney*** had not dealt with the issue of sub-classification of the

* **K.C. Gajapati Narayan Deo vs. State of Orissa, (1953) 2 SCC 178**

"Scheduled Castes" much less had dealt with the State's power to sub-classify or sub-divide or re-group the Castes specified as "Scheduled Castes" under Article 341 of the Constitution.

59. So far as ***Indra Sawhney*** is concerned, the factual matrix was that the Government of India under Article 340 of the Constitution had constituted the "Second Backward Classes Commission" on January 1, 1979 under the Chairmanship of Shri B. P. Mandal (known as the Mandal Commission). The terms of the reference of the said Commission were *inter alia* to determine the criteria for defining the socially and educationally backward classes, to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified, and to examine the desirability or otherwise of making provision for reservation of appointments or posts in favour of such backward classes of citizens which were not adequately represented in the public services and posts in connection with the affairs of the Union or of any State. The Government of India itself on the recommendations of the Mandal Commission issued an office memorandum on August 13, 1990 purporting to extend reservations for socially and educationally backward classes in its services w.e.f. August 7, 1990. The said O.M reserved 27% of the seats

for SEBC in addition to those already reserved for the Scheduled Castes and Scheduled Tribes. The issuance of the said O.M led to widespread protest and filing of writ petitions in the Supreme Court questioning the said Memorandum. The Five-Judge Bench of this Court by its order dated October 1, 1990 stayed the operation of the said O.M. dated 13th August, 1990, however, the process of identification of castes for locating the SEBCs was permitted to continue. Thereafter, as a consequence of the change in the Government at the Centre, another O.M on September 25th, 1991 modifying the earlier O.M. of August 13, 1990 was issued, by introducing the economic criteria in the grant of reservation by giving preference to the poorer sections of the SEBC's in the 27% quota and reserving another 10% of the vacancies in the civil services for other economically backward sections not covered by any of the existing schemes of reservation, which was explained to extend to the poorest amongst the higher caste and other religions also. The constitutionality of the said O.M dated September 25, 1991 was challenged before this Court and the Nine-Judge Bench was constituted to hear the matters. The matter was heard by the Nine-Judge Bench and by a 6:3 decision, the constitutionality, validity and enforceability of the impugned O.M dated 13.08.1990 subject to certain conditionalities

and prerequisites was upheld, whereas paragraph 2(ii) of the second O.M. dated September 25, 1991 providing 10% additional reservation for the economically backward was held unconstitutional and struck down. Six separate judgments were delivered. The leading judgment was by ***B. P. Jeevan Reddy***, J, (for M.H. Kania, C.J., and M.N. Venkatchaliah, A.M. Ahmadi and himself) with ***S. Ratnavel Pandian*** and ***P.B Sawant, J.J*** concurring by their separate judgments.

60. Several questions were posed before the Nine-Judge Bench in ***Indra Sawhney*** which have been broadly indicated and discussed in the leading judgment of ***Jeevan Reddy, J*** along with the miscellaneous questions discussed therein. The questions particularly germane to the Scheduled Castes/Scheduled Tribes were the Question-3(a), Question-3(e) and Question-10. The Question-3(a) was, “what does the expression “backward class of citizens” in Article 16(4) mean?” The Question-3(e) was, “whether the class, to be designated as a backward class, should be situated similarly to the Scheduled Castes/Scheduled Tribes?” The Question-10 was, “whether the distinction made in the second memorandum between poorer sections of the backward classes and others was permissible under Article 16?”

61. **Justice Jeevan Reddy** in his leading judgment while answering question 3(b) with regard to identification of "backward class of citizens" observed in Paragraph 781 as under: -

> **"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."

62. Justice ***Jeevan Reddy*** further discussed the issue with regard to the "means test" and "creamy layer test" qua question no. 3 (d) and made a special note in paragraph 792 at page 725 that: -

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

63. While summarising the issues involved in Question no. 3, **Justice Jeevan Reddy** held in Para 796 and 797 as under: -

> **"796.-797.** We may now summarise our discussion under Question No. 3. (*a*) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (*b*) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks

convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does — what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (*c*) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (*d*) 'Creamy layer' can be, and must be, excluded. (*e*) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens". The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4)."

