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1. Study Material-Law

Creamy Layer in SC/ST Community

Key Points

- The Supreme Court's order to broaden the definition of the "creamy layer" and include members of the SC/ST community will cause changes to the country's current reservation system. This order has made significant changes to India's reservation system by allowing subcategorization within Scheduled Castes and extending the use of the "creamy layer" concept to Scheduled Tribes as well as Scheduled Castes. These steps are intended to ensure that the most underprivileged members of these communities may benefit from reserve.
- The Indian government has been assigned the responsibility of creating a strong system to identify those who are part of the 'creamy layer' inside the Scheduled Castes and Scheduled Tribes. This procedure is essential in order to avoid the abuse of reservation privileges by economically privileged segments of these communities.
- There is an increasing focus on limiting reservation advantages to just those who are the initial recipients of such benefits. The policy has undergone a gradual transformation in response to dynamic social and economic circumstances. Gaining a comprehensive understanding of this historical backdrop is crucial for fully grasping the intricacies of the present reservation system.
- The criteria for ascertaining an individual's inclusion in the 'creamy layer' are contingent upon elements such as income, employment, and educational credentials

Introduction

Supreme Court recently in the case of **State of Punjab Vs. Davinder Singh & Ors., decided on 01-08-2024,** had held the sub classification of the SC community. The court stressed the need of keeping the 'creamy layer' within the Scheduled Castes from receiving quota benefits that are specifically earmarked for these groups. Currently, the notion of the 'creamy layer' is only relevant to reservations for Other Backward Classes.

The verdict was pronounced by a Constitution Bench consisting of Chief Justice of India DY Chandrachud and Justices BR Gavai, Vikram Nath, Bela Trivedi, Pankaj Mithal, Satish Chandra Sharma, and Manoj Misra. Sub-classification was maintained by six justices, with Justice Trivedi dissenting. Out of the six judges, four specifically emphasized in their decisions that the exclusion of the creamy layer should also be applied to SCs.

Justice BR Gavai, in his ruling, emphasized the need for the State to formulate a strategy that can effectively identify the privileged segment within the Scheduled Castes and Scheduled Tribes, in order to preclude them from receiving affirmative action advantages. He contended that only this method could attain genuine equality as established in the Constitution.

Justice Gavai emphasized that it is important to distinguish between the offspring of SC citizens who have benefited from reservations and the children of others who have not taken advantage of such reserves. He proposed that the standards for distinguishing creamy layers among SCs/STs should be distinct from those used for OBCs.

Justice Vikram Nath endorsed Justice Gavai's perspective, stating that the concept of the creamy layer, which is relevant to Other Backward Classes (OBCs), should also be extended to Scheduled Castes (SCs). Justice Pankaj Mithal argued that reservations should only be awarded to the first generation. Furthermore, if a first-generation person improves their status via reservation, their offspring in the second generation should not be entitled for reservation benefits. Justice Satish Chandra Sharma concurred with Justice Gavai, stating that the State must legally compel the identification of the creamy layer among SC/STs.

The term "creamy layer" was initially employed by the Apex court in the case of Indira **Sawhney Vs. Union of India, AIR 1993 SC 477**, which is also known as the Mandal Commission case.

The term "creamy layer" is employed in the political system to refer to members of other backward classes (OBCs) who are economically stable, more educated, and comparatively forward.

The people under such creamy layer aren’t eligible for benefits provided by the government through sponsorship and also, they won’t be getting any professional benefits.

The criteria that was used for the same was the financial status of the OBCs and this was also the main factor that was gauged while introducing the 'creamy layer' concept.

Individuals who are more financially secure will be classified as part of the creamy layer and will be ineligible to receive reservation benefits. Conversely, those who are less financially stable will be eligible to receive reservation benefits.

Creamy layer's foundation

The second backward classes commission, also known as the Mandal commission, proposed the concept of creamy layer classification for OBCs. A notification regarding a reservation of 27% for socially, economically and educationally backward groups was passed by the government in 1990 in order to provide aid to them. In the case of **Indira Sawhney Vs. Union of India,** the Apex Court upheld the 27% reservation for OBCs and the exclusion of the creamy stratum, which was challenged.

Following the Supreme Court's ruling, an expert committee was established under the leadership of retired Justice R.N. Prasad to establish the criteria for determining the gelatinous layer.

In 1993, the Department of Personnel and Training published a list of individuals from a variety of income brackets who were unable to take advantage of the reservation benefit for their children.

The creamy layer concept excluded a small number of OBCs from being a part of the larger OBC group for whose upliftment, reservation was introduced. These small OBCs weren't allowed to use the reservation benefit and would be ineligible for the same. Among this category, the personnel of government entities and PSUs were also included.

The exclusion was based on the income wealth test, which is applicable to the offspring of individuals with a gross annual income exceeding Rs. 8 Lakhs P. The same also applies to the individuals' holding positions in PSUs and other governmental organisations for a period of three consecutive years.

Historical Context

The Government of India Act was enacted in the year 1919, around the time of the first world war and this had established the foundations upon which the reservation policies in India were built upon. The British enacted a substantial quantity of legislation during this period, despite their greater focus on Europe than on India, with the intention of facilitating the development of the Indian Territory.

The Government Act of 1919 had addressed a number of minorities-related concerns, including the creation of communal electorates, and also made major changes within the government institutions.

The Montague-Chelmsford reforms were the subject of scrutiny by the Simon Commission in 1927, following the Act of 1919. It was after a thorough analysis and investigation of the province and its people, that their delegates had suggested combining separate electorates and giving seats to the poor classes, as they were unable to vote.

A roundtable discussion was held in London in 1931 to discuss and assess the Simon Commission's findings, the suggested amendments, and the procedure for incorporating them into the new constitution. There were numerous Indian delegates representing a variety of interests. Prime Minister Ramaswamy Macdonald presided over the conference.

The issue of minority was left unresolved in the conference due to the strong opposition of Mahatma Gandhi and Congress to the appeal for a separate electorate for depressed classes, despite the existence of distinct electorates from B.R. Ambedkar.

The reservation policy developed even more than it had in the pre-independence period, and the post-independence era saw a dramatic change in the system. The constituent assembly that had created and established the reservation policy was led Dr. B.R. Ambedkar. The Indian constitution contains numerous articles that were specifically designated for this purpose.

India was a nation with a highly rigid caste-based hierarchical structure, in which the higher castes reaped the majority of the benefits while the lower castes were despised by the higher castes. The majority of the population was economically, socially, educationally, and politically disadvantaged. The Schedule caste, schedule tribes, and other backward classes were the three categories into which the backward classes were classified.

In June 1932, Prime Minister Ramsey Macdonald of Britain implemented the **"communal awards,"** which mandated that Muslims, Sikhs, Indian Christians, Anglo-Indians, Europeans, and the untouchables each receive their own representation. The backward classes were assigned a certain number of seats to be filled by election from designated constituencies. Only voters from the impoverished classes were eligible to vote, and their voting rights were restricted owing to their image as being untouchables in India.

The reservation process, which began in the 2nd century B.C., was evident in the historical facts and evidence. The superior castes were granted caste-based reservation privileges over the working class. Absolute privileges were granted to the higher strata in all profitable and respectable professions and provisions.

The lowest social class had no choice but to engage in menial jobs. The Manusmiriti's reservation system, mentioned much about the caste system and it depicts how the higher castes, the Brahmins, the Kshatriyas, etc, had exercised their control over the individuals belonging to the lower caste and had exploited them.

The Constitution of India was drafted and introduced after India had gotten independence in the year 1947. The drafters of the constitution had given priority to the problems and the needs of the backwards classes. This was when Article 46 was introduced into the constitution.

According to Article 46, the state is required to protect the educational and economic interests of the disadvantaged people and prevent social injustice and exploitation. It is also responsible for giving particular attention to fostering their well-being.

Many additional articles were incorporated to further empower the underprivileged in addition to Article 46. This was considered the most effective approach to rectifying the error that had been repeated for centuries, as they were the group that were oppressed the most all this while.

Despite the fact that the reservation policy is an exception to the equality norm, it is still regarded as a critical component of equality. The reservation policy for marginalized groups is one aspect of promoting equality. The recommendation given by the Mandal commission has led to the incorporation of the other backward classes into the reservation system, alongside the existing reservation of about 15% for the SCs and STs in educational institutions.

Nevertheless, the public continues to depend on reservation, despite the fact that the country has been independent for 59 years. The reason the percentage is lesser is that those who have previously benefited from reservation and have made progress are continuing to receive it, rather than that the underprivileged have not made progress. This group of individuals that have made progress economically and are now more privileged than before are known as the "creamy layer."

Reservations in favour of the backward classes (BCs) were implemented in a significant portion of the country prior to independence. Hunter commission was appointed to compromise the presidency areas and the princely states south of the Vindhayas. Jyortirao Phule demanded that all individuals receive free and compulsory education, as well as proportional representation in government positions.

In 1891, there was a demand for the reservation of government positions, as there was a movement against the recruitment of non-natives into public service, which overlooked qualified native individuals. Shahu Maharaj implemented reservations in Maharashtra in 1901, including those for non-Brahmins and backward classes, as early as 1902.

For providing education and easing out its access, Shahu Maharaj had opened many hostels in the Kolhapur area in order to facilitate the same. Additionally, he ensured that all individuals were provided with suitable employment, irrespective of their social status. Also, Shahu Maharaj had actively advocated for caste system free society in India, and he had campaigned for eradication of untouchability and was vocal about the same.

The notice of 1902 had mandated a 50% quota in services for marginalized classes in the state of Kolhapur. This marks the first formal implementation of reservation for the disadvantaged groups in India. The implementation of reservations in 1909 aimed to provide advantages to certain castes and groups that were not adequately represented in the British government. Prior to Indian independence, there were many more changes that either supported or opposed reservations.

Substantial alterations were implemented in support of the Scheduled Tribes, Scheduled Castes and Other Backward Classes subsequent to the event of independence of India. Subsequently, The Mandal commission was introduced, and its purpose was to assess the conditions of the socially and educationally disadvantaged sections. Prior to the proclamation of Indian independence, the commission did not possess precise statistics about the position of a certain sub-caste on reservation.

Constitutional provisions

Article 15 of the Indian Constitution provides protection to Indian people from discrimination by the State based on variables such as religion, race, sect, sex, and place of origin. This protection is ensured by sub-clauses (1) and (2) of Article 15. The article stipulates the right to equality regardless of the social class

a person belongs to and also, it gives the right equal access to public areas, which prohibits any form of restriction on any individual based on any of the aforementioned factors and the use of public spaces.

There are certain exemptions and the same are stipulated in Article 15(3), (4), and (5) and it basically underscores the provision that the State is permitted to establish distinctive provisions for women and children under the initial exception. The second and third exceptions grant the State the authority to establish special provisions for the socially and educationally underprivileged sectors of the nation, as well as the Schedule castes and scheduled tribes.

At first glance, Article 15(4) may appear to be a general provision that safeguards any form of beneficial discrimination in the form of special provisions for the benefit of the classes mentioned. Nevertheless, discriminatory provisions of this nature may be invalidated as absurd in the circumstances, in addition to the question of when a specific class can be legitimately considered a "backward class."

It may appear that articles 15(4) and 15(5) violate Article 14 (right to equality); however, this is not the case, as protective discrimination is also a facet of equality. Equality is a fundamental aspect of the Indian Constitution, and any treatment of equals unequally or unequally would violate the fundamental structure of the Constitution.

The objective of Article 16 of the Indian Constitution is to ensure that all citizens have the same opportunity to secure public appointments and employment. The initial two clauses of the Article explicitly stipulate that no Indian citizen shall be subjected to employment discrimination. These clauses establish the foundation for equal employment opportunities by prohibiting discrimination based on religion, ethnicity, caste, gender, place of birth, or any other factor.

The State is authorized to enact legislation to ensure that the disadvantaged classes of citizens are adequately represented in the services of the State, including the reservation of posts in the government sector or employment. This is stipulated in Clause (4) of Article 16. The central government maintained that the reservation in the promotion of SCs and STs should not be altered or affected, as the Indra Sawhney case pertains exclusively to the backward classes.

Nevertheless, the Parliament was able to establish reservation for SCs and STs in promotion posts by enacting the 77th Amendment Act, 1995, which included clause 4-A in Article 16 of the Constitution. This merely meant that the reservation in promotion in government positions would persist even after the verdict in the Mandal case.

The Indian Constitution was amended in 2000 with the 81st Amendment to include Clause (4-B) under Article 16, which came after Clause (4-A). The purpose of adding this provision to the Constitution was to avoid the accumulation of unfilled vacancies from the previous or preceding year, specifically for eligible candidates from the SEBC category. The purpose of this particular provision was to ensure that such vacant positions are not included in the 50% reservation policy for SCs, STs, and OBCs in the year following that. Similarly, Article 16(4) grants the state the authority to enact legislation for the safeguarding of Scheduled Castes (SC) and Scheduled Tribes (ST). Articles 15(4) and 16(4) address the existing societal inequities that are seen in practice.

Justifying the preference given to socially and economically disadvantaged groups is necessary to achieve true equality.

Articles 14, 15, and 16 establish the concept of protective or positive discrimination as an aspect of equality. Article 15 (4) and 16 (4) provide the basis for India's reservation policy. However, allocating an unreasonably large proportion of seats at any technical school exclusively for each of the backward classes would be invalid, since it would undermine the intention of the Article by placing the general public at a disadvantage.

Origins of the Creamy Layer Concept

In the seminal case of **State of Kerala Vs. N.M. Thomas AIR 1976 SC 490**, the Supreme Court established the term 'creamy layer' while maintaining the policy of reservations in promotions. Justice Krishna Iyer issued a warning regarding the potential for affluent individuals from backward castes to monopolize reservation benefits, which could potentially undermine the intended support for the weakened members of the same groups who would be unable to access these benefits.

The above findings by the court, even though were not immediately put into exercise or became binding by law, still it did highlight and emphasized upon the 'creamy layer's' concept and its notion.

In 1992, the Supreme Court addressed the Mandal Commission Report (1980), which had advocated for reservations for Other Backward Classes in Central Government positions and Public Sector Undertakings, in the seminal case of **Indira Sawhney Vs. Union of India**. In 1991, the government under V.P. Singh had introduced a policy that had reserved 27% of government jobs and positions along with other job opportunities for the OBCs.

There were objections and the same were upheld by the nine-judge panel and it was also emphasized and stated that the individuals coming under such 'creamy layer' shouldn't be receiving the reservation related advantages. The Supreme Court recognized the creamy layer as those who belong to the Other Backward Classes and have made considerable social and economic advancements.

The court considered these individuals to be on par with any member of the forward classes in terms of their level of development. Regarding the criteria for removing individuals from reserves, it was pointed out that economic considerations should not be the only element considered.

However, money might be used as a measure of social standing if economic success necessarily results in social progression. The court cited instances of socially astute persons, such as IAS, IPS, and other officials in the All-India Services, who should be exempted from reservation privileges.

The notion of the creamy layer was further considered by the Supreme Court of India in the aforementioned case of Indira Sawhmey, in the hearing that took place in the year 1999. It was highlighted by the Court that the right to equality would be infringed, and discrimination would take place if the advantages of reservation were not provided to the persons who were the most disadvantaged within the backward classes without the execution of the creamy layer concept.

There was emphasis upon the individuals belonging to the creamy layer and being privileged within the marginalised community and it was stated that individuals from the backward class who were employed in higher government services, such as the IAS and IPS, were socially and economically advanced and, thus it can't be said that they are in need of special privileges under the reservation policy. Consequently, they were stated to be ineligible for reservation benefits.

After the acknowledgement of the recommendations of the commission's the central government went on to reserve 27% of seats and positions in the central government services and issued the same in the Office Memorandum.

The SC went on to determine in their ruling that the said reservation shouldn't apply to creamy layer of OBCs. There was a commission that was established by the government which was to be headed by Justice Ram Nandan Prasad and the purpose of the same was the determination of the individuals falling in the creamy layer category among the OBCs.

The recommendations made by the commission were acknowledged and received an official backing.

Following this, the Central Government had issued an order outlining the criteria and conditions for the exclusion of OBCs from the Creamy Layer. These standards and procedures are still employed till date.

Criterion For Creamy Layer

Families with an annual income over Rs 8 lakh are categorized as part of the creamy layer. The government often revises this income threshold. Furthermore, progeny of officials in both Group A and Group B services are excluded. Furthermore, those who come from privileged backgrounds, including those whose parents are professionals such as doctors, engineers, and lawyers, and who have significant wealth and high social status, are also considered part of the wealthy demographic. Furthermore, families that own extensive parcels of agricultural property that exceed certain thresholds are also considered part of the privileged class.

Individuals belonging to the creamy layer are disqualified from receiving the reservation advantages designated for Other Backward Classes in several domains such as government employment and educational establishments. The individuals of Schedule Caste and Schedule Tribe are not included within the concept of 'creamy layer' as of now and they are eligible for all the reservation benefits that the government provides, irrespective of their financial conditions. The objective of this strategy is to enhance the circumstances of these communities, which have historically faced substantial economic and social disparities.

Supreme Court's Decision

In the case of **State of Punjab & Ors. Vs. Davinder Singh & Ors.,** the Hon'ble Supreme Court had addressed the long-standing issue of sub-categorization within Scheduled Castes which was there with the intention of implementing and providing reservations to the required individuals. In the following case, the application of Articles 14 to 16 and article 341 of the constitution were called into question and the challenge its comprehension was the main issue in the case.

Primary Issues

The main concern in this case was around the question of whether sub-classification within Scheduled Castes is permissible according to the

Constitution of India. The petitioners advocated for the subdivision of the SC category in order to guarantee that reservation advantages are extended to the most marginalized subgroups within the backward categories.

On the other hand, the respondents argued against the sub- classification and stated that the same goes against the principle of equality as highlighted by the Constitution and it weakens the uniformity of the Scheduled Castes, which is affirmed by the President under Article 341.

Appellants Argument

The appellants, which include several state governments, said that sub-classification within SCs is necessary to attain substantive equality. They hypothesized that the absence of sub-categorization results in the concentration of reservation advantages among the more privileged parts within the SC category, hence depriving the most disadvantaged groups of sufficient representation.

The appellants had presented thorough evidence and had demonstrated the discrepancies throughout the SC community, based upon this they had contended that sub-classification would be beneficial in addressing these imbalances. Further, they had cited prior rulings and constitutional provisions that uphold the state's authority to enact specific measures for the progress of socially and educationally disadvantaged groups, including the possibility of additional sub-categorization.

Respondents Argument

The respondents had contended that the practice of sub-classification within the SC community would be violative of the constitutional provisions and that the same would contravene the concept of equality before the law and equal protection of the law, as enshrined by Article 14. Their reliance on the Supreme Court's ruling in **E.V. Chinnaiah vs. State of Andhra Pradesh** was significant.

The ruling said that sub-classification within Scheduled Castes is not allowed since it undermines the uniformity of the group identified by the President under Article 341.The respondents said that the Constitution regards individuals of the Scheduled Castes as a cohesive and indistinguishable collective when it comes to the implementation of quotas and reservation. They further had stated that any kind of sub-categorization would lead to unfair discrimination within the group.

Analysis by the Court

The Supreme Court started its study by conducting a comprehensive scrutiny of

the development of reservation rules in India, highlighting the need of striking a balance between nominal equality and real equality. The Court observed that the principle of legal equality, which applies equal treatment to all people, does not always result in practical or substantive equality, particularly for historically disadvantaged groups such as the SCs.

The Court acknowledged that the basic goal of reservation is to give equal chances for individuals who have experienced social and educational disadvantages.

The Indra Sawhney case that was cited in the court, the SC had analysed the same and had stated in reference to it that the court in that case had carefully reviewed the guidelines established and the same held that the reservations for OBCs should not include the concept of 'creamy layer' so as to guarantee that the advantages of reservation are received by those who actually need them.

The Court had determined similarities between the need for the exclusion of the creamy layer in Other Backward Classes and the need for sub-classification within Scheduled Castes (SCs) in order to attain genuine equality.

In addition, the Court analysed the particular clauses of Articles 14, 15, 16, and 341. Article 14 ensures that everyone is treated equally under the law and receives equal protection from the laws. Meanwhile, Articles 15 and 16 permit the state to create specific measures to promote the progress of socially and educationally disadvantaged groups.

The President has the authority and power to decide which caste would be recognized as a 'scheduled caste' under the Article 341. Moreover, in the present case it was seen as to whether the provisions under the article allow for sub classification, and it was concluded that it wasn’t prohibited.

The court had analysed the data that was present, and this was done with the intent to comprehend and understand the differences and gaps that existed within the SC category. The history of the caste and the data along with it was analysed for the said purpose.

In the absence of sub-classification, the more developed sections of the SCs may be granted exclusive access to the benefits of reservation, while the most disadvantaged individuals are left without adequate support. The Court concluded that sub-classification is an essential mechanism to guarantee that the advantages of affirmative action measures are directed towards those individuals who are most in need of them.

Held

The Supreme Court has officially validated the legality of sub-categorization within the Scheduled Castes. The Court established that sub-categorization is permissible to provide fairness and to ensure that the most disadvantaged groups within the SC category benefit from reservation privileges. It was further stated by the bench that in the case of E.V. Chinnaiah, the Court had revisited its prior decision and had changed it.

Moreover, it was said that the President's power to identify Scheduled Castes under Article 341 did not prohibit the state from establishing more sub-categories to address inequalities within the SC group. Thus, it was emphasized by the court that the main purpose of reserves is to uplift persons who are the most disadvantaged, and sub-classification is a legitimate approach to achieve this goal.

Various Other Cases Involving Reservation Policies

The main contention in the case of **M. Nagaraj Vs. Union of India**, **(2006) 8 SCC 212,** case was regarding the government's four constitutional amendments — the 77th Constitutional Amendment Act of 1995, the 81st and 82nd Constitutional Amendment Act of 2000 and the 85th Constitutional Amendment Act of 2001 and that they should be invalidated due to the reason that they were established to undermine the decision of the court given in the Indra Sawhney Case.

The constitutional validity of all four amendments was upheld by the five-judge Bench in the Nagaraj case. Nevertheless, the Supreme Court's subsequent two validations in this case were contentious. The court had initially stated that state doesn't need to establish reservations for SC and ST community for the purposes of promotions as there was no requirement for the same.

Moreover, it was also declared that in the case that the state wishes to establish such provisions upon its discretion then the same should adhere to the Article 335 and it should collect data and survey the population of the area to gauge the unfairness or the underrepresentation faced by the community's people in the work sector.

Secondly, the Nagaraj ruling altered the Court's previous stance from the Mandal case, in which it had excluded the concept of the creamy layer for SCs and STs, limiting it to OBCs. The Nagaraj decision emphasized that the State must ensure that the reservation provision does not exceed the ceiling limit of 50%, contradict the creamy layer principle, or perpetuate reservations indefinitely, even if it has

compelling reasons for their existence. Consequently, the Supreme Court expanded the definition of the creamy layer to include the Scheduled Castes and Scheduled Tribes populations.

The Mandal case verdict, which categorized SCs and STs as the most marginalized and disadvantaged groups, contradicts the Centre's plea for the Court to reassess its stance on these matters. As a result, it is often assumed that there is no requirement for the plight or the underrepresentation that is being faced by the SCs and STs to be demonstrated once they are a part of the Presidential List as per Article 341 and 342 of the constitution.

Parliament is the sole entity that has the authority to modify the specified List, which delineates the SCs and STs in each state and Union Territory. Furthermore, the Indra Sawhney case did not implement the concept of the creamy layer. In the case of **Jarnail Singh Vs. Lachhmi Narain Gupta, AIR 2018 SC 4729,** the court clearly said that it did not desire to send the aforementioned problem to a bigger tribunal.

The Court's ruling in the Nagaraj case struck down the obligation for governments to acquire quantifiable evidence on the social and economic disadvantages of SCs and STs while giving quotas in promotions. Nevertheless, states are still required to provide relevant data that demonstrates the inadequacy of SCs and STs' representation in the cadre.

The court had upheld and reiterated the decision taken in the Nagaraj case, which was regarding the creamy layer principle, according to which the privileged individuals belonging to the SC/ ST community were prevented from reaping the benefits of the reservation policies. The Court determined that the creamiest members of Scheduled Castes/Scheduled Tribes communities had to be excluded from the benefits of reservation in government services in order to preserve the benefits from the policy and limit them for the people that are backward even within their communities.

For this reason, the people who attain privileges through economic growth or any job position, the ones who enter into the creamy layer, shall be deemed ineligible from attaining the special privileges through the reservation policies. This ensures fair distribution of opportunities and benefits.

The Court also observed that it would be impossible to enhance the conditions of the weaker groups if only a small portion of the class were able to secure and maintain every desired position in the public sector, thereby leaving the remainder of the class in the same state as before.

The government is currently requesting that the Supreme Court reconsider its decision in the Jarnail Singh case in light of the milky layer principle, as it was recently overturned.

Reservation provides sufficient positive discrimination to promote the interests of economically and socially marginalized groups in society.

Moreover, the principle of creamy layer is essential to differentiate between the people who are progressing socially and economically and the ones who are still regressed. This ensures that the benefits of the reservation policies are being given to only those people who are in need of social representation and an economic push.

Political reactions to the Order

Prakash Ambedkar, the president of the Vanchit Bahujan Aghadi (VBA), criticized the Supreme Court Constitution Bench's judgment that permitted states to sub-classify the Scheduled Castes (SCs) and Scheduled Tribes (STs) in order to make sure the reservations reach to the neediest groups of people within these communities. He argued that the ruling contradicted the principles of reservation outlined in the Constitution.

As the grandson of B R Ambedkar, Prakash Ambedkar emphasized that any sub-classification should be undertaken by Parliament rather than by states, warning of the ruling's adverse implications by deeming it as a central matter rather than the state's matter. Ambedkar remarked that the Supreme Court's decision was a triumph for those advocating for sub-classification, but it lacked the proper process. He asserted that states are not competent authorities to conduct such sub-classifications, which should be the prerogative of Parliament. In addition, he had also raised a question regarding the foundation of the doctrine of sub categorization, and the purpose of the same was to provide a space within the marginalised communities so as to give them fair and equal representation.

Another question that was posed by Ambedkar was as to how the dominance of one particular group in the general category would be addressed with and he further argued that there should equal and fair representation for individuals of both the general and reserved categories. Regarding this, Ambedkar had also called for a national strategy to think and implement measures regarding the same.

Chandrashekhar Aazad, founder of the Bhim Army and chief of the Aazad Samaj Party (Kanshi Ram), expressed the need to review the full judgment and the

dissenting opinion, highlighting concerns about potential violations of Article 341 and the absence of a socio-economic caste survey.

He questioned if the parties to the lawsuit really understood the suffering caused by discrimination. He also brought up concerns over the application of the current reservation regulations, which include lateral entry and reservation in promotions. Aazad suggested financial assistance programs to improve the lives of socially disadvantaged families.

Shambhavi Choudhary, the Lok Janshakti Party (Ram Vilas) MP from Samastipur, deemed the judgment unfair as it introduced the concept of the creamy layer, which applied only to OBCs, into SC/ST reservations. She cautioned against separating reserves based on several criteria, stressing that reservations were intended for social representation rather for economic backwardness. The Samajwadi Party MP from Lalganj, Daroga Prasad Saroj, said that a caste census was necessary to make sure that representation matched population proportions.

The CPM called on the government to include backward sections within the SCs in affirmative action, while Bahujan Samaj Party chief Mayawati opposed the sub-classification, likening it to an "Emergency-like" situation. She asserted that atrocities against SCs and STs affected them equally as a group and opposed any form of sub-classification.

Chandra Bhan Prasad, a Dalit writer and activist had criticized the court's order and had labelled it as a strategy to divide Dalits. On the other side, the Lok Janshakti Party, which is headed by Chirag Paswan, had announced their plans to seek a review of the order.

Political parties such as the Congress and the BJP took a measured approach, first gathering public opinion before deciding on a formal response. The ruling, which sought to address state-specific problems including quota demands among Dalit communities, was supported by the chief ministers of Telangana and Karnataka as well as by former Karnataka CM Basavraj Bommai.

However, the idea to include creamy layer criterion into SC reservations raised further concerns. This criterion, which was formerly exclusive to OBCs, sparked concerns that it will restrict quota advantages to those in the sub-categorized SC bloc who pass the economic barrier, therefore affecting their presence in public employment.

Public's Reaction and Way Forward

The decision has received positive responses from across the country from the public. It is being said that the exclusion of the affluent segment from Scheduled Castes would guarantee that the most marginalized populations would receive quota benefits. Amogh Sagar, a counsel at the Patna High Court, stated that the ruling was well-received by society. This was due to the fact that it enabled a more equitable distribution of resources, ensuring that those who were true beneficiaries of affirmative action received it.

Nevertheless, he emphasized that the government should have taken the initiative to assist the castes that were falling behind within these categories. Further, he highlighted and emphasized upon the significance of sub-classification with the aim of maintaining equity and the establishment of a fair society, as the laws should be tailored to the requirements of the citizens.

There were critics that had opposing views, and they had contended that decision could present many problems. Lawyers from New Delhi, one of them being Shivani Verma voiced opposing views, arguing that reservations need to be used to help people learn skills and then stop. While the ruling could benefit the really disadvantaged class, it might also make competition in the broader category more intense.

She observed that the judgment would have a beneficial effect on underprivileged SC/ST individuals by excluding the luxurious layer and allowing the genuine underdeveloped communities to benefit.

Subhajit Naskar, an assistant professor at Jadavpur University, expressed his vehement opposition to the judgment, describing it as unconstitutional and disrespectful to marginalized communities. He contended that the court's decision disregarded the experiences of SC/ST individuals who have attained been promoted to better positions as they still are subjected to caste discrimination.

Pa. Ranjith, a Dalit activist, asserted that caste is a socio-cultural identity that is not influenced by economic status. He also argued that the creamy layer concept in SC/ST categories undermines affirmative action efforts to promote social justice. He also criticized the bench's perspective for perpetuating further exclusion rather than expanding quotas to reflect demographic realities, arguing that reservations are already insufficient, resulting in underrepresentation.

Furthermore there can be significant sociological and policy ramifications that can arise from the Supreme Court's decision in question, especially in light of its

emphasis on the differences that exists between the individuals from the SC community residing in urban or metropolitan regions and those individuals residing in the rural areas. Also, due to the ease of access to jobs and education in cities, the exclusion of the creamy layer could be simpler there. A bigger problem can arise in the identification of individuals belonging to such creamy layer and their exclusion, this problem might get even worse in the rural areas due to lack of resources to address the same.

It would be expected of the states and the government to conduct thorough and comprehensive analysis and studying of the data in order to identify such percentage of individuals that fulfil the criteria to be called a part of the creamy layer.

Such a procedure will include the conduction of periodic demographic survey and analysis of the population of that area and further, it would also include the collection of the requisite data of the various such sub communities in order to keep a track of the socio-economic changes of the same.

Experts in constitutional law differed in their judgments about the judgment's legitimacy and possible challenges. Some saw it as a step toward full equality, while others worried that it would make the reservation system worse and further isolate certain communities.

Advocated of Social justice had shown concerns about how the ruling in question would affect underprivileged communities. While some believed that excluding the creamy layer would benefit the most disadvantaged, others were concerned that it would only worsen already-existing inequalities within SCs.

Affirmative action's future rests on maintaining a careful balance between meritocracy and the advancement of true equality. During a speech at the parliament, Ambedkar had opposed the presence of time bound reservation and had emphasized on the need for a more long-term plan to give fair representation to the marginalized community and promoting people based on merit rather than their caste. For ensuring that the requirements of the marginalized and backward groups are properly addressed, affirmative action laws must be consistently reviewed and enhanced.

Current Scenario and Way Forward

While it is undeniable that the reservation system has helped India's underprivileged populations, a large proportion of the population either does not know about these advantages or lives in places without the necessary infrastructure to access them. It is crucial to recognize that reservations don't

work by themselves to further their growth. Although reservations play a vital role in elevating the status of marginalized groups, they are not the only option.

The Constitution guarantees fundamental rights, including the right to free education, but it is crucial that these rights be applied to everyone. In addition, the caste system must be abolished as it is the root cause of ongoing inequity in many parts of the country. The foremost objective should revolve around the complete eradication of the reservation system and in doing so, ensuring that equality is maintained among the citizens of India.

The current situation of SCs and STs has improved as a result of reservations; however, they continue to experience unequal treatment in certain regions due to their inferior caste status. Certain measures must be implemented to monitor the situation to ensure that the benefits of the reservation policy are received by the appropriate individuals.

Excluding advanced sections of SCs and STs from claiming reservations would increase the number of opportunities available to the less advanced sections. The government is required to update the current lists by excluding those that no longer necessitate reservations and including those that are still underprivileged. This modification will not raise the demand for a greater quota; rather, it will retain the current proportion of reservations.

In order to guarantee seats or jobs in organizations that would not otherwise hire people from lower castes, the reservation system was put in place. It is the responsibility of the government to plan out strategies and implement the in order to assist the most disadvantaged members of society. It is crucial to stop the powerful or rich from abusing reservations since doing so would undermine the program's objective.

The government should prioritize the development of their capabilities rather than providing them with undue advantages, and the delicate stratum should be excluded from reservations. Furthermore, it is imperative to implement awareness campaigns regarding the reservation policy in order to inform those who are opposed to it of its significance for the underprivileged and impoverished segments of society, who may be oblivious of such policies.

Conclusion

The recent decision made by the Supreme Court on the concept of the "creamy layer" and the allowance of sub-classification within Scheduled Castes community is a significant step forward in the direction of achieving substantive equality. In addition, the court had also taken note of the gaps that existed within

such communities and the same were depriving the individuals of such communities of fair and equal lifestyles. Keeping the same in mind the SC had urged the adoption of affirmative action programs that are more focused and effective.

In its decision, the court unanimously had agreed to extend the concept of 'creamy layer' which was earlier a practice that was exclusively exercised within the OBC community, to be extended to the SC community as well.

The said decision by the court demonstrates its commitment to guaranteeing that benefits of reservation are distributed to such individuals within the community that are actually in need. Even though the said decision is an encouraging one, yet for it to be a truly useful, there is a need for a thorough plan of action and sharp execution to prevent any discrepancies.

Take away Points

Sub-classification of SCs: The Supreme Court has permitted states to sub-classify SCs in order to more effectively allocate reservation benefits to the most marginalized sections within the community.

Expansion of the creamy layer concept: The creamy layer principle, which was previously implemented in OBCs, has been extended to SCs in order to prevent the concentration of benefits among more privileged sections.

Equilibrium between affirmative action and equality: The court underscored the necessity of maintaining a balance between the objectives of elevating historically disadvantaged communities and the principles of equality.

Practical Approach: The ruling emphasizes upon the idea of data collection and surveys with regards to identifying the people who belong to the marginalized communities and further determining the inequalities that people face within the community in order to come up with practical solutions for the same.

Ongoing challenges: One of the challenge regarding the sub-classification is the accurate implementation by the government. There is a need for a long-term action plan and the same should be such that it involves careful planning to bring about a positive change and also to avoid any obstacles that arise so as to ensure that equal benefits are given to all the individuals.

B. Important Cases August 2024

Important Supreme Court Cases
August 2024

S.N.	Subject	Case Reference
1.	Sub-Classification is permissible within Scheduled Castes to give separate quotas for more backwards	State of Punjab and Ors. Vs. Davinder Singh and Ors., decided on 01/08/2024
2.	Lieutenant Governor (LG) of Delhi has the power to nominate aldermen to the Municipal Corporation of Delhi without the aid and advice of the Delhi Government.	Govt of NCT of Delhi Vs. Office of Lieutenant Governor of Delhi, decided on 05/08/2024
3.	It is not the length of delay that would be required to be considered while examining the plea for condonation of delay, it is the cause for delay which has been propounded will have to be examined. If the cause for delay would fall within the four corners of "sufficient cause", irrespective of the length of delay same deserves to be condoned. However, if the cause shown is insufficient, irrespective of the period of delay, same would not be condoned.	Mool Chandra Vs. Union of India & Anr., decided on 05/08/2024
4.	Expunges P&H High Court's Unwarranted Observations against SC's Stay Order	In Re: Order of Punjab and Haryana High Court, Dated 17.07.2024 and Ancillary Issues, decided on 07/08/2024
5.	Before exercising the power to grant police custody remand, the Courts must apply judicial mind to the facts of the case so as to arrive at a satisfaction as to whether the police custody remand of the accused is genuinely required. The Courts are not expected to act as messengers of the investigating agencies and the remand applications should not be allowed in a routine manner.	Tusharbhai Rajnikantbhai Shah Vs. State of Gujarat, decided on 07/08/2024
6.	Grants bail to Manish Sisodia. Right to	Manish Sisodia Vs. Directorate

	speedy trial denied in liquor policy case	of Enforcement, decided on 09/08/2024
7.	'Bail is the rule, jail is the exception' even in special statutes like the Unlawful Activities (Prevention) Act 1967.	Jalaluddin Khan Vs. Union of India, decided on 13/08/2024
8.	Laid down the yardsticks which should be fulfilled for initiating proceedings for the offence of perjury under Section 193 of Indian Penal Code, 1860.	James Kunjwal Vs. State of Uttarakhand & Anr., decided on 13/08/2024
9.	A judgment of the Court cannot contain the Judge's personal opinions on various subjects. Similarly, advisory jurisdiction cannot be exercised by the Court by incorporating advice to the parties or advice in general. The Judge has to decide a case and not preach. The judgment cannot contain irrelevant and unnecessary material. A judgment must be in simple language and should not be verbose. Brevity is the hallmark of quality judgment. We must remember that judgment is neither a thesis nor a piece of literature. However, we find that the impugned judgment contains personal opinion of the Judges advice to the younger generation and advice to the legislature.	In Re: Right to Privacy of Adolescents, decided on 20/08/2024
10.	Bar to anticipatory bail under Section 18 of the SC and ST (Prevention of Atrocities) Act, 1989 is not attracted unless a prima facie case under the Act is made out against the accused.	Shajan Skaria Vs. State of Kerala, decided on 23/08/2024
11.	Under Section 227 Cr.P.C., a Judge is required to sift the evidence to find out whether there was sufficient ground for proceedings against the accused. The expression “not sufficient ground for proceeding against the accused” means that the “Judge is not a mere post office to frame the charge at the behest of the prosecution. The judge must exercise the judicial mind to the facts of the case in	M/s. Karnataka Emta Coal Mines Ltd. and Anr. Vs. Central Bureau of Investigation, decided on 23/08/2024

	order to determine whether a case for trial has been made out by the prosecution."	
12.	Even in the Prevention of Money Laundering Act (PMLA), bail is the rule and jail is the exception.	Prem Prakash Vs. Union of India through the Directorate of Enforcement, decided on 28/08/2024
13.	It cannot be assumed that dowry and traditional presents given at the time of marriage are entrusted to the parents-in-law of the bride and would attract the ingredients of Section 6 of the Dowry Prohibition Act, 1961. Stridhan is the exclusive property of the woman, and her father cannot claim recovery of Stridhan from in-laws without explicit authorisation from her.	Mulakala Malleshwara Rao & Anr. Vs. State of Telangana & Anr., decided on 29/08/2024
14.	The production of title deeds of the property as a security towards the debt amounts to the creation of a 'mortgage by deposit of title deeds' under Sec. 58 (f) of the Transfer of Property Act, 1882.	A. B. Govardhan Vs. P. Ragothaman, decided on 29/08/2024

IN THE SUPREME COURT OF INDIA

State of Punjab and Ors.
Vs.
Davinder Singh and Ors.

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

HEADNOTE – Sub-Classification is permissible within Scheduled Castes to give separate quotas for more backwards with the majority of 6:1. Justice Bela Trivedi dissented. States can identify more backwards among the SC categories and can sub-classify them for separate quota within the quota.

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, CJI.

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1. The reference to this Constitution Bench raises significant questions relating to the right to equal opportunity guaranteed by the Constitution. The principal issue is whether sub-classification of the Scheduled Castes for reservation is constitutionally permissible.

A. Background

i. Relevant constitutional provisions

2. Article 14 of the Constitution stipulates that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. Article 15(1) states that the State should not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(4) stipulates that nothing in Article 15 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.1

3. Article 16 deals with equality of opportunity in matters of public employment. Clause (1) of Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) stipulates that no citizen shall be discriminated in or be ineligible for any employment or office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Clause (4) of the provision states that nothing in Article 16 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 State2.

4. Article 366(24) of the Constitution defines the term 'Scheduled Castes' to mean such castes, 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. Article 341(1) grants the President the power to notify the castes, races or tribes (or parts of or groups within castes, races or tribes) which shall be deemed to be Scheduled Castes for a State or a Union Territory for the purposes of the Constitution.

The President has been empowered to issue the notification with respect to a State in consultation with the Governor of the State. Article 341(2) stipulates that Parliament may by law include or exclude any caste, race, or tribe (or part of or group within any caste, race, or tribe) from the list of Scheduled Castes specified in the notification and that a notification issued under clause (1) shall not be varied by any subsequent notification. Article 341 is extracted below for reference:

"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 thereof, by public notification, specify the castes, races or tribes, or parts of or groups within castes, races, 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 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."

5. Articles 3423 and 342-A4 relate to notification of Scheduled Tribes and socially and educationally backward classes respectively and contain provisions pari materia to Article 341.

ii. The genesis of the reference to the Constitution Bench

6. The State Legislature of Punjab enacted the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act 20065. The long title stipulates that it is a statute to provide for reservation in services for the members of the Scheduled Castes and Backward Classes and for matters incidental thereto. Section 2(f) defines "Scheduled Castes" as Scheduled Castes notified by the President under Article 341 of the Constitution by the Constitution (Scheduled Castes) Order 1950, as amended from time to time.

Section 4(2) provides that reservation of twenty-five percent shall be made for the members of the Scheduled Castes and twelve percent for Backward Classes while filing up vacancies by direct recruitment in services. Section 4(5) stipulates that fifty percent of the vacancies of the quota reserved for the Scheduled Castes

in direct recruitment shall be offered to Balmikis and Mazhabi Sikhs, if available, as a first preference from amongst the Scheduled Castes.

7. Proceedings were instituted under Article 226 of the Constitution for challenging the validity of Section 4(5) of the Punjab Act. By a judgment dated 29 March 2010, the High Court of Punjab and Haryana declared Section 4(5) unconstitutional, relying on the judgment of the Constitution Bench of this Court in EV Chinniah v. State of Andhra Pradesh6.

8. Opposing the State's appeal against the order of the High Court, the respondents relied upon the judgment of the Constitution Bench in Chinnaiah (supra). The State submitted that Chinnaiah (supra) does not apply to the controversy in hand and that the decision is in any event, not consistent with the judgment of the nine-Judge Bench in Indra Sawhney v. Union of India.7 On 20 August 2014, a three-Judge Bench referred the correctness of Chinnaiah (supra) for consideration by a larger Bench. The three-Judge Bench observed that the judgment needs to be revisited, considering Article 338, the judgment of this Court in Indra Sawhney (supra) and the interplay between Article 16 and Articles 338 and 341 of the Constitution.

9. On 9 November 1994, the Government of Haryana issued a notification8 by which the Scheduled Castes in the State were classified into two categories - Blocks A and B - for the purposes of reservation. Block B consisted of Chamars, Jatia Chamars, Rahgars, Raigars, Ramdasias or Ravidasias. Block A consisted of the remaining thirty-six castes in the list of Scheduled Castes for the State. Within the quota reserved for Scheduled Castes in direct recruitment for Government jobs, fifty percent of the vacancies were to be offered to candidates from Block A and the other fifty percent were to be offered to candidates from Block B.

The notification further stipulated that in case suitable candidates from Block A were unavailable, candidates from Block B should be recruited against those vacancies. Similarly, in the event that suitable candidates from Block B were unavailable, candidates from Block A should be recruited against those vacancies. Thus, preference would be given to castes belonging to Block A and Block B in the fifty per cent earmarked for them. Proceedings were initiated under Article 226 for challenging the constitutional validity of the notification.

By a judgment dated 6 July 2006, the High Court of Punjab and Haryana quashed the notification on the ground that the sub-classification of castes placed in the list of Scheduled Castes is unconstitutional in view of the judgment of this Court in Chinnaiah (supra). The Special Leave Petitions challenging the judgment of

the High Court of Punjab and Haryana were tagged with the appeals involving the challenge to the Punjab Act.

10. The State Legislature of Tamil Nadu enacted the Tamil Nadu Arunthathiyars (Special Reservation of seats in educational institutions including private educational Institutions and of appointments or posts in services under State within the Reservation for the Scheduled Castes) Act 20099. The long title to the legislation states that it is an Act to provide for reservation of seats to Arunthathiyars in educational institutions, including private educational institutions in the State and for appointment in services under the State.

The Tamil Nadu Act defines Arunthathiyars to mean the castes of Arunthathiyar, Chakkiliyan, Madari, Madiga, Pagadi, Thoti and Adi Andhra from the list of seventy-six Scheduled Castes notified by the President under Article 341, as amended from time to time.10 Section 3 stipulates that sixteen per cent of the seats reserved for the Scheduled Castes in educational institutions shall be offered to the Arunthathiyars, if available, having regard to the social and educational backwardness of the community.

Section 4 makes a similar provision for the Arunthathiyars in recruitment to Government posts.11 Proceedings under Article 32 of the Constitution were instituted before this Court for challenging the constitutional validity of the Tamil Nadu Act on the ground that it contravenes the judgment of this Court in Chinnaiah (supra). The batch of matters challenging the Tamil Nadu Act was tagged with the batch of matters challenging the Punjab Act.

iii. The judgment in Chinnaiah

11. A three - judge Bench of this Court was called upon to adjudicate on the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act 2000. The Act was enacted following the recommendations of the Ramachandran Raju Commission constituted by the State Government. The Commission was tasked with ascertaining the groups among the Scheduled Castes in the State who had failed to avail of the benefits of reservations in college admissions and state public services.

The Commission found inter-se backwardness among the Scheduled Castes in the state in matters of reservation in education and appointment. Accepting its findings - that there were inequalities among the Scheduled Castes as far as the distribution of the benefits of reservation was concerned - the State Government promulgated the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Ordinance 1999. While proceedings challenging the Ordinance were pending, the State enacted a law to replace Ordinance.

Section 3, which provided for 'Rationalisation of Reservations,' apportioned the benefits of reservation among Scheduled Castes into four groups - Groups A, B, C and D - in varying percentages : 1% for Group A, 7% for Group B, 6% for Group C and 1% for Group D respectively, subject to the availability of eligible candidates. The Andhra Pradesh High Court rejected challenges to the Act, leading to appeals which came to be decided by this Court in Chinnaiah (supra).

12. The appellants argued that the State legislature lacked legislative competence to enact the law. They argued that once enumerated in the Presidential List under Article 341 of the Constitution, the Scheduled Castes constitute a homogenous class, which is incapable of further subdivision/subclassification. Such a classification, they argued, amounted to tinkering with the Presidential List, in violation of Article 341(2) and Article 14 of the Constitution.

13. The respondent-State on the other hand, argued that Article 341 allows the President to identify certain castes as Scheduled Castes and only Parliament can include or exclude entries from the List so created. The State argued that it could, in exercise of powers under Articles 15(4) and 16(4) decide the scope and extent of reservations. This power, they argued, was not limited by Article 341 which operates in an entirely different field.

The State urged that the Act of 2000 was a form of affirmative action and it did not exclude or include anyone from the Presidential List under Article 341. Such a sub-classification of the Scheduled Castes was claimed to be permissible under Article 16(4) for the same reason that this Court had held in Indra Sawhney (supra) that the backward classes could be divided into the 'more backward' and 'backward', depending on inter-se backwardness.

14. A Constitution Bench of this Court, speaking through Justice Santosh Hegde (for himself, Justice SN Variava and Justice BP Singh), Justice HK Sema and Justice SB Sinha unanimously held that the Andhra Pradesh Act was unconstitutional.

15. Justice Hegde examined whether the Andhra Pradesh Act tinkered with the Presidential List notified under Article 341 and held that the States have no power to deal with the Scheduled Castes except the maintenance of efficiency of administration. Justice Hegde observed that certain members of the Constituent Assembly sought to give power to the States to interfere with the list but the amendments to that effect were unsuccessful. Analysing the opinion of Justice Hegde, the following formulations emerge:12

a. The Scheduled Castes form a class by themselves13 as elucidated in the opinions of Justice Krishna Iyer and Justice Fazl Ali in State of Kerala v. NM Thomas;14

b. The purpose of the Act was to divide the castes in the Presidential List and then to distribute the 15% reservations for the Scheduled Castes in the state among four groups. The Act did not provide reservations for the first time but redistributed them by sub-classifying the Scheduled Castes. Reservations are not a constitutional mandate and once the state has fulfilled the obligation to reserve certain seats under Articles 15(4) and 16(4), it cannot apportion reservations among sub-classes. Notwithstanding the purpose of such sub-classification, the State cannot claim legislative competence under Entry 41, List II and Entry 25, List III of the Seventh Schedule in order to divide the Scheduled Castes' List. The pith and substance of the law in question was not traceable to these entries;15

c. The Scheduled Castes constitute a class, and a classification already exists. The issue was whether a further classification is permissible within this class with the objective of providing reservations.16 The rationale of Indra Sawhney (supra), to the extent that it permitted subclassification of the Other Backward Classes17, did not apply to the Scheduled Castes.18 Sub-classification was akin to giving preference to a 'miniscule proportion' of the Scheduled Castes, over other groups and would be impermissible in view of Article 14;19 and

d. The Constitution creates a legal fiction in terms of which the Scheduled Castes constitute a "class as a whole". The States cannot sub-divide them. Such a sub-classification would tinker with the Presidential list and violate Article 14. If the benefits of reservation are not being distributed equitably, they can be supplemented by additional measures such as training, which would not be contrary to Articles 14 and 15.20 A further sub-classification amongst the Scheduled Castes would not be reasonable and a uniform yardstick must be adopted to give benefits to the Scheduled Castes.21

16. In his concurring opinion, Justice HK Sema held that the purpose of reservations is to afford special protection to the members of the Scheduled Castes and Scheduled Tribes as a homogenous class of persons. Further classification of this class of people would amount to tinkering with the Presidential List. This regrouping of a homogenous group would, also amount to reverse discrimination and be violative of Article 14.22

17. In his concurring opinion, Justice SB Sinha held that Indra Sawhney (supra), while determining whether backward classes could be divided into more backward and backward classes, was not dealing with Scheduled Castes.23 In that context, Justice Sinha observed:

a. Unlike the Other Backward Classes, Scheduled Castes and Scheduled Tribes are treated as a separate class by the Scheduled Castes and Tribes Orders;24

b. The State had failed to establish the reasonableness of its classification among the Scheduled Castes;25

c. The Relli Community was the most backward community and hardly received any benefits of reservations. On the other hand, the Adi Andhra community was numerically larger and educationally better off compared to the Rellis. Both these groups were placed in Group A and Group D respectively and each was given the same 1% share in total reservations. The Act thus wrongly treated them alike despite apparent differences, without any basis;26

d. Micro-classification was impermissible under Article 14;27

e. Backwardness of the class was the link holding this class together and a classification that is justifiable based on backwardness of the class cannot be based on backwardness of the caste;28

f. Article 16(4) must be read with Article 335 and efficiency of administration cannot be sacrificed to benefit some castes out of the homogenous Scheduled Castes;29 and

g. The validity of the sub-classification and not the extent of the reservation was in question. Therefore, the argument that the States have the prerogative to decide the extent of reservations was inapplicable.30 The State could certainly stipulate the legislative policy about the extent of reservations but it could not take away the benefit of reservations on the ground that certain groups among the Scheduled Castes have advanced in the hierarchy.31

iv. The reference

18. On 27 August 2020, in State of Punjab v. Davinder Singh32, a Constitution Bench held that the judgment in Chinnaiah (supra) requires to be revisited by a larger Bench of seven Judges because it failed to consider significant aspects bearing on the issue. These aspects have been formulated thus:

a. In Indra Sawhney (supra),33 this Court held that it is constitutional to classify the backward class into the 'backward' and the 'more backward' class of citizens. The provisions of Articles 341, 342, and 342A are pari materia. That being the case, this Court has to analyse how a contrary conclusion to the effect that sub-classification is permissible within the Backward Class but not within the Scheduled Castes, could be reached. In Indra Sawhney (supra) the phrase "Backward Classes" in Article 16(4) was interpreted to include both socially and

educationally backward classes and the Scheduled Castes and Scheduled Tribes;34

b. The Scheduled Castes are not a homogenous class35. Preferential treatment can be given to the most downtrodden of the class who are not adequately represented. Such a sub-classification is made to provide equality of opportunity, so as to achieve the purpose of reservation;36

c. It would be open to the State, under Article 16(4), to grant the benefits of reservation on a rational basis to certain castes within the Scheduled Castes by fixing a reasonable quota of the reserved seats for them if they are inadequately represented;37 and

d. Preferential treatment to certain castes would not lead to the exclusion of other castes from the list prepared under Article 34138. In Jarnail Singh v. Lachhmi Narain Gupta39, this Court observed that the exclusion of the "creamy layer" from the Scheduled Castes for securing the benefit of reservation does not tinker with the Presidential List under Article 341. All the castes included in the list of Scheduled Castes are given the benefit of reservation even if they are sub-classified.

B. Submissions

19. The submissions of the counsel were restricted to the issue of whether the judgment of this Court in Chinnaiah (supra) requires to be reconsidered since the High Court had held that the Punjab Act and the Haryana Notification were unconstitutional solely for the reason that they are contrary to the above judgment.

i. Submissions of Petitioners

20. Mr Gurminder Singh, Advocate General for the State of Punjab and Mr Shadan Farasat, Additional Advocate General made the following submissions:

a. The judgment in Chinnaiah (supra) erroneously treats the Scheduled Castes as an indivisible monolith/block;

b. Preferential treatment promotes substantive equality. Chinnaiah(supra) is against the very idea of reservations which mandates protective discrimination based on relative backwardness;

c. Justice SB Sinha's judgment in Chinnaiah (supra) is self-contradictory. While it recognizes inter-se disparity among the Scheduled Castes, it holds the remedy to address this disparity to be unconstitutional. Once inter-se disparity is

acknowledged, sub-classification of the class would be in pursuance of substantive equality;

d. The State has the power to sub-classify because the enabling power to reserve seats includes ancillary and supplemental provisions such as preferences, concessions and exemptions;

e. In Indra Sawhney (supra) this court has recognised internal differences between castes.40 Sub-classification within a class aligns with the opinion of Justice Mathew in NM Thomas (supra) holding that further classification within the class was possible;41

f. The Scheduled Castes are not a homogenous group but face varying degrees of discrimination. The first part of the obligation under Article 16(4) to ascertain backwardness has been accomplished by the President and subsequently, by the Parliament under Article 341. The second part of the enquiry about 'inadequate representation' is a mandate for the States. If the Scheduled Castes list were to be treated as a monolith, it would render the second part of Article 16(4) otiose and make the role of the States redundant;

g. Sub-classification varies from the creamy layer principle since (i) economic advancement does not offset social discrimination faced by the Scheduled Castes; (ii) while the creamy layer excludes the socially advanced, sub-classification aims to identify within the Scheduled Castes, those who face the maximum social discrimination; (iii) subclassification mainstreams certain castes and creates a preference based on qualitative inclusion, contradistinguished from exclusion of the creamy layer; and (iv) preferential treatment identifies certain castes within the Scheduled Castes' list, while the creamy layer exclusion applies to individuals;

h. Scheduled Castes do not lose their identity once enumerated because caste is a sociological reality while the enumeration in the list is through the operation of a legal fiction. The limited preference to some groups by sub-classification because of their relative disadvantage will not exclude the other Scheduled Castes in the List notified under Article 341;

i. The State Legislatures have the legislative competence to make preferences for the purposes of laws in relation to Entry 41 of List II and Entry 25 of List III of the Seventh Schedule; and

j. Article16(4) is not subject to Article 335. 'Efficiency' under Article 335 must be defined in an inclusive sense.

21. Mr Kapil Sibal, senior counsel made the following submissions:

a. The Constitution permits sub-classification. Article 366(34) which defines the Scheduled Castes envisages that even a part of a caste or a group may be included;

b. While Justice Mathew in NM Thomas (supra) noted that "they are no castes in the Hindu fold but an amalgam of castes.", in Chinnaiah (supra), Justice Hegde replaced "they" with "there" in the above paragraph and noted instead, "there are no castes.". This replacement completely alters the meaning of the quotation in NM Thomas (supra) which was that the Scheduled Castes and Scheduled Tribes are a conglomeration of groups placed outside of the caste hierarchy, and not that Scheduled Castes/Scheduled Tribes are homogenous42;

c. When Dr. B R Ambedkar stated in the Constituent Assembly that Article 341 is meant to "eliminate any kind of political factors" in "disturbing" the List, he was referring to inclusion and exclusion from the List. Subclassification has no bearing on the power of inclusion and exclusion. Potential political tinkering cannot obviate the present constitutional need for acknowledging and remedying inter-se inequality among the Scheduled Castes;

d. Article 342A of the Constitution inserted by the Constitution (One Hundred and Second Amendment) Act 2018 empowers the President to notify socially and educationally backward classes. This Article is pari materia to Article 341 and Article 342. Sub-classification is permissible for Schedule Castes because Indra Sawhney (supra) permits subclassification for the Socially and Educationally Backward Classes and after the inclusion of Article 342A, they are at par with the Scheduled Castes; and

e. Chinnaiah (supra) is not in line with empirical data collected by the State. According to the view of Justice Reddy in Indra Sawhney (supra)43, several castes or tribes within the Scheduled Castes and Scheduled Tribes are not similarly situated.

22. Mr Shekhar Naphade, senior counsel appearing on behalf of the State of Tamil Nadu submitted that: a. Chinnaiah (supra) does not provide connecting links between Article 341 and subclassification. The plain meaning of Article 341 does not limit the power of the State legislature to classify the listed Scheduled Castes; and b. Classification based on inter-se backwardness is in pursuance of Article 14. This inter-se backwardness is not among individuals but among groups in the Scheduled Castes. Indra Sawhney (supra) is applicable to sub-classification of the Scheduled Castes.

23. Mr Gopal Sankaranarayanan, senior counsel submitted on behalf of Intervenor Madiga Jana Seva Samiti that Scheduled Castes or Tribes are not

castes because Article 366(24) uses "deemed". Article 16(2) uses "only"; thus, a Scheduled Caste, identified due to historic untouchability, is not "caste" under Articles 15(1) and16(2).

24. Mr KK Venugopal, learned senior counsel for the Petitioner Madiga Reservation Porata Samithi submitted that Article 14 does not only mandate equal treatment to all but also bars discrimination by equal treatment of unequals. He submitted that Article 38(2) entitles those who are unequal in status to special treatment to bring them on the same plane. Article 341 has to be read along with Article 38(2).

25. Mr R Venkataramani, Attorney General of India submitted that Articles 14 to 16 and Articles 341 and 342 operate in different fields. Mere designation under Article 341 does not entail homogeneity.

26. Mr Tushar Mehta, Solicitor General of India submitted that equality is not a static concept. It has evolved from the judgment of this Court in Champakam Dorairajan (supra), to Indra Sawhney (supra). Sub-classification is an issue of rationalising the affirmative action regime.

27. Mr Nidhesh Gupta, Senior Counsel submitted that adequate representation is a matter within the subjective satisfaction of the state, subject to backwardness and inadequacy of representation. Courts cannot scrutinize underlying data to reach that satisfaction of the state. Since Article 16(4) refers to "backward classes of citizens" collectively, Scheduled Castes are at par with the Backward Classes. Article 16(4) is a broader provision that Articles 15 (4) and 15(5). While Articles 15(4), 15(5) refer to "any special provisions for the Scheduled Castes..", Article 16(4) uses "any backward class of citizens". The use of "any" in Article 16(4), as opposed to the use of the word "the" to qualify the beneficiary classes in Articles 15(4) and 15(5), indicates that there is a greater discretionary power under Article 16(4).

28. Mr Vijay Hansaria, Senior Counsel submitted that the List under Article 341 is not a constitutional provision in itself, but an executive order passed by the President that can be modified by Parliament.

29. Dr S Muralidhar, Senior Counsel appearing on behalf of the State of Andhra Pradesh submitted that the State has not enacted a new law consequent to the decision in Chinnaiah (supra).

30. Mr Arun Bhardwaj, Senior Counsel appearing on behalf of the State of Haryana submitted that there are disadvantaged groups within the Scheduled Castes and the State should be allowed to alleviate their concerns.

31. Mr Kanu Agarwal, standing counsel for Chandigarh submitted that affirmative action can be summarized as a two- step process including identification (Articles 341 and 342) and extension (i.e. how affirmative action can be undertaken).

32. Ms Shraddha Deshmukh, counsel submitted that rights cannot be bundled up for the unequal members of the Scheduled Castes, without ensuring that the rights accrue to them in proportion to their lack of representation. Subclassification is therefore, essential for better representation of the weaker among the Scheduled Castes.

33. Mr Dama Sheshadri Naidu, Mr Rajesh Kumar Khanna, Mr Sidharth Luthra, senior counsel, and Dr Vivek Sharma, Mr Shivam Singh and Mr Sanjay Jain, counsel appearing on behalf of other Petitioners and Intervenors have adopted the above submissions.

ii. Submissions of Respondents

34. Mr Manoj Swarup, senior counsel made the following submissions:

a. The Scheduled Castes constituted by a notification issued by the President under Article 341(1) are a class in themselves. The latter part of Article 341(2) stipulates that no variation to the List is permitted except by a law enacted by Parliament. The class constituted by the Presidential notification can be interfered with only by Parliament under Article 341(2). As is evident from the Constituent Assembly debates on Article 341, Parliament is solely vested with the power to alter the Presidential list otherwise, the executive would tinker with the list to achieve political ends;

b. Upon the issuance of a notification by the President under Article 341, the castes notified are deemed to be Scheduled Castes for the purposes of the Constitution. The castes which are included in the Presidential list under Article 341 are heterogenous. However, once notified, the castes are put in an artificial mould of homogeneity by the deeming fiction;

c. The necessary effect of the preferential treatment to Balmiki Sikhs and Mazhabis in the fifty percent seats reserved for Scheduled Castes in Punjab is that the persons belonging to other Scheduled Castes are excluded from those seats;

d. None of the entries in the Seventh Schedule deal with Scheduled Castes. The only entry under which a law on reservation for the Scheduled Castes can be enacted is Entry 97 of List I. Thus, even if subclassification of the Scheduled

Castes is permissible, only Parliament and not the Legislature of the State has the power to enact such a law;

e. The National Commission for Scheduled Castes constituted under Article 338 can consider any new data sets or experiences of the Scheduled Castes and make recommendations. However, the power to alter the list solely vests with Parliament;

f. Courts through a judicial exercise cannot include or exclude any caste from the list of Scheduled Castes or Scheduled Tribes notified by the President44;

g. Classification within the Scheduled Castes is based on caste which is impermissible by virtue of Article 16(2); and

h. Contrary to the submissions of the petitioners, Chinnaiah (supra) discusses the interplay between Articles 16(4) and 341 of the Constitution.

35. Mr Salil Sagar, senior counsel made the following submissions:

a. The direct impact and effects standard45 must be used to decide the issue of whether granting preference to certain castes amounts to tinkering the Presidential List. Sub-classification, in effect, restricts the scope and operation of the Presidential list in the following manner:

i. It has an exclusionary effect, disturbing the scheme of reservation sought to be implemented;

ii. It disproportionately increases the share of reservation available to certain communities and decreases the share available to the rest of the communities; and

iii. The sub-grouping of castes violates the legal fiction in Article 341 by which a homogenous group is created for the purposes of the Constitution.

b. In Indra Sawhney (supra), this Court held that sub-classification of other backward classes is constitutionally valid. This Court cautioned against the application of the same principles to Scheduled Castes and Scheduled Tribes; and

c. Sub-classification of the Scheduled Castes cannot be held constitutional merely because Articles 341, 342 and 342-A are pari materia. The classes represented by the Scheduled Castes and the Other Backward Classes are distinct. Castes which are notified as Scheduled Castes have a feature of commonality; they all suffer from the historical injustice of untouchability.

36. Dr KS Chauhan, senior counsel made the following submissions: a. In Indra Sawhney (supra), this Court held that a caste can be a class for the purposes of reservation under Article 16 if the caste is socially and educationally backward46; and b. In Indra Sawhney (supra), Justice Jeevan Reddy observed that Article 16(4) of the Constitution mainly contemplates that reservation must be on the grounds of social backwardness. There cannot be any further classification of the Scheduled Castes since all the castes which are notified as Scheduled Castes by the President share the commonality of social backwardness in the form of untouchability.

37. Mr Sanjay Hegde, senior counsel made the following submissions:

a. This Court in the judgments delivered after Indra Sawhney (supra) has observed that it was limited in its application to Other Backward Classes47;

b. In State of Kerala v. NM Thomas48, this Court held that the Scheduled Castes constitute a class in themselves. Similar observations were made in Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India49;

c. The notification issued by the President under Article 341 can be altered only by law made by Parliament50;

d. States must confer the benefits to members of all the castes notified by the President under Article 341. If the State Government is of the opinion that benefits are not required to be conferred to the caste, then it can make a recommendation for its exclusion from the list of Scheduled Castes; and

e. The purpose of conferring Parliament with the power to alter the list issued by the President under Article 321 is to prevent the tinkering of the list for political purposes.

38. Mr Mallela Venkata Rao, counsel submitted that the opinion of Justice SB Sinha in Chinnaiah (supra) that other forms of affirmative action must be employed to remedy inter-se backwardness within the Scheduled Castes is the appropriate and constitutional approach.

39. Mahendra Kumar Mitra, Petitioner-in-person appearing on behalf of Dr. Ambedkar Scheduled Castes Federation, Karnataka submitted that the recommendation of the Justice Usha Mehra Committee to include Clause (3) to Article 341 providing Parliament the power to sub-categorize castes upon a resolution received from the State was not accepted by the National Commission for Scheduled Castes51.

40. Anusuchit Jaati-Janjati Adhikari Evam Karamchari Sangh, a social welfare association submitted that sub-classification of the Scheduled Castes defeats the purpose of providing special reservation to Scheduled Castes.

41. Mr Saket Singh, appearing for the Haryana Pradesh Chamar Mahasabha, submitted that the deeming fiction in Article 341 creates a common identity of Scheduled Castes even though each caste within the list possesses a unique identity. Counsel further submitted that the Constitution would expressly provide a provision for the special treatment of certain castes where necessary.

42. Mr Vembadi Subramanian and Mr VK Biju, counsel, made submissions on the same lines.

C. Issues

43. The Constitution Bench has to adjudicate upon whether the sub-classification of Scheduled Castes for the purpose of providing affirmative action, including reservation is valid. In this context, the following issues arise for consideration:

a. Whether sub-classification of a reserved class is permissible under Articles 14, 15 and 16;

b. Whether the Scheduled Castes constitute a homogenous or a heterogenous grouping;

c. Whether Article 341 creates a homogenous class through the operation of the deeming fiction; and

d. Whether there any limits on the scope of sub-classification.

D. Analysis

i. The jurisprudence on reservation

44. The jurisprudence surrounding reservations has undergone turbulations, both inside and outside the courts. Two crucial issues have dominated the jurisprudential debate - identifying the model of equality espoused by the Constitution and the interplay of equality with 'efficiency' or 'merit'. It is important that we trace the core principles governing reservations in India before we proceed to answer the issue of whether sub-classification of the Scheduled Castes is violative of Articles 14,15 and 16. This would enable us to analyze whether sub-classification furthers the constitutional promise of equality.

a. Reservation as an exposition of substantive equality

45. The purpose of the equal opportunity principle in Article 16(1) and the reservation provision in Article 16(4) has emerged as a focal point of the jurisprudence on reservations in this Court. A discussion of the journey of the competing models of equality that the Court has espoused and their evolution over the course of the years is necessary to understand the constitutional vision on equality.

I. The competing visions of equality

46. Articles 14, 15 and 16 of the Constitution encompass an equality code in pursuance of the preambular values of equality of status and opportunity and social justice. Article 14 lays down general principles governing equality by postulating that there must be "equality before the law" and "equal protection of law". In its formative years, this Court interpreted Article 14 through the lens of the classification doctrine52 which is premised on the recognition that formal equality in law, by which every person irrespective of their circumstances is treated alike, does not translate to factual equality. The underlying foundation of this doctrine is that two persons who are not similarly situated cannot be treated alike.53

47. Articles 15(1) and 16(1) were viewed as an elucidation of the equality principle housed in Article 14.54 However, the Courts were reticent in applying the doctrine of reasonable classification and its underlying assumption that 'not all persons (and not all situations) are alike' to the realm of reservation. The reason for the hesitation was that the means adopted (that is, reservation) were understood to not have relevance to securing equality of opportunity which was defined in terms of formal equality and efficiency55.

In the State of Madras (now Tamil Nadu), seats in Medical and Engineering colleges were apportioned among different groups in the proportion set forth in a Government Order called the "Communal GO". Seats were apportioned in specific proportions for Non-Brahmins (Hindus), Backward Hindus, Brahmins, Harijans, Anglo-Indians, Christians and Muslims.56

In State of Madras v. Champakam Dorairajan57, a Constitution Bench of this Court held the reservation of seats in educational institutions on that basis to be unconstitutional and violative Article 29(2) which stipulates that no citizen shall be denied admission in any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. The Court observed that Article 29 does not contain an exception clause such as Article 16(4) which would permit reservation of seats in educational institutions.

48. The State of Madras also notified that vacancies to the post of District Munsif would be filed on the basis of the Communal GO. In B Venkataramana v. The State of Madras58, reservation of seats in services based on the Communal GO was challenged. The Constitution Bench observed that Article 16(4) permits the State to make provisions for 'backward classes' in the services if they are not adequately represented in the opinion of the State and that only Harijans and the backward Hindus can be considered as 'backward classes'. The denial of admission to seats other than those reserved for Harijans and Backward Hindus, it was observed, would be a discrimination based on "caste," violating Articles 16(1) and 16(2).

49. The above judgments adopted a formalistic and reservation-limiting approach in the reading of the constitutional provisions. In this approach, reservation was viewed as an exception to the principle of equal opportunity in Articles 15(1) and 16(1). This Court had recognized the principle of reasonable classification in Article 14 before the decision in Champakam Dorairajan (supra). However, it did not transpose the principle to the realm of reservation.59 Even in Venkataramana (supra), this Court held that reservation in services is permissible only because the Constitution expressly provides for it. Reservation or any other form of affirmative action was regarded as antithetical to the equality principle and not a re-statement of it.

50. The Constitution was amended by the Constitution (First Amendment) Act 1951 to include Clause (4) in Article 15 to overcome the judgment in Champakam Dorairajan (supra). Despite the inclusion of Article 15(4), a formalistic reading of the equality code continued. In Balaji v. State of Mysore60, this Court observed that Articles 15(4) and 16(4) are special provisions (or in other words, an exception to the principle of equality) while prescribing a cap of fifty per cent on the total seats to be reserved. It was in NM Thomas v. State of Kerala,61 that this Court undertook an expansive and substantive reading of the equality code.

In that case, proceedings were instituted for challenging the constitutional validity of Rule 13AA of the Kerala State and Subordinate Services Rules 1958 by which the qualifying criteria was relaxed for candidates belonging to the Scheduled Castes and Scheduled Tribes. The majority constituting the seven-Judge Bench interposed the principle of reasonable classification in Article 14 to Article 16(1)62 and observed that Article 16(4) is not an exception to the principle of equality of opportunity. Article 16(4), in the opinion of the Court, clarifies and explains the principle in Article 16(1).63 Chief Justice Ray observed that Article 16(1) will not be violated when the rule ensures "equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration".64

Chief Justice Ray's opinion rests on two conceptual foundations. First, the goal of Article 16(1) is to ensure equality of representation while maintaining efficiency of service; and second, the beneficiaries must be the unrepresented class. Equality of opportunity was framed in the language of equal representation subject to these two caveats. Justice K K Mathew adopted a different approach. The learned Judge broke down the conceptual foundation of the equality provision in the following manner:

a. A criterion which is relevant to the apportionment of the good (that is, services) must be adopted65;

b. It must be determined if the relevant criterion leads to an a priori exclusion of a certain class. The State is required to identify if persons of all classes have an equal chance of satisfying the chosen criteria66; and

c. There is a violation of the right to equal opportunity if the relevant criterion leads to a priori exclusion. In that case, a compensatory provision must be made to offset the disadvantage.67

51. In his concurring opinion, Justice Krishna Iyer observed that when two interpretations of Article 16(1) are available, that which ensures equal participation and fair representation in administration must be chosen.68

52. Thus, at the end of the first phase, it was clarified that the Constitution espouses a substantive vision of equality where reservation is not an exception but, as Justice Krishna Iyer observed in NM Thomas (supra), an "illustration of constitutionally sanctified" classification69. However, the Judges varied on the purpose of Article 16(1). While Chief Justice Ray defined equality in opportunity in terms of equality in representation and efficiency of service, Justice Mathew defined it in terms of equality in representation of the backward class.

Additionally, Chief Justice Ray identified the beneficiary class as the 'unrepresented' class without laying down the basis of the underrepresentation. Justice Mathew on the other hand, identified the beneficiary class not merely on the basis of under-representation but on the cause for under-representation. It was this difference in the opinions that brooded over the post-NM Thomas era. In the subsequent section, we will discuss the impact of Chief Justice Ray's reading of the principle of efficiency into Article 16 on the scope of reservation policies.

II. The "efficiency" of reservation

53. The expansive reading of the constitutional ideal of equality, noticed above, was not sufficient to realize the full potential of affirmative action. A barrier was raised through Article 335. Article 335 emphasizes that the State shall maintain

efficiency of administration while deciding the claims of the Scheduled Castes and the Scheduled Tribes in appointments to services.70 This Court, while deciding the following four important questions relating to reservations, placed considerable emphasis on the efficiency of service to limit the scope of reservation:

a. Whether reservation is limited to initial appointment;

b. If reservation is extendable to promotions, the method to be employed to ascertain seniority;

c. Whether lowering the standard of evaluation for backward classes violates the equal opportunity principle in Article 16; and

d. The permissible method for calculating vacancies to be filled through reservation. The central theme that governed these four issues was whether the expansion of the scope of reservations would dilute the overall efficiency of the service.