64. ***Pandian*, J**. in his concurring opinion observed in Paragraph 39 that the words "backward class of citizens", occurring in Article 16(4) are neither defined nor explained in the Constitution though the same words occurring in Article 15(4) are followed by a qualifying phrase, "socially

and educationally". In paragraph-126, he observed that it is not necessary for a class to be designated as backward class that it should be situated similarly to the Scheduled Castes and Scheduled Tribes.

65. Justice ***P.B. Sawant*** in his concurring judgment observed as under in paragraph 417: -

> **"417.** Under Article 16(4), the reservation in the State employment is to be provided for a "class of people" which must be "backward" and "in the opinion of the State" is "not adequately represented" in the services of the State. Under Article 46, the State is required 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 Scheduled Tribes, and "to protect" them from "social injustice" and "all forms of exploitation". Since in the present case, we are not concerned with the reservations in favour of the SCs/STs, it is not necessary to refer to Article 335 except to point out that, it is in terms provided there that the claims of SCs/STs in the services are to be taken into consideration, consistently with the maintenance of efficiency of administration. It must, therefore, mean that the claims of other backward class of citizens and weaker sections must also be considered consistently with the maintenance of the efficiency. For, whomsoever, therefore, reservation is made, the efficiency of administration is not to be sacrificed, whatever the efficiency may mean. That is the mandate of the Constitution itself."

66. After taking into consideration, the principles laid down in ***Indra Sawhney***, ***Justice Hegde in E.V. Chinnaiah*** rightly observed in paragraph 38 as under: -

> **"38.** On behalf of the respondents, it was pointed out that in *Indra Sawhney case* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] the Court had permitted subclassification

of Other Backward Communities, as backward and more backward based on their comparative underdevelopment, therefore, the similar classification amongst the class enumerated in the Presidential List of Scheduled Castes is permissible in law. We do not think the principles laid down in *Indra Sawhney case* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] for subclassification of Other Backward Classes can be applied as a precedent law for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments."

67. ***Justice H.K. Sema***, J. concurring with ***Justice Hegde*** in ***E.V. Chinnaiah*** observed in Paragraph 48 as under: -

> **"48.** In *Indra Sawhney* v. *Union of India* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1: (1992) 22 ATC 385] this Court observed at SCC p. 725 that the discussion of creamy layer is confined to Other Backward Classes only and has no relevance in the case of Scheduled Castes and Scheduled Tribes."

68. ***Justice S.B.*** **Sinha** also in his concurring opinion observed in paragraph 76 and 92 as under: -

> **"76.** Having regard to the decision of this Court in *Indra Sawhney* v. *Union of India* [1992 Supp (3) SCC 217: 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] backward class citizens can be classified in four different categories — (*i*) more backward, (*ii*) backward, (*iii*) Scheduled Caste, and (*iv*) Scheduled Tribe. A contention has been raised that in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] the Court permitted a classification amongst Other Backward Classes and as such there is no reason as to why the said

principle shall not be applied to the members of the Scheduled Castes. In *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] itself this Court categorically stated that it was not concerned with the question as regards members of Scheduled Castes and Scheduled Tribes. (SCC para 792 at p. 725) It is relevant to note that Question 5 formulated by Jeevan Reddy, J. was only in relation to the further division in the backward classes into backward and more backward categories. Advisedly, no question was framed as regards division of Scheduled Castes into more backward and backward Scheduled Castes.

92. The impugned Act as also the judgment of the High Court are premised on the observations in *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] that there is no constitutional or legal bar for a State in categorising the backward classes as backward and more backward class. This Court, however, while referring to Article 16(4) of the Constitution stated that it recognised only one class viz. backward class of citizens in the following terms: (SCC p. 716, para 781)

"*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."