54. In General Manager, Southern Railway v. Rangachari71, the issue was whether Article 16(4) permits reservations in promotions. Writing for the majority of the Constitution Bench, Justice Gajendragadkar observed that though reservations in promotions are detrimental to "efficiency", a reading of Article 16(4) to include reservations in promotions would further substantive equality72:

"27. It is true that in providing for the reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the members of the backward classes consistently with the maintenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts."

(emphasis supplied)

55. Both the majority and the minority (consisting of Justice Wanchoo and Justice Ayyangar) agreed that reservations impair the efficiency of administration. The learned Judges belonging to the minority only disagreed on the balance which must be drawn between reservation and efficiency of service. Justice Gajendragadkar observed that though reservations in promotion will

impair efficiency of administration, the social benefit of reservation will trump the cost of the impairment.

Justice Wanchoo and Justice Ayyangar disagreed. According to the minority, an interpretation of Article 16(4) to include reservation in promotion would be contrary to the principles set out in Article 335.73 Similarly, in CA Rajendran v. Union of India,74 this Court observed that restricting reservations only to Class III and Class IV posts was justified because Class I and Class II posts require candidates with higher efficiency which would not be achieved if promotional posts are reserved.75

56. The judgment in Rangachari (supra) was overruled in Indra Sawhney (supra). In Indra Sawhney (supra), this Court adopted the approach of the minority in Rangachari (supra), holding that reservations in promotions would dilute efficiency in administration.76 By the Constitution (Seventy-seventh Amendment) Act 1995, Parliament amended the Constitution to include Clause (4-A) into Article 16 permitting reservation for the Scheduled Castes and the Scheduled Tribes in promotion.

57. The issue whether members of the Scheduled Castes and Scheduled Tribes should be considered senior to candidates of the general category (who were senior to the candidates of the reserved category in the feeder category)77 when they are being considered for subsequent promotion arose before this Court. In Union of India v. Virpal Singh Chauhan78, this Court held that though the catch-up rule is not implicit in Article 16, it is a constitutionally valid practice to maintain "efficiency".79

This was reiterated in Ajit Singh (I) v. State of Punjab80. Justice NP Singh, writing for the three-Judge Bench observed that the process of appointments must balance both Article 16(4) and Article 335 and that the "principal object of a promotion system is to secure the best possible incumbents for the higher position".81 Subsequently, Parliament amended Article 16(4-A) by the Constitution (Eighty-fifth Amendment) Act 2001 to overcome a series of judgments of this Court where the rule of consequential seniority in reservation was held to result in reversediscrimination. Article 16(4-A), as amended by the Constitution (Eighty-fifth Amendment) Act 2001, enables the State to provide reservation in promotion with consequential seniority.

58. In Indra Sawhney (supra), Justice Jeevan Reddy writing for four Judges observed that relaxation of qualifying marks in promotion would result in inefficiency of administration. This position was reiterated by a two-Judge Bench in S Vinod Kumar v. Union of India82. A proviso was included in Article 335 by the Constitution (Eighty-second) Amendment Act 2000 to overcome this aspect

of the ruling in Indra Sawhney (supra) and Vinod Kumar (supra). The proviso provides that Article 335 does not prevent the State from relaxing the qualifying marks in any examination for reservation in promotion.

59. The method for calculating the permissible total percentage of reservation was another issue in which the "efficiency of administration" was used to limit the scope of reservation. This Court had held in Balaji (supra) and Indra Sawhney (supra) that reservation must not exceed 50 per cent. The State was faced with a peculiar situation where a sufficient number of persons from the reserved category was not available to fill the seats reserved for them. The issue was whether the unfilled seats of the reserved category could be carried over to the next year, and whether the carried forward vacancies could be counted while calculating the total percentage of reserved seats in that year.

60. In T Devadasan v. Union of India83, the majority held that a carry forward of the unfilled vacancies of the reserved category to the next year will abrogate the equal opportunity principle and impair efficiency. Justice Subba Rao while dissenting, advocated for a harmonious reading of Articles 16, 46 and 335. Laying the groundwork for the jurisprudential development in NM Thomas (supra), the learned Judge observed that the phrase "any provision" in Article 16(4) is wide enough to include the carry forward rule. The observation of the majority that carrying forward the vacancies to the subsequent year is contrary to the equal opportunity principle was line with the judgment in Balaji (supra) because the judgment was delivered in the pre-NM Thomas (supra) era. However, besides the narrow interpretation of the equal opportunity principle, the concept of "efficiency" also weighed with the Court.

61. By the Constitution (Eighty-first) Amendment Act 2000, the Constitution was amended to include Article 16(5) by which the States are permitted to carry forward the unfilled seats of the reserved category to be filled up in the succeeding years. The challenge to the constitutional validity of Article 16(4- A) and 16(4-B) was rejected by the Constitution Bench in M Nagaraj v. Union of India84 where it was held that the efficiency of administration is only relaxed and not "obliterated" by the inclusion of Articles 16(4-A) and 16(4-B).85

62. As is evident from the discussion above, the jurisprudence in the second phase on questions involving the scope of reservation, evolved around the idea that reservation dilutes the efficiency in administration or to put it otherwise, reservation is anti-merit. The Constitution was amended to overcome this Court's holding on each of the above issues, thereby overhauling the premise that reservation does not ensure efficiency in service. The Constitution, after the numerous turbulations within each of the issues traced, today advances a more substantive reading of the equality provision, expanding the sphere and the scope

of reservation to ensure that the benefits trickle down to those who need it the most.

However, traces of the friction between merit and reservation continue to persist even after the amendments to Articles 16 and 335.86 This Court has, with a few divergences87, continued to uphold the binary of merit and reservations. The understanding of the Courts at the end of this phase was that the scope of reservation must be expanded to ensure substantive equality in spite of its dilution of efficiency88, thereby continuing to read the requirement of efficiency into Article 16(4). III. The interplay of Article 16 and Article 335

63. In this section, we will discuss whether the principle in Article 335 must be read as a limitation on the power of the State to provide reservations under Article 16. Article 335 provides that 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. The proviso to the Article states that the provision shall not prevent the "relaxation of qualifying marks in any examination or lowering the standards of evaluation", for reservation of the Scheduled Castes and the Scheduled Tribes in matters of promotion.

64. Reservations under Article 16(4) are not restricted to the Scheduled Castes and Scheduled Tribes. The provision provides the State with the enabling power to provide reservations for the "backward classes" which are not adequately represented in the services of the State. The "backward class" encompasses more than the Scheduled Castes and the Scheduled Tribes. It encompasses all classes whose backwardness is attributable to social reasons.89 This includes other socially and educationally backward classes such as the Other Backward Class category, women and the disabled.

65. Applying the additional requirement of "efficiency of administration" only with respect to the exercise of power under Article 16(4) vis-à-vis the Scheduled Castes and the Scheduled Tribes would be discriminatory. Reading this requirement into Article 16(4) assumes that a dilution of the principle of efficiency in administration is the necessary effect of reservation for the Scheduled Castes and Scheduled Tribes while the same standard is not applied to reservations for Other Backward Classes.

Though this Court has not expressly stated so in as many words, efficiency of administration was added as a requirement for the exercise of power under Article 16(4) to prevent discrimination between the Scheduled Castes/Scheduled Tribes and other Socially and Educationally Backward Classes. If the requirement of efficiency of administration in Article 335 was not read into

Article 16, then the requirement would only apply to reservations for the Scheduled Castes and the Scheduled Tribes but not for the reservation of other socially backward beneficiary classes.90

66. However, such an interpretative exercise (that is, applying the principle of efficiency of service to restrict the power of the State to provide affirmative action policies) is contrary to the express language of Article 335 which is confined to the Scheduled Castes and the Scheduled Tribes. The preliminary error is that the requirement of efficiency of administration was viewed as an additional requirement and a roadblock to reservation provisions. Efficiency was not understood as a facet of the principle of equal opportunity.

67. The meaning of the phrase "efficiency" as it occurs in Article 335 must be determined to take this argument to its logical conclusion. Though the Constitution does not define the phrase, the proviso to the Article offers interpretative guidance. The proviso states that "relaxation in qualifying marks in any examination or lowering the standards of evaluation" does not amount to a reduction in the efficiency of administration.

There can be two possible deductions about the scope of the provision, based on a reading of the proviso. One possible meaning that can be deduced is that marks in the qualifying examination are not a marker of efficiency of administration because if they were, then a reduction of the qualifying standards/marks would also lead to a reduction in efficiency. Another possible interpretation could be that the premise of the proviso is that while reduction or dilution of the evaluating standards or the qualifying marks is not inconsistent with maintenance of efficiency, a complete removal of the qualifying marks would be.91

Even if the latter interpretation is accepted, it only goes to establish that securing higher marks in an examination does not contribute to higher efficiency and that securing a minimum mark (and not the highest) in the examination is sufficient to maintain efficiency of administration. Thus, a policy which allows for lower qualifying marks or standards of evaluation is by the proviso to Article 335 not contrary to efficiency.

68. The only constitutional provision which refers to an examination for appointments to posts in services is Article 320 which stipulates that the Union and State Public Service Commissions must conduct examinations for appointments to the services of the Union and the State. An examination is an assessment to determine the proficiency of candidates and their suitability for the post. The Constitution does not prescribe the exact method of assessment which must be adopted for the examination.

The Constitution also does not prescribe that the examination must be framed in a manner which would only assess skill sets accessible to certain classes of people. The principle of equality in opportunity in Article 16(1) is therefore the guide for the State while it is determining the method of examination. The examination or any method of distribution of posts must ensure factual equality. An examination leads to a priori exclusion if it only assesses the skill set that is accessible to specific classes. It is to offset this disadvantage that affirmative action policies are introduced for the distribution of posts.

69. The underlying premise of the decision in NM Thomas (supra) is that the distribution of public resources including seats in educational institutions and public services must be based on considerations of equality and justice. Thus, Article 335 is not a limitation on the exercise of power under Articles 16(1) and 16(4). Rather, it is a restatement of the necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services. Efficiency of administration must not be viewed in terms of the narrow lense of scores in an examination which a priori excludes certain classes but in terms of inclusivity and equality as required by Article 16(1).

70. This Court has previously challenged the binary of reservation and merit. In Devadasan (supra), Justice Subba Rao observed that there is no conflict between the provisions of Articles 16(4) and 335 and that the latter has no bearing on the interpretation of the former. Justice Rao observed that the former provision, is directory while the latter is a mandatory provision by which the State is required to consider the "claims"92 of the Scheduled Castes and Scheduled Tribes.93 Subsequently, in Vasanth Kumar (supra) Justice Chinnappa Reddy echoed this view. The learned Judge observed that reservation cannot be viewed as a conflict between the principles of merit and distributive justice. It is rather, the conflict between the haves and the havenots. 94

71. This line of reasoning was furthered in BK Pavitra (II) v. State of Karnataka95, where this Court observed that the assumption of the critiques of reservation is that awarding opportunities in government services based on "merit" results in an increase in administrative efficiency.96

In BK Pavitra (II) (supra) and Neil Aurelio Nunes v. Union of India97, this Court highlighted the folly of measuring "merit" based on the performance of candidates in a seemingly "neutral" selection process which is factually not neutral since the process does not provide equal opportunity to candidates belonging to classes which face widespread inequalities in accessing facilities required to ace the examinations.98 In Neil Aurelio Nunes (supra), a two-Judge Bench of this Court discussed the privileges that accrue to the advanced classes

in the form of cultural capital which ensures that a child is unconsciously trained by the familial environment and the economic capital:

"24. the privileges that accrue to forward classes are not limited to having access to quality schooling and access to tutorials and coaching centres to prepare for a competitive examination but also includes their social networks and cultural capital) communication skills, accent, books or academic accomplishments) that they inherit from their family. Social networks based on community linkages) become useful when individuals seek guidance and advice on how to prepare for examination and advance in their career."

72. One of us (DY Chandrachud J) writing for the Bench, observed that while examinations are a convenient method to allocate educational resources, they are not effective markers of merit, and that merit should be understood in terms of the social good of equality and inclusivity.99

73. Before concluding the discussion in this section, we deem it necessary to discuss the opinion of the nine-Judge Bench in Indra Sawhney (supra) on the binary of merit and reservation because this Bench sitting in a composition of seven is bound by the opinion of the larger Bench. The petitioners in that case argued that the necessary effect of reservation is the appointment of less meritorious persons while the respondents argued that marks obtained in an examination do not represent the inherent merit of the candidate. Justice B P Jeevan Reddy, authoring the plurality opinion, observed that it is not necessary to express their view on the competing visions of reservation and merit.

However, the learned Judge observed that reservation is not anti-merit. The learned Judge made two conceptual observations: first, even if merit is not synonymous with efficiency in administration, its relevance and significance cannot be ignored. Reservations imply the selection of a less meritorious person100; and second, members of disadvantaged sections, given the opportunity, would overcome the barriers and prove their merit.

74. Applying these two principles, Justice Jeevan Reddy held that: (a) the removal of minimum marks in qualifying examinations for the backward class is invalid; (b) there cannot be reservations in promotions101; and (c) there cannot be any reservation in certain positions of services "where either on account of the nature of duties attached to them or the level (in the hierarchy)", merit alone counts.

The learned Judge also proceeded to give a nonexhaustive list of such positions. The list included technical posts in research and development organizations/departments/institutions; specialties and super-specialties in

medicine, engineering and other such courses in physical sciences and mathematics; defense services; posts of professors; airline pilots; and scientists and technicians in nuclear and space application. Justice Pandian also agreed with this view102, making it the view of the majority.

75. Justice Jeevan Reddy recognized that reservation is not anti-merit. Two constitutional amendments overruled the above aspects of the holding in Indra Sawhney (supra). These amendments altered the intersection between the exercise of power under Article 16(4) and Article 335. The Constitution (Seventy-seventh Amendment) Act 1995 included Article 16(4-A) enabling the State to provide reservations for the Scheduled Castes and the Scheduled Tribes in promotions.

The Constitution (Eighty-second) Amendment Act 2000 added the proviso to Article 335 stipulating that lowering the standards of evaluation will not be inconsistent with the maintenance of efficiency. The amendments recognize the difficulties and struggles faced by members of the Scheduled Castes and the Scheduled Tribes during promotions. In a formal sense, the criteria of selection for promotions a priori excludes the members of the Scheduled Castes and Scheduled Tribes because the criteria which are considered to be appropriate are not accessible to them.

In a more informal but substantive manner, the members of the Scheduled Castes and the Scheduled Tribes are often unable to climb up the ladder because of the stigma of incompetence held against candidates who are selected through reservation. The stereotype operates against them because they are externalized as "affirmative action beneficiaries" or "quota candidates".103 The amendments recognize the discrimination through the operation of both human conduct and recruitment processes. They are an emphatic repudiation of the binary of reservation and merit.

ii. Permissibility of sub-classification under Article 14

76. In Chinnaiah (supra), one of the issues was "whether the impugned enactment creates sub-classification or micro-classification of Scheduled Castes".104 Justice Santosh Hegde, writing for himself and two other Judges noted that according to the decision in NM Thomas (supra), all the castes in the list acquired a special status as a 'class' and that a classification for the purpose of reservation already existed.

The learned Judge observed that the Scheduled Castes form a class by themselves and any further classification would violate the doctrine of reasonableness.105 Justice Hegde observed that a class cannot be sub-divided to give more

preference to a "miniscule proportion of the Scheduled Castes in preference to the other members of the same class".106 In his concurring opinion, Justice Sema observed that further classification of the Scheduled Castes, who constitute a homogenous group would amount to "discrimination in reverse" and would run contrary to Article 14107.

Justice Sinha observed that the Constitution permitted additional measures in respect of disadvantaged groups to bring them at par with the advantaged groups, but the class which requires the benefits of additional protection, cannot be discriminated inter se when both satisfy the test of abysmal backwardness and inadequate representation in public service.108 Justice Sinha further noted that the state had not discharged the burden of proving reasonable classification and the nexus of the classification with the purpose of the enactment.109

77. In Chinnaiah (supra), this Court held that the Scheduled Castes cannot be further classified for the purpose of reservation because they constitute an internally homogenous class by virtue of their inclusion in the Presidential list and thus, as a class, groups within the Scheduled Castes cannot be treated differently. In view of the already existing classification of the Scheduled Castes under the Constitution, further classification and consequent preferential treatment were held to violate Article 14, as it would amount to a constitutionally proscribed 'micro-classification'. To appreciate the correctness of this view of Article 14 and micro-classification, we must analyze the contours of the equality guarantee and permissibility of subclassification under Article 14.

a. The contours of Article 14

78. Article 14 employs two expressions - equality before the law and equal protection of the laws. Both different in content and sweep110. "Equality before the law"-, an expression derived from the English Common law, entails absence of special privileges for any individual within the territory. It does not mean that the same law should apply to everyone, but that the same law should apply to those who are similarly situated.111 The expression "equal protection of the laws" means that among equals, laws must be equally administered. It enjoins the State with the power to reasonably classify those who are differently placed.

The mandate of "equal protection of laws" casts a positive obligation on the state to ensure that everyone may enjoy equal protection of the laws, and no one is unfairly denied this protection. In essence, the guarantee of equality entails that all persons in like circumstances must be treated alike. That there must be a parity of treatment under parity of conditions.112 Equality does not entail sameness. The State is allowed to classify in a manner that is not discriminatory. The doctrine of classification gives content to the guarantee of equal protection of

the laws.113 Under this approach, the focus is on the equality of results or opportunities over equality of treatment.114

79. The Constitution permits valid classification if two conditions are fulfilled. First, there must be an intelligible differentia which distinguishes persons grouped together from others left out of the group. The phrase "intelligible differentia" means difference capable of being understood.115 The difference is capable of being understood when there is a yardstick to differentiate the class included and others excluded from the group.116 In the absence of the yardstick, the differentiation would be without a basis and hence, unreasonable.

The basis of classification must be deducible from the provisions of the statute; surrounding circumstances or matters of common knowledge.117 In making the classification, the State is free to recognize degrees of harm.118 Though the classification need not be mathematical in precision, there must be some difference between the persons grouped and the persons left out, and the difference must be real and pertinent.119 The classification is unreasonable if there is "little or no difference".120 Second, the differentia must have a rational relation to the object sought to be achieved by the law, that is, the basis of classification must have a nexus with the object of the classification.121

b. Sub-classification as a facet of equality

80. The first issue that arises for the consideration of this Court is whether the principle of sub-classification per se violates Article 14. It is established precept that Article 14 guarantees factual and not formal equality. Thus, if persons are not similarly situated in reference to the purpose of the law, classification is permissible. The same logic of classification equally applies to sub-classification. The law can further classify a class that is already created by law for a limited purpose if it is heterogeneous for another purpose. This Court has in multiple judgments held that such classification within a class is valid under Article 14.122

81. To lay down the contours of the scope of sub-classification, it needs to be determined if the class is an integrated homogenous class. In All India Station Masters & Assistant Station Master's Association v. General Manager, Central Railways123, the issue before a Constitution Bench of this Court was whether 'road-side Station Masters' could be differentiated from Guards for the purpose of promotion to the higher post of Station Masters. Answering the issue in the affirmative, this Court held that the Station Masters and Guards did not form an integrated class since they were recruited and trained separately.

Thus, a distinction between the two classes was held not to be violative of the equality code which only requires the State to treat equals equally. Similarly, in Mohd. Shujat Ali v. Union of India124, another Constitution bench of this Court held that the distinction between graduate and non-graduate Supervisors for the purpose of promotion to the post of Assistant Engineer was valid because there was no integration between the two categories. The pay scale and even the nomenclature for the two classes were different.

82. In All India Station Masters (supra) and Mohd. Shujat Ali (supra), this Court did not specifically answer the question of whether there could be subclassification within an integrated class. That issue arose for adjudication before this Court in State of Jammu and Kashmir v. Triloki Nath Khosa125. The rules provided that only Assistant Engineers who possessed a degree or certain other qualifications were entitled to promotion to the post of Divisional Engineer.

However, the pool of Assistant Engineers consisted of both degree and diploma holding graduates. The diploma holders among them challenged the constitutionality of the rule on the ground that it classified within the class of "Assistant Engineers" based on their educational qualification, and such a classification within a class was violative of Article 14.

It was argued that if persons recruited from different sources are integrated into one class, they cannot thereafter be classified to permit preferential treatment in favour of some of them. This Court upheld the validity of the rule holding that the classification based on educational qualifications, for the purpose of promotions is not unreasonable. Justice YV Chandrachud (as he then was), writing for the bench held that the classification had a reasonable nexus with the objective of promotions, which was to achieve administrative efficiency in engineering services.

83. It was also submitted that if persons recruited from different sources are integrated into one class, no further classification can be made within that class. In this case, the direct recruits to the post of Assistant Engineer were required to hold a degree in civil engineering. However, the promotees were drawn from the service which was open to both degree and diploma holders (the latter did not require a civil engineering degree).

Thus, it was argued that a classification based on educational qualifications is a classification which is based on the source of service. This Court held that though persons were appointed from various sources such as promotion and direct recruitment, they came to be integrated into a common class of Assistant Engineers126. However, despite this integration into a class, they could be

validly classified based on educational qualifications because it was not a classification based on the source of service.

84. In this context, this Court cautioned that the judgment ought not to be interpreted as a justification for minute and microcosmic classifications and that the theory of classification could not be evolved through "imperceptible extensions", diluting the very substance of the equality guarantee.127 Distinguishing the judgment in Roshan Lal Tandon v. Union of India128, this Court observed in Triloki Nath (supra) that the issue in the former was whether the yardstick for integration (that is, the source of recruitment) could be used as a yardstick for further integration, which was not the issue in Triloki Nath (supra). Thus, Triloki Nath (supra) is the leading judgment for the proposition that an integrated class can be further classified if there is intelligible differentia and if the yardstick used has a nexus to the object of the provision.129

85. It is not a given that appointees of different sources form an integrated class merely upon their appointment to one post. Even upon integration, the groups retain their separate identity for other purposes. In Katyani Sayal v. Union of India130, this Court held that the Assistant Officers of the Railways recruited through a competitive examination and those recruited on the recommendation of the Union Public Service Commission do not form an integrated homogenous class because the objects of recruitment, the tenure and even the appointing authority are different.

In Col AS Iyer v. V Balasubramanyam131, a Constitution Bench of this Court upheld Survey of India promotion rules that reserved 50% more posts for engineers drawn from the military than for civilian engineers. Justice Krishna Iyer, writing for the Bench, observed that the army engineers never merged into the Survey of India service, along with their civilian counterparts.

86. The judgment of this Court in DS Nakara v. Union of India132 has dwelt on the issue of sub-classification. In Nakara133, a scheme which divided pensioners into two groups based on the date of retirement, to provide pension was challenged. A Constitution Bench held that pensioners formed a class. Notably, this Court, similar to Triloki Nath (supra), did not hold that sub-classification is impermissible merely because the pensioners constitute a class in themselves.

As opposed to the inherent impermissibility of subclassification, the particular basis of classification in that case namely, the date of retirement, was found to be arbitrary considering the objective of granting pensions. It was held that if this basis of classification was accepted as valid, it would create an artificial distinction between two persons who retired within forty-eight hours of each other. Writing for the Bench, Justice D A Desai held that this Court while

deciding if sub-classification is permissible must determine if the class is homogenous for the purpose of the law.134

87. Nakara (supra) goes a step further than Triloki Nath (supra) to state that the scope of sub-classification does not hinge on the yardstick which is used to integrate groups into a class but on the issue of whether the class is homogenous or integrated for the specific objective of the law. When a law integrates a class, such as diploma and degree holders, it integrates the class for the purpose of that specific law and not for all purposes. Thus, a class which is not similarly situated for the purpose of the law can be further classified. The test that the Court must follow to determine the validity of the sub-classification of a class is as follows:

a. Whether the class is "homogenous" or "similarly situated" for the purpose of the specific law;

b. If the answer to 'a' above is in the affirmative, the class cannot be subclassified;

c. If the answer to 'a' above is in the negative, the class can be subclassified upon the fulfilment of the following standard:

i. There must be a yardstick (or intelligible differentia) further classifying the class; and

ii. The yardstick must have a rational nexus with the object of the statute.

c. Micro-classification: the limits of sub-classification

88. The next issue which arises is whether there are any limits to subclassification. In numerous judgments, this Court has held that the State must not micro-classify since such classifications would denude (rather than promote) the guarantee of equality, replacing the doctrine of equality with the doctrine of classification.135 When does sub-classification take the properties of micro-classification?

89. In Nakara (supra), this Court incidentally illustrated what could be termed as a microscopic classification. This Court observed that if each pensioner were to be classified based on their individual dates of retirement or the month of their retirement, it would be too microscopic a classification. Notably, it was not the State's argument that every individual pensioner retiring on a particular date was a class unto themselves or that the date of retirement was the basis of classification. Rather, the argument was that those retiring before the designated date were a class, distinct from those retiring after that date:

"9. Is this class of pensioners further divisible for the purpose of "entitlement" and "payment" of pension into those who retired by certain date and those who retired after that date? If date of retirement can be accepted as a valid criterion for classification, on retirement each individual government servant would form a class by himself because the date of retirement of each is correlated to his birth date and on attaining a certain age he had to retire.

It is only after the recommendations of the Third Central Pay Commission were accepted by the Government of India that the retirement dates have been specified to be 12 in number being last day of each month in which the birth date of the individual government servant happens to fall. In other words, all government servants who retire correlated to birth date on attaining the age of superannuation in a given month shall not retire on that date but shall retire on the last day of the month. Now, if date of retirement is a valid criterion for classification, those who retire at the end of every month shall form a class by themselves. This is too microscopic a classification to be upheld for any valid purpose. Is it permissible or is it violative of Article 14?"

(emphasis supplied)

90. All persons are unequal in one or the other aspect. In a given situation, even a single individual may be treated as a class by themselves.136 In that case, it is particularly important that laws do not micro-classify. The question of whether the classification amounts to a micro-classification which is impermissible under Article 14 would depend on the facts of each case. However, the two crucial components of the standard of intelligible differentia prescribe the limits of sub-classification. The two components are (a) the purpose; and (b) the rational basis (or principle) for the differentiation. This Court has previously held that the purpose must be independent of the differentiation.137

The Court grants the State sufficient latitude in identifying the purpose, including the degrees of harm.138 The same degree of latitude is not accorded to the principle underlying the differentiation. It is not sufficient if the principle underlying the classification is relevant or shares a nexus to the purpose. The principle underlying the classification must be reasonable and rational.139 In Nakara (supra), this Court questioned the rationale of classifying the beneficiary class based on the date of retirement. In a concurring opinion in Navtej Singh Johar v. Union of India140, Justice Indu Malhotra held that a principle of differentiation based on "core and immutable" characteristics is not rational.

For example, if the law stipulates that the loan of farmers from one specific village in a State will be fully waived, it must prove through the submission of cogent material that there is a rational principle distinguishing one village from

other villages in the State. In this context, the State will for example have to prove that location of the land is a rational principle of categorization and then subsequently prove that the village is not similarly situated for the purpose of the law. With this background, we proceed to analyze the specific issue of whether the sub-classification within the Scheduled Castes is constitutionally permissible.

iii. Sub-classification in reservations: tracing the journey through Balaji, Vasanth Kumar and Indra Sawhney

91. The issue of whether the State can further sub-classify within a class for the purpose of reservation first arose in MR Balaji (supra). The State of Mysore appointed the Mysore Backward Class Committee to advise it on the adoption of criteria for the determination of the socially and educationally backward class. Based on the report of the Committee, the State recommended the sub-classification of the Backward Class into the Backward Class and More Backward Class based on educational backwardness141. In MR Balaji (supra) the Constitution Bench held the sub-classification of the backward class to be unconstitutional because it:

(a) was solely based on caste142; and

(b) devised measures for the benefit of "all" classes of citizens who are less advanced when compared to the most advanced class in the State which is not the scope of Article 15(4)143:

"29. In this connection, it is necessary to add that the sub-classification made by the order between Backward Classes and More Backward Classes does not appear to the justified under Article 15(4). Article 15(4) authorises special provision being made for the really backward classes. In introducing two categories of Backward Classes what the impugned order, in substance purports to do is to devise measures for the benefit of all the classes of citizens who are less advanced, compared to the most advanced classes in the State, and that, in our opinion, is not the scope of Article 15(4). The result of the method adopted by the impugned order is that nearly 90% of the population of the State is treated as backward, and that illustrates how the order in fact divides the population of the State into most advanced and the rest, and puts the latter into two categories of Backward and More Backward. The classification of the two categories, therefore, is not warranted by Article 15(4)."

92. This view was critiqued by Justice O Chinnappa Reddy in Vasanth Kumar (supra). In Vasanth Kumar (supra), this Court was invited to deliver its opinion on reservations which may serve as a guideline to the Commission that the

Government of Karnataka proposed to appoint for examining the question of reservation in education and employment sectors.

In his concurring opinion, Justice Chinnappa Reddy observed that as a matter of principle, sub-classification within a reserved class is valid provided that both the classes are far behind the advanced class and that one of the classes is ahead of the most backward class.144 The learned Judge observed that the validity of the classification of the Backward Class into Backward and More Backward Classes may be open to adjudication on the facts of each case.

93. In Indra Sawhney (supra), an Office Memorandum which introduced a criterion giving preference for the poorer of the Socially and Educationally Backward Class was under challenge. The learned Judges diverged on the interpretation of the phrase "poorer". Justice Pandian construed the phrase "poorer" in the Memorandum to mean economically weaker sections. Justice B P Jeevan Reddy, authoring the plurality opinion, construed the phrase "poorer" not in the economic sense but in the socio-economic sense.

The learned Judges adopted a different approach while dealing with the issue of sub-classification owing to this divergence. Justice Pandian observed that preference for a section of the socially and educationally backward section would eliminate or exclude the other section of the class.145 This observation of the learned Judge must be read along with a previous observation that the socially and educationally backward class shares a common characteristic of social backwardness which cannot then be further divided solely based on economic criteria.

Thus, the learned Judge did not find the sub-classification of the socially and educationally backward classes unconstitutional per se but the sub-classification of the class based on economic criteria which is alien to the determination of the beneficiary class. Another reason for the decision of the learned Judge was the model of sub-classification which was prescribed by the Office Memorandum. The Office Memorandum provided that the poorer section would have preference over all the seats reserved for a class, leaving the possibility of excluding the rest open.

94. Justice Jeevan Reddy observed that there is no constitutional or legal bar in classifying the backward class into backward and most backward class.146 The learned Judge held that sub-classification is valid for two reasons. First, there may be inter-se backwardness within same class and in such a situation, sub-classification ensures that the more backward of the class can secure the benefit.147 Second, the constitutional scheme expressly provides for sub-classification. Article 16(4) only identifies the beneficiary class as the "backward

class" unlike Article 15(4) which expressly identifies the socially and educationally backward class, the Scheduled Castes and the Scheduled Tribes. The relevant observation is extracted below:

"803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country.

What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

95. The learned Judge also construed the phrase "preference" in the Office Memorandum to mean "equitable apportionment" such that preference does not exclude the benefit to the less backward of the socially and educationally backward class.

96. With respect to the sub-classification of the backward classes, Justice Sawant observed that both the sub-categories must be substantially (and not comparatively) backward when compared to the forward class and there must be a substantial difference in backwardness between the sub-categories themselves. The learned Judge notes that if these two criteria are fulfilled, then it is not only advisable but imperative to sub-classify. Echoing the opinion of Justice Jeevan Reddy, Justice Sawant observed that sub-classification would lead to the exclusion of classes if the preference model is followed instead of the model whereby a percentage of seats are allotted to the most backward.148

97. The observations in Indra Sawhney (supra), elucidate the following three principles with respect to sub-classification:

a. Sub-categorization within a class is a constitutional requirement to secure substantive equality in the event that there is a distinction between two sections of a class;

b. Sub-classification must not lead to the exclusion of one of the categories in the class. A model that provides sufficient opportunities to all categories of the class must be adopted; and

c. Sub-classification among a class must be on a reasonable basis. Justice Sawant held that the distinction between the categories must be substantial. Justice Jeevan Reddy held that the subcategorization must be reasonable.

a. Indra Sawhney did not exclude sub-classification within the Scheduled Castes

98. In Chinnaiah (supra), this Court observed that the principles in Indra Sawhney (supra) on sub-classification of the Other Backward Class will not apply to the Scheduled Castes because the judgment specifically observed that it is only ruling on the sub-classification of the Other Backward Class and not the Scheduled Castes and the Scheduled Tribes.149 At two places in Indra Sawhney (supra), Justice Jeevan Reddy limited the observations to the Other Backward Classes and did not extend them to the Scheduled Castes and Scheduled Tribes. While dealing with the identification of the backward class of citizens under Article 16(4), the learned judge made the following observations:150

"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."

99. These observations were made in the specific context of the recognition of the Scheduled Castes and the Scheduled Tribes as a separate class of beneficiaries under Article 15(5) and their absence in Article 16(4). Justice Jeevan Reddy noted that it is admitted that the Backward Class in Article 16(4) includes the Scheduled Castes and Scheduled Tribes even though the provision does not expressly state so.

100. While discussing the issue of the exclusion of the creamy layer in the identification of the beneficiary class under Article 16(4), Justice Jeevan Reddy noted that the discussion is confined to the Other Backward Class and does not have any relevance to the Scheduled Castes and the Scheduled Tribes.151 This observation must also be understood in the context in which it was made. While discussing the necessity of the exclusion of the creamy layer of the Other Backward Class for the purposes of reservation, Justice Reddy observed that social backwardness is the connecting link in a class identified under Article 16(4). The learned Judge remarked that the class does not remain a homogenous class if some of the members of the class are socially forward.

This Court noted that economic advancement can be a relevant criterion to exclude the creamy layer provided that the economic advancement is so high as to cause social advancement. The observation that this does not apply to the

Scheduled Castes and Scheduled Tribes was made because they suffer from a more egregious form of social backwardness when compared to the Other Backward Class. The Court did not deem it necessary to decide the issue of whether the financial advancement of the members of the Scheduled Castes and Scheduled Tribes would cause social advancement since the issue in Indra Sawhney (supra) was only with respect to reservation for the Other Backward Class.

101. The question then is whether there is any reason to not extend the principle of sub-classification to the Scheduled Castes when a nine-Judge Bench of this Court has already extended the principle to the beneficiary classes under Articles 15 and 16. It is true that the social backwardness of the Other Backward Class is not comparable to that of the Scheduled Castes since they are more socially advanced than the Scheduled Castes.

That is precisely why the Constitution groups them into two separate classes in Article 15(4). It is also true that the castes included within the class of Other Backward Class do not suffer from a single form of social backwardness. The castes which are included within the Other Backward Class suffer from a certain degree of comparable backwardness but the form of social backwardness amongst them may vary. As opposed to this position, the Scheduled Castes suffer from a common form of social backwardness through untouchability.

102. It is one thing to argue that the Scheduled Castes cannot be sub-categorized on account of their limited heterogeneity and common identity as opposed to the Other Backward Class. But it is another issue to completely disregard the application of the principle of sub-classification to the Scheduled Castes on the ground that Indra Sawhney (supra) limited its application to the Other Backward Class. We do not find that the purport of the observations in Indra Sawhney (supra) on sub-classification was to limit it to the Other Backward Classes, to the exclusion of the Scheduled Castes.

The principle of subclassification was given judicial assent in Indra Sawhney (supra) to ensure that the principle of substantive equality is fulfilled. The principle of subclassification will be applicable to the Scheduled Castes if the social positions of the constituents among the castes/groups is not comparable. In the subsequent section, we will analyze if Article 341 through the operation of the deeming fiction creates an integrated homogenous class that cannot be further classified.

iv. The import of the deeming fiction in Article 341

103. Article 366(24) defines the Scheduled Castes as the castes, groups, races or tribes which are deemed to be Scheduled Castes under Article 341(1). The provision does not offer any assistance on the criteria which must be satisfied by the castes, groups, races or tribes for them to be notified as a Scheduled Caste under Article 341. The definition clause only refers to the deeming fiction created by Article 341. Article 341(1) also does not lay down the criteria for inclusion of a caste as a Scheduled Caste.

Sub-clause (1) of Article 341 refers to the power of the President to specify the castes, races, tribes or parts of or groups within these three groups. Specified as such, they shall be deemed to be Scheduled Castes for the purpose of the Constitution in relation to the state. The respondents submitted that the "deeming fiction" creates a homogenous integrated class that cannot be further classified. The tenability of the submission needs to be analyzed. a. Chinnaiah on the deeming fiction in Article 341

104. In his opinion in Chinnaiah (supra), Justice Santosh Hegde relied on NM Thomas (supra) to hold that the Scheduled Castes, though drawn from various castes, races and tribes, attain a new status by the Presidential notification. Justice Sema noted that once notified through a Presidential Notification under Article 341 (1), Scheduled Castes attain a homogenous status.

The learned Judge then held that the objective of the notification was to afford special protection to the Scheduled Castes as a homogenous group, which cannot be regrouped in the manner in which it was done by the Andhra Pradesh Act. Justice Sinha noted that Scheduled Castes constitute a class of persons entitled to special protection and could not be discriminated inter se, as all of them satisfied the test of abysmal backwardness and inadequate representation. He specifically observed that the Scheduled Castes are a "single integrated class of most backward citizens".