69. In ***Ashok Kumar Thakur vs. Union of India and Others***[22]**,** another Five-Bench judgment, after considering earlier judgments on the issue whether the "creamy layer" principle is applicable to the Scheduled Castes and Scheduled Tribes, held that the said Principle cannot be

[22] **(2008) 6 SCC 1**

applied to Scheduled Castes and Scheduled Tribes as they are separate classes by themselves. To be precise, it held as under: -

> **"184.** So far, this Court has not applied the "creamy layer" principle to the general principle of equality for the purpose of reservation. The "creamy layer" so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. "Creamy layer" principle is one of the parameters to identify backward classes. Therefore, principally, the "creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. Ray, C.J., in an earlier decision, stated that "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". And they are so identified by virtue of the notification issued by the President of India under Articles 341 and 342 of the Constitution. The President may, after consultation with the Governor, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which for the purpose of the Constitution shall be deemed to be Scheduled Castes or Scheduled Tribes. Once the notification is issued, they are deemed to be the members of Scheduled Castes or Scheduled Tribes, whichever is applicable. In *E.V. Chinnaiah* [(2005) 1 SCC 394] concurring with the majority judgment, S.B. Sinha, J. said : (SCC p. 403)
>
> "The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive. The object of Articles 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and education backwardness wherefrom they suffer. *Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional*. (Paras 52, 111 and 84)
>
> (emphasis supplied)

> **186.** Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to the Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the purpose of reservation, the principles of "creamy layer" are not applicable for Scheduled Castes and Scheduled Tribes."

70. In view of the above, I am of the opinion that though ***Indra Sawhney*** had sought to define "backward class" in terms of social backwardness, while considering the ambit of "backward class" for the purpose of Article 16(4), it did not deal with the issue qua the Scheduled Castes/ Scheduled Tribes particularly in the light of Article 341/342, rather it categorically kept the Scheduled Castes/ Scheduled Tribes outside the purview of consideration. The Scheduled Castes being the most backward class amongst the backward classes, and having acquired a special status by virtue of Article 341, the question of defining "backward class" qua the "Scheduled Castes" did not arise, and rightly not dealt with in ***Indra Sawhney*** for the purposes of Article 16(4) of the Constitution.

71. In so far as Article 15(4) and 15(5) are concerned, the use of the word "any" before the words "socially and educationally backward classes"

and the use of the word “the” before “Scheduled Castes/ Scheduled Tribes” clearly indicate that the said provisions pertain to the “Other Backward Classes” which are socially and educationally backward, and that the said provisions also pertain to the “Scheduled Castes” and “Scheduled Tribes”, however the “Scheduled Castes” do not require any further identification once they are notified under Article 341. As rightly held in ***Ashok Kumar Thakur***[*], the “creamy layer” principle is one of the parameters to identify backward classes. The “Scheduled Castes” having already been specified in the Presidential List under Article 341, the said creamy layer principle cannot be applied to the “Scheduled Castes” for their identification as backward class. In my opinion, the Five-Judge Bench has thoroughly misread and misinterpreted ***Indra Sawhney,*** to opine that ***Indra Sawhney*** permitted sub-classification of backward classes including the Scheduled Castes/Scheduled Tribes, rather they were categorically kept outside the purview of consideration by the Nine-Judge Bench in ***Indra Sawhney.***

72. The reliance placed on ***Jarnail Singh*** is also thoroughly erroneous. In ***Jarnail Singh,*** the Five-Judge Bench was called upon to examine the

[*] **(2008) 6 SCC 1**

correctness of the law laid down in ***Nagaraj.*** In para-17 of ***Jarnail Singh***, the Bench observed that: -

> "The judgment in ***Chinnaiah*** has been referred by the three Judge Bench to a larger bench by an Order dated 20th August, 2014. This is because, according to the three Judge Bench, ***Chinnaiah*** is contrary to Article 338 of the Constitution of India and ***Indra Sawhney***. Since the correctness of ***Chinnaiah*** does not arise before us, we need not say more about this reference which will be decided on its own merits."