105. One of the issues in Jarnail Singh (supra) was whether the judgment in Nagaraj (supra) was correct to apply the principle of the exclusion of the creamy layer to the Scheduled Castes and Scheduled Tribes. It was argued before the Court in Jarnail Singh (supra) that the application of the creamy layer principle to the Scheduled Castes and Scheduled Tribes would have the effect of amending the List, which is not permissible under Articles 341(2) and 342(2). The Constitution Bench held that the exclusion of the creamy layer from the Scheduled Castes and the Scheduled Tribes is justified under the equality code because the members of the creamy layer no longer require reservation since they have moved "forward so that they may march hand in hand with other citizens of India on an equal basis."152

Writing for the Bench, Justice Nariman observed that the application of the principle of creamy layer to reservations for the Scheduled Castes and the Scheduled Tribes per se will not have the effect of tinkering with the Lists notified under Articles 341 and 342 because a caste as a whole is not excluded from the List but only persons who have overcome backwardness are excluded.153

106. Thus, it needs to be determined if the interpretation of the scope of Article 341 in Chinnaiah (supra) is correct. We must decide, first, whether Article 341 creates a deeming fiction. Second, if it does, the purpose and effect of the legal fiction created under Article 341 must be analyzed. That is, we must decide whether the legal fiction creates a homogenous class which cannot be further classified. Third, the scope of the prohibition under Article 341 (2) must be determined in relation to the effect of the legal fiction created by Article 341(1).

b. Scope of deeming fiction

107. The use of the phrase "deemed to be" is not conclusive of a legal fiction.154 The word deemed is used for many purposes, such as for the artificial construction of a word and to clarify uncertain constructions, or plainly just to mean "regarded as being".155 A legal fiction is essentially a presumption that certain facts which do not exist in fact, will be treated as real and existing for the purpose of law. Courts have evolved two principles on the operation of legal fictions. The first principle is that a legal fiction must be confined to its 'legitimate field', for the specific purpose for which it was created.156 In Bengal Immunity Company Ltd v. State of Bihar157, a seven-Judge Bench of this Court held that legal fictions are created only for a certain purpose and they must be confined only to that "legitimate field".

In its decision in that case, this Court held that the deeming fiction in the Explanation to Article 286(1)(a), before the Constitution (Sixth Amendment) Act 1956, (by which a sale was deemed to have taken place in the State where the goods were delivered because of the direct sale) only applied to Article 286(1)(a) and not to Article 286(2). This Court held that the scope of Article 286(1)(a) which barred a State from imposing tax on sales outside the State, was different from the scope of Article 286 (2) which stated that unless otherwise provided by law, State laws could not tax a sale or purchase which took place in the course of inter-state trade or commerce.158

108. The second principle is that the scope of the legal fiction must be extended to the consequences which "logically" flow from its creation. The opinion of Lord Asquith in East End Dwelling Co. Ltd. v. Finsbury Borough Council159 is the leading case for this proposition. The Law Lord observed that the effect of a

legal fiction must not be limited to treating facts that do not exist as real but must be expanded to understand the effects and consequences that flow from the legal fiction.160

However, a law creating a deeming fiction cannot create presumptions in favor of a legal consequence but only presumptions about facts from which certain legal consequences may follow. In Delhi Cloth & General Mills Co. Ltd v. State of Rajasthan161, the constitutional validity of the Kota Municipal Limits (Continued Existence) Validating Act of 1975 was challenged. The Municipalities Act prescribed a mandatory procedure for delimitation of municipalities including a public notice inviting objections.

This mandatory procedure was flouted in the inclusion and exclusion of certain villages to and from the Kota municipality in the State. The Validating Act provided that notwithstanding the mandatory provisions of the Municipalities Act, those villages would be deemed to have always continued to exist as they do within the limits of Kota municipality. The Court held that the Validating Act required the deeming of a legal position rather than the deeming of a fact from which such legal consequence would follow. The Bench found that this was not a permissible creation of a fiction. Article 341 must be interpreted based on the above principles.

c. Article 341 does not create a deeming fiction

109. In Punit Rai v. Dinesh Chaudhary162, the issue before a three-Judge Bench of this Court was whether the Respondent, who contested an election for a seat reserved for the Scheduled Castes in the Legislative Assembly, belonged to the Scheduled Caste community. Justice Sinha, writing the concurring opinion made a passing observation that Article 341(1) creates a deeming fiction.163 However, this observation does not form the ratio decidendi of the judgment. Thus, it needs to be analyzed if Article 341(1) creates a deeming fiction.

110. Article 341(1) consists of three parts. The first part lays down the procedure for notifying a caste as a Scheduled Caste. The President, in consultation with the Governor (if the notification is with respect to a State) is empowered to specify castes which shall be Scheduled Castes. In the second part, a provision similar to Article 366(26), provides some clarity on who could be notified as a Scheduled Caste: a caste, race, or tribe or parts of or groups within the caste, race or tribe. The third part, with the use of the words "for the purposes of this Constitution be deemed to be Scheduled Castes" includes a substantive provision.

In the absence of the word "deemed", the provision would have solely been a procedural clause, empowering the President to notify the Scheduled Castes. The

use of the word "deemed" ensures that the castes or groups of castes shall be regarded as Scheduled Castes by the very act of notifying them. Thus, the inclusion of the word 'deemed' in Articles 341(2) and 342(2) does not create a legal fiction since it does not provide any artificial construction. To that extent, the observations of the three-Judge Bench of this Court in Punit Rai (supra) that Article 341(2) creates a deeming fiction are erroneous.

111. In Milind (supra), a Constitution Bench of this Court observed that the purpose of Article 341(1) is to recognize and identify the Scheduled Castes for the purpose of the Constitution and to prevent disputes as to who would constitute a Scheduled Caste for the purpose of the benefits under the Constitution.164 The Indian social order consists of castes or groups which suffer from varying degrees of social backwardness, ranging from untouchability to occupational segregation.

These castes are grouped into different classes by the Constitution, such as the Scheduled Castes or the Scheduled Tribes, based on the degree of marginalization for the purpose of conferring benefits through affirmative action. A caste only becomes a Scheduled Caste or a Scheduled Tribe or a socially and educationally backward caste when the President issues a notification to that effect in the exercise of the power under Articles 341, 342 and 342A respectively. Thus, it could be argued that the word "deemed" in the provision creates a legal fiction for creating a constitutional identity for the castes which are included in the lists.

112. Even if it is accepted that the deeming fiction is used for the creation of a constitutional identity, the fiction can neither be extended to other purposes nor can it create legal consequences that do not logically flow from the fiction. Accepting the respondents' argument that once included in the List, communities specified in the List of Scheduled Castes assume homogeneity would be akin to extending the legal fiction to a purpose that was not envisaged. The purpose of the deeming fiction is 'identification' of castes which are the Scheduled Castes.

The logical corollary of the identification of castes or groups as Scheduled Castes is not that this creates a homogenous unit. The inclusion of certain castes within the Scheduled Caste category is only to demarcate them from other castes which are not included in the category. The inclusion does not automatically lead to the formation of a uniform and internally homogenous class which cannot be further classified. Article 341 creates a legal fiction for the limited purpose of identification of Scheduled Castes by distinguishing them from other groups.

It offers no guidance on how the Scheduled Castes fare among themselves or on heterogeneity among the Scheduled Castes for the purpose of the Constitution.

The legal fiction which assigns an identity to the Scheduled Castes, separate from other categories cannot be stretched to draw inferences about the existence or non-existence of internal differences among the Scheduled Castes. The only logical consequence is that each of the groups that is included in the list will receive the benefits that the Constitution provides to the Scheduled Castes as a class.

113. In Chinnaiah (supra), Justice Santosh Hegde observed that the Castes notified by the President in the exercise of power under Article 341 form a class in themselves. For this purpose, the learned Judge relied on the following observations of the Constitution Bench in NM Thomas (supra):

a. Justice Mathew observed that the members of the Scheduled Castes attain a new status by the Presidential Notification;165

b. Justice Krishna Iyer observed that the Scheduled Castes are not castes within 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;166 and

c. Justice Fazal Ali observed that the Scheduled Castes and the Scheduled Tribes have been given a special status in the Constitution and they constitute a class by themselves.167

114. It is necessary to understand the context of the case to understand the import of the above observations. In NM Thomas (supra), rules providing concessions to the members of the Scheduled Castes for qualifying at the entrance examination were challenged. One of the issues before the Court was whether the concession to the members of the Scheduled Castes violated Article 16(2) since it discriminates solely on the ground of "caste". To overcome the embargo placed by Article 16(2), the learned Judges observed that provision for affirmative action is made in favour of the Scheduled Castes, which once notified by the President in exercise of the power under Article 341 are not a "caste" but a class.

The class that is constituted by the Presidential notification as the Scheduled Castes consists of numerous castes, thereby forming a class. The observations in NM Thomas (supra) do not go further to state that it is a homogenous class that cannot be classified further. In fact, Justice Mathew observed in the very next paragraph that there can be further classification within a class if there is an intelligible differentia separating a group within a class from another group.168

Additionally, the approach adopted in NM Thomas (supra) by this Court that the Scheduled Castes are a class because they comprise of a collection of castes must be read in the context of the nine-Judge Bench decision in Indra Sawhney

(supra), where this Court held that caste is itself a class. Therefore, we are of the view that the inference drawn by Justice Hegde in Chinnaiah (supra) that the Scheduled Castes are a homogenous class based on the above observations in NM Thomas (supra) is erroneous. d. Article 341(1) read with Article 341(2) only proscribes exclusion from and inclusion in the Scheduled Castes List.

115. In Chinnaiah (supra), this Court held that sub-classification amounted to tinkering with the Presidential list by the State legislature, and was therefore, violative of Article 341(2) which exclusively vests power in Parliament. Article 341(2) prescribes the only manner in which the Presidential Notification under Article 341(1) may be altered. The provision stipulates that castes, races or tribes, or parts of or groups within them once notified by the President under Article 341(1) may be included in or excluded from the List only by Parliament. The latter half of the clause states by way of abundant caution that 'save as aforesaid', the notification shall not be varied. The provision reads as follows:

"(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."

(emphasis supplied)

116. Dr B R Ambedkar, while proposing the inclusion of Articles 300A and 300B of the Draft Constitution (which correspond to Articles 341 and 342 of the Constitution), indicated that once notified, any elimination from the list or an addition to the list was to be made by Parliament and not by the President. This limitation, he noted was to eliminate "political factors" from disturbing the list:

"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."169

117. Unless amended in the manner prescribed under Article 341(2), the Presidential List notified under Article 341(1) is conclusive of which community is a Scheduled Caste and must be taken as it is. Article 341(2) prescribes the scope of permissible changes to the List published under Article 341(1) and exclusively vests the power to vary these lists in Parliament.

118. The prohibitions in Articles 341 (1) and 342 (2) are two-fold : first, specification as a Scheduled Caste is circumscribed by the territorial limits of the State or the region, specific to which a particular group has been notified170. For instance, Entry 23 of Part I of the Scheduled Castes Order for the State of Andhra Pradesh enumerates: "Godagalli, Godagula (in the districts of Srikakulam, Vizianagaram and Vishakhapatanam)". Hence, the enlisted communities (Godagalli and Godagula) are treated as a Scheduled Caste for the districts named in the entry and not for the entire State.

In Marri Chandra Shekar Rao v. Dean, Seth GS Medical College171, a Constitution Bench of this Court considered whether a member of the Gouda community, recognized as a Scheduled Tribe in Andhra Pradesh, could seek admission to a seat reserved for the Scheduled Tribes in Maharashtra. Answering it in the negative, this Court observed that since the social conditions of caste groups vary across the country, a caste or tribe could not be generalized as a Scheduled Caste or Scheduled Tribe for the whole country. It held that the expression "in relation to that State" in Articles 341 (1) and 342(1) could not be rendered redundant by treating a caste specified as a Scheduled Caste in one State to be entitled to the benefits for Scheduled Castes in another State, where it was not so specified.172

In Bir Singh v. Delhi Jal Board173, one of the issues before this Court was whether the power of the State to make provisions for affirmative action for the Scheduled Castes and Scheduled Tribes under Article 16(4) is impacted by the power of the President under Articles 341(1) and 342(1) of the Constitution. The Constitution Bench held that a State in exercise of its power under Article 16(4), cannot extend the benefits accorded to the Scheduled Castes to a caste which is not enumerated in the Presidential list notified under Article 341(1). The Court held that the enabling provision under Article 16(4) must be harmoniously read with Articles 341 and 342.

Therefore, if a statute extends the policy of affirmative action to groups not enumerated specifically with respect to that State/Union Territory, it would circumvent the mandate of Article 341(2) and would be an impermissible expansion of the List, contrary to the mandate of Article 341(1).174 Thus, this Court held that the benefit of reservation cannot be extended to a caste which is not enumerated as a Scheduled Caste in that State, though it finds a place in the Presidential List with respect to another State.

119. Second, Article 341(2) provides that only Parliament can include in or exclude from the List any caste, tribe, race or their parts or groups. The Presidential notification cannot be varied by any subsequent notification, other than by an inclusion or exclusion by Parliament. By completely vesting in

Parliament the power to include or exclude from the Presidential List, Article 341(2) correspondingly limits the power of the President (acting on the aid and advice of the Council of Ministers at the Centre) and the Governor (acting on the aid and advice of the State Government when consulted) to include or exclude castes or sub-castes from the List.

120. In Chinnaiah (supra), this Court interpreted Article 341(2) as a limit on the power of the President to "tinker" with the list.175 Article 341(2) consists of two parts. First, it grants only Parliament the power to "include or exclude" any caste or group, or a part of the caste or group, and second, "save as aforesaid", a notification issued by the President under Article 341(1) shall not be varied by any other subsequent notification. It is important to understand the purport of the second part of the provision to understand the scope of Article 342(2).

121. The second part of Article 341(2) must be read in the context of Article 367. Article 367 provides that unless the context otherwise requires, the General Clauses Act 1897 shall apply for the interpretation of the Constitution as it applies to the interpretation of an Act of the Legislature of the Dominion of India. Section 21 of the General Clauses Act 1897 states that the power to issue notifications includes the power to add to, amend, vary or rescind the notification.176

By Article 341(1) read with Article 367 and Section 21 of the General Clauses Act 1897, the President would have the power to add to, amend, vary or rescind the notification. The first part of Article 341(2) removes the power of the President to include in and exclude from the List and places it in the domain of Parliament. This power is traceable to the words "add to" or "amend" in Section 21 of the General Clauses Act. The second part of Article 341(2) ensures that the President does not have any residual power to "vary" the List.

The phrase "vary" in common parlance has a wider meaning than exclusion or inclusion. It includes altering the list, even by partial change.177 However, the phrase "vary" in Article 341(2) takes the meaning of inclusion in and exclusion from the List, and not the other way around. This is clear with the use of the phrase "save as aforesaid" in the second part of the provision. Thus, by Article 341(2), the President does not have the power to vary the List notified under Article 341(1) by inclusion in and exclusion from it.

122. The power of Parliament to vary the list includes not merely the power to exclude or include "any caste, race or tribe" but also the power to exclude or include "parts of or groups within any caste, race or tribe". In Milind (supra), the issue before this Court was whether an entry titled 'Halba/Halbi' in the Scheduled

Tribe Order relating to the State of Maharashtra could be read to include the 'Halba-Koshti' tribe.

This Court held that the Presidential list is to be read as it is and no evidence could be allowed to establish that an entry in the Scheduled Caste or Scheduled Tribe list included a particular group that was not included specifically in the List. The Court held that any other interpretation would infringe upon the power accorded solely to Parliament by Article 341(2). Justice Shivraj V Patil, writing for the Bench, held that unless a tribe is specified expressly in the List under Article 342, which is pari materia to Article 341, no inquiry could be held or evidence led to establish that such tribe, or any part thereof, is included within the meaning of an entry included in the Presidential Order.178

This Court underscored that the power of the States is limited to making recommendations at the initial stage of consultation, prior to the notification of the Presidential List under Article 341(1). This Court observed that the Constitution vests the power to make any further changes to the List in Parliament to prevent alterations to the List due to political pressure.179

123. The prohibition under Article 341(2) entails that once a particular caste, race, tribe or a part or group of it is specified in the Presidential List under Article 341(1), the list shall be read as it is with no additions or deletions. The benefit of the special provisions shall not be given to any caste or sub-caste not included in the List with respect to that State. Article 341(2) uses the words "include in" or "exclude from" and "shall not be varied". These terms contained in the provision are unambiguous.

An inclusion would occur if the State were to enact a law that extends the benefits meant for Scheduled Castes in that State to a community that is not enumerated as a Scheduled Caste for that State. The only mechanism open to the State, in case it regards a community fit for inclusion in the List notified for that State, is to make a proposal to that effect to the central authorities. After due inquiry, the community may be added to the List by Parliament, subject to its satisfaction that such a modification is required. Until then, the State has to apply the Scheduled Castes List as it is.180

Thus, to summarize, Article 341(2) bars the State Legislature from removing or adding castes from and to the List respectively. Sub-classification within the Scheduled Castes for the purposes of affirmative action, including reservation does not include or exclude any caste or group from the List. Section D(iii) of this judgment deals with the different models of sub-classification to determine if the operation of reservation upon subclassification in-effect leads to exclusion.

v. Historical and empirical evidence of inter-se backwardness within the Scheduled Castes

124. Having held that Article 341 does not create an integrated homogenous class, we will next decide whether there is an intelligible differentia to group the castes within the Scheduled Castes. For this, it needs to be analyzed if the Scheduled Castes are a heterogenous class. The respondents submitted that there cannot be any sub-categorization of the Scheduled Castes because all the castes face the same form of social backwardness based on untouchability. The petitioners, on the other hand, submitted that there exists inter-se backwardness within the Scheduled Castes.

125. The Constitution of India does not provide a definition of the Scheduled Castes. Article 366(24) states that castes/groups notified under Article 341 shall be Scheduled Castes. However, neither Article 341 nor Article 366(24) prescribes the criteria for their identification. The President issued the Constitution (Scheduled Castes) Order 1950 which nearly corresponds to the Government of India (Scheduled Castes) Order 1936 notified under the Government of India Act 1935.181 It is important to identify the criteria for inclusion of groups or castes in the Scheduled Castes Order 1936.

126. The Government of India Act 1935 did not define the criteria for the identification of Scheduled Castes. Clause 26(1) of the First Schedule to it defined the Scheduled Castes as castes that corresponded to the classes of persons known as the "depressed classes":

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

(emphasis supplied)

127. It is necessary that we briefly refer to the historical material on how the depressed classes were identified to analyze if the Scheduled Castes are a heterogenous class and whether there is an intelligible differentia distinguishing the sub-categories within the Scheduled Castes.

a. Identification of the depressed classes

128. In 1916, the definition of the depressed classes was raised in the Indian Legislative Council. It was suggested during the discussion that the expression should include criminal and wandering tribes, aboriginal tribes and untouchables.182

In 1917, Sir Henry Sharp, the Education Commissioner, prepared a list of depressed classes which included the aboriginal or hill tribes, depressed classes and criminal tribes. While preparing the list, Sir Henry stated that depressed classes "includes communities which though not absolutely outside the pale of caste, are backward and educationally poor and despised and also certain classes of Muslims. Some have interpreted it as simply educationally backward".183

129. In 1919, the Southborough Franchise Committee adopted the test of untouchability to define the depressed class. The Indian Franchise Committee 1932, inter alia, was appointed to ascertain if a separate electorate must be provided to the depressed classes. The Committee also had to arrive at a definition of "depressed classes". The Committee interpreted the phrase "depressed classes" as the 'untouchability class', that is, the class whose touch or approach is deemed to cause pollution as it exists in the United Provinces.184

The report stated that the depressed classes "should not include primitive or aboriginal tribes nor should it include those Hindus who are only economically poor and in other ways backward but are not regarded as untouchables."185 The Committee accepted the tests of untouchability formulated by Hutton186. Hutton had submitted a Census Report in 1931 by which depressed castes were defined as castes, contact with whom requires purification. The instruction which was given to determine if the caste is an untouchable caste was as follows:

"I have explained depressed castes as castes, contact with whom entails purification on the part of high caste Hindus. It is not intended that the term should have any reference to occupation as such but to those castes which by reason of their traditional position in Hindu society are denied access to temples, for instance, or have to use separate wells or are not allowed to sit inside a school but have to remain outside or which suffer similar social disabilities. These disabilities vary in different parts of India being much more severe in the south of India than elsewhere."187

130. The following tests were directed to be considered to determine if the caste faces untouchability:

a. Whether the caste or class in question can be served by clean Brahmans;

b. Whether the caste or class in question can be served by the barbers, water-carriers, tailors, etc., who serve the caste Hindus;

c. Whether the caste in question pollutes a high caste Hindu by contact or by proximity;

d. Whether the caste or class in question is one from whose hands a caste Hindu can take water;

e. Whether the caste or class in question is debarred from using public conveniences such as, roads, ferries, wells, or schools;

f. Whether the caste or class in question is debarred from the use of Hindu temples;

g. Whether in ordinary social intercourse, a well-educated member of a caste or class in question will be treated as an equal by high caste men of the same educational qualifications;

h. Whether the caste or class in question is merely depressed on account of its own ignorance, illiteracy or poverty and but for that would be subject to no social disability; and i. Whether it is depressed on account of the occupation followed and whether but for that occupation it would be subject to no social disability.

131. Though the test that was proposed to be used was that of untouchability, the criteria above and in particular, criteria (f), (g) and (h) indicate that other forms of social disability which cannot be strictly confined to untouchability were also considered. The report recognized that there may be a variance in the degree of restrictions based on the degree of untouchability. For example, a few castes may have been denied entry to a temple as compared to castes which were denied entry to the inner sanctuary of the temple.188

132. The Note submitted by Assam casts light upon the heterogeneity amongst the castes which face untouchability. The Note states that untouchability as it existed in Madras, where an untouchable's touch necessitated immediate purification, did not exist in Assam. Mr Maullan, the Census Superintendent in Assam defined the depressed class (which he termed as "exterior castes") as castes whose water is not acceptable and in addition are so deficient in education, wealth, influence, or for some reason connected with their traditional occupations which prevents them from acquiring any further social privileges. The Superintendent further noted that there are influential and wealthy castes even among the jal-achals (that is, those whose water was not acceptable). The note also distinguished the untouchability which certain castes faced from other untouchable castes:189

"The exterior castes themselves are, however, guilty of similar treatment to each other and an exterior caste which considers itself to be on a higher social level than another exterior caste adopts exactly the same attitude as the higher castes do towards the exterior castes. A case which recently happened in Sunamganj illustrates this point. The local ferryman there (a patni by caste) was prosecuted

for refusing to row a Muchi and that it has always been the practice, if a Muchi wanted to cross the river, for the paddle to be given to him so that he could row himself across."

133. The Note of the Superintendent of Assam on Mahars further elucidated the point that there was no "uniformity" in the untouchability faced by members of various castes. The Note explained that Mahars were included in the list of depressed class though they were jal-chal in the limited sense in as much as a man of the forward caste "can smoke huka filled with water by a Mahar". They were included because they were untouchables with respect to everything but for smoking requirements and they were a socially and educationally backward community:190

"I have made close and careful enquiries and there is a general consensus of opinion that the Mahars are not jal-chal and are a depressed class. The story of Raja Subid Narayan made them jal-chal for smoking requirements only, seems to be true. If the Mahars are at all jal-chal, they are jalchal only in the sense that a man of the higher caste can smoke a huka filled with water by a Mahara. There is not a single graduate among the Maharas in this subdivision and not even a single matriculate can be found. The deputy Inspector of Schools reports that the only educated Maharas he has met in the whole subdivision are three persons working as Vernacular teachers in Primary and Middle English Schools. So the Maharas are depressed both socially and educationally."

134. The list prepared by Madras noted that castes to whom the "technical stigma of untouchability" does not apply, had been excluded from the list. This approach when juxtaposed with the approach adopted by Assam, varies with respect to the stringency of the untouchability standard employed.191 It is evident that there is no one "form" of untouchability. Untouchability, like other forms of social disability differs in degree and severity.

135. Based on the tests for identifying untouchability laid down by Hutton, the Provincial Committee prepared the provincial estimates of depressed classes. In Madras, Bombay and the Central Province, there was a general agreement between the Provincial Committees and the Local Governments on the estimate of the depressed classes because the distinction between the depressed and other classes of the Hindu Communities was clearly defined. On the other hand, the States of Bihar, Orissa and Assam while stipulating the castes which faced untouchability observed that untouchability in the States did not exist in the same form as it existed in South India.

136. Mr SB Rambe, Mr CY Chintamani and Mr RR Bakhale submitted a note of dissent, inter alia, on the depressed classes in which they claim that the tests for

untouchability were not applied with uniformity.192 They observed that untouchability only existed in Madras, Bombay and the Central Province. They claimed that in other states, untouchability was not an adjunct of a person but the occupation that they pursued and thus, those castes should not have been included in the list of the depressed classes.193 It is here that the Note submitted by Dr B R Ambedkar on depressed classes is of particular importance for it encapsulates the heterogeneity within the castes which suffer untouchability.

137. Dr B R Ambedkar highlighted that applying a uniform criterion to identify the depressed class would be inappropriate. Dr Ambedkar observed that the differences in the tests of untouchability do not indicate differences in the conditions of the untouchables because the notion underlying both the standards would be the same, that it is below the dignity to interact or touch persons of certain castes. He observed that the difference in the rigidity with which untouchability is practiced does not eliminate the notion of such a practice.194

This indicates that the depressed classes were identified based on the notion of untouchability and not in the literal sense of the term. The effect of adopting the notional and not the literal test is that the social condition of all the castes included within the depressed classes is not uniform. Though the Government of India (Scheduled Castes) Order 1936 did not exactly correspond to the List published by Hutton or the Provincial Franchise Committees, the inclusions and exclusions to the list broadly matched.195

138. The heterogeneity within the class is also evident from the Constitution (Scheduled Castes) Order 1950 where certain castes are notified as the Scheduled Castes in specific localities. For example, in the State of Madhya Pradesh, of the twenty-five castes, only nine are Scheduled Castes throughout the State. The criteria used to identify the Scheduled Castes itself indicates that the endeavor was not to include all castes that suffered from identical forms of untouchability. Thus, the Scheduled Castes are not a homogenous class.

b. Empirical evidence of heterogeneity

139. Field researchers have also accounted that the Scheduled Castes are not one homogenous class. Studies indicate that certain castes of the Scheduled Castes are not only sociologically backward vis-à-vis the forward castes but also amongst the Scheduled Castes themselves. AM Shah recounts that there was much less interaction between two Dalit castes in Gujarat than there was between a Dalit caste and a forward class. The author observes that the priests for the Dalits are placed high amongst the Dalit castes and the scavengers are placed the lowest, with the leather-workers and the rope makers occupying the intermediary positions:196

"Briefly, the Dalits have reproduced among themselves a hierarchy on the model of caste hierarchy in general. There is at the top a small caste of garodas (derived from the Sanskrit word 'guru'), who are priests for other dalit castes, Similarly, just as there are castes of bards for the upper castes, there is a bardic caste of dalit mendicants called dhed bava or sadhu. The garudas, turi barots, and dhed sadhus are accorded certain sacredness. The bhangis (scavengers) are the bottom of the hierarchy and the most under-privileged. Between the garodas and bhangis there is a large caste, the higher stratum of which is traditionally vankar (weavers) and the lower stratum dhed (menial servants). The chamars (leatherworkers) and senwas (rope-makers) occupy positions intermediately between the vankarcum-dheds and bhangis. The bhangis are the most oppressed."

140. The Robert F Kennedy Centre for Justice and Human Rights in collaboration with Navsarjan (an organization that promotes the rights of Dalits) undertook an extensive study on caste discrimination in 1589 villages in Gujarat. The census conducted by them produced results of horizontal discrimination, the practice by which certain Dalit castes practiced untouchability against other Dalit castes. The study identified that the practice of food, water and religion related untouchability is emulated within the Dalits as well.

For example, Dalits of the lower sub-caste were prevented from sitting with the rest of the Dalit community during meals. They were not given tea when they visited the house of a higher sub-caste. It was also found that only in twelve percent of the villages could a Dalit belonging to a lower sub-caste receive water in the house of a Dalit of a higher sub-caste. The study also found that in 92.4 percent of the villages studied, all the Dalits did not have access to all-Dalit burial grounds and that the lower sub-castes were denied entry into to Dalit Temples in 79 percent of the villages.197

141. Similarly, in Tamil Nadu, when an Arunthathiyar man and a Paraiyar woman (both the castes find a place in the Scheduled Castes list) eloped, the woman's family allegedly raped the women of the man's family in retaliation.198 The inequality within the Scheduled Castes in Andhra Pradesh has also been studied. Uma Ramaswamy draws on the inequality within the Scheduled Castes by comparing the social positions of members of the Mala and Madiga Castes.199

The Madigas traditionally pursue the occupation of leather work which is assigned a lower status when compared to the weaving occupation of Malas. The author states that neither do members of both the castes live in the same hamlet nor do they draw water from the same well. The study found that the hierarchy between the castes translated to their relative progress in education, employment

and political activity. In 1961, 10 percent of Malas were literate as against 5.1 percent of Madigas.

In 1971, the proportion of literates among Malas had gone up to 12.9 per cent in comparison to 6.2 percent among the Madigas. The author stated that hierarchy exists even within the Mala caste. Mala Jangam and Mala Desari are priestly castes and are spiritual advisors to Mala satellite castes. Within the Mala satellite castes, Mala Jangam is at the top, followed by Mala Pambala, Masti and Gurra Malas. The sub-castes also follow rules of untouchability amongst themselves:200

"There are certain rules that restrict the taking of food, water and access to the temples among the Dalits. The Malas, higher caste Dalit do not take food or water from the Madigas, the lower caste Dalit in village India. Mala Jangam, Mala Dasari and Mithal Ayyalwar do not eat or drink from Malas, Madigas and Dakkal. Similarly other castes do not take cooked food or water from these castes. Malas and Madigas have separate wells and temples. Malas do not take food and water from Mastu, Gurram Malas and Madigas.

But all these castes take food and water from priestly class of Malas. The singari, the gurus to Madigas, strictly refrain from eating food touched or cooked by Madigas or other satellite caste. Bindla though enjoys higher social status in Madigas satellite caste. The higher castes do not take either cooked food or water from Bindlas. Being worshippers of Shakti (the power) they do not take food or water from the hands of their satellite castes, since they consider themselves as sacred.

Sindhu, the entertaining caste of Madigas" do not take food or water from Dakkals but their food or water is acceptable for Madigas. Dakkals who occupied a lowest social status in social hierarchy accept food and water from all castes, except Vishwa Brahamaa. The food or water of Dakkals is not acceptable to any other caste. Dakkals have to take food or water standing outside Madiga houses. Thus the higher caste Dalits do not drink or dine in common. These commenalities indicate the foundation of Panchama hierarchy and heterogeneous caste cleavages within Scheduled Castes in Andhra Pradesh."

142. Empirical evidence indicates that there is inequality even within the Scheduled Castes. The Scheduled Castes are not a homogenous integrated class. vi. The power of the State to sub-classify under Articles 15 and 16 143. Article 16(4) provides the State with the enabling power to make provisions for reservations in appointments or posts in favour of "any backward class of citizens".

The provision, unlike Article 15(4), does not distinguish amongst the Scheduled Castes, Scheduled Tribes, and other Socially and Educationally Backward Classes. In Indra Sawhney (supra), this Court defined the backward class in terms of social backwardness. Social backwardness is attributable to several identities such as caste, gender and disability. Though, the backwardness caused due to these multiple identities are all collectively within the ambit of the backward class for the purposes of Article 16(4), the State is free to recognize the heterogeneity amongst the class and provide separate reservation to women and the Scheduled Castes to deal with the purpose.

144. Article 15(4) recognizes the power of the State to make "any" special provisions for the advancement of "any" socially and educationally backward classes of citizens or for "the" Scheduled Castes and "the" Scheduled Tribes. Article 15(5) is similarly worded. It was submitted before this Court that the use of the preposition "any" before the socially and educationally backward class as opposed to the phrase "the" before Scheduled Castes and Scheduled Tribes indicates the Scheduled Castes and Scheduled Tribes are a homogenous integrated class. We do not agree with the submission. The provision provides the State with the power to make "any" special provisions for the Scheduled Castes and the Scheduled Tribes. Thereby, it recognizes the wide power of the State to employ a range of means to secure substantive equality. This would include sub-classification within the Scheduled Castes.

145. The first prong of the test for sub-classification is whether the Scheduled Castes form a homogenous integrated class for all purposes. We have held above that even if Article 341 creates a deeming fiction, the provision does not create an integrated class that cannot be further sub-classified. The provision only puts certain castes or groups or parts of them into a group called the Scheduled Castes.

The castes or groups within the Scheduled Castes form an integrated class for the limited purpose of constitutional identification. They do not form an integrated class for any other purpose. We have also established through historical and empirical evidence that the Scheduled Castes notified by the President under Article 341 are a heterogenous class where groups within the class suffer from varying degrees of social backwardness. Thus, the first test is satisfied.

146. The State in exercise of its power under Articles 15 and 16 is free to identify the different degrees of social backwardness and provide special provisions (such as reservation) to achieve the specific degree of harm identified. If the Scheduled Castes are not similarly situated for the purposes of the law (or the specific harm identified), there is nothing in Articles 15, 16 and 341 which prevents the State from applying the principle of sub-classification to the class. Thus, the Scheduled Castes can be further classified if: (a) there is a rational principle for

differentiation; and (b) if the rational principle has a nexus with the purpose of sub-classification.

147. One of the issues before this Court in Chinnaiah (supra) was whether the State has the legislative competence to sub-classify. Justice Santosh Hegde observed that having once fulfilled the mandate of providing reservations under Articles 15(4) and 16(4), the enactments were beyond the legislative competence of the State because - first, the primary object of the law was grouping of sub-castes and apportionment of reservations was merely consequential and second, the State could not under Entry 41 of List II and Entry 25 of List III (of the Seventh Schedule) dealing with State services and education respectively, divide the Scheduled Castes List.201 Justice Sinha noted that the legislative competence of the State legislatures under Article 246 is subject to the other provisions of the Constitution, namely Article 341 of the Constitution.202

148. The opinions in Chinnaiah (supra), conflate the issue of legislative competence, which is referrable to Articles 245 and 246, with the power to ensure substantive equality under Articles 15 and 16. Article 245 read with the Seventh Schedule lays down the legislative competence of the State Legislatures and Parliament. Articles 15(4) and 16(5) recognize the power of the State to make special provisions for the advancement of the backward class, including the Scheduled Castes. These provisions permit the State to confer the benefit of affirmative action on classes where it is most necessary. Thus, the power of the State to sub-classify the Scheduled Castes for the purpose of affirmative action, including reservations, is traceable to Articles 15(4) and 16(5) in the case of educational institutions and appointments, respectively.

vii. Criteria for sub-classification

149. The object of the special provisions in Articles 15(4) and 16(4) is to provide substantive equality to the beneficiary class.203 Inter-se backwardness within the class is a roadblock to achieving substantive equality. Sub-classification is one of the means to achieve substantive equality. But the crucial question is, what should be the rational principle to distinguish categories within the Scheduled Caste? Should it be based on the form of untouchability or any form of inter-se social backwardness? We will discuss the rational principle which must be used for sub-categorization in this segment of the judgment.

150. It is important to understand the provision from the perspective of the beneficiary class for whose advancement it has been adopted, to elucidate the rational principle for differentiation. Though both Articles 15(4) and 16(4) share a similarity to the extent that they enable the State to provide affirmative action policies, there exist some dissimilarities in the language of the provisions. Firstly,

Articles 15(4) and 16(4) deal with different spheres. Article 15(4) is a general provision which gives effect to the principle of substantive equality by recognizing that the non-discrimination provisions shall not prevent the State from making "any special provision" for the advancement of the beneficiary class.

On the other hand, Article 16(4) deals specifically with matters of public employment. Secondly, Article 16(4) only deals with reservation while Article 15(4) recognizes other forms of affirmative action. Article 15(4) is broader and all-encompassing as compared to Article 16(4). Thirdly, the beneficiary class under Article 15(4) must be "socially and educationally backward" while the class under Article 16(4) is a backward class which is not adequately represented. The Scheduled Castes and the Scheduled Tribes are expressly carved out in Article 15(4), unlike Article 16(4), where they are encompassed within the "backward class".

151. One of the issues that must be adjudicated while discussing the scope of the provisions is whether the beneficiary classes in Articles 15(4) and 16(4) are different. This issue must be decided with reference to:

a. The use of the qualifiers "socially and educationally" backward in Article 15(4); and

b. The use of the qualifier "adequate representation" in Article 16(4).

a. The meaning of "Backward Class"

152. Article 15(4), unlike Article 16(4), provides that the beneficiary class for the purposes of the provision must be socially and educationally backward. In Balaji (supra), this Court held that the beneficiary class under Article 15(4) must be both socially and educationally backward. Justice Gajendragadkar observed that caste, occupation and poverty are important factors for determining the socially backward class.204

This was reiterated in Janki Prasad Parimoo v. State of Jammu and Kashmir205. Justice D G Palekar writing for this Court made a crucial observation on the relationship between social and educational backwardness. The learned Judge observed that though the phrases 'socially' and 'educationally' are used cumulatively for the purposes of identifying the backward class under Article 15(4), "if a class as a whole is educationally advanced it is generally also socially advanced because of the reformative effect of education on that class".206

The relationship between social and educational backwardness where social backwardness contributes to educational backwardness was reiterated in Indra

Sawhney (supra). Thus, though the criteria of socially and educationally backward class must be cumulatively read for the purposes of identifying the beneficiary class, they are not mutually exclusive concepts. They have a causal relationship, where the educational backwardness of a class is an impact of its social backwardness.