73. After noting above, the Five-Judge Bench in ***Jarnail Singh*** did not agree with the view taken by the Five-Judge Bench in ***Ashok Kumar***[*] that the creamy layer principle is merely a principle of identification and not a principle of equality. The Bench in ***Jarnail Singh*** agreed with that part of decision in ***M. Nagaraj and Others vs. Union of India and Others***[*] which held that the creamy layer test is applicable to the Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test, however, it did not agree with ***Nagaraj***, when ***Nagaraj*** required the States to collect quantifiable data on backwardness, in so far as Scheduled Castes and Scheduled Tribes are concerned. The Bench in ***Jarnail Singh*** held that "it would clearly be contrary to ***Indra Sawhney***, which had held that the requirement of

---

[*] **(2008) 6 SCC 1**
[*] **(2006) 8 SCC 212**

social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who inevitably fall within the expression "Backward Class of Citizens" and therefore the decision the judgment in ***Nagaraj*** would have to be declared to be bad on this ground." In my opinion, such observations in ***Jarnail Singh*** are self-contradictory. In any case, the Bench had no occasion to deal with nor had dealt with the issue whether sub-classification of "Scheduled Castes" notified in the Presidential List under Article 341 was permissible to be made by the States.

74. It is very common that the Constitutional Benches in their judgments deal with many complex facts and legal issues. Not all that has been said in the body of judgment would become a precedent or binding for other Courts. The judgments of the Constitution Benches have to be read in the context of questions which arose for consideration before them. Certain observations made in the judgment may be necessary for deciding the issues involved, but every observation made on law in the course of delivering the judgment may not have a binding effect as a precedent. Any observation or remark made or opinion expressed incidentally or collaterally, and not directly upon the question posed before the Court would be an 'obiter dicta' and not a 'precedent'. A

decision is an authority for what it decides and not what can logically be deduced therefrom, as held in ***State of Haryana vs. Ranbir alias Rana***[23]***.*** It was also observed in ***ADM Jabalpur vs. Shivakant Shukla***[24] that the statements which are not part of ratio decidendi constitute obiter dicta and are not authoritative.

75. In none of the cases – ***Indra Sawhney*** or ***Jarnail Singh***, the issue of sub-classification of "Scheduled Castes" in the context of Article 341 was raised or argued, nor was decided by the concerned Benches, as was raised and decided in ***E.V. Chinnaiah***. Hence, it would be a fallacy to hold that the law laid down in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** or ***Jarnail Singh.***

76. Since I have held that the State has neither executive nor legislative power to sub-classify or sub-divide or re-group the castes, races or tribes specified as the "Scheduled Castes" in the Presidential List notified under Article 341, the other questions pertaining to the criteria or yardstick for sub-classification, or requirement for collecting quantifiable data etc. by the State for sub-classification, are not required to be addressed.

---

[23] (2006) 5 SCC 167
[24] (1976) 8 SCC 521

AFFIRMATIVE ACTION AND CONSTITUTIONAL FRAMEWORK

77. The affirmative actions of the States have to be within the Constitutional framework, and if they are not, the Courts cannot ratify the same by bending or moulding the specific mandates contained in the Constitution. Article 142 even with the width of its amplitude cannot be used to build a new edifice where none existed earlier, by ignoring Constitutional provisions dealing with the subject and thereby achieve something indirectly which cannot be achieved directly.* As held by the Constitution Bench in the landmark judgment in case of ***Supreme Court Bar Association vs. Union of India and Another[25].***

> **"47.** The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary* to those powers which are *specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the*

---

[25] **(1998) 4 SCC 409**

> *parties*, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties."

78. The action of the State though well-intentioned and affirmative in nature, if violates the specific provision of the Constitution, cannot be validated by the Supreme Court in exercise of its jurisdiction under Article 142. The removal of inequalities or remedy to remove inequalities cannot be permitted at the cost of violation of the specific provision of the Constitution. When the wordings of the provision of the statutes, in the instant case of Article 341 of the Constitution are clear, as also the

intention of the draftsmen of the Constitution, the Court cannot add or subtract words from such provision to give it a meaning which the Court feels would achieve the goal of social transformation. Sometimes the affirmative action and the Constitution intersect with each other in complex ways, as the affirmative action policies are framed by the States to promote diversity and to address historical inequalities, while the legal frameworks have to ensure that these policies are implemented within the bounds of the Constitution. The implementation of the affirmative action policies must align with the Constitutional and legal principles, particularly those related to equality and non-discrimination. In short, the affirmative action and the legal frameworks, though both do aim at more equitable society, they must navigate complex legal principles to ensure fairness and Constitutionality.