153. The next issue is whether the beneficiary classes in Article 15(4) and Article 16(4) are the same even though, unlike Article 15(4), Article 16(4) does not include the qualifiers of "social" and "educational". In Janki Prasad Parimoo (supra), this Court read the requirement of social and educational backwardness into Article 16(4).207 This was reiterated in Vasant Kumar v. State of Karnataka208 by a Constitution Bench of this Court. However, in Indra Sawhney (supra), Justice B P Jeevan Reddy speaking for four Judges (Chief Justice Kania, Justice Venkatachaliah, Justice AM Ahmadi and himself) observed that there is no basis for this assumption.

The learned Judge observed that Article 16(4) applies to a much larger class. The socially and educationally backward class is one of the categories, to which Article 16(4) applies. The socially and educationally backward classes are included within the broader class to which Article 16(4) applies. Justice Jeevan Reddy also held that reading educational backwardness in Article 16(4), which deals with reservation in appointments at any level, would not appropriate:

"787. "Backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). Thus, SEBCs referred to in Article 340 is only [one] of the categories for whom Article 16(4) was enacted: Article 16(4) applies to a much larger class than the one contemplated by Article 340.

It would, thus, be not correct to say that 'backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services- which may mean, at any level whatsoeverinsisting upon educational backwardness may not be quite appropriate."

154. The observation above must not be read in a vacuum. The purport of the observation by Justice Jeevan Reddy is clarified in the subsequent paragraph where the learned Judge observed that though educational backwardness is not to

be excluded as a criterion, social backwardness must have caused educational backwardness:

"788. It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty- which in turn breeds and perpetuates the social and educational backwardness. They feel upon each other constituting a vicious cycle. It is a wellknown fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes.

The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational."

155. In Indra Sawhney (supra), Justice Pandian defined the backward class of citizens as "a group of persons having common traits or attributes coupled with retarded social, material (economic) and intellectual (educational) development in the sense that not having so much of intellect and ability will fall within the ambit of 'any backward class of citizens' under Article 16(4)".209

The learned Judge further elucidated that the "primary consideration" in identifying the backward class is social backwardness.210 Justice Sawant also observed that in identifying the beneficiary class under Article 16(4), social backwardness must be given importance. Justice Sawant held that the criterion for the identification of the beneficiary class is whether it is socially backward and whether the class which is educationally and economically backward, is so because of its social backwardness.211

156. Justice Kuldip Singh adopted a different approach. The learned Judge held that the beneficiary classes in Articles 15(4) and 16(4) are different. Justice Kuldeep Singh observed that unlike the determination of the beneficiary class in Article 15(4) which must be socially and educationally backward, the class identified for the purposes of Article 16(4) need not be backward because:

a. The Constituent Assembly Debates indicate that reservation under Article 16(4) is to provide access to communities that have not had a 'look in' at the administration of the State. The object of including the phrase "backward" in Article 16(4) - which did not find a place in the initial draft - was only for the purpose of reducing the number of claimants for the reserved posts;212

b. Inadequate representation in the services of the State is the only test for the identification of the beneficiary class under Article 16(4). Inadequate representation can be identified based on occupation, economic criterion, family income, political sufferers, border areas, backward areas, communities kept out of State services or any other means.213 The 'backward class' must be culled out from the classes which are inadequately represented214;

c. The backward class cannot be classified into adequately represented and inadequately represented. A class that is adequately represented cannot be considered backward. Reading the qualifier of inadequate representation with respect to the backward class would render the former expression redundant; and215

d. The Constitution has expressly mentioned the Scheduled Castes and the Scheduled Tribes whenever the Constitution grants protection to the "weaker classes".216

157. Contrary to the opinion of Justice Kuldeep Singh, which held that the determining character of the class in Article 16(4) is not backwardness but inadequacy of representation217, the majority in Indra Sawhney (Justice Reddy writing for four Judges, Justice Pandian and Justice Sawant) held that the predominant factor which must be employed to identify the "backward class" must be social backwardness. The majority also held that the backward class in Article 16(4) subsumes the socially and educationally backward class identified under Article 15(4).218 Thus, the objective of both Articles 15(4) and 16(4) is to ensure substantive equality by uplifting the socially backward class.

b. Inadequacy of representation in services of the State

158. The issue on the identification of beneficiaries which will impact the scope of reservation is whether the class is both backward and inadequately represented. That is, whether they are mutually exclusive qualifiers. In Indra Sawhney (supra), Justice Sawant writing the concurring opinion observed that only classes which are inadequately represented must be provided reservation under Article 16(4). In the opinion of the learned Judge, a class that is backward will cease to be a beneficiary when the class becomes adequately represented. This observation aligns with the argument that reservation must not be provided once the goal of the provision, which is securing adequate representation is achieved.

159. To navigate this issue, it is necessary that we refer to the debates of the Sub-Committee of Minorities and Sub-Committee of Fundamental Rights to ascertain the reason for the inclusion of the phrase "inadequate representation" in Article

16(4). The Objectives Resolution which was introduced by Mr Jawaharlal Nehru on 13 December 1946 resolved to provide adequate safeguards for minorities, backward and tribal areas, and the depressed and other backward classes. The equality provision in the first draft report submitted by the Sub-Committee on Fundamental Rights did not provide for reservation of seats for the backward community or the minorities.

Though the report included provisions emphasizing anti-discrimination and equal opportunity, it did not recommend an enabling provision for affirmative action.219 The Sub-Committee on Minorities along with the Fundamental Rights Sub-Committee decided to examine the clauses recommended to determine if any of them required to be amended to protect minority rights. During the discussion, Mr KM Munshi stated that reservation may have to be made for the minorities in public employment.220 An Advisory Committee was formed to make recommendations on how best to reconcile the antidiscrimination provision with the provision for reservation. The Sub- Committee on Minorities recommended that a proviso may have to be added to meet the claims of representation of the marginalized communities.221

160. After the discussion, Dr Ambedkar representing the Advisory Committee, suggested the inclusion of the following provision: "Nothing herein contained shall prevent the State from making provisions for reservation in public services in favour of classes as may be prescribed by the State."

(emphasis supplied)

161. The Sub-Committee on Fundamental Rights debated two issues related to the above clause. First, whether the word "minority" or "class" must be used to signify the beneficiaries. The debates indicate that the phrase "class" was preferred over "minority" because the latter has a specific connotation, that is, religious or political minorities and this would exclude classes who constitute the majority but are yet not adequately represented. The reason is best explained by Dr Ambedkar in the Annexure to the Memorandum and Draft Articles on the Rights of States and Minorities, where he noted that "to make religious affiliation the determining factor for constitutional safeguards is to overlook the fact that religious affiliation may be accompanied by an intense degree of social separation and discrimination".222

162. The second issue was whether the provision must be qualified with the phrase "adequately represented". A few members expressed the fear that the use of the phrase "adequate representation" would become litigious.223 In spite of this apprehension, the phrase was retained to restrict the discretion of the State since the phrase "class" and not "minority" was adopted. Without the phase

"adequate representation", the clause would have also included reservations for adequately represented majorities for whom the benefit was not intended. However, with the inclusion of the phrase "adequately represented" qualifying the phrase "classes", the benefit of the provision extends to classes which may be considered 'majorities' but are yet inadequately represented.224

163. The debates in the Sub-Committee on Fundamental Rights and Sub-Committee on Minorities indicate that the beneficiaries of reservation are classes that are not "adequately represented" and this could include classes which are numerical majorities. Provisions for reservation are now available not only to the members of the Scheduled Castes and Scheduled Tribes but also of the socially and educationally backward classes which are numerical religious majorities. The phrase "backward" preceding "class" was absent in the draft circulated by the Sub-Committee. The phrase was included in Article 10 of the Draft Constitution. The inclusion of the phrase backward along with the qualifier of adequate representation clarifies the scope of the beneficiary class.

164. Dr B R Ambedkar stated in the Constituent Assembly that reservations under Article 10 of the Draft Constitution [Article 16 of the Constitution of India] are given to those who have not had a "proper look-in" to the administration because it has historically been controlled by a few communities.225 Referring to the above observations of Dr Ambedkar, Justice Jeevan Reddy held in Indra Sawhney (supra) that the objective of Article 16(4) is to ensure that the backward classes get the opportunity to share state power.226

165. It is clear from the debates extracted above that the purpose of the reservation clause is to remedy the inadequate representation in public services of certain "classes". The cause for inadequate represented could be two-fold. First, it may be a result of laws that expressly excluded certain classes from accessing the good, that is posts in public service. Second, it may be the result of a class being excluded not expressly by law but through social exclusion. A class may be socially excluded from accessing skills which are relevant for acquiring the good. These restrictions could either be in the form of social and informal or legal and formal restrictions.

166. In Indra Sawhney (supra), Justice Jeevan Reddy observed that a class for the purpose of securing reservations under Article 16(4) should not only be a backward class but must also be inadequately represented in the services of the State.227 Thus, the beneficiary class is not to be determined solely on the basis of whether the class is a numerical minority or a majority in the services of the State.

The focus instead is on identifying classes that have been excluded from public services not as a matter of chance or choice but because of the operation of the system of hierarchy. Thus, both the phrases, "backward" and "not adequately represented," in Article 16(4) cannot be interpreted in a mutually exclusive manner in determining the beneficiary class under Article 16(4). The intent of Article 16(4) is to cover those classes which have been inadequately represented because of their backwardness. Thus, the requirement of inadequate representation cannot be detached from the requirement of backwardness.

c. The requirement of "effective" representation

167. Conventionally, the State has assessed if the class is adequately represented by comparing the representation of the class in the services to the total population of the State.228 However, adequacy of representation when determined purely from a numerical perspective without accounting for factors such as representation vis-à-vis posts would dilute the purpose of the provision. The objective of Article 16(4) is to ensure effective representation of the class in the services of the State across posts and grades.

Classes which are socially backward occupy the lowest of the social strata primarily because of the traditional occupation accorded to the class by social rules. For example, certain Dalit castes are regarded as scavenger castes. Even with the provision of reservation, it is very difficult for the backward classes to shed the traditional occupation that is ascribed to them by society and optimize the opportunities even at the lowest levels. The struggles that the class faces do not disappear with their representation in the lower grades. The endeavor is to ensure true and effective representation of the socially backward classes across posts.

168. Opportunities for real and effective representation must be created in all posts and grades. The objective of the provision is not to emulate the existing social hierarchy where the low-grade posts are occupied by the socially backward while supervisory and managerial posts continue to be occupied by the advanced classes. If the objective of Article 16(4) is to be achieved in the truest sense, the inadequacy of representation must not be determined only on the basis of the total number of members of the backward class in the services of the State but by assessing the representation of the class across various posts.

169. The meaning of the phrase "adequate representation" fell for the consideration of this Court in Rangachari (supra). Writing for the majority, Justice Gajendragadkar observed that adequate representation means not only numerical representation but qualitative representation as well:

"25. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression "adequately represented" imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service can be judged."

(emphasis supplied)

170. On the other hand, Justice Wanchoo and Justice Rajgopala Ayyangar observed that the phrase 'adequate representation' only conveys the meaning of inadequacy of representation in the quantitative sense and does not convey any idea of equality.229

In Triloki Nath v. State of Jammu and Kashmir (I)230, a reservation policy providing 50 percent of the seats to Muslims from Jammu and Kashmir, 60 percent of the remaining fifty percent seats to Hindus from Jammu and the remaining 40 percent of the 50 percent to Kashmiri Pandits was challenged. The State contended that the sole test of backwardness for the beneficiary class under Article 16(4) is inadequacy of representation in the services of the State. The Constitution Bench rejected the argument, observing that if it is accepted, the benefit would be conferred only on the 'rich and cultured' who are socially and educationally advanced.

171. Justice Jeevan Reddy also adopted a value-ridden interpretation of the phrase "adequately represented" in Indra Sawhney (supra). The learned Judge held that the principal test to determine the adequacy of representation is "effective representation or effective voice in the administration" and not mere numerical presence. Effective representation can only be achieved, in this view, when there is adequate representation at all levels or posts in the administration. Justice Sawant also adopted a similar approach.231

172. We are in complete agreement with the opinions of Justice Jeevan Reddy in Indra Sawhney (supra) and Justice Gajendragadkar in Rangachari (supra) on this aspect which is being discussed in the present segment. Adequate representation means meaningful and effective representation. The sphere of public services is a constitutionally recognized realm for reservation because being a part of the administrative mechanism of the State is itself an indicator of social power. It is

for the same reason that the Constitution, when it was adopted, guaranteed reservation in the legislature.

However, there exists a hierarchy in social power within the sphere of public service. Positions that are higher up in the pyramid are positions that command greater authority. For example, let us assume a situation where the Class III and Class IV posts in the State are filled by members of a certain class while the higher positions of authority and power are filled by members of a certain class. This demographic of representation, if the service is taken as a whole unit, does not paint a realistic picture of the inequality that persists within the sphere.

If numerical representation is used as an indicator, provision for representation will have to be made in favour of classes which are unrepresented in Class III and Class IV which does not align with the purpose of the provision. In fact, that would be nothing but another indicator of the existence of unequal social structures where members of the backward classes are subject to the authority and power of the more advanced. Thus, a numeric-representation focused interpretation of the phrase 'inadequate representation' does not fulfill the purpose of the provision.

173. In view of the discussion above, the following principles are summarized with respect to the objective and yardstick for identifying the beneficiary class under Articles 15(4) and 16(4):

a. The beneficiary class in Article 15(4) must be a socially and educationally backward class. "Socially and educationally backward" are not mutually exclusive concepts. The phrase constitutes a constitutional recognition of the sociological reality that educational backwardness is caused by the social backwardness of the class;

b. The beneficiary class in Article 16(4), similar to the class under Article 15(4), must predominantly be socially backward. The purpose of both the provisions is to ensure substantive equality of opportunity to the socially backward communities. The beneficiary class in Article 16(4) subsumes the socially and educationally backward classes under Article 15(4);

c. The qualifier of inadequate representation in Article 16(4) is not mutually exclusive of the requirement of backwardness. The inadequate representation of the class in the services of the State must be because of social backwardness; and

d. The adequacy of representation must be determined based on the standard of effective representation and not numerical representation.

d. Yardstick for sub-classification

174. This takes us to the next question. What must be the rational basis for subclassification within the beneficiary classes? Since the purpose of Articles 15(4) and 16(4) is to ensure equality of opportunity of the socially backward classes, the criterion for sub-classification within a class (be it the Other Backward Classes or the Scheduled Castes or Tribes) must be an indicator of social backwardness. The yardstick for classification must differentiate the class based on inter-se social backwardness.

The inter-se backwardness could be identified based on the same or different identity. The State has identified the Other Backward Classes, the Scheduled Castes and the Scheduled Tribes.232 Here, the State sub-classifies based on the same identity, that is, social backwardness because of caste identity. Horizontal reservation is provided to classes which face backwardness due to identities other than caste such as gender233 and disability234. Here, the State subclassified based on a different identity.

175. Though Article 16(4) only refers to the "backward class" collectively, the Scheduled Castes are differentiated because they suffer from social backwardness in the form of untouchability which leads to educational and economic backwardness. The Scheduled tribes are classified as a separate class because they suffer from social backwardness because of their spatial and cultural isolation from the rest of the population.235

Since the State can use any yardstick to determine inter-se backwardness, it is not necessary that the criteria for sub-classification and the criteria used to distinguish the class from the other classes must be the same. That is, if the criteria for recognizing the Scheduled Castes as a backward class is untouchability, it is not necessary that the group can be sub-classified only if there is inter-se backwardness due to the same identity (that is, untouchability).

176. The Scheduled Castes are a collection of castes, races or tribes or parts of groups, races or tribes.236 Caste is both a unit in the sense that it consists of a homogenous group of people and is also an indicator of backwardness because it is an occupational grouping.237 The nexus between caste and occupation continues to persist, more predominantly in the rural areas.

This position has been expounded by numerous cases right from Balaji (supra) to Indra Sawhney (supra). A caste whose traditional occupation is that of scavenging and another caste whose traditional occupation is that of weaving may both face the stigma of untouchability. However, the caste whose traditional occupation is that of scavenging will be more socially backward when compared to the weaver caste because of the caste-occupation-poverty nexus.

177. How does the State identify inter-se social backwardness within the Scheduled Castes? As discussed above, the inter-se backwardness can, inter alia, be identified based on inadequacy of effective representation. However, it must be proved that inadequacy of effective representation of a caste is because of its social backwardness. I have had the benefit of reading the erudite opinion of my learned Brother, Justice Gavai. My learned Brother and I agree that the State must prove that the group/caste carved out from the larger group of Scheduled Castes is more disadvantaged and inadequately represented.

viii. The limits of sub-classification

178. Having held that sub-classification of the Scheduled Castes for the purposes of reservation is valid and having laid down the yardstick which must be used for further categorization, the next issue that falls for our consideration is its scope. In this section, we will answer the following issues: a. Whether the State should earmark seats for the each of the subcategorized classes or follow a preference model; and b. Whether the State can allocate seats or preference for each of the castes in the Scheduled Castes List. This section is not intended to prescribe an inflexible criterion for the State. Our analysis will lay down broad constitutional parameters without trenching on matters of policy.

a. Model of special provisions

179. A crucial issue which arises for consideration is with respect to the model of reservations for the sub-classified classes. There are two models that the State may employ while reserving seats for the sub-classified castes. It needs to be analyzed if both the methods are constitutional.

180. In the first model, the class(es) that are more socially backward are given a preference to all the seats that are reserved for the Scheduled Castes. There are two variations of this model. In the first variation, certain castes are given a preference over all the seats reserved for the category of Scheduled Castes. In other words, the sub-categorized class will get the first bite at the apple. In the second variation, the sub-categorized class will have a preference over a certain percentage of seats. Any unfilled seats will be available to the other categories.

181. In the second model, seats shall be exclusively available to certain castes. The exclusive model differs from the preference model to the limited extent that in the former, the seats that are not filled will be carried over to be filled by the same castes in the subsequent year while in the latter, the seats that are not filled will be available to the other castes within the same class. There are two variations to this model as well. In the first variation, a certain percentage of seats will be reserved for the sub-categorized class and the State shall carry forward

the unfilled seats, if any, to be filled by the same class in the subsequent year. In the second variation, all the seats are exclusively available to a certain caste from the category and the State shall carry forward the unfilled seats.

182. Whether the preference or the exclusive model is unconstitutional would depend on whether the variation in-effect excludes any caste notified as a Scheduled Caste with respect to that State by the President under Article 341(1). With respect to the preference model, the first variation by which preference is given to certain castes to all the seats would be an unconstitutional approach because there is a possibility that other categories within the class of the Scheduled Castes are excluded. For example, if the State grants preference to three of the thirty castes classified as the Scheduled Castes over all the seats reserved for the Scheduled Castes, it is possible that the three castes exercise their preference and fill up all the seats.

This would lead to a situation where the other twenty-seven castes classified as the Scheduled Castes would be excluded from the benefit of reservation. This model will be arbitrary and unreasonable also because the Other Backward Classes which are socially advanced compared to the castes classified as the Scheduled Castes would receive the benefit of reservation but the castes or groups within the Scheduled Castes would not. The castes classified as the Scheduled Castes must be given the opportunity to secure the benefit. If not, the provision would become otiose for their purposes.

183. However, the second variation of the first model is differently placed vis-à-vis the scope of Article 341(2). In the second variation, preference to certain castes is given only over a certain percentage of the seats. Thus, castes for whom preference is not given but which are included in the List of Scheduled Castes will be able to compete for a certain percentage of seats. In addition to those seats, they may get the opportunity to compete for the percentage of seats reserved for the sub-classified caste, if they are left unfilled. Thus, this model does not have the effect of excluding any of the castes in the Scheduled Castes List.

184. The difference between the first and the second model is the method in which unfilled vacancies of the more-backward sub-category are to be filled. In the former, the more backward sub-category only has a preference to a certain percentage of seats while in the latter, a percentage of the seats is exclusively available to them and the unfilled seats, if any, will not be available to be filled by the more advanced category of the class. The State may carry forward the unfilled vacancies to the subsequent year which will be available to the same category for which the seats were reserved.

185. Article 16(4-B) provides that the State can consider carrying forward the unfilled vacancies of the year, which were reserved to be filled by classes under Article 16(4) and 16(4-A), to the subsequent year or years. The provision further provides that the unfilled vacancies shall not be considered together with the vacancies of the subsequent year for determining the ceiling of fifty percent reservation on total vacancies for that year.

186. Article 16(4-B) does not make any distinction between a class and subclassified classes. The provision stipulates that the State can carry forward vacancies of unfilled seats which were reserved to be filled under Articles 16(4) and 16(4-A) of the Constitution. As held in the preceding section, the power of the State to sub-classify within the Scheduled Castes is traceable to Article 16(4). Further, the seats that remain unfilled will not in any manner reduce the seats which are available to the other sub-categories of the Scheduled Castes. The Constitutional validity of Article 16(4-B) was upheld in Nagaraj (supra). Thus, there is no reason to prevent the State from exercising its power under Article 16(4-B) of carrying forward the vacancies which are reserved for a specific sub-category. Such an exercise will be legal and valid.

187. Like the first model, the constitutionality of the exclusive model depends on the percentage of reservation for the sub-categorized castes. The model of sub-classification will be unconstitutional if it excludes some Scheduled Castes from the benefit. This, similar to the first variant of the preference model, would violate of Article 341(2), and would thus be unconstitutional. However, the second version of the exclusive model in which only a certain percentage of seats is exclusively allotted to the sub-classified castes would be constitutional.

For example, if ten percent of the seats reserved for the Scheduled Castes are reserved for the more backward among Scheduled Castes, the other castes will have the chance to compete for the other ninety percent of the seats, thus, not excluding any of the castes. The sole test is whether the operation of the policy has the effect of eliminating the possibility of castes or groups competing for the seats reserved for the Scheduled Castes.

188. Article 341(2), as we have noted above, unambiguously prevents inclusion in and exclusion from the Scheduled Castes List by anyone except Parliament. Inclusion could be by way of extending the benefits meant for Scheduled Castes in the State, to a community that is not specifically mentioned in the State Scheduled Castes List (as was the case in Milind (supra)), by reading as a part of an enumerated entry or by reading it as a synonym of an enumerated entry. Such an exercise is not open to the States or for that matter to the Courts.

Only Parliament is entrusted with the power to make inclusions to or exclusions from the Lists of Scheduled Castes and Tribes. The thrust of the prohibition, as Dr Ambedkar also indicated, is a proscription on the elimination of an entry or addition of an entry to the List. Such elimination or addition, it was apprehended could arise out of political calculations in the hope of short-term electoral gains. Therefore, only Parliament is invested with the exclusive power to make such variations to the List. Any legislative effort by the State that does not either include unspecified communities or exclude specified communities from the Scheduled Castes List applicable to that State does not fall foul of Article 341(2) of the Constitution.

189. The state has the power to follow either of the two permissible models discussed above while reserving seats through sub-classification. The decision of the State to choose from either of the two models will depend on multiple considerations such as the degree of backwardness of certain castes vis-à-vis the other castes and the total number of qualifying candidates belonging to the Scheduled Castes (both the more backward castes of the Scheduled Castes and the others).

190. The course of action adopted by the State is subject to judicial review, when faced with a constitutional challenge. Where the action is challenged, the State will have to justify the basis of its action. The basis of the sub classification and the model which has been followed will have to be justified on the basis of empirical data gathered by the State. In other words, while the State may embark on an exercise of sub-classification, it must do so on the basis of quantifiable and demonstrable data bearing on levels of backwardness and representation in the services of the State.

It cannot in other words merely act on its whims or as a matter of political expediency. The decision of the State is amenable to judicial review. When its action is challenged under Article 226 or before this Court under Article 32, the State must provide justification and the rationale for its determination. No State action can be manifestly arbitrary. It must be based on intelligible differentia which underlie the sub-classification. The basis of the sub-classification must bear a reasonable nexus to the object sought to be achieved.

b. The caste-class conundrum

191. One of the issues that arises is whether the State may provide special provisions for each caste within the class. In Indra Sawhney (supra), the State classified the Other backward Castes into two categories - the backward class and the more backward class. Thus, the class was only subdivided into two

categories. Is it permissible to classify the Scheduled Castes by providing preference or reservation in a percentage of seats to every caste?

192. Both Articles 15(4) and 16(4) do not enable reservation based on castes but only on classes. The absence of the use of "caste" in Articles 15(4) and 16(4) when coupled with its use in Articles 15(2) and 16(2) led the courts to hold that caste cannot be the sole basis of reservation.238 However, as Marc Galanter notes, the court had erroneously fused the two distinct usages of caste, as a unit or class, and as a criterion of backwardness.239

193. In Balaji (supra), the criterion for the determination of social and educational backwardness was in question. This Court held that caste is a relevant consideration for determining social backwardness. However, the Court observed that caste cannot be the sole basis for determining the beneficiary class because it would perpetuate the vice of castes. Disagreeing with the Nagan Gowda report, Justice Gajendragadkar writing for the Bench, held that economic backwardness and not caste is the ultimate cause of social backwardness.

This interpretation of the permissibility of caste as a criterion to determine the backward class was approved in Chitralekha v. State of Mysore.240 In P Rajendran v. State of Madras,241 this Court deviated from the approach adopted in Chitralekha (supra) and MR Balaji (supra) observing that caste is a class because it is a homogenous "unit".242 The approach in P Rajendran (supra) was later approved by a nine-Judge Bench in Indra Sawhney (supra), where this Court observed that to determine a socially backward class, a caste can be identified as a unit since it is homogenous and then the criteria for backwardness can be applied to it.243

194. The Constitution does not bar the allocation of a percentage of seats to a caste since every caste is a class. However, the State must have sufficient material to prove inter-se backwardness between each of the castes. The State must with the submission of cogent material prove that there is a rationale principle which distinguishes the groups included and those excluded from the class. However, the rational principle will have nexus with the object only when the principle can identify the inter-se social backwardness of the class.

For example, if the State allocates a separate percentage of seats for the dhobi caste and the barber caste, it must prove that these two castes suffer from differing levels of social backwardness. It is not merely sufficient for the State to base the classification on the difference in the traditional occupation of the two castes. Rather, the State must on the basis of quantifiable data prove that the castes suffer from different levels of social backwardness. The State must also

back this with the submission of data on effective representation of the caste in the services of the State.

195. Though sub-categorization based on each caste is permissible, we are of the opinion that there can never be a situation where seats are allocated for every caste separately. Though each caste is a separate unit, the social backwardness suffered by each of them is not substantially distinguishable to warrant the State to reserve seats for each caste. If the social backwardness of two or more classes is comparable, they must be grouped together for the purposes of reservation.

ix. Scope for judicial review

196. The scope of judicial review of reservation policies was laid down in Indra Sawhney (supra). Justice Jeevan Reddy observed that a class for meriting reservations must be both backward and inadequately represented in the "services under the State". In Nagaraj (supra), this Court held that backwardness must be based on objective standards whereas inadequacy of representation must factually exist. The Court held that the State must submit quantifiable data to prove backwardness and inadequacy of representation. This standard applies for classifying groups for the purpose of reservations and would, equally apply for sub-classification within a group because it is premised on the same principle of difference and inequality.

197. Two prominent considerations arise while discussing the scope of judicial review of sub-classification of the Scheduled Castes and the Scheduled Tribes. First, whether the State must prove inter-se backwardness given the position of law laid down in Indra Sawhney (supra) that the backwardness of the Scheduled Castes and the Scheduled Tribes is not required to be proved. Second, whether the inadequacy of representation of the more backward of the Scheduled Castes must be proved.

a. Inter-se backwardness

198. In Indra Sawhney (supra), this Court held that the requirement of social and educational backwardness cannot be applied to the Scheduled Castes and the Scheduled Tribes because they admittedly fall within the backward class of citizens.244 One of the issues before the Constitution Bench of this Court in Jarnail Singh v. Lachhmi Narain Gupta245, was whether Nagaraj (supra) in requiring the State to collect quantifiable data showing backwardness is contrary to the decision in Indra Sawhney (supra), where this Court held that backwardness of the Scheduled Castes and the Scheduled Tribes need not be proved. In Jarnail Singh (supra), this Court held that observations in Nagaraj (supra) that the State is required to collect quantifiable data to prove the

backwardness of the Scheduled Castes and the Scheduled Tribes is bad in law because it is contrary to Indra Sawhney (supra).

199. The decision in Indra Sawhney (supra) exempts the State from having to prove that the Scheduled Castes and the Scheduled Tribes are backward for the purposes of securing benefits under Articles 15 and 16. The observations do not exempt the State from having to justify the decision of sub-classifying within the Scheduled Castes and Scheduled Tribes for the purposes of reservation. The basis of sub-classification is that few of the castes or groups within the class are more backward. Thus, though the State is not required to collect quantifiable data to prove backwardness of the entire class of the Scheduled Castes/Tribes, it is required to collect data to prove inter-se backwardness within the class, where it seeks to make a sub-classification within the class.

b. Adequacy of representation

200. Justice Jeevan Reddy noted in Indra Sawhney (supra) that the issue of whether a class is inadequately represented is a matter within the subjective satisfaction of the State which is evident from the use of the phrase "in the opinion of the State", and that the subjective satisfaction of the executive action must be judicially reviewed based on the standard laid down in Barium Chemicals v. Company Law Board246.

In Barium Chemicals (supra), a Constitution Bench of this Court while determining the validity of administrative actions held that though the formation of opinion by the State may be based on its subjective satisfaction, the State could not act based on circumstances it 'thinks' existed. There must be apparent circumstances that merit a certain inference by the State, and such circumstances, must be shown to exist at least prima facie.247 In the preceding section, we have held that inadequacy of effective representation is a criterion for determining interse backwardness. Hence, quantifiable data for that purpose must be submitted.

201. In Nagaraj (supra), this Court held that the State must submit quantifiable data to satisfy the court that reservations are necessary "on account of inadequacy of representation of the Scheduled Castes and Scheduled Tribes in a particular class or classes of posts".248 However, in the subsequent paragraphs, this Court held that the cadre strength must be taken as a unit to ascertain whether a given class or group is adequately represented. These observations were made in the backdrop of RK Sabharwal (supra) where this Court held that the entire cadre strength should be taken into account to determine if the quota limit has been breached. The relevant observations are delineated as under:

"82. Before dealing with the scope of the constitutional amendments we need to recap the judgments in Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] and R.K. Sabharwal [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481]. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in R.K. Sabharwal [(1995) 2 SCC 745: 1995 SCC (L&S) 548 : (1995) 29 ATC 481] this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached.

It was clarified that the judgment in Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%. 83. In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based."

(emphasis supplied)

202. At this juncture, it is important that we clarify the observations in Nagaraj (supra) extracted above. In Nagaraj (supra), this Court referred to the judgment in RK Sabharwal while observing that the cadre must be taken as a unit to determine the inadequacy of representation. However, the context in which RK Sabharwal (supra) held cadre must be considered as a unit was different. In that case, two issues were considered. First, whether appointments of the backward classes in the general category must be counted while working out the percentage of reservation for the backward classes. Second, whether the reservation is complete when the posts earmarked for the Scheduled Castes or Scheduled Tribes are filled.

It is while answering the second of the issues that this Court held that reservations must operate in accordance with the roster maintained in the Department which will be a running account every year to ensure that there is no excessive reservation. This Court explained the working of the calculation of cadrebased vacancy as follows: posts falling in specific serial numbers would be reserved seats allotted to each class and when a reserved seat falls vacant, it must be filled by the person of the same category:

"5. concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. "16% of the posts" are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes.

To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved categories is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter.

As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation."

203. The inference in Nagaraj (supra) that cadre must be taken as a unit to determine inadequacy of reservation based on the above observations in RK Sabharwal (supra), in our respectful opinion, is misplaced. The cadre as a unit was considered only for the purpose of preparation of roster to draw a balance between the reserved and open seats. This Court did not hold that cadre must be used as a unit for the purpose of determining the adequacy of representation. In fact, RK Sabharwal (supra) says to the contrary. RK Sabharwal (supra) observed that the State Government may take the total population of a particular Backward Class and its representation in the State Services while determining adequacy of representation:

"4. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take

the total population of a particular Backward Class and its representation in the State Services."

As observed above, the inadequacy of representation in the services of the State is an indicator to determine the backwardness of the class in the services of the State. When the cadre-strength is used, the inadequacy of representation of the class is not determined. Rather, it determines the inadequacy of representation in a cadre, thereby, merging the distinction between quantitative and qualitative representation. Further, the observations in Nagaraj (supra) that adequate reservation of the class or group must be measured against the cadre is contrary to the plain language of Articles 16(4) and 16(4-A). Both the provisions use the phrase "not adequately represented in the services under the State".

204. Thus, in view of the above discussion, the State for a valid exercise of power to sub-classify under Article 16(4) is required to collect quantifiable data with respect to the inadequacy of representation of the sub-categories in the services of the State. As held in the preceding section, the inadequacy of representation is an indicator of backwardness and thus, to use the cadre as a unit to determine representation alters the purpose of the indicator itself. The State while deciding if the class is adequately represented must calculate adequacy based on effective and not quantitative representation.

E. Conclusion

205. In view of the discussion above, the following are our conclusions:

a. Article 14 of the Constitution permits sub-classification of a class which is not similarly situated for the purpose of the law. The Court while testing the validity of sub-classification must determine if the class is a homogenous integrated class for fulfilling the objective of the sub-classification. If the class is not integrated for the purpose, the class can be further classified upon the fulfillment of the two-prong intelligible differentia standard;

b. In Indra Sawhney (supra), this Court did not limit the application of subclassification only to the Other Backward Class. This Court upheld the application of the principle to beneficiary classes under Articles 15(4) and 16(4);

c. Article 341(1) does not create a deeming fiction. The phrase "deemed" is used in the provision to mean that the castes or groups notified by the President shall be "regarded as" the Scheduled Castes. Even if it is accepted that the deeming fiction is used for the creation of a constitutional identity, the only logical consequence that flows from it is that castes included in the list will receive the

benefits that the Constitution provides to the Scheduled Castes. The operation of the provision does not create an integrated homogenous class;

d. Sub-classification within the Scheduled Castes does not violate Article 341(2) because the castes are not per se included in or excluded from the List. Sub classification would violate the provision only when either preference or exclusive benefit is provided to certain castes or groups of the Scheduled Castes over all the seats reserved for the class;

e. Historical and empirical evidence demonstrates that the Scheduled Castes are a socially heterogenous class. Thus, the State in exercise of the power under Articles 15(4) and 16(4) can further classify the Scheduled Castes if (a) there is a rational principle for differentiation; and (b) the rational principle has a nexus with the purpose of sub-classification; and

f. The holding in Chinnaiah (supra) that sub-classification of the Scheduled Castes is impermissible is overruled. The scope of sub-classification of the Scheduled Castes is summarized below:

i. The objective of any form of affirmative action including subclassification is to provide substantive equality of opportunity for the backward classes. The State can sub-classify, inter alia, based on inadequate representation of certain castes. However, the State must establish that the inadequacy of representation of a caste/group is because of its backwardness;

ii. The State must collect data on the inadequacy of representation in the "services of the State" because it is used as an indicator of backwardness; and

iii. Article 335 of the Constitution is not a limitation on the exercise of power under Articles 16(1) and 16(4). Rather, it is a restatement of the necessity of considering the claims of the Scheduled Castes and the Scheduled Tribes in public services. Efficiency of administration must be viewed in a manner which promotes inclusion and equality as required by Article 16(1).

206. The Registry is directed to obtain administrative instructions from Chief Justice for placing the matters before an appropriate Bench.

.....CJI. [Dr. Dhananjaya Y. Chandrachud]

.....J. [Manoj Misra]

New Delhi;

August 01, 2024

1 Article 15 (4) "Nothing in this article or in clause (2) of Article 29 shall prevent the State form 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."

2 Article 16 (4) "Nothing in this article shall prevent the State from making any provision for 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."

3 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.

4 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.

5 "Punjab Act"

6 (2005) 1 SCC 394

7 (1992) Supp (3) SCC 217

8 Notification No.22/5590-3-GS/111

9 "Tamil Nadu Act"

10 Tamil Nadu Act; Section 2(a)

11
4. Notwithstanding anything contained in the 1994 Act or the 2006 Act or in any other law for the time being in force or in any judgment, decree or order of any Court or other authority, having regard to the social and educational backwardness of Arunthathiyars included in the Scheduled Castes, sixteen per cent of the appointments or posts reserved for the Scheduled Castes shall be offered to Arunthathiyars, if available, in appointments or posts in the services under the State, on preferential basis amongst the Scheduled Castes, in such manner as may be prescribed.

Explanation.- For the purposes of this Act, "services under the State" includes the services under-

(i) The Government

(ii) He legislature of the State

(iii) Any local authority

(iv) Any Corporation or Company owned or controlled by the Government; or

(v) Any other authority in respect of which the State Legislature has power to make laws

12 Chinnaiah (supra) [Justice Hegde, 13-19].

13 Chinnaiah (supra) [Justice Hegde, 20-26].

14 Chinnaiah (supra) [Justice Hegde, 82, 135 and 169].

15 Chinnaiah (supra) [Justice Hegde, 30-31].

16 Chinnaiah (supra) [Justice Hegde, 38].

17 "OBCs"

18 Chinnaiah (supra) [Justice Hegde, 38].

19 Chinnaiah (supra) [Justice Hegde, 39,40]

20 Chinnaiah (supra) [Justice Hegde, 43]

21 ibid.

22 Chinnaiah (supra) [Justice Sema, 49, 50]

23 Chinnaiah (supra) [Justice Sinha, 75]

24 Chinnaiah (supra) [Justice Sinha, 77]

25 Chinnaiah (supra) [Justice Sinha, 81]

26 Chinnaiah (supra) [Justice Sinha, 97].

27 Chinnaiah (supra) [Justice Sinha, 98]. Relied on Triloki Nath v. State of J&K 1969 1 SCR 103; State of UP v. Pradip Tandon 1975 1 SCC 267; Akhil Bhartiya Soshit Karamchari Sangh (Rly) v. Union of India (1981) 1 SCC 246.

28 Chinnaiah (supra) [Justice Sinha, 104].

29 Chinnaiah (supra) [Justice Sinha, 105].

30 Chinnaiah (supra) [Justice Sinha, 112,113].

31 Chinnaiah (supra) [Justice Sinha, 114].

32 (2020) 8 SCC 1

33 (1992) Supp (3) SCC 217 [Justice Reddy,803];[Justice Sawant, 524 and 525]

34 (2020) 8 SCC 1 [42]

35 Relied on the observation of Justice Reddy in Indra Sawhney (supra)

36 (2020) 8 SCC 1 [50]

37 (2020) 8 SCC 1 [52, 56]

38 (2020) 8 SCC 1 [35]

39 (2018) 10 SCC 396

40 Relied on Indra Sawhney (supra) [Justice Reddy, 802].

41 Relied on NM Thomas (supra) [Justice Mathew, 43]

42 Chinnaiah (supra) [Justice Hegde, 22] relying on NM Thomas (supra) [Justice Iyer, 135]

43 Relied on Indra Sawhney (supra) [Justice Reddy, 795].

44 Bhaiyalal v. Harikishan Singh, (1965) 2 SCR 877; State of Maharashtra v, Milind, (2001) 1 SCC 4; Bir Singh v. Dekhi Jal Board, (2018) 10 SCC 312

45 Relied on IR Coelho v. State of Tamil Nadu, (2007) 2 SCC 1

46 (1992) Supp (3) SCC 217 [Justice Pandian, 57,60,67,82,95]; [Justice Jeevan Reddy, 782,784]

47 Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 [293, 393, 633]; Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396 [16, 24, 34]

48 (1976) 2 SCC 310

49 (1981) 1 SCC 246

50 Relied on B. Basavalingappa v. D. Munichinnapa, (1965) 1 SCR 316; Bhaiya Lal v. Harikrishnan Singh, (1965) 2 SCR 877; Srish Kumar Chodhury v. State of Tripura, 1990 Supp SCC 220; Palghat Jilla Than dan Samudhya Samrakshna Samiti v. State of Kerala, (1994) 1 SCC 359; State of Maharashtra v. Milind, (2001) 1 SCC 4 [15]; Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312

51 3rd meeting of the National Commission for Scheduled Castes held on 13.12.2010 under the Chairmanship of Dr PL Punia.

52 See State of West Bengal v. Anwar Ali Sarkar, 1952 AIR 75

53 Chiranjit Lal Chowdhury v. Union of India, 1950 SCC 833 [38,39]

54 Chiranjit Lal Chowdhury v. Union of India, 1950 SCC 833 [38,39]

55 General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36; CA Rajendra v. Union of India, AIR 1968 SC 507

56 Non-Brahmin (Hindus): 6; Backward Hindus: 2; Brahmins: 2; Harijan: 2, Anglo-Indians and Indian Christians (1); Muslims: 1.

57 1951 SCR 525

58 AIR 1951 SC 229

59 Article 15(4) was included in the Constitution by the Constitution (First Amendment) Act 1951 to overcome the judgment in Champakam Dorairajan.

60 AIR 1963 SC 649

61 (1976) 2 SCC 310; the seeds of the expansive approach were sowed by Justice Subba Rao in T Devadasan.

62 (1976) 2 SCC 310 [Ray CJI, 21]

63 (1976) 2 SCC 310 [Ray CJI, 37]

64 (1976) 2 SCC 310 [Ray CJI, 45]

65 (1976) 2 SCC 310 [Justice Mathew, 55]

66 (1976) 2 SCC 310 [Justice Mathew, 58-59]

67 (1976) 2 SCC 310 [Justice Mathew, 74]

68 (1976) 2 SCC 310 [Justice Krishna Iyer, 120]

69 (1976) 2 SCC 310 [Justice Krishna Iyer, 136]

70
335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of service, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

71 (1962) 2 SCR 586

72 (1962) 2 SCR 586 [27]; See Article 335 which provides that that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. The majority in Rangachari (supra), interpreted the phrase "matters relating to employment" as it occurs in Article 16(1) to also include promotion.

The next issue which fell for the consideration of the Court was whether Article 16(4) covers promotion because the provision only uses the phrases "appointments or posts". This Court held that the phrase "posts" would - as held by the High Court - not mean ex-cadre posts but posts in the services under the State because any other interpretation would be contradictory to the purpose of Article 16(4) which is to ensure adequate representation.

73 (1962) 2 SCR 586 [Justice Wanchoo, 35]; [Justice Ayyangar, 41]

74 AIR 1968 SC 507

75 AIR 1968 SC 507 [9]

76 1992 Supp (3) SCC 217 [Justice Reddy, 827, 828]; [Justice Thommen,302]; [Justice Sawant,552]

77 The service rule by which the general category retains their seniority is called the catch-up rule. The service rule by the seniority is measured based on the feeder pool is called consequential seniority.

78 (1995) 6 SCC 684

79 Also see Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209

80 (1996) 2 SCC 715; "it cannot be overlooked that at the first promotion from the basic grade, there was no occasion to examine their merit and suitability for the purpose of promotion."

81 (1996) 2 SCC 715 [15]

82 (1996) 6 SCC 580

83 (1964) 4 SCR 680

84 (2006) 8 SCC 212

85 (2006) 8 SCC 212 [108]

86 Nagaraj v. Union of India, (2006) 8 SCC 212

87 Neil Aurelio Nunes v. Union of India, (2022) 4 SCC 1; BK Pavitra (II) v. State of Karnataka, (2019) 16 SCC 129

88 See General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36; T Devadasan v. Union of India, (1964) 4 SCR 680 [Justice Subba Rao, 32]

89 See Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [116,117,492,788, 859(3)(e)]

90 The opinion of Justice Sawant in Indra Sawhney (supra), highlights this aspect:" 434: It cannot, however, be doubted that the same considerations will have to prevail while making provisions for reservation in favour of all backward classes under Article 16(4). To hold otherwise would not only be irrational but discriminatory between two classes of backward classes."

91 See Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [835]; M Nagaraj v. Union of India, (2006) 8 SCC 212 [108]

92 Justice Krishna Iyer in NM Thomas (supra) observed that the usage of the phrase 'claims' in Article 335 indicates that reservation is a right and not the provision of charity or benevolence. [paragraph 128]

93 (1964) 4 SCR 680 [25]

94 1985 (Supp) SCC 714 [35, 36]

95 (2019) 16 SCC 129

96 (2019) 16 SCC 129 [129]

97 (2022) 4 SCC 1

98 Neil Aurelio Nunes v. Union of India, (2022) 4 SCC 1

99 Neil Aurelio Nunes v. Union of India (2022) 4 SCC 1 [28]; BK Pavitra (II) v. State of Karnataka (2019) 16 SCC 129 [131]

100 Also see, Janki Prasad Parimoo v. State of J&K, (1973) 1 SCC 420, Justice Khanna in NM Thomas v. State of Kerala, (1976) 2 SCC 310; Justice Subba Rao in Devadasan v. Union of India, 1964 4 SCR 680

101 The holding that there shall not be reservations in promotions was based on the link between Article 16(4) and Article 335. See, Justice Reddy [827] and Justice Sawant [552-224]

102 Justice Pandian in Indra Sawhney, (1992) Supp (3) SCC 217 [243(11)]

103 See Ashwini Deshpande, Double Jeopardy? Stigma of Identity and Affirmative Action, The Review of Black Political Economy 2019, Vol. 46(I) 38-64

104 Chinnaiah (supra) [Justice Hegde J,32]

105 Chinnaiah (supra) [Justice Hegde,37,43].

106 Chinnaiah (supra) [Justice Hegde,36]

107 Chinnaiah (supra) [Justice Sema, 46-50].

108 Chinnaiah (supra) [Justice Sinha, 81]

109 ibid.

110 Indra Sawhney (supra) [Justice Reddy,643].

111 Gauri Shankar v. Union of India, AIR 1995 SC 55.

112 Indra Sawhney (supra), [Thommen J, 260].

113 HM Seervai, Constitutional Law of India, 4th Edition, Volume I, page 439.

114 Sandra Fredman, Substantive Equality Revisited, International Journal of Constitutional Law, Volume 14, Issue 3, 2016, 712-738.

115 State of West Bengal v. Anwar Ali Sarkar (1952) 1 SCC 1.

116 Anwar Ali Sarkar (supra) (1952) 1 SCC 1, [Das J, 66].

117 Shri Ram Krishna Dalmia v. Shri SR Tandolkar 1958 SCC OnLine SC 6, [12].

118 Ibid; Special Courts Bill, 1978, In re, (1979) 1 SCC 380.

119 Moorthy Match Works v. CCE, (1974) 4 SCC 428.

120 Deepak Sibal v. Punjab University, (1989) 2 SCC 145.

121 Indra Sawhney (supra) [Reddy J, 643]; State of Kerala v. N.M. Thomas (1976) 2 SCC 310; Ram Krishna Dalmia v. Justice S.R. Tendolkar, 1959 SCR 279; Budhan Choudhry v. State of Bihar (1955) 1 SCR 1045

122 State of Kerala v. NM Thomas [Justice Mathew J, 83]; DS Nakara v, Union of India 1983 1 SCC 305 [Justice Desai, 48].

123 AIR 1960 SC 384.

124 1975 3 SCC 76.

125 1974 1 SCC 19.

126 ibid, [YV Chandrachud J, 50]. "50. We are therefore of the opinion that though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications. The Rule providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders does not violate Articles 14 and 16 of the Constitution and must be upheld."

127 ibid, [YV Chandrachud J, 51]. "51. But we hope that this judgment will not be construed as a charter for making minute and microcosmic classifications. Excellence is, or ought to be, the goal of all good governments and excellence and equality are not friendly bed-fellows. A pragmatic approach has therefore to be adopted in order to harmonize the requirements of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: What after all is the operational residue of equality and equal opportunity?"

128 (1968) 1 SCR 185

129 See NM Thomas [Justice Mathew, 83]

130 (1980) 3 SCC 245.

131 1980 1 SCC 634.

132 1983 1 SCC 305

133 ibid [48]

134 DS Nakara (supra) [Desai J,42] : "If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogenous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision and would such classification be founded on some rational principle?"

135 Mohammad Shujat Ali and Others v. Union of India 1975 3 SCC 76 [Justice Bhagwati, 24-26].

136 Charanjit Chowdhury (supra) 833 [58]; Ram Krishna Dalmia (supra) [11].

137 Deepak Sibal v. Punjab University (1989) 2 SCC 145

138 See Anwar Ali Sarkar (Supra) [7]; Ram Krishna Dalmia (supra) [11]; State of Gujarat v. Shri Ambica Mills (1974) 4 SCC 656 [61].

139 See DS Nakara (supra) [43]

140 (2019) 3 SCC 345.

141 The criterion for the sub-classification was whether the standard of education in the community is less than 50% of the State Average. If it is, the community must be regarded as a more backward community. If it is not, then the community must be regarded as the backward community.

142 AIR 1963 SC 649 [25]

143 AIR 1963 SC 649 [29] This observation must be read along with the observation in Paragraph 21 where this Court held that the test of relativity must not be used to determine the backward class:

"21. In considering the scope and extent of the expression "Backward Classes" under Article 15(4), it is necessary to remember that the concept of backwardness is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it. If such relative tests were to be applied by reason of the most advanced classes, there would be several layers or strata of backward classes and each one of them may claim to be included under Article 15(4)."

144 Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [55]

145 Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [207(5)]

146 Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217 [802]

147
"802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There

may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes."

148
"524. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic. Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points.

The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in Vasanth Kumar [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] where the backward classes are grouped into five categories, viz., A, B, C, D and E. In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput.

To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post. In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential."

149 Chinnaiah v. State of AP, (2005) 1 SCC 394 [Justice Santhosh Hegde, 38]; [Justice Sinha, 76]

150 (1992) Supp (3) SCC 217 [781]

151 (1992) Supp (3) SCC 217 [792]

152 (2018) 10 SCC 396 [26, 34].

153 ibid [26].

154 See Consolidated Coffee Ltd v. Coffee Board, Bangalore, 1980 3 SCC 358 [11,12]; Bhuwalka Steel Industries Limited v. Union of India, (2017) 5 SCC 598 [36,37,43,44]

155 St. Aubyn v. Attorney General, 1952 AC 15, 53 [Lord Radcliffe]

156 Industrial Supplies Private Limited v. Union of India, (1980) 4 SCC 341 [25]; K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754 [39]; See Bengal Immunity Company Ltd v. State of Bihar, (1955) SCC OnLine SC 2.

157 Bengal Immunity Company Ltd v. State of Bihar, (1955) SCC OnLine SC 2 [Justice Das, 32].

158
52. A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have got to be worked out to their logical extent. But due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286(1)(a) is solely for the purpose of subclause (a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be.

The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-State character of the transaction into an intra-State one. This type of conversion could not have been in the contemplation of the Constitution-makers and is contrary to the express purpose for which the legal fiction was created as set out in the Explanation to Article 286(1)(a). [emphasis supplied]

159 LR 1952 AC 109.

160 ibid at page 132. "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

161 1976 3 SCC 443.

162 2003 8 SCC 204.

163 ibid [Justice Sinha, 25].

164 ibid, [35]

165 NM Thomas (supra) [Justice Mathew, 82].

166 NM Thomas (supra) [Justice Iyer, 135].

167 NM Thomas (supra) [Justice Fazal Ali, 169] : "If, therefore, the members of the scheduled castes and the scheduled tribes are not castes, then it is open to the State to make reasonable classification in order to advance or lift these classes so that they may be properly represented in the services under the State."

168 NM Thomas (supra) [Justice Mathew, 83].

169 Constituent Assembly Debates, Volume 9, page 1636 (17 September 1949)

170 See Constitutional (Scheduled Castes) Order, 1950 [2,4].

171 (1990) 3 SCC 130

172 Marri (supra) [9]

173 2018 10 SCC 312.

174 ibid, [Justice Gogoi, 34]; [Justice Banumathi, 79, 81]

175 Chinnaiah (supra), [Justice Hegde, 43]

176
21. Power to issue, to include power to add to, amend, vary or rescind notifications orders, rules, or byelaws-Where, by any [Central Act] or Regulations a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to , amend, vary or rescind any notifications, orders, rules, or bye-laws so issued.

177 "Vary" - to make changes to something to make it slightly different. Oxford Learner's Dictionary, <https://www.oxfordlearnersdictionaries.com/definition/american_english/vary>; "vary" Merriam-Webster Dictionary <https://www.merriam-webster.com/thesaurus/vary#thesaurus-entry-1-2>

178 Milind (supra) [12].

179 Milind (supra) [15].

180 Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala, 1994 1 SCC 359 [17, 18].

181 Marc Galanter, Competing Equalities: Law and the Backward Classes in India, [Oxford University Press (1984)] 130

182 Report of the Indian Franchise Committee (1932) Vol I, 112

183 Ibid, 113

184 id

185 id

186 Ibid,Pg. 112

187 Hutton Censes Report (1931) 471

188 Ibid, 472

189 Ibid, 495

190 Ibid, 498

191 Ibid, 499

192 Minute of dissent by Mr SB Rambe, Mr CY Chintamani, Mr RR Bakhale, Report of the Franchise Committee, 231

193 id

194 Dr Ambedkar, Note on the Depressed Classes, Report of the Franchise Committee, 211

195 Galanter, supra, 130

196 AM Shah, The 'Dalit" category and its Differentiation; Also see AM Shah, Untouchability, the Untouchables and Social Change in Gujarat in Dimensions of Social Life, Essays in Honor of David G Mandelbaum (edited by Paul Hockings)

197 Robert F Kennedy, Center for Justice and Human Rights, Understanding Untouchability: A comprehensive Study of Practices and Conditions in 1589 Villages, 22-33

198 Ravinchandran Bathran, The many omissions of a concept: Discrimination amongst Scheduled Castes, Economic & Political Weekly, (Vol L1 No. 47, November 19, 2016) 1342-1346

199 Uma Ramaswamy, Protection and Inequality among Backward Groups, Economic & Political Weekly (Vol. 21 No. 9, 9 March 1986)

200 Justice Usha Mishra Report on National Commission to Examine Issue of Sub-Categorisation [327]

201 Chinnaiah (supra) [Justice Hegde, 31]

202 Chinnaiah (supra) [Justice Sinha, 90]

203 See NM Thomas (supra)

204 MR Balaji v. State of Mysore, AIR 1963 SC 649 [24,25]

205 (1973) 1 SCC 420

206 (1973) 1 SCC 420 [24]

207 (1968) 2 SCR 786

208 1985 Supp SCC 714; Justice Chinnappa Reddy observed that "backward classes of citizens referred to in Article 16(4), despite the short description, are the same as the socially and educationally backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, so fully described in Article 15(4)." Justice Sen and Justice Venkataramiah (as the learned Chief Justice then was) observed that Articles 15(4) and 16(4) are intended for the benefit of those who belong to casts, communities which are traditionally disfavored and which have suffered societal discrimination in the past.

209 (1992) Supp (3) SCC 217 [58]

210 (1992) Supp (3) SCC 217 [117]

211 (1992) Supp (3) SCC 217, [Justice Thommen, 273]; [Justice Sawant 441,552]

212 (1992) Supp (3) SCC 217 [363]

213 (1992) Supp (3) SCC 217 [368]

214 (1992) Supp (3) SCC 217 [364]

215 (1992) Supp (3) SCC 217 [366]

216 (1992) Supp (3) SCC 217 [367]

217 See opinion of CJ Ray in MN Thomas (supra)

218 (1992) Supp (3) SCC 217 [Justice Reddy,787]; [Justice Sahai, 583]

219 There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, ranks, roads, schools and places of public resort maintained wholly or party out of public funds or dedicated to the use of the general public (b) There shall be equality of opportunity for all citizens- (i) in matters of public employment (ii) in the sercise or carrying on of any occupation, trade, business or profession; and no citizen shall on any of the grounds aforesaid be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occuptation, trade, business or profession within the Union (2) Any enactment, regulation, judgment, order, custom or interpretation of law, in force immediately before the commencement of this Constitution by which any penalty, disadvantage, or disability is imposed upon or any discrimination is made against any citizen on any of the grounds aforesaid shall cease to have effect.

220 B Shiva Rao, The Framing of India's Constitution: Select Documents [Vol II, The Indian Institute of Public Administration] 221

221 Ibid, 258-259; KM Panikkar: "I was responsible for the change from the word 'minorities'. The reason which I gave was that minorities in India have come to have a specific meaning, that is to say, religious or political minorities, Muslims, Sikhs etc.

222 Shiva Rao, supra, 109

223 BR Ambedkar: "I am omitting the words "not adequately represented". If we have the words "not adequately represented", any reservation made by the State may be open to be challenged in a court. The court may say that reservation is made for a class although it is adequately represented."

224 KM Panikkar: "I was responsible for the change from the word 'minorities'. The reason which I gave was that minorities in India have come to have a specific meaning, that is to say, religious or political minorities, Muslims, Sikhs etc. Sikh, Muslim, Depressed Classes, either a political or religious minority. The meaning has come to that. There may be among the majority, among the Hindus for example, many classes who have not adequate representation in the services."

225 CAD Vol 7. P. 701

226 Reddy J [694] "In short, the objective behind Article 16(4) is empowerment of the deprived backward communities- to give them a share in the administrative apparatus and in the governance of the community." Also see Paragraph 161 where Justice Pandian states that "inadequate representation is not confined to any specific section of the people, but all those who fall under the group of backwardness whether they are Shudras of Hindu community or similarly situated other backward classes of people in other communities, namely, Muslims, Sikhs, Christians etc.

227 Also see Nagaraj (supra) where this Court observed that the discretion of the State under Article 16(4) is subject to the existence of "backwardness" which must be based on objective factors and "inadequacy of representation" which must factually exist.

228 See RK Sabharwal v. State of Punjab, (1995) 2 SCC 745 [4]; BK Pavitra (II) v. State of Kerala, (2019) 16 SCC 129 [107]; Indra Sawhney, (1992) Supp (3) SCC 217 [807 and 808]

229 Justice Wanchoo's opinion "32. Therefore, when Article 16(4) says that reservation may be made in order that any backward class of citizens may be adequately represented in the services it means that reservation may be made in order to make the number of any backward class sufficient in the services under the State. These words do not in my opinion convey any idea of equality [...]; Justice Ayyangar [Paragraph 43]:

"I have drawn attention to this because it pointedly demonstrates that the correct view is that when "inadequacy of representation" is referred to in Article 16(4) as justifying a reservation, the only rational and reasonable construction of the words are that it refers to a quantitative deficiency in the representation of the backward classes in the service taken as a whole and not to an inadequate representation at each grade of service or in respect of each post in the service."

230 (1967) 2 SCR 265

231 (1992) Supp (3) SCC 217 [517]

232 See the Central Educational Institutions (Reservation in Admission) Act 2006

233 Seats have been reserved for women through executive notifications issued by various states.

234 See The Rights of Persons with Disabilities Act 2016, Sections 32, 34

235 Galanter,supra, 147

236 Constitution of India 1950; Article 366(24)

237 (1992) Supp (3) SCC 217 [Justice Jeevan Reddy, 779]

238 Venkataramana v. State of Madras, AIR 1951 SC 226; Balaji v. State of Mysore, AIR 1963 SC 649

239 Galanter, supra, Pg. 189

240 AIR 1964 SC 1823

241 (1968) 2 SCR 786

242 "It must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward classes within the meaning of Article 15(4)."

243 (1992) Supp (3) SCC 217 [859]

244 (1992) Supp (3) SCC 217 [Justice Reddy 781; 796-797]

245 (2018) 10 SCC 396

246 AIR 1967 SC 295; (1992) Supp (3) SCC 217 [Justice Reddy, 798]

247 AIR 1967 SC 295 [28]

248 Nagaraj v. Union of India, (2006) 8 SCC 212 [117]

IN THE SUPREME COURT OF INDIA

State of Punjab & Ors.
Vs.
Davinder Singh & Ors.

[Civil Appeal No.2317 of 2011]
[C.A. No. 5593 of 2010]
[S.L.P.(C) No. 8701 of 2011]
[W.P.(C) No. 1477 of 2019]
[W.P.(C) No. 21 of 2023]
[W.P. (C) No. 562 of 2022]
[C.A. No. 5586 of 2010]
[C.A.No. 5597 of 2010]
[C.A. No. 5598 of 2010]
[C.A.No. 5600 of 2010]
[C.A. No. 5589 of 2010]
[C.A. No. 5587 of 2010]
[C.A. No. 5595-5596 of 2010]
[C.A.No. 2324 of 2011]
[C.A.No. 6936 of 2015]
[S.L.P.(C) No. 30766 of 2010]
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JUDGMENT

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B.R. Gavai, J.

I have gone through the erudite and scholarly judgment authored by Hon'ble the Chief Justice of India. I am in agreement with the views expressed by the Hon'ble the Chief Justice of India. Taking into consideration the importance of the matter, I find it apposite to express my opinion through this separate judgment. Since the facts and submissions of the learned counsel appearing on behalf of the parties have been elaborately considered in the judgment of the Hon'ble the Chief Justice of India, in order to avoid repetition, I have not referred to them.

I. BACKGROUND

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

Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two

things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others.

On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.

How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

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

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

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

3. Two months thereafter, the Constitution of India came into force on 26th January 1950. On 26th November 2023, we have completed 74 years from the

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

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

5. The present case raises a dispute amongst various classes in the group of Scheduled Castes who claim to be more underprivileged and therefore claim for a more differential treatment qua the more advantageous in that group. Per contra, the rival classes inside them claim that once the classes are brought into the Presidential List of Scheduled Castes or Scheduled Tribes, they become a part of homogeneous group, and a further classification is not permissible under the Constitution.

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

7. The 5-Judge Bench of this Court in the case of E.V. Chinnaiah vs. State of A.P. and others1 has held that such a further classification on the ground of more backwardness among the backwards listed in the Presidential List is not permissible. However, another 5-Judge Bench of this Court in the case of The State of Punjab & Ors. vs. Davinder Singh & Ors.2 has doubted the view in E.V. Chinnaiah (supra) and referred the matter to a larger Bench. That is how these matters came up for consideration before us.

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

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

9. In the beginning, a nomenclature often used by Christian Missionaries was 'depressed classes' to describe the poor and downtrodden section of the society. A wide array of untouchable castes, aboriginal tribes, and other backward communities were all lumped together under that label. In 1909, leaders like Gopal Krishna Gokhale and Annie Besant also referred to low caste or marginalized communities in India as the 'depressed classes'. Besant compared the 'depressed classes' in India to the 'submerged tenth' in England, i.e., unskilled labourers, scavengers, sweepers, casual dock labourers, etc., constituting 10% of the population of that country. However, by 1918, the term 'depressed classes' began to be used for only low-caste Hindus who suffered from the stigma of untouchability. The word 'class' in 'depressed class' was really a synonym for caste3.

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

"40. Leather workers

41. Watchmen and Village Menials

42. Scavengers"

11. Thereafter comes the Indian Statutory Commission Report, 1930. The heading of Chapter 4 of Part I is "Caste and the Depressed Classes". The report specifically states that a Caste has been described as "the foundation of the Indian social fabric". It further states that every Hindu necessarily belongs to the caste of his parents, and in that caste he inevitably remains. It states that no accumulation of wealth and no exercise of talents can alter his caste status; and marriage outside his caste is prohibited or severely discouraged. It further states that in some cases, the application of the rule of caste seems almost to prescribe the means of livelihood of its members; indeed, many castes partake of the nature of occupational guilds.

It states that the caste system, which may have originated in the preservation of ceremonial purity in social relations and in rules designed to limit admixture of blood, has during ages developed into an institution which assigns to each individual his duty and his position in orthodox Hinduism. However, the boundary which brings members of the same caste together also serves to

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

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

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

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

14. Paragraph 54 of the Report deals with "Disabilities of the Untouchables". It states that the actual disabilities, other than religious, suffered by the untouchables owing to their untouchability vary very greatly in different parts of India, not only from province to province, but also in different parts of the same province and even sometimes in different parts of the same district. It states that the two most widespread difficulties are about water and schools.

It states that in many places it was customary for the untouchables to be denied access to the wells or tanks used by the other castes and great difficulty has often been found, when a new source of water supply has been provided from public funds by local authorities, in arranging for the untouchables to have use of it. The Report highlights that if any village draws its water from a river, the untouchables will be required to take their supply from a different point, lower down.

In many places the children of untouchables are either excluded altogether from ordinary schools, although provided in whole or in part from public funds, otherwise they would be required to sit apart. In some cases, the untouchable children are required to attend the classes standing outside the classroom. The Report highlights that the difficulty of the administrator or political reformer was much increased by the fact that the great body of the untouchables yet accept their destiny as natural and inevitable. The Report states that their state is indeed pitiable inside the Hindu fold and yet not of it living on the edge of starvation, and unaware of any hope of improving their lot.

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

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

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

18. The Report further states that in Bengal, Bihar and Orissa and the United Provinces, although there were large numbers belonging to untouchable castes, in general they do not seem to suffer so universally or so severely as in the South. The Report, however, states that the problem did exist in these areas also. The Report also gives approximate percentage of population of the number of untouchables. The Report excludes aboriginals who are outside the Hindu fold.

19. The next document that requires a mention is 'the Census of India 1931'. The said Report coins the phrase 'primitive tribes', who reside in hills, forests, and other nomadic groups. These primitive tribes provide a foundation for Scheduled

Tribes. It also notes that the formerly depressed classes are now referred to as the Scheduled Castes.

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

21. Then comes the Government of India Act, 1935 (hereinafter referred to as "the 1935 Act"). Part II of the 1935 Act deals with "The Federation of India". Chapter I thereof deals with "Establishment of Federation and Accession of Indian States". Section 5 of the 1935 Act deals with "Proclamation of Federation of India" and Section 6 of the 1935 Act deals with "Accession of Indian States".

Clause (a) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of States. Clause (b) of sub-section (2) of Section 5 of the 1935 Act provided that the States, the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained, have acceded to the Federation.

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

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

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

25. It will be relevant to reproduce Clause 8 of the First Schedule to the 1935 Act, which reads thus: "8. In any Province to which a seat to be filled by a

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

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

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

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

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

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

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

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

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

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

_____

AT THE COURT AT BUCKINGHAM PALACE

The 30th day of April, 1936
Present,

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL

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

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

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

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

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

3. Notwithstanding anything in the last preceding paragraph-

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

(b) in Bengal no person who professes Buddhism or a tribal religion shall be deemed to be a member of any scheduled caste; and if any question should arise as to whether any particular person does or does not profess Buddhism or a tribal religion, that question shall be determined according to the answers which he may make, in the prescribed manner, to such questions as may be prescribed.

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

5. Any reference in the Schedule to this Order to any division, district, subdivision, tahsil or municipality shall be construed as a reference to that

division, district, subdivision, tahsil or municipality as existing on the first day of July, nineteen hundred and thirty-six.

SCHEDULE

PART I - MADRAS

(1) Scheduled castes throughout the Province:-

Adi-Andhra	Gosangi	Paidi
Adi-Dravida	Haddi	Painda
Adi-Karnataka	Hasla	Paky
Ajila	Holeya	Pallan
Arunthuthiyar	Jaggali	Pambada
Baira	Jambuvulu	Pamidi
Bakuda	Kalladi	Panchama
Bandi	Kanakkan	Paniyan
Bariki	Kodalo	Panniandi
Battada	Koosa	Paraiyan
Bavuri	Koraga	Paravan
Bellara	Kudumban	Pulayan
Byagari	Kuravan	Puthirai Vannan
Chachati	Madari	Raneyar
Chakkiliyan	Madiga	Relli
Chalavadi	Maila	Samagara
Chamar	Mala	Samban
Chandala	Mala Dasu	Sapari
Cheruman	Matangi	Semman
Dandasi	Moger	Thoti
Devandrakulathan	Muchi	Tiruvalluvar
Ghasi	Mundala	Valluvan
Godagali	Nalakeyava	Valmiki
Godari	Nayadi	Vettuvan
Godda	Paga dai	

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

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

PART II - BOMBAY

Scheduled Castes :-

(1) Throughout the Province:-

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

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

(3) In the Kanara district - Kotegar.

PART III - Bengal

Scheduled castes throughout the Province:-

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

PART IV - UNITED PROVINCES

Scheduled castes :-

(1) Throughout the Province:-

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

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

PART V - PUNJAB

Scheduled Castes throughout the Province:-

Ad Dharmis	Marija Marecha	or	Khatik
Bawaria	Bangali		Kori
Chamar	Barar		Nat
Chuhra, or	Bazigar		Pasi

Balmiki		
Dagi and Koli	Bhanjra	Perna
Dumna	Chanal	Sapela
Od	Dhanak	Sirkiband
Sansi	Gagra	Meghs
Sarera	Gandhila	Ramdasis

PART VI - BIHAR

Scheduled Castes:-

(1) Throughout the Province:-

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

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

Bauri	Bhumij	Rajwar
Bhogta	Ghasi	Turi
Bhuiya	Pan	

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

Bauri	Ghasi	Rajwar
Bhogta	Pan	Turi
Bhuiya		

PART VII - CENTRAL PROVINCES AND BERAR

Scheduled Castes	Localities

Basor, or Burud Chamar Dom Ganda Mang Mehtar or Bhangi Mochi Satnami		Throughout the Province
Audhelia	:	In the Bilaspur district
Bahna	:	In the Amraoti district
Balahi, or Balai	:	In the Berar division and the Balaghat, Bhandara, Betul, Chanda, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nagpur, Nimar Saugor and Wardha districts
Bedar	:	In the Akola, Amraoti and Buldana districts.
Chadar	:	In the Bhandara and Saugor districts
Chauhan	:	In the Drug district
Dahayat	:	In the Damoh subdivision of Saugor district.
Dewar	:	In the Bilaspur, Drug and Raipur districts.
Dhanuk	:	In the Saugor district, except in the Damoh subdivision thereof.
Dhimar	:	In the Bhandara district
Dhobi	:	In the Bhandara, Bilaspur, Raipur and Saugor districts, and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Dohor	:	In the Berar division, and the Balaghat, Bhandara, Chanda, Nagpur and Wardha districts
Ghasia	:	In the Berar division and in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur and Wardha districts.
Holiya	:	In the Balaghat and Bhandara districts.
Jangam	:	In the Bhandara district.
Kaikari	:	In the Berar division, and in Bhandara, Chanda, Nagpur and Wardha districts.
Katia	:	In the Berar division, in the Balaghat, Betul Bhandara, Bilaspur, Chanda, Drug, Nagpur, Nimar, Raipur and Wardha districts, in the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.

Khangar	:	In the Bhandara, Buldhana and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Khatik	:	In the Berar division, in the Balaghat, Bhandara, Chanda, Nagpur and Wardha districts, in the Hoshangabad tahsil of the Hoshangabad district, in the Chhindwara district, except in the Seoni subdivision thereof, and in the Saugor district, except in the Damoh subdivision thereof.
Koli	:	In the Bhandara and Chanda district
Kori	:	In the Amraoti, Balaghat, Betul, Bhandara, Buldana, Chhindwara, Jubbulpore, Mandla, Nimar, Raipur and Saugor districts, and in the Hoshangabad district, except in the Harda and Sohagpur tahsils thereof.
Kumhar	:	In the Bhandara and Saugor districts and the Hoshangabad and Seoni-Malwa tahsils of the Hoshangabad district.
Madgi	:	In the Berar division, and in the Balaghat Bhandara, Chanda, Nagpur and Wardha districts.
Mala	:	In the Balaghat, Betul, Chhindwara, Hoshangabad, Jubbulpore, Mandla, Nimar and Saugor districts.
Mehra, or Mahar	:	Throughout the Province, except in the Harda and Sohagpur tahsils of the Hoshangabad district.
Nagarchi	:	In the Balaghat, Bhandara, Chhindwara, Mandla, Nagpur and Raipur districts.
Ojha	:	In the Balaghat, Bhandara and Mandla districts and the Hoshangabad tahsil of the Hoshangabad district.
Panka	:	In the Berar division, in the Balaghat, Bhandara, Bilaspur, Chanda, Drug, Nagpur, Raipur, Saugor and Wardha districts and in the Chhindwara district except in the Seoni subdivision thereof.
Pardhi	:	In the Narsinghpur subdivision of the Hoshangabad district.
Pradhan	:	In the Berar division, in the Bhandara Chanda, Nagpur, Nimar, Raipur and Wardha districts and in the Chhindwara district, except in the Seoni subdivision thereof.
Rujjhar	:	In the Sohagpur tahsil of the Hoshangabad district.

PART VIII - ASSAM

Scheduled Castes: -

(1) In the Assam Valley: -

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

(2) In the Surma Valley:-

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

PART IX - ORISSA

Scheduled castes: -

(1) Throughout the Province:-

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

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

Government of India (Constitution of Orissa) Order, 1936, from the Vizagapatam and Ganjam Agencies in the Presidency of Madras:-

Pan, or Pano

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

Dom, or Dombo

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

Bauri	Bhumij	Turi
Bhuiya	Ghasi, or Ghasia	

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

Kori	Nagarchi	Pradhau

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

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

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

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

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

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

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

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

"300A-Scheduled Castes

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

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

300B-Scheduled Tribes

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

(2) Parliament may by law include in or exclude from the list of scheduled tribes specified in a notification issued by the President under clause (1) of this article any Tribe or Tribal community or part of or group within any Tribe or Tribal community but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

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

"The object of these two articles, as I stated, was to eliminate the, necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. It is now proposed that the President, in consultation with the Governor or Ruler of a State should have, the power to issue a general notification in the Gazette specifying all the Castes and tribes or groups thereof deemed to be

Scheduled Castes and Scheduled Tribes for the purposes of the privileges which have been defined for them in the Constitution.

The only limitation that has been imposed is this: that once a notification has been issued by the President, which, undoubtedly, he will be issuing in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by Parliament and not by the President. The object is to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President."