79. The upshot of the above discussion may be summarised as under: -

(i) When the law was settled by the Constitution Bench in ***E.V. Chinnaiah*** after considering all the previous judgments including ***Indra Sawhney*** and after investing substantial judicial time and resources, the same should not have been doubted and referred to the larger bench by the Three-Judge Bench in ***Davinder Singh***, and that too without assigning any reason much less cogent reason

for their disagreement disregarding the well settled doctrines of Precedents and *Stare decisis.*

(ii) While giving a broad and generous construction to the Constitutional provisions, the rule of "plain meaning", or "literal" interpretation, which is the "primary rule" has to be kept in mind.

(iii) The Presidential List specifying "Scheduled Castes" under Article 341 assumes finality on the publication of the notification, and the castes, races or tribes, or groups within castes, races or tribes specified in the notification are deemed to be the "Scheduled Castes" in relation to that State or Union Territory as the case may be, for the purposes of the Constitution and as such assume special status of "Scheduled Castes".

(iv) It is only the Parliament by law which can include in or exclude from the list of the "Scheduled Castes" specified in the notification notified under Clause (1), any caste, race or tribe or part of or group within any caste, race or tribe. Such notification notified under Clause (1) cannot be varied even by the President by issuing any subsequent notification.

(v) It is by virtue of the notification of the President under Article 341 that the "Scheduled Castes" come into being. Though the members of Scheduled Castes are drawn from different castes, races or tribes, they attain special status of "Scheduled Castes" by virtue of Presidential Notification. The etymological and evolutionary history and the background of the nomenclature "Scheduled Castes", coupled with the Presidential orders published under Article 341 of the Constitution, make the "Scheduled Castes", a homogenous class, which cannot be tinkered with by the States.

(vi) The States have no legislative competence to enact the law for providing reservation or giving preferential treatment to a particular caste/castes by dividing/sub-dividing/sub-classifying or regrouping the castes, races or tribes enumerated as the "Scheduled Castes" in the notification under Article 341.

(vii) Under the guise of providing reservation or under the pretext of taking affirmative action for the weaker of the weakest sections of the society, the State cannot vary the Presidential List, nor can tinker with Article 341 of the Constitution.

(viii) The Nine-Judge Bench in ***Indra Sawhney*** and the Five-Judge Bench in ***Jarnail Singh*** had not dealt with the issue of sub-classification of the "Scheduled Castes" in the context of Article 341, much less had dealt with the State's powers to sub-classify or sub-divide or regroup the castes specified as "Scheduled Castes" under Article 341 of the Constitution, and therefore, it could not be held that the law laid down in ***E.V. Chinnaiah*** was not in consonance with ***Indra Sawhney*** or ***Jarnail Singh.***

(ix) The power conferred upon the Supreme Court under Article 142 cannot be used to supplant the substantive law applicable to the case under consideration. Even with the width of its amplitude, Article 142 cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with the subject, and thereby to achieve something indirectly which cannot be achieved directly. The action of the State, though well intentioned and affirmative in nature, if violates the specific provision of the Constitution, cannot be validated by the Supreme Court in exercise of its jurisdiction under Article 142.

(x) The affirmative action and legal frameworks, though both do aim at more equitable society, they must navigate complex legal principles to ensure fairness and constitutionality.

80. In that view of the matter, I am of the opinion that the law laid down by the Five-Judge Bench in ***E.V. Chinnaiah*** is the correct law and deserves to be confirmed.

.....J.
[BELA M. TRIVEDI]

NEW DELHI;
AUGUST 01ST, 2024.