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

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

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

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

44. It is amply clear that the purpose behind the said provisions was that once an identification has been done in the List so notified, the Executive should not tinker with it and any addition or deletion had to be made only by Parliament.

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

"Shri V. I. Muniswami Pillai : Mr. President, I come to support the amendments that have been moved by the Honourable Dr. Ambedkar. These amendments deal with the definition of Scheduled Castes. As far as I can see he has made it clear that, according to the second part of it, the President on the 26th January 1950 will publish a list of such communities that come under the category of Scheduled Castes. But I would like to inform this House of the background which brought out the special name of Scheduled Castes.

It was the intouchability, the, social evil that has been practised by the Hindu Community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu society. Going backwards to 1916 it was in that year when Government found that something had to be done for the untouchable classes, (when they said untouchable classes, they were always understood to be Hindus,) and they had to be recognised. In Madras there were six communities that came under this classification. During the Montago Chelmsford reforms they were made ten.

In 1930 when the great epochmaking fast of Mahatma Gandhi came about, then only the country saw who were the real untouchable classes. And in the 1935 Act, the Government thoroughly examined the whole thing and as far as the Province of Madras is concerned they brought 86 communities into this list or category, though there were some touchable classes also. Now, after further examination the Provincial Governments have drawn up a list and I think according to the amendment mover's suggestions, all those communities that come-under the category of untouchables and those who profess Hinduism will be the Scheduled Castes, because I want to emphasise about the religion.

I emphasise this because of late there have been some movements here and there; there are people who have left Scheduled Castes and Hinduism and joined other religions and they also are claiming to be scheduled Castes. Such convert cannot come under the scope of this definition. While I have no objection to Government granting any concessions to these converts, I feel strongly that they should not be clubbed along with Scheduled Castes. Sir, I am grateful to the Drafting Committee and also to the Chairman of that Committee for making the second portion of it very clear, that in future, after the declaration by the President as to who will be the Scheduled Castes, and when there is need for including any other class or to exclude, anybody or any community from the list of Scheduled Castes that must be by the word of Parliament.

I feel grateful to him for bringing in this clause, because I know, as a matter of fact, when Harijans behave independently or asserting their right on some matters, the Ministers in some Provinces not only take note and action against those members, but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed. I strongly oppose the amendment moved by Pandit Bhargava.

The reason is that he wants to have the ten years period for observing these amendments. But he has entirely forgotten that under another article that we have already passed, or will pass the Constitution provides for the appointment of a Special officer at the Centre and also various officers in all the Provinces to go into the various disabilities of these communities and to submit a report to the President who will then be able to know whether the Scheduled Castes have reached a stage when the facilities now given to them could be withdrawn. I do not think that the reasons that he has advanced are fair and square for the uplift of the Harijans. With these few words, I support the amendment."

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

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

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

Chairman for bringing in this clause and that when Harijans behave independently or assert their right on some matters, not only the members of that community but their entire community is harassed.

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

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

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-

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

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

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

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

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

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions

relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

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

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

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.

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

"16. Equality of opportunity in matters of public employment.-

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

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office 14[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

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

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

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

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

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

"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.-

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

"335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.-

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

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for

relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

"338. National Commission for Scheduled Castes.-

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

(2) Subject to the provisions of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed shall be such as the President may by rule determine.]

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

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

(5) It shall be duty of the Commission-

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

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

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress of their development under the Union and any State;

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

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

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

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

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

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

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

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

(c) receiving evidence on affidavits;

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

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

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

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

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

"366. Definitions.-

In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-

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

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

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

III. JUDICIAL PRECEDENTS

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

51. It will also be relevant to note that by the First Amendment to the Constitution in the year 1951 by which clause (4) was added to Article 15 was necessitated on account of the judgment of this Court in the case of State of Madras vs. Smt. Champakam Dorairajan4 wherein Government Order specifying reservation for Harijans was set aside.

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

52. In the case of M.R. Balaji and others vs. State of Mysore5, the subject matter of challenge before the Constitution Bench of this Court was an order issued by the State of Mysore under Article 15(4) of the Constitution of India. Vide the said order, the State reserved 68% of the seats in the engineering and medical colleges and other technical institutions for the educationally and socially backward classes and Scheduled Castes and Scheduled Tribes and only 32% seats were available for the merit pool.

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

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

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

It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them.

Article 34(1) provides for the issue of public notification specifying the castes, races or tribes which shall, for the purposes of this Constitution, be deemed to be Scheduled Castes either in the State or the Union territory as the case may be. Similarly Article 342 makes a provision for the issue of public notification in respect of Scheduled Tribes. Under Article 338(3), it is provided that references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other Backward Classes as the President may, on receipt of the report of a commission appointed under Article 340(1) by order, specify and also to the Anglo-Indian community.

It would thus be seen that this provision contemplates that some Backward Classes may by the Presidential order be included in Scheduled Castes and Tribes. That helps to bring out the point that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes."

55. This Court observed that the backward classes of citizens for whom special provision is authorized to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. It has been observed that

the Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement.

However, it was realized that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less backward than the Scheduled Castes and Scheduled Tribes, and it was thought that some special provision ought to be made even for them. The Court observed that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes.

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

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

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

58. The Court then considered the question as to whether caste can be made the sole basis for determining the social backwardness was permissible or not. The Court observed that the group of citizens to whom Article 15(4) applies are described as "classes of citizens", not as castes of citizens. The Court observed that therefore in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens.

It has been observed that though the caste of the group of citizens may be relevant, its importance should not be exaggerated. The Court further observed that social backwardness is, on the ultimate analysis, the result of poverty to a very large extent. It observed that the classes of citizens who are deplorably poor automatically become socially backward. It observed that they do not enjoy a status in society and have, therefore, to be content to take a backward seat. The Court therefore held that both caste and poverty are relevant in determining the backwardness of citizens.

59. The Court further observed that the occupations of citizens may also contribute to making classes of citizens socially backward. It has been observed that there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt

to become socially backward. It has been observed that the place of habitation also plays a role in determining the backwardness of a community of persons.

It therefore held that the problem of determining who are socially backward classes is very complex. It has been held that sociological, social, and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward. However, it observed, that is the function of the State which purports to act under Article 15(4) of the Constitution of India.

60. In the facts of the said case, the Court found that the State had applied the sole criteria of caste without regard to the other factors. It was therefore held that the criteria of social backwardness of the communities to whom the order impugned therein was applied was not permissible under Article 15(4) of the Constitution of India.

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

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

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

63. Coming next to one of the most important judgments dealing with the affirmative action which is the 7-Judge Bench judgment of this Court in the case of State of Kerala and another vs. N.M. Thomas and others6. In the said case, out of the 7 Learned Judges, 5 Learned Judges upheld the provisions made by the Kerala Government for providing affirmative action to ameliorate the situation of Scheduled Castes and Scheduled Tribes.

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

"21. Articles 14, 15 and 16 form part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is an incident

of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to the objects to be achieved. Under Article 16 there can be a reasonable classification of the employees in matters relating to employment or appointment.

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

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

23. In Ambica Mills case [(1974) 4 SCC 656 : 1974 SCC (L&S) 381] this Court explained reasonable classification to be one which includes all who are similarly situated and none who are not. The question as to who are similarly situated has been answered by stating that one must look beyond the classification to the purpose of law. "The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good." [SCC p. 675: SCC (L&S) p. 400, para 54]

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

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

28. This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to

any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).

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

30. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class. The Roadside Station Masters and Guards are recruited separately, trained separately and have separate avenues of promotion. The Station Masters claimed equality of opportunity for promotion vis-à-vis the guards on the ground that they were entitled to equality of opportunity.

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

65. It could thus be seen that in the opinion of Ray, C.J., Articles 14, 15 and 16 form part of a string of constitutional rights guaranteed by it, which supplement each other. His Lordship observed that Article 16, which ensures to all citizens equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. In turn, Article 16(1) gives effect to

Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus with the objects to be achieved.

66. Referring to the judgment of this Court in the case of State of Gujarat v. Shri Ambica Mills Ltd., Ahmedabad7, His Lordship explained the reasonable classification to be one which includes all who are similarly situated and none who are not. He further observed that discrimination is the essence of classification, and that equality is violated if it rests on an unreasonable basis. He observed that those who are similarly circumstanced are entitled to an equal treatment and that equality is amongst equals.

He observed that the classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups. He further observed that such differential attributes must bear a just and rational relation to the object sought to be achieved. He further observed that there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. He observed that Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection.

He observed that this equality of opportunity need not be confused with absolute equality. It is observed that power to make reservation, which is conferred on the State, under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. His Lordship observed that in providing for reservation of appointments or posts under Article 16(4) the State has to take into consideration the claims of the Backward Classes consistently with the maintenance of the efficiency of administration.

67. His Lordship further observed thus:

"38. The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cummerit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority.

This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2). The relevant touchstone of validity is to find out whether

the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it."

68. It is observed that the rule which provides that given the necessary requisite merit, a member of the backward class shall get priority so as to ensure adequate representation and the said rule will not violate Article 14 or Article 16(1) and (2). The relevant consideration would be to find out whether the rule of preference secures adequate representation for the unrepresented backward community or goes beyond it. 69. His Lordship further observed thus:

"43. Scheduled Castes and scheduled tribes are not a caste within the ordinary meaning of caste. In Bhaiyalal v. Harikishan Singh [AIR 1965 SC 1557 : (1965) 2 SCR 877] this Court held that an enquiry whether the appellant there belonged to the Dohar caste which was not recognised as a scheduled caste and his declaration that he belonged to the Chamar caste which was a scheduled caste could not be premitted because of the provisions contained in Article 341.

No court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. Scheduled caste is a caste as notified under Article 366(25). A notification is issued by the President under Article 341 as a result of an elaborate enquiry. The object of Article 341 is to provide protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and tribes, who are said by this Court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality.

Article 15(4) and 16(4) bring out the position of Backward Classes to merit equality. Special provisions are made for the advancement of Backward Classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept equality is equality of opportunity for appointment. Preferential treatment for members of Backward Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14.

Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality."

70. His Lordship clearly observed that Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste. He observed that no court can come to a finding that any caste or any tribe is a scheduled caste or scheduled tribe. It is observed that the object of Article 341 is to provide protection to the members of Scheduled Castes having regard to the economic and educational backwardness from which they suffer.

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

It has been emphasized that only such special provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). His Lordship goes on to say that preferential treatment for members of Backward Classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. It has been observed that equality of opportunity for unequals can only mean aggravation of inequality and that equality of opportunity admits discrimination with reason and prohibits discrimination without reason.

His Lordship held that discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It has been held that Preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. It has been held that the differential treatment in standards of selection is within the concept of equality.

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

"53. Formal equality is achieved by treating all persons equally:

"Each man to count for one and no one to count for more than one."

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

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

55. In distributing the office of a State, not any sort of personal equality is relevant; for, unless we employ criteria appropriate to the sphere in question, it would turn out that a man's height or complexion could determine his eligibility or suitability for a post. As Aristotle said, claims to political office cannot be based on prowess in athletic contests. Candidates for office should possess those qualities that go to make up an effective use of the office.

But this principle also does not give any satisfactory answer to the question when differential treatment can be meted out. As I said, the principle that if two persons are being treated or are to be treated differently there should be some relevant difference between them is, no doubt, unexceptionable. Otherwise, in the absence of some differentiating feature what is sauce for the goose is sauce for the gander. The real difficulty arises in finding out what constitutes a relevant difference.

56. If we are all to be treated in the same manner, this must carry with it the important requirement that none of us should be better or worse in upbriging, education, than anyone else which is an unattainable ideal for human beings of anything like the sort we now see. Some people maintain that the concept of

equality of opportunity is an unsatisfactory concept. For, a complete formulation of it renders it incompatible with any form of human society.

Take for instance, the case of equality of opportunity for education. This equality cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. To remedy this, all children might be brought up in State nurseries, but, to achieve the purpose, the nurseries would have to be run on vigorously uniform lines. Could we guarantee equality of opportunity to the young even in those circumstances? The idea is well expressed by Laski:

"Equality means, in the second place, that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal. Children who are brought up in an atmosphere where things of the mind are accounted highly are bound to start the race of life with advantages no legislation can secure. Parental character will inevitably affect profoundly the equality of the children whom it touches. So long, therefore, as the family endures - and there seems little reason to anticipate or to desire its disappearance - the varying environments it will create make the notion of equal opportunities a fantastic one. ["Liberty and Equality" in Special Problems and Public Policy : Inequality and Justice, Ed. Lee Rainwater, pp. 26 to 31]

57. Though complete identity of equality of opportunity is impossible in the world, measures compensatory in character and which are calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1)."

73. Mathew, J. observed that formal equality is achieved by treating all persons equally. Formally, it requires that all men have to be treated as the same. He observed that men are not equal in all respects. The claim for equality is in fact a protest against unjust, undeserved and unjustified inequalities. It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges.

He observed that as soon as we clear up the confusion between equality in the moral sense and equality in the physical sense, it is just to promote certain equalities precisely to compensate for the fact that men are actually born different. He explains the theory of proportional equality and observed that the principle of proportional equality can be attained only when equals are treated equally and unequals unequally. He observed that if there is no significant respect in which persons concerned are distinguishable, differential treatment would be unjustified.

But if there is significant respect in which persons concerned are distinguishable, the same would justify differential treatment. His Lordship observed that if two people are being treated or are to be treated differently there should be some relevant difference between them. Otherwise, in the absence of some differentiating feature what is sauce for the goose is sauce for the gander. He observed that the real difficulty arises in finding out what constitutes a relevant difference.

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

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

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

65. Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains insofar as, and only insofar as, each member of a community, whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence. [See R.H. Tawney, "Equality", (1965) pp. 103-04]

66. The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal

equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. They mark off a world in which the Government should have no jurisdiction.

In this realm, it was assumed that a citizen has no claim upon Government except to be left alone. But the language of Article 16(1) is in marked contrast with that of Article 14. Whereas the accent in Article 14 is on the injunction that the State shall not deny to any person equality before the law or the equal protection of the laws that is, on the negative character of the duty of the State, the emphasis in Article 16(1) is on the mandatory aspect, namely, that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State implying thereby that affirmative action by the Government would be consistent with the article if it is calculated to achieve it. If we are to achieve equality, we can never afford to relax:

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

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

The idea finds expression in a number of cases in America involving social discrimination and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law.

While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the

private inequalities of wealth, of education and other circumstances. [See "Developments - Equal Protection", 82 Harv LR 1165]

68. The idea of compensatory State action to make people who are really unequal in their wealth, education or social environment, equal, in specified areas, was developed by the Supreme Court of the United States. Rousseau has said:

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

76. His Lordship observed that if we want to give equality of opportunity for employment to the members of the Scheduled Castes and Scheduled Tribes, we will have to take note of their social, educational, and economic environment. His Lordship observed that the directive principle embodied in Article 46 is not only binding on the lawmaker, but it should equally inform and illuminate the approach of the court when it makes a decision. Referring to the exposition in the case of His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala8, His Lordship states that the Court is also a 'state' when it makes a decision within the meaning of Article 12.

77. His Lordship observed that 'equality of opportunity' is not simply a matter of legal equality and that its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It has been observed that the guarantee of equality is something more than what is required by 'formal equality'. It implies differential treatment of persons who are unequal.

It has been observed that egalitarian principle requires that the Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claim Fundamental rights as enacted in Part III of the Constitution are, by and large, essentially negative in character. His Lordship observed that the emphasis in Article 16(1) is on the mandatory aspect that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. It therefore implies that affirmative action by the Government would be consistent with the article if it is calculated to achieve it.

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

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

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

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

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

75. It is said that Article 16(4) specifically provides for reservation of posts in favour of Backward Classes which according to the decision of this Court would include the power of the State to make reservation at the stage of promotion also and therefore Article 16(1) cannot include within its compass the power to give any adventitious aids by legislation or otherwise to the Backward Classes which would derogate from strict numerical equality.

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

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

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

"It is increasingly demanded that the distribution of success and failure within one group be roughly comparable to that within other groups. It is not enough that all individuals start out on even terms, if the members of one group almost invariably end up well to the fore and those of another far to the rear. This is what ethnic politics are all about in America, and in the main the Negro American demands are being put forth in this new traditional and established framework.

Here a point of semantics must be grasped. The demand for equality of opportunity has been generally perceived by White Americans as a demand for liberty, a demand not to be excluded from the competitions of life - at the polling place, in the scholarship examinations, at the personnel office, on the housing market. Liberty does, of course, demand that everyone be free to try his luck, or test his skill in such matters. But these opportunities do not necessarily produce equality: on the contrary, to the extent that winners imply losers, equality of opportunity almost insures inequality of results.

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

77. Beginning most notably with the Supreme Court's condemnation of school segregation in 1954, the United States has finally begun to correct the discrepancy between its ideals and its treatment of the black man. The first steps, as reflected in the decisions of the courts and the civil rights laws of Congress, merely removed the legal and quasi-legal forms of racial discrimination. These actions while not producing true equality, or even equality of opportunity, logically dictated the next step: positive use of government power to create the possibility of a real equality. In the words of Professor Lipset:

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

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

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

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

82. He observed that no member of the forward classes or communities should complain against a compensatory measure made by the Government to ensure that the members of Scheduled Castes and Scheduled Tribes get their due share of representation in public services.

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

84. Mathew, J. rejects the contention that Article 16(4) is an exception to Article 16(1). He states that such an interpretation does not consider the social, economic, educational background of the members of the Scheduled Castes and Scheduled Tribes. He held that if equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an

exception to Article 16(1) and that it is only an emphatic way of putting the extent to which equality of opportunity could be carried i.e., even up to the point of making reservation.

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

86. Mathew, J. further observed thus:

"83. A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. In other words, the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class.

It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the principle laid down in All India Station Masters and Assistant Station Masters Association v. General Manager, Central Railway [(1960) 2 SCR 311 : AIR 1960 SC 384.] ; S.G. Jaisinghani v. Union of India and State of J&K. v. Triloki Nath Khosa [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771.] has no application here."

87. It has been observed that a classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. It has been observed that the classification must be founded on some reasonable ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule. It specifically observed that it is a mistake to assume a priori that there can be no classification within a class.

He held that if there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of

classification, such a further classification within the class would be permissible in law. He observed that though in one sense classification brings about inequality it is promotive of equality if its object is to bring those who share a common characteristic under a class, for differential treatment for sufficient and justifiable reasons.

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

"124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets.

Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by intercaste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination".

Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions.

For them, Articles 46 and 335 remain a "noble romance" [As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).] , the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An

equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.

125. The core conclusion I seek to emphasise is that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice - not enshrinement of great rights in Part III and good goals in Part IV. Otherwise, the solemn undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality".

A clear vision of the true intendment of these provisions demands a deep understanding of the Indian spiritual-secular idea that divinity dwells in all and that ancient environmental pollution and social placement, which the State must extirpate, account for the current socio-economic backwardness of the blacked-out human areas described euphemistically as scheduled castes and scheduled tribes. The roots of our constitutional ideas - at least some of them - can be traced to our ancient culture. The noble Upanishadic behest of collective acquisition of cultural strength (सह वीर्यं करवावहे) is involved in and must evolve out of "equality", if we are true to the subtle substance of our finer heritage."

89. His Lordship categorizes three-fold danger of reservation. According to him, firstly the benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim of backwardness is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment.

However, they wish to wear the "weaker section" label to score over their near-equals formally categorized as the upper brackets. Thirdly, according to him, a lasting solution to the problem would come only from improvement of social environment, added educational facilities and cross-fertilization of castes by inter-caste and inter-class marriages sponsored as a massive State program.

90. His Lordship observed that every step needed to achieve in action actual, equal, partnership for the harijans, alone amounts to social justice. He observed that if this is not done, the solemn undertakings in Articles 14 to 16 read with Articles 46 and 335 may be reduced to a "teasing illusion or promise of unreality".

91. His Lordship further observed thus:

"136. The next hurdle in the appellant's path relates to Article 16(4). To my mind, this sub-article serves not as an exception but as an emphatic statement, one

mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to. In the language of Subba Rao, J. (as he then was), in Devadasan [AIR 1964 SC 179: (1964) 4 SCR 680, 700 : (1965) 2 LLJ 560].

"The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."

True, it may be loosely said that Article 16(4) is an exception but, closely examined, it is an illustration of constitutionally sanctified classification. Public services have been a fascination for Indians even in British days, being a symbol of State power and so a special article has been devoted to it. Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt (see, for instance, CIT v. Shaw Wallace & Co. [59 IA 206: AIR 1932 PC 138]).

137. "Reservation" based on classification of backward and forward classes, without detriment to administrative standards (as this Court has underscored) is but an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. Article 16(1) and (4) are concordant.

This Court has viewed Article 16(4)as an exception to Article 16(1). Does classification based on desperate backwardness render Article 16(4) redundant? No. Reservation confers pro tanto monopoly, but classification grants under Article 16(1) ordinarily a lesser order of advantage. The former is more rigid, the latter more flexible, although they may overlap sometimes. Article 16(4) covers all backward classes; but to earn the benefit of grouping under Article 16(1) based on Articles 46 and 335 as I have explained, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied."

92. Referring to the observation of Subba Rao, J. in the case of T. Devadasan vs. Union of India9, Krishna Iyer, J. observed that Article 16(4) serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to.

93. He observed that on a closer examination, it can be seen that clause (4) of Article 16 is an illustration of constitutionally sanctified classification. He

observed that Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt.

94. It is observed that the "Reservation" based on classification of backward and forward classes, without detriment to administrative standards is an application of the principle of equality within a class and grouping based on a rational differentia, the object being advancement of backward classes consistently with efficiency. His Lordship further observed that Article 16(4) covers all backward classes. He however states that for earning the benefit of grouping under Article 16(1) based on Articles 46 and 335, the twin considerations of terrible backwardness of the type harijans endure and maintenance of administrative efficiency must be satisfied.

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

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

"178. The concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. Indeed if this artificial interpretation is put on the scope and ambit of Article 16 it will lead to channelisation of legislation or polarisation of rules. Differences and disparities exist among men and things and they cannot be treated alike by the application of the same laws but the law has to come to terms with life and must be able to recognise the genuine differences and disparities that exist in human nature. Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification. In Morey v. Doud [354 US 457, 473] it was so aptly observed:

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

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

Category I-clause (1) of Article 16

Category II-clause (2) of Article 16.

Category Ill-clause (4) of Article 16.

180. Clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. It is important to note that the Constitution uses the words "equality of opportunity for all citizens". This inherently implies that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens. This, therefore, can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. The classification, however, must be a reasonable one and must fulfil the following conditions:

(i) It must have a rational basis;

(ii) it must have a close nexus with the object sought to be achieved;

(iii) it should not select any person for hostile discrimination at the cost of others."

97. His Lordship observed that differences and disparities exist among men and things, and they cannot be treated alike by the application of the same laws. He observed that the law must come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature. He observed that the Legislature has also to enact legislation to meet specific ends by making a reasonable and rational classification.

98. It has been observed that clause (1) of Article 16 clearly provides for equality of opportunity to all citizens in the services under the State. His Lordship emphasized that the words "equality of opportunity for all citizens" used in the Constitution imply that the opportunity must be given not only to a particular section of the society or a particular class of citizens who may be advanced or otherwise more affluent but to all classes of citizens.

According to the Learned Judge, this can be achieved by making a reasonable classification so that every class of citizens is duly represented in services which will enable equality of opportunity to all citizens. He however culls out three conditions, viz., (i) it must have a rational basis; (ii) it must have a close nexus with the object sought to be achieved; and (iii) it should not select any person for hostile discrimination at the cost of others. 99. Echoing the sentiments of the other Learned Judges, by holding that Article 16(4) is not a proviso to Article 16(1), the Learned Judge observed thus:

"187. For these reasons, therefore, I respectfully agree with the observations of Subba Rao, J., as he then was, in T. Devadasan v. Union of India [AIR 1964 SC 179 : (1964) 4 SCR 680 : (1965) 2 LLJ 560] where he observed:

"That is why the makers of the Constitution introduced clause (4) in Article 16. The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."

My view that Article 16(4) is not a proviso to Article 16(1) but that this clause covers the whole field of Article 16 is amply supported by the decision of this Court in General Manager, Southern Railway v. Ranga-chari where it was observed: (p. 599)

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

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

100. Next is the case of Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association vs. Union of India and others10, where a bench of 3 Learned Judges of this Court was considering the policy directives issued by the Railway Board introducing reservation in cases of selection as well as nonselection posts and other related issues regarding affirmative action.

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

"12. Granville Austin [Granville Austin: The Indian Constitution - Cornerstone of a Nation] quotes profusely from the Constituent Assembly proceedings to prove the goal of the Indian Constitution to be social revolution. Radhakrishnan, representing the broad consensus, said that: [Ibid, p. 27]

"India must have a 'socio-economic revolution' designed not only to bring about the real satisfaction of the fundamental needs of the common man, but to go much deeper and bring about 'a fundamental change in the structure of Indian society'."

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

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

"21. The preamble which promises justice, liberty and equality of status and opportunity within the framework of secular, socialist republic projects a holistic perspective. Article 16 which guarantees equal opportunity for all citizens in matters of State service inherently implies equalisation as a process towards equality but also hastens to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing and devotes Article 16(4) for this specific purpose.

In a given situation of large social categories being submerged for long, the guarantee of equality with the rest is myth, not reality, unless it is combined with affirmative State action for equalisation geared to promotion of eventual equality. Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). The prescription of Article 16(1) needs, in the living conditions of India, the concrete sanction of Article 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung. To bury this truth is to sloganise Article 16(1) and sacrifice the facts of life.

22. This is not mere harmonious statutory construction of Article 16(1) and (4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality belong alike to bhangi and brahmin, prince and pauper, if the panchama proletariat is to feel the social transformation Article 16(4) promises, the State must apply equalising techniques which will enlarge their opportunities and thereby progressively diminish the need for props.

The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception [Article 16(4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d'etre, to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1), to casteify "reservation" even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State.

23. The authentic voice of our culture, voiced by all the great builders of modern India, stood for abolition of the hardships of the pariah, the mlecha, the bonded labour, the hungry, hard-working halfslave, whose liberation was integral to our

independence. To interpret the Constitution rightly we must understand the people for whom it is made - the finer ethos, the frustrations, the aspirations, the parameters set by the Constitution for the principled solution of social disabilities. This synthesis of ends and means, of life's maladies and law's remedies is a part of the know-how of constitutional interpretation if alienation from the people were not to afflict the justicing process: [J. Landis : Note on Statutory Interpretation, 43 Harv L Rev 886, 891 (1930)] A statute rarely stands alone. Back of Minerva was the brain of Jove, and behind Venus was the spume of the ocean."

104. The Learned Judge observed that the guarantee of equal opportunity provided under Article 16 for all citizens in matters of State service inherently implies equalization as a process towards equality. However, he also emphasizes the need to harmonize the realistic need to jack up "depressed" classes to overcome initial handicaps and join the national race towards progress on an equal footing. He states that Article 16(4) has been devoted for this very specific purpose.

He observed that the guarantee of equality to the large social categories being submerged for long, with the rest, would be myth and not reality, unless it is combined with affirmative State action for equalization geared to promotion of eventual equality. He observed that Article 16(4) is not a jarring note but auxiliary to fair fulfilment of Article 16(1). He observed that the prescription of Article 16(1) needs the concrete sanction of Article 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung.

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

106. Krishna Iyer, J. further observed thus:

"34. Special provisions for depressed classes and even other castes have a pre-Constitution history. After the Constitution was enacted the legality of old rules

based on caste became moot and the Central Government revised its policy. The post-Constitution reincarnation of the communal G.O. concentrated not on caste orientation but on elimination of socioeconomic suppression and the diverse ways to achieve this objective.

36. Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. Nevertheless, our founding fathers were realists, and so did not declare the proposition of equality in its bald universality but subjected it to certain special provisions, not contradicting the soul of equality, but adapting that never-changing principle to the ever-changing social milieu. That is how Articles 15(4) and 16(4) have to be read together with Articles 15(1) and 16(1). The first sub-article speaks of equality and the second sub-article amplifies its content by expressly interdicting caste as a ground of discrimination.

Article 16(4) imparts to the seemingly static equality embedded in Article 16(1) a dynamic quality by importing equalisation strategies geared to the eventual achievement of equality as permissible State action, viewed as an amplification of Article 16(1) or as an exception to it. The same observation will hold good for the sub-articles of Article 15. Thus we have a constitutional fundamental guarantee in Articles 14 to 16; but it is a notorious fact of our cultural heritage that the Scheduled Castes and the Scheduled Tribes have been in unfree India nearly dehumanised, and a facet of the struggle for Freedom has been the restoration of full personhood to them together with the right to share in the social and economic development of the country.

Article 46 is a Directive Principle contained in Part IV. Every Directive Principle is fundamental in the governance of the country and it shall be the duty of the State to apply that principle in making laws. Article 46, in emphatic terms, obligates the State "to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation".

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

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

The positive accent of this article is that the claims of SC & ST to equalisation of representation in services under the State, having regard to their sunken social status and impotence in the power system, shall be taken into consideration. The negative element, which is part of the article, is that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

39. Article 341 makes it clear that a "scheduled Caste" need not be a "caste" in the conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). Scheduled Castes become such only if the President specifies any castes, races or tribes or parts or groups within castes, races or tribes for the purpose of the Constitution. So, a group or a section of a group, which need not be a caste and may even be a hotchpotch of many castes or tribes or even races, may still be a Scheduled Caste under Article 341.

Likewise, races or tribal communities or parts thereof or part or parts of groups within them may still be Scheduled Tribes (Article 342) for the purpose of the Constitution. Under this definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be. It is the socioeconomic backwardness of a social bracket, not mere birth in a caste, that is decisive. Conceptual errors creep in when traditional obsessions obfuscate the vision."

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

108. He then stated that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He then considered the interplay between Articles 15(4) and 16(4) on the one hand and Articles 15(1) and 16(1) on the other hand. He thereafter refers to the notorious fact of our cultural heritage that the Scheduled Castes and the Scheduled Tribes have been in unfree India nearly dehumanized, and a facet of the struggle for freedom has been the restoration of full personhood to them

together with the right to share in the social and economic development of the country.

He thereafter refers to Article 46 and the importance of the said Directive Principle in the governance of the country and observes that it shall be the duty of the State to apply that principle in making laws. He stated that reading Article 46 together with Article 16(4) expresses the intention of the Constitution-framers that the exploitation of the harijan-girijan groups in the past shall be extirpated with special care by the State. For completeness, he then refers to Article 335 to state that measures taken by the State, pursuant to the mandate of Articles 16(4), 46 and 335, shall be consistent with and not subversive of "the maintenance of efficiency of administration".

109. Krishna Iyer, J. then observed that Article 341 makes it clear that a "Scheduled Caste" need not be a "caste" in the conventional sense and, therefore, may not be a caste within the meaning of Article 15(2) or 16(2). He states that Scheduled Castes become such only if the President specifies any castes, races or tribes or parts or groups within castes, races or tribes for the purpose of the Constitution. He observed that under the definition, one group in a caste may be a Scheduled Caste and another from the same caste may not be and that it is the socioeconomic backwardness of a social bracket, not mere birth in a caste, that is decisive.

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

"73. A luminous preface to the constitutional values nullified by social realities is found in Dr Ambedkar's address to the Constituent Assembly earlier extracted, which draws poignant attention to the life of contradictions between the explosive social and economic inequalities and the processes of political democracy. "How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?" was the interrogation before the framers of the Constitution and they wanted to enforce the principle of "one man, one value".

This perspective must inform the code of equality contained in Articles 14 to 16. Equality being a dynamic concept with flexible import this Court has read into Articles 14 to 16 the pragmatic doctrine of classification and equal treatment to all who fall within each class. But care must be taken to see that classification is not pushed to such an extreme point as to make the fundamental right to equality cave in and collapse (see observations in Triloki Nath Khosa v. State of J&K [(1974) 1 SCC 19 : 1974 SCC (L&S) 49 : (1974) 1 SCR 771] . Ray, C.J., in

Kerala v. Thomas [(1976) 2 SCC 310, 331, 332, 333, 334 : 1976 SCC (L&S) 227, 248 249, 250, 251 : (1976) 1 SCR 906, 926-29] epitomised the position in a few passages: [SCC pp. 331, 332, 333 & 334: SCC (L&S) pp. 248, 249, 250 & 251, paras 21, 24, 27, 28, 30 & 31

"Articles 14, 15 and 16 from part of a string of constitutional guaranteed rights. These rights supplement each other. Article 16 which ensures to all citizens equality of opportunity in matters relating to employment is an incident of guarantee of equality contained in Article 14. Article 16(1) gives effect to Article 14. Both Articles 14 and 16(1) permit reasonable classification having a nexus to be the object to be achieved.

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

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

This equality of opportunity need not be confused with absolute equality. Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class. The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances.

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

The learned Chief Justice relied upon earlier decisions to substantiate this proposition. In Triloki Nath Khosa v. State of J&K [(1976) 2 SCC 310, 337 : 1976 SCC (L&S) 227, 254 : (1976) 1 SCR 906, 932] this Court had held that the State may make rules guided by realities just as the legislature "is free to recognise degrees of harm and it may confine its restrictions to those classes of

cases where the need is deemed to be the clearest". Thus we arrive at the constitutional truism that the State may classify, based upon substantial differentia, groups or classes and this process does not necessarily spell violation of Articles 14 to 16."

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

112. The Learned Judge further observed as under:

"76. Proceeding on this footing, the fundamental right of equality of opportunity has to be read as justifying the categorisation of SCs & STs separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally sanctioned in terms, as Articles 16 (4) and 46 specificate. The classification is just and reasonable. We may, however, have to test whether the means used to reach the end are reasonable and do not outrun the purposes of the classification. Thus the scope of the case is narrowed down."

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

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

"94. It is fashionable to say - and there is, perhaps, some truth in it - that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom and other professions. Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency. We are not impressed with the misfortune predicted about governmental personnel being manned by morons merely because a sprinkling of harijans/girijans happen to find their way into the services.

Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the administration of the country. The malady of

modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes. Nor does the specious plea that because a few harijans are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren."

[emphasis supplied]

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

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

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

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

"123. Because fundamental rights are justiciable and directive principles are not, it was assumed, in the beginning, that fundamental rights held a superior position under the Constitution than the directive principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognised that the difference between the Fundamental rights and directive principles lies in this that Fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the directive principles are aimed at securing social and economic freedoms by appropriate State action.

The Fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. So they are made justiciable. But, it is also evident that notwithstanding their great importance, the directive principles cannot in the very nature of things be enforced in a court of law. It is unimaginable that any court can compel a legislature to make a law. If the court

can compel Parliament to make laws then parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in that sense that the Constitution says that the directive principles shall not be enforceable by courts.

It does not mean that directive principles are less important than Fundamental rights or that they are not binding on the various organs of the State. Article 37 of the Constitution emphatically states that directive principles are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and the laws. The directive principles should serve the courts as a code of interpretation.

Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the directive principles or if it is not in discharge of some of the undoubted obligations of the State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the directive principles and other provisions of the Constitution.

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

118. The Learned Judge discussed the interplay between the Fundamental Rights and the Directive Principles. He observed that the Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action. The Learned Judge observed that merely because the Directive Principles are not enforceable by Courts, it does not mean that Directive Principles are less important than Fundamental rights or that they are not binding on the various organs of the State.

Referring to Article 37 of the Constitution, the Learned Judge states that the Directive Principles are nevertheless fundamental in the governance of the country, and it shall be the duty of the State to apply these principles in making laws. He held that it becomes the duty of the court to apply the directive

principles in interpreting the Constitution and the laws; that the directive principles should serve the courts as a code of interpretation. He held that the Fundamental rights should thus be interpreted in the light of the directive principles and the latter should, whenever and wherever possible, be read into the former.

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

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

"125. Let us now take a look at Article 16(1) and Article 16(4). Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. To the class of citizens who are economically and socially backward this guarantee will be no more than mere wishful thinking, and mere "vanity wind and confusion", if it is not translated into reality by necessary State action to protect and nurture such class of citizens so as to enable them to shake off the heartcrushing burden of a thousand years' deprivation from their shoulders and to claim a fair proportion of participation in the administration.

Reservation of posts and all other measures designed to promote the participation of the Scheduled Castes and the Scheduled Tribes in the Public Services at all levels are in our opinion necessary consequences flowing from the Fundamental Right guaranteed by Article 16(1). This very idea is emphasised further by Article 16(4). Article 16(4) is not in the nature of an exception to Article 16(1). It is a facet of Article 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an underprivileged and deprived class of citizens to whom egalite de droit (formal or legal equality) is not egalite de fait (practical or factual equality). It is illustrative of what the State must do to wipe out the distinction between egalite de droit and egalite de fait.

It recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged. Equality of opportunity must be such as to yield "Equality of Results" and not that which simply enables people, socially and economically better placed, to win against the less fortunate, even when the competition is

itself otherwise equitable. John Rawls in A Theory Of Justice demands the priority of equality in a distributive sense and the setting up of the social system "so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return". His basic principle of social justice is:

"All social primary goods - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured."

One of the essential elements of his conception of social justice is what he calls the principle of redress:

"This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for." Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that "Equality of Opportunity must yield Equality of Results" and if the fulfilment of Article 16(1) in Article 16(4) ever needed a philosophical foundation it is furnished by Rawls' theory of justice and the redress Principle."

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

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

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

123. The next judgment of the Constitution Bench of this Court that requires consideration is the case of K.C. Vasanth Kumar and another vs. State of Karnataka11. In the said case, the Court was invited not so much to deliver judgment but to express its opinion on the issue of reservations in the context of Articles 15(4) and 16(4), which would serve as a guideline to the Commission which the Government of Karnataka had proposed to appoint, for examining the

question of affording better employment and educational opportunities to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Each of the 5 Learned Judges comprising the Constitution Bench of this Court rendered their separate opinions.

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

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

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

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

(3) Insofar as the other backward classes are concerned, two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

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

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

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

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

"30. Let me conclude. If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty.

31. Let me make abundantly clear that this approach does not deal with reservation in favour of Scheduled Castes and Scheduled Tribes. Thousands of years of discrimination and exploitation cannot be wiped out in one generation. But even here economic criterion is worth applying byrefusing preferred treatment to those amongst them who have already benefited by it and improved their position. And finally reservation must have a time span otherwise concessions tend to become vested interests.

This is not a judgment in a lis in an adversary system. When the arguments concluded, a statement was made that the Government of State of Karnataka would appoint a Commission to determine constitutionally sound and nationally acceptable criteria for identifying socially and educationally backward classes of citizens for whose benefit the State action would be taken. This does not purport to be an exhaustive essay on guide lines but may point to some extent, the direction in which the proposed Commission should move."

127. It could thus be seen that the Learned Judge supports applying the economic criterion for the purpose of compensatory discrimination or affirmative action. According to the Learned Judge, it would strike at the root cause of social and educational backwardness. He further states that simultaneously it would be a

vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation.

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

129. Rejecting the contention that the reservation is antiimperialist, Chinnappa Reddy, J. observed thus:

"35. One of the results of the superior, elitist approach is that the question of reservation is invariably viewed as the conflict between the meritarian principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis. There is not enough fruit in the garden and so those who are in, want to keep out those who are out. The disastrous consequences of the so-called meritarian principle to the vast majority of the undernourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated. And, what is merit? There is no merit in a system which brings about such consequences.

Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and Society, who has no books and magazines to read at home, no radio to listen, no TV to watch, no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40 per cent or 50 per cent of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90 per cent of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life.

If spring flower he cannot be, autumn flower he may be. Why then, should he be stopped at the threshold on an alleged meritarian principle? The requirements of

efficiency may always be safeguarded by the prescription of minimum standards. Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle be put against mediocrity when we come to Scheduled Castes, Scheduled Tribes and backward classes?"

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

The Learned Judge observed that with all these disadvantages, if he is able to secure the qualifying 40% or 50% of the marks at a competitive examination, he cannot be said to have no merit, especially if he be compared with the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination and may secure 70, 80 or even 90% of the marks. The Learned Judge further observed that the requirements of efficiency may always be safeguarded by the prescription of minimum standards.

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

"51. Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them.

There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes. Such a test would perpetuate the dominance of the existing upper classes.

Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the "enlightened" classes will capture all the "open" posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the "enlightened" classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of imposing themselves."

132. The Learned Judge rejects the argument that insofar as Other Backward Classes are concerned, their social backwardness has to be ascertained by applying the test of nearness to the conditions of existence of the Scheduled Castes. The Learned Judge observed that such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Scheduled Tribes.

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

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

"143. This view is in conformity with the intention underlying clause (6) of the resolution regarding the aims and objects of the Constitution moved by Jawaharlal Nehru on December 13, 1946 which asked the Constituent Assembly to frame a Constitution providing adequate safeguards for minorities, backward and tribal areas and depressed and other backward classes and also with the provisions of Article 338 and Article 340 of the Constitution. Unless the above restriction is imposed on the Government, it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the State as backward even though in fact it may be an advanced caste or group or community but just below some other forward community.

There is another important reason why such advanced castes or groups or communities should not be included in the list of backward classes and that is

that if castes or groups and communities which are fairly well advanced and castes and groups and communities which are really backward being at the rock-bottom level are classified together as backward classes, the benefit of reservation would invariably be eaten up by the more advanced sections and the really deserving sections would practically go without any benefit as more number of children of the more advanced castes or groups or communities amongst them would have scored higher marks than the children of more backward castes or groups or communities.

In that event the whole object of reservation would become frustrated. It is stated that it was with a view to avoiding this anomalous situation, the Government of Devaraj Urs had to appoint the Havanur Commission to make recommendations for the purpose of effectively implementing the objects of Article 15(4) and Article 16(4). Hence as far as possible while preparing the list of backward classes, the State Government has to bear in mind the above principle as a guiding factor.

The adoption of the above principle will not unduly reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4) of the Constitution since over the years the level of the Scheduled Castes and Scheduled Tribes is also going up by reason of several remedial measures taken in regard to them by the State and Central Governments. At the same time, it will also release the really backward castes, groups and communities from the stranglehold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades.

It is time that more attention is given to those castes, groups and communities who have been at the lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many of the Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of the Scheduled Castes and the Scheduled Tribes.

144. Since economic condition is also a relevant criterion, it would be appropriate to incorporate a "means test" as one of the tests in determining the backwardness as was done by the Kerala Government in Jayasree case63. These two tests namely, that the conditions of caste or group or community should be more or less similar to the conditions in which the Scheduled Castes or Scheduled Tribes are situated and that the income of the family to which the candidate belongs does not exceed the specified limit would serve as useful criteria in determining beneficiaries of any reservation to be made under Article 15(4). For the purpose of Article 16(4) however, it should also be shown that the backward class in

question is in the opinion of the Government not adequately represented in the Government services."

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

E. Indra Sawhney vs. Union of India

135. Then next comes the 9-Judge Bench judgment of this Court in the case of Indra Sawhney and others vs. Union of India and others12, which could be considered as an important milestone laying down the law about reservations for Other Backward Classes. The extracts from the said judgment of 9- Judge Bench have in-extenso been reproduced in the referral judgment (The State of Punjab & Ors. vs. Davinder Singh & Ors.13).

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

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

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

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

"792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps.

They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line - how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter.

If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become - say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere.

The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement.

At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further

enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want.

It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward.

It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

139. His Lordship observed that if some of the members in a class are far too advanced socially, the connecting thread between them and the remaining class snaps. The Court observed that 'too advanced socially' means economically and may also mean educationally. It has been observed that they would be misfits in the class. The Court considered the difficulty in drawing the line. It is observed that it should not amount to taking away with one hand what is given with the other.

The Court observed that the basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. The Court observed that the line to be drawn must be a realistic one. The Court posed a question as to whether such a line should be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. It has been observed that since it is difficult to assess income from agriculture, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding.

It is observed that the income limit must be such as to mean and signify social advancement. The Court observed that at the same time, it must be recognized that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. It has been observed that if a member of a designated backward class would become a member of IAS or IPS or any other

All India Service, his status in the society rises and he is no longer socially disadvantaged.

The Court observed that clause (4) of Article 16 aims at group backwardness, the exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). No doubt, it has been specified that the said discussion was confined to Other Backward Classes only and had no relevance in the case of Scheduled Tribes and Scheduled Castes.

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

"802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen.

It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes.

In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc."

Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins etc. Group C pertains to "Scheduled Castes

converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This categorisation was justified in Balram [(1972) 1 SCC 660 : (1972) 3 SCR 247]. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a wellaccepted phenomenon throughout the country.

What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say - we may reiterate - that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law."

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

142. The Court observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It is observed that it does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). It has therefore been observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour.

143. It has also been observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, the OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. It has been observed that the same logic also warrants categorization as between more backward and backward. The Court, however, cautioned that it may not be

construed as implying that the State should do it, but it was only saying that if the State chooses to do so, it is not impermissible in law.

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

"523. As regards the second part of the question, in Balaji [1963 Supp 1 SCR 439 : AIR 1963 SC 649] it was observed that the backward classes cannot be further classified in backward and more backward classes. These observations, although made in the context of Article 15(4) which fell for consideration there, will no doubt be equally applicable to Article 16(4). The observations were made while dealing with the recommendations of the Nagan Gowda Committee appointed by the State of Karnataka which had recommended the classification of the backward communities into two divisions, the Backward and the More Backward.

While making those recommendations the Committee had applied one test, viz., "Was the standard of education in the community in question less than 50% of the State average? If it was, the community was regarded as more backward; if it was not, the community was regarded as backward." The Court opined that the sub-classification made by the Report and the order based thereupon was not justified under Article 15(4) which authorises special provision being made for 'really backward classes'. The Court further observed that in introducing two categories of backward classes, what the impugned order in substance purported to do was to devise measures "for the benefit of all the classes of citizens who are less advanced compared to the most advanced classes in the State".

That, according to the Court, was not the scope of Article 15(4). The result of the method adopted by the impugned order was that nearly 90% of the population of the State was treated as Backward and that, observed the Court, illustrated how the order in fact divided the population of the State into most advanced and the rest, putting the latter into two categories of the Backward and the More Backward. Thus, the view taken there against the sub-classification was on the facts of that case which showed that almost 90% of the population of the State was classified as backward, the backwardness of the Backward (as against that of the More Backward) being measured in comparison to the most advanced classes in the State.

Those who were less advanced than the most advanced, were all classified as Backward. The Court held that it is the More Backward or who were really backward who alone would be entitled to the benefit of the provisions of Article 15(4). In other words, while the More Backward were classified there rightly as backward, the Backward were not classified rightly as backward.

524. It may be pointed out that in Vasanth Kumar [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] Chinnappa Reddy, J after referring to the aforesaid view in Balaji [1963 Supp 1 SCR 439 : AIR 1963 SC 649] observed that the propriety of such test may be open to question on the facts of each case but there was no reason why on principle there cannot be a classification into Backwards and More Backwards if both classes are not merely a little behind, but far far behind the most advanced classes.

He further observed that in fact, such a classification would be necessary to help the more backward classes; otherwise those of the backward classes who might be a little more advanced than the more backward classes, would walk away with all the seats just as if reservation was confined to the more backward classes and no reservation was made to the slightly more advanced of the backward classes, the backward classes would gain no seats since the advanced classes would walk away with all the seats available for the general category. With respect, this is the correct view of the matter.

Whether the backward classes can be classified into Backward and More Backward, would depend upon the facts of each case. So long as both backward and more backward classes are not only comparatively but substantially backward than the advanced classes, and further, between themselves, there is a substantial difference in backwardness, not only it is advisable but also imperative to make the sub-classification if all the backward classes are to gain equitable benefit of the special provisions under the Constitution. To give an instance, the Mandal Commission has, on the basis of social, educational and economic indicators evolved 22 points by giving different values to each of the three factors, viz., social, educational and economic.

Those social groups which secured 22 points or above have been listed there as "socially and educationally backward" and the rest as "advanced". Now, between 11 and 22 points some may secure, say, 11 to 15 points while others may secure all 22 points. The difference in their backwardness is, therefore, substantial. Yet another illustration which may be given is from Karnataka State Government order dated October 13, 1986 on reservations issued after the decision in Vasanth Kumar [1985 Supp SCC 714 : 1985 Supp 1 SCR 352] where the backward classes are grouped into five categories, viz., A, B, C, D and E.

In category A, fall such castes or communities as that of Bairagi, Banjari and Lambadi which are nomadic tribes, and Bedaru, Ramoshi which were formerly stigmatised as criminal tribes whereas in category D fall such castes as Kshatriya and Rajput. To lump both together would be to deny totally the benefit of special provisions to the former, the latter taking away the entire benefits. On the other

hand, to deny the status of backwardness to the latter and ask them to compete with the advanced classes, would leave the latter without any seat or post.

In such circumstances, the sub-classification of the backward classes into backward and more or most backward is not only desirable but essential. However, for each of them a special quota has to be prescribed as is done in the Karnataka Government order. If it is not done, as in the present case, and the reserved posts are first offered to the more backward and only the remaining to the backward or less backward, the more backward may take away all the posts leaving the backward with no posts. The backward will neither get his post in the reserved quota nor in the general category for want of capacity to compete with the forward.

525. Hence, it will have to be held that depending upon the facts of each case, sub-classification of the backward classes into the backward and more or most backward would be justifiable provided separate quotas are prescribed for each of them."

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

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

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

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

147. It could thus be seen that Sawant, J. observed that if the advanced section in a backward class is so advanced as to be able to compete with the forward

classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).

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

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

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

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

This indicates that there can be only one list of Scheduled Castes in regard to a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. Any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution. In the entire Constitution wherever reference has been made to "Scheduled Castes" it refers only to the list prepared by the President under Article 341 and there is no reference to any subclassification or division in the said list except, maybe, for the limited purpose of Article 330, which refers to reservation of seats for Scheduled Castes in the House of the People, which is not applicable to the facts of this case.

It is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the

Presidential List of Scheduled Castes. Therefore, it is clear that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and this group could not be subdivided for any purpose. A reference to the Constituent Assembly in this regard may be useful at this stage."

150. His Lordship observed that from the perusal of Article 341 of the Constitution, there can be only one list of Scheduled Castes regarding a State and that list should include all specified castes, races or tribes or part or groups notified in that Presidential List. It has been observed that any inclusion or exclusion from the said list can only be done by Parliament under Article 341(2) of the Constitution.

It is observed that it is also clear from Article 341 that except for a limited power of making an exclusion or inclusion in the list by an Act of Parliament there is no provision either to subdivide, subclassify or subgroup these castes which are found in the Presidential List of Scheduled Castes. It has been observed that the Constitution intended all the castes including the subcastes, races and tribes mentioned in the list to be members of one group for the purpose of the Constitution and that the said group could not be subdivided for any purpose.

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

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

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

153. In paragraph 31, the Court observed thus:

"31. On a detailed perusal of the Act it is seen that Section 3 is the only substantive provision in the Act, rest of the provisions are only procedural. Section 3 of the Act provides for the creation of 4 groups out of the castes enumerated in the Presidential List of the State. After the regrouping it provides for the proportionate allotment of the reservation already made in favour of the Scheduled Castes amongst these 4 groups. Beyond that the Act does not provide

for anything else. Since the State had already allotted 15% of the total quota of the reservation available for the backward classes to the Scheduled Castes the question of allotting any reservation under this enactment to the backward classes does not arise.

Therefore, it is clear that the purpose or the true intendment of this Act is only to first divide the castes in the Presidential List of the Scheduled Castes into 4 groups and then divide 15% of reservation allotted to the Scheduled Castes as a class, amongst these 4 groups. Thus it is clear that the Act does not for the first time provide for reservation to the Scheduled Castes but only intends to redistribute the reservation already made by sub-classifying the Scheduled Castes which is otherwise held to be a class by itself. It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate.

It is the prerogative of the State concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which includes the Scheduled Castes, to reserve certain seats in educational institutions under Article 15(4) and in public services of the State under Article 16(4). That part of its constitutional obligation, as stated above, has already been fulfilled by the State. Having done so, it is not open to the State to subclassify a class already recognised by the Constitution and allot a portion of the already reserved quota amongst the State-created subclass within the list of Scheduled Castes.

From the discussion hereinabove, it is clear that the primary object of the impugned enactment is to create groups of subcastes in the list of Scheduled Castes applicable to the State and, in our opinion, apportionment of the reservation is only secondary and consequential. Whatever may be the object of this sub-classification and apportionment of the reservation, we think the State cannot claim legislative power to make a law dividing the Scheduled Castes List of the State by tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. Therefore, we are of the opinion that in pith and substance the enactment is not a law governing the field of education or the field of State public services."

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

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

"41. The conglomeration of castes given in the Presidential Order, in our opinion, should be considered as representing a class as a whole. The contrary approach of the High Court, in our opinion, was not correct. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further.

If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such sub-classification would be violative of Article 14 of the Constitution. It may be true, as has been observed by the High Court, that the caste system has got stuck up in the society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld.

It is also difficult to agree with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalising the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated.

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

43. The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of microclassification is not permissible. Such classification of the members of different classes of people based on their respective castes would also be violative of the doctrine of reasonableness.

Article 341 provides that exclusion even of a part or a group of castes from the Presidential List can be done only by Parliament. The logical corollary thereof would be that the State Legislatures are forbidden from doing that. A uniform yardstick must be adopted for giving benefits to the members of the Scheduled Castes for the purpose of the Constitution. The impugned legislation being contrary to the above constitutional scheme cannot, therefore, be sustained."

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

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

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

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

159. It could thus be seen that His Lordship has also recognized that the Scheduled Caste consists of not only the people who belong to some backward caste but also race or tribe or part of or groups within castes, races or tribes and that they are not merely backward but the backwardmost.

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

"96. But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative

steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

161. It is further observed in paragraph 113 thus:

"113. The power of the State Legislature to decide as regards grant of benefit of reservation in jobs or in educational institutions to the backward classes is not in dispute. It is furthermore not in dispute that if such a decision is made the State can also lay down a legislative policy as regards extent of reservation to be made for different members of the backward classes including Scheduled Castes. But it cannot take away the said benefit on the premise that one or the other group amongst the members of the Scheduled Castes has advanced and, thus, is not entitled to the entire benefit of reservation. The impugned legislation, thus, must be held to be unconstitutional."

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

G. M. Nagaraj vs. Union of India

163. Next in line is the case of M. Nagaraj and others vs. Union of India and others14, where the Constitution Bench of this Court was considering, inter alia, the constitutional validity of the Constitution (Seventy-Seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001. Answering the aforesaid, the Court observed thus:

"121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs.

They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the subclassification between OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , the concept of post-based roster with

inbuilt concept of replacement as held in R.K. Sabharwal [(1995) 2 SCC 745 : 1995 SCC (L&S) 548 : (1995) 29 ATC 481].

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

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

However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eightysecond Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001."

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

H. Jarnail Singh vs. Lachhmi Narain Gupta

165. The correctness of the decision in M. Nagaraj was referred to the Constitution Bench in the case of Jarnail Singh and others vs. Lachhmi Narain Gupta and others15. The Constitution Bench in the said case considered two issues: firstly, with regard to the correctness of the view taken in M. Nagaraj about the requirement of collecting quantifiable data showing backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment; and secondly, with regard to applicability of the creamy layer principle even to the Scheduled Castes and Scheduled Tribes.

166. The Court, insofar as the first issue is concerned, held that the requirement of collection of quantifiable data on backwardness and inadequacy of representation of Scheduled Castes and Scheduled Tribes in public employment is concerned, is contrary to the 9-Judge Bench judgment in the case of Indra Sawhney and liable to be struck down to that extent. However, insofar as the second issue regarding making the creamy layer principle applicable even to Scheduled Castes and Scheduled Tribes is concerned, the Court observed thus:

"26. The whole object of reservation is to see that Backward Classes of citizens move forward so that they may march hand in hand with other citizens of India on an equal basis. This will not be possible if only the creamy layer within that class bag all the coveted jobs in the public sector and perpetuate themselves, leaving the rest of the class as backward as they always were. This being the case, it is clear that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India.

The caste or group or sub-group named in the said List continues exactly as before. It is only those persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation. Even these persons who are contained within the group or sub-group in the Presidential Lists continue to be within those Lists. It is only when it comes to the application of the reservation principle under Articles 14 and 16 that the creamy layer within that sub-group is not given the benefit of such reservation.

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

When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or sub-

groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India. We do not agree with Balakrishnan, C.J.'s statement in Ashoka Kumar Thakur [Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 : 3 SCEC 35] that the creamy layer principle is merely a principle of identification and not a principle of equality.

28. Therefore, when Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] applied the creamy layer test to Scheduled Castes and Scheduled Tribes in exercise of application of the basic structure test to uphold the constitutional amendments leading to Articles 16(4-A) and 16(4-B), it did not in any manner interfere with Parliament's power under Article 341 or Article 342.

We are, therefore, clearly of the opinion that this part of the judgment does not need to be revisited, and consequently, there is no need to refer Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] to a seven-Judge Bench. We may also add at this juncture that Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] is a unanimous judgment of five learned Judges of this Court which has held sway since the year 2006. This judgment has been repeatedly followed and applied by a number of judgments of this Court, namely:

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

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

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

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

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

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

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

167. The Court in unequivocal terms held that when a court applies the creamy layer principle to Scheduled Castes and Scheduled Tribes, it does not in any manner tinker with the Presidential List under Articles 341 or 342 of the Constitution of India. It is observed that the caste or group or sub-group named in the said List continues exactly as before. It has been further observed that it is only those persons within that group or subgroup, who, on account of belonging to the creamy layer, have come out of untouchability or backwardness would be excluded from the benefit of reservation.

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

IV. PRESENT REFERENCE

169. A 3-Judge Bench of this Court in the case of State of Punjab and others vs. Davinder Singh and others16 vide order dated 20th August 2014, doubted the correctness of the Constitution Bench decision of this Court in the case of E.V. Chinnaiah and referred it to the larger Bench. The larger Bench of 5-Learned Judges proposed the following issues17.

"1.1. (i) Whether the provisions contained under Section 4(5) of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 are constitutionally valid?

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

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

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

"52. The State has the competence to grant reservation benefit to the Scheduled Castes and Scheduled Tribes in terms of Articles 15(4) and 16(4) and also Articles 341(1) and 342(1). It prescribes the extent/percentage of reservation to different classes. The State Government can decide the manner and quantum of reservation. As such, the State can also make sub-classification when providing reservation to all Scheduled Castes in the List based on the rationale that would conform with the very spirit of Articles 14, 15 and 16 of the Constitution providing reservation. The State Government cannot tamper with the List; it can neither include nor exclude any caste in the List or make enquiry whether any synonym exists as held in Milind [State of Maharashtra v. Milind, (2001) 1 SCC 4 : 2001 SCC (L&S) 117].

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

54. Apart from that, the other class out of Scheduled Castes/Scheduled Tribes/socially and educationally backward classes, who is not denied the benefit of reservation, cannot claim that whole or a particular percentage of reservation should have been made available to them. The State can provide such preference on rational criteria to the class within Lists requiring upliftment.

There is no vested right to claim that reservation should be at a particular percentage. It has to accord with ground reality as no one can claim the right to enjoy the whole reservation, it can be proportionate one as per requirement. The State cannot be deprived of measures for upliftment of various classes, at the same time, which is the very purpose of providing such measure. The spirit of the reservation is the upliftment of all the classes essential for the nation's progress.

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

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

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

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

V. CONSIDERATION

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

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

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

175. It would be apposite to refer to the statement by Dr. B.R. Ambedkar in 'Evidence before the Southborough Committee' (1919), where he gave several examples of the unjust treatment meted out to the untouchables by the oppressor castes as thus19:

"From an untouchable trader no Hindu will buy. An untouchable cannot be engaged in lucrative service. Military service had been the monopoly of the untouchables since the days of the East India Company. They had joined the Army in such large numbers But after the mutiny when the British were able to secure soldiers from the ranks of the Marathas, the position of the low-caste men who had been the prop of the Bombay Army became precarious, not because the Marathas were better soldiers but because their theological bias prevented them from serving under low-caste officers.

The prejudice was so strong that even the noncaste British had to stop recruitment from the untouchable classes. In like manner, the untouchables are refused service in the Police Force. In a great many of the Government offices it is impossible for an untouchable to get a place. Even in the mills a distinction is observed. The untouchables are not admitted in Weaving Departments of the Cotton Mills though many of them are professional weavers. An instance at hand may be cited from the school system of the Bombay Municipality.

This most cosmopolitan city ruled by a Corporation with a greater freedom than any other Corporation in India has two different sets of schools one for the children of touchables and the other for those of the untouchables. This in itself is a point worthy of note. But there is something yet more noteworthy. Following the division of schools it has divided its teaching staff into untouchables and touchables. As the untouchable teachers are short of the demand, some of the untouchable schools are manned by teachers from the touchable class.

The heart-killing fun of it is that if there is a higher grade open in untouchable school service, as there is bound to be because of a few untouchable trained teachers, a touchable teacher can be thrust into the grade. But if a higher grade is open in the touchable school service, no untouchable teacher can be thrust into that grade. He must wait till a vacancy occurs in the untouchable service! Such is the ethics of the Hindu social life."

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

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

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

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

"He asserted that the issue of temple entry or access to public resources is an issue of equality. He stated:

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

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

"Legally, the right to public property is not required to be established by any deed; it is available automatically to everybody. Even if he has no usage or it was not continuous, it does not deprive him of that right. Suppose, somebody did not walk on a particular road, does that mean he can never use that road? Therefore, it would be quite idiotic to say that since Untouchables never went to the temple or never drew water from the public wells, so now they cannot do that."22

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

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

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

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

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

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

"Article 16 (Article 10 in Draft Constitution)

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

It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration

which has now-for historical reasons- been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration.

Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with subclause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation.

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

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

He states that on account of historical reasons, the administration has been controlled by one community or a few communities, that such a situation should disappear and that the others also must have an opportunity of getting into the public services. However, he states that if the demand of such communities, in

full, is accepted, it will destroy the first principle of equality guaranteed in clause (1).

He gives an instance that if certain communities which are unrepresented or a group of communities have a population of 70% and if 70% reservation is provided for such communities, leaving only 30% for the open competition, it will destroy the very concept of equality of opportunity. He therefore advocates for confinement of reservation to a minority of seats. He therefore states that unless some qualifying phrase as "backward" is used for making reservation, the entire rule would be unworkable. He therefore justifies the efforts of the Drafting Committee in employing the word 'backward'.

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

Article 16 (Article 10 in Draft Constitution)

"The Hon'ble Dr. B.R. Ambedkar: Somebody asked me: "What is a backward community"? Well, I think anyone who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My honourable Friend, Mr. T. T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter.

If the local Government included in this category of reservations such a large number of seats, I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner."

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

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

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

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

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

190. No doubt that by the Constitution (One hundred and Second Amendment) Act, 2018, Article 342A regarding socially and educationally backward classes has been inserted. Clause (26C) in Article 366 of the Constitution of India has also been inserted by the said Amendment insofar as socially and educationally backward classes are concerned. It was sought to be argued before us that in view of the Constitution (One hundred and Second Amendment) Act, 2018, read with the law laid down by this Court in the case of Indra Sawhney regarding Other Backward Classes, the judgment of this Court in E.V. Chinnaiah needs a relook.

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

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

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

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

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

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

196. In paragraph 41, this Court held that the conglomeration of castes given in the Presidential Order, in their opinion, should be considered as representing a class as a whole. It is held that the very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggested that they were not to be subdivided or subclassified further. It goes on to hold that if a class within a class of members of the

Scheduled Castes is created, the same would amount to tinkering with the list and would amount to violation of Article 14 of the Constitution.

The Court then disagreed with the High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. The Court, taking note of the fact that the benefits of reservation are not percolating to them equitably, suggested that measures should be taken to see that they are given such adequate or additional training to enable them to compete with the others.

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

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

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

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

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

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

203. The observations made by the Learned Judge are in the context of the arguments that any special treatment on the ground of caste is prohibited under

Article 16(2). The Learned Judge observed that Article 16(2) was not coming in the way to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division. The Learned Judge further observed that the Indian jurisprudence has generally regarded Scheduled Castes and Scheduled Tribes not as caste but as a large backward group deserving of societal compassion.

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

205. Again, the observations made by Fazal Ali, J. in paragraph 169, are with regard to the arguments based on prohibition of Article 16(2). It is observed that the Scheduled Castes and Scheduled Tribes do not fall with the purview of Article 16(2) of the Constitution, which prohibits discrimination between the members of the same caste. It is observed that if, therefore, the members of the Scheduled Castes and the Scheduled Tribes are not castes, then it is open to the State to make reasonable classification to advance or lift these classes so that they may be able to be properly represented in the services under the State.

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

207. In paragraph 44 of the judgment in N.M. Thomas, Ray, C.J. observed that the equality of opportunity for unequals can only mean aggravation of inequality; equality of opportunity admits discrimination with reason and prohibits discrimination without reason; and discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. It is observed that preferential representation for the Backward Classes in services with due regard to administrative efficiency is permissible object and Backward Classes are a rational classification recognized by the Constitution. He therefore held that the differential treatment in standards of selection is within the concept of equality.

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

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

210. In paragraph 75, the Learned Judge observed that such sort of preferential treatment would be permissible under Article 16(1) as such a preferential treatment alone would put the backward class people on a parity with the forward communities. The Learned Judge observed that whether there is equality of opportunity can be gauged only by the equality attained in the result. He states that formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. It is observed that the equality of result is the test of equality of opportunity.

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

212. In paragraph 129, after considering the constitutional scheme, the Learned Judge observed that the Constitution itself demarcates harijans from others. That this is based on the stark backwardness of this bottom layer of the community. It is observed that the differentiation has been made to cover specifically the area of appointments to posts under the State. He further held that the twin objects, blended into one, are the claims of harijans to be considered in such posts and the maintenance of administrative efficiency. The Learned Judge observed that the State has been obligated to promote the economic interests of harijans and like backward classes.

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

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

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

216. In paragraph 178, the Learned Judge observed that the concept of equality or equal opportunity as contained in Article 16 does not mean that same laws must be applicable to all persons under every circumstance. He observed that if this artificial interpretation is put on the scope and ambit of Article 16 it will lead to channelization of legislation or polarization of rules. It is observed that differences and disparities exist among men and things, and they cannot be treated alike by the application of the same laws. He observed that the law has to come to terms with life and must be able to recognize the genuine differences and disparities that exist in human nature.

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

218. It can thus be seen that in none of the judgments in N.M. Thomas it is held that the Scheduled Castes are a homogeneous class. It has been held that once the Scheduled Castes and Scheduled Tribes have been identified and they find a place in the Presidential List, they will continue to be the Scheduled Castes and Scheduled Tribes. It has been held that by the very fact of they being included in the Presidential List, they are deemed to be backward and no further enquiry regarding their backwardness would be warranted.

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

220. Again, in paragraph 98, he considered the argument that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. He advised the Administration to innovate and classify to weed out the creamy layer of Scheduled Castes/Scheduled Tribes. However, he observed that the Court cannot force the State in that behalf.

221. In K.C. Vasanth Kumar, Chandrachud, C.J. in paragraph 2, observed that the reservation in employment and education in favour of Scheduled Castes and Scheduled Tribes must continue without the application of a means test for a

further period not exceeding 15 years. He observed that after the said period of 15 years, the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes.

Insofar as Other Backward Classes are concerned, he stated that two tests should be conjunctively applied for identifying them for the purpose of reservations in employment and education: One, that they should be comparable to the Scheduled Castes and Scheduled Tribes in the matter of their backwardness; and two, that they should satisfy the means test such as a State Government may lay down in the context of prevailing economic conditions.

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

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

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

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

226. Jeevan Reddy, J. in paragraph 802, in the case of Indra Sawhney, gives an illustration with regard to two occupational groups viz., goldsmiths and vaddes (traditional stonecutters in Andhra Pradesh). He stated that both are included within Other Backward Classes. He observed that none can deny that goldsmiths are far less backward than vaddes and so if both are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes.

The Learned Judge further observed that in such a situation, a State may think it advisable to make a categorization even among other backward classes so as to ensure that the more backward among the backward classes obtain the benefits intended for them. He stated that where to draw the line and how to effect the sub-classification, however, is a matter for the Commission and the State and so long as it is reasonably done, the Court may not intervene.

227. It will also be relevant to note that in paragraph 803, the Learned Judge observed that Article 16(4) recognizes only one class i.e., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). The Learned Judge observed that it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. The Learned Judge observed that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. He states that the same logic also warrants categorization as between more backward and backward.

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

229. It is pertinent to note that the said discussion in the judgment was pertaining to "identification" of backward classes of citizens. As discussed hereinabove, insofar as the Scheduled Castes and Scheduled Tribes are concerned, identification is already covered by the Presidential List issued under Artiles 341 and 342.

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

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

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

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

233. That being the case, if the Scheduled Castes and Scheduled Tribes are a part of backward class of citizens under Article 16(4), then the question would be, as to why sub-classification which is permitted in case of Other Backward Classes cannot be permitted in case of Scheduled Castes and Scheduled Tribes?

234. Though the initial view of this Court was that Article 16(4) is by way of exception to Article 16(1), the same has undergone a thorough change, particularly after the judgment of this Court in the case of His Holiness Kesavananda Bharati Sripadagalavaru vs. State of Kerala24 in relation to interplay between the Fundamental Rights and the Directive Principles. Shortly after the judgment in Kesavananda Bharati, came the judgment of 7-Judge Bench of this Court in N.M. Thomas wherein the 5-Learned Judges took a view that Article 16(4) was not by way of exception to Article 16(1).

It was held that the trinity of Articles 14 to 16 embodied the concept of equality. It was emphasized that equality does not mean equality to all. It was held that equality as enshrined under the Constitution did not mean formal equality but real equality. It was held that to bring real equality unequal treatment to unequals was what was contemplated under the Constitution. It was held that if unequals are to be treated equally it will lead to nothing else but perpetuating inequality. It was held that only giving an unequal treatment to unequals so that they can march ahead can bring out real equality.

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

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

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

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

239. Krishna Iyer, J. in paragraph 124 refers to the research conducted by the A.N. Sinha Institute of Social Studies, Patna which would reveal a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. He observed that, for them, Articles 46 and 335 remain a 'noble romance', the bonanza going to the 'higher' harijans. He states in paragraph 136 that Article 16(4) need not be a saving clause but put in due to the overanxiety of the draftsman to make matters clear beyond possibility of doubt. He observes in paragraph 142 that the genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. According to him, to treat sharply dissimilar persons equally is subtle injustice. He held that if Article 16(4) admits of reasonable classification, so does Article 16(1).

240. In K.C. Vasanth Kumar, Y.V. Chandrachud, C.J. observed that the test of economic backwardness ought to be made applicable even to the Scheduled Castes and Scheduled Tribes after a period of 15 years from the date of the judgment. Desai, J. in the said judgment observed that even in the case of Scheduled Castes and Scheduled Tribes the economic criterion was worth applying by refusing preferred treatment to those amongst them who have already benefitted by it and improved their position.

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

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

243. Further, Krishya Iyer, J. in Akhil Bharatiya Soshit Karamchari Sangh reiterates that Articles 14 to 16 form a code by themselves and embody the distilled essence of the Constitution's casteless and classless egalitarianism. He states that Article 46, in emphatic terms, obligates the State "to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". He states that reading Article 46 together with Article 16(4), the inference is obvious that administrative participation by the Scheduled Castes and Scheduled Tribes shall be promoted with special care by the State.

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

245. Chinnappa Reddy, J. in the same judgment states that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. He states that the Directive Principles should serve the courts as a code of interpretation. He states that the Fundamental Rights should be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former.

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

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

248. As already discussed hereinabove, it has been held that further classification of backward classes into backward and more backward classes is permissible under the Constitution. The only caveat put by Sawant, J. is that if it is done there has to be a reservation for both backward as well as for more or most backward classes. It has been held in Indra Sawhney that under Article 16(4) the Scheduled Castes are also included in the term 'backward class of citizens'.

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

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

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

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

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

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

255. In a catena of decisions, this Court held that the State must resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It has been held that State should take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed, to bring about real equality. Reference in this respect may be made to the Constitution Bench judgment of this Court in the case of Marri Chandra Shekhar Rao vs. Dean, Seth G.S. Medical College and others25, wherein this Court observed thus:

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

256. Some startling facts have been brought to our notice. Though the Presidential List for the State of Andhra Pradesh has a list of 60 Scheduled Castes, Justice Usha Mehra Commission Report26 shows that out of these 60 Scheduled Castes, only 4 or 5 had availed the benefits of reservation, leaving the rest of the Scheduled Castes in the Presidential List high and dry. The Report shows that the same has resulted in an anomaly that none of the majority caste despite their inclusion in the Presidential List for the State of Andhra Pradesh,

have been able to seek reservation benefits including entry into Government service under the State except for the job of Sweepers and/or Farash.

257. Insofar as the State of Punjab is concerned, it is sought to be urged on behalf of the State of Punjab that though Balmikis and Mazhabi Sikhs constitute 41.9% of the total population of the Scheduled Castes, the percentage of these categories in public employment is totally disproportionate to their population among the Scheduled Castes. In any case, it is urged that what is provided under the Act27 was only differential treatment insofar as 50% of the vacancies reserved for Scheduled Castes is concerned. Only if the candidates from these categories are available, the seats would go to these categories. On account of non-availability of the candidates from these categories, the seats would fall into the other categories of the Scheduled Castes.

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

259. No doubt that if the State decides to provide 100% of the reservation for Scheduled Castes to one or more categories enlisted in the Presidential List in that State to the exclusion of some categories, it may amount to tinkering with that list because, in effect, it would amount to denial of benefit of reservation to those Scheduled Caste categories which have been excluded. In my view, that would, in effect, amount to deletion of the said categories from the Presidential List notified under Article 341 of the Constitution, which power is exclusively reserved with Parliament, in my opinion, such an exercise would not be permissible.

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

He therefore held that the subclassification of backward classes would be permissible provided the reserved seats are available for backward classes as well as more or most backward classes. I am therefore of the considered view that

merely because more preferential treatment is provided to the more backward or more inadequately represented among the Scheduled Castes, it would not amount to tinkering with the Presidential List. In my view, the same would be permissible in view of the law laid down by the 9-Judge Bench in the case of Indra Sawhney.

261. The ground realities cannot be denied. Even among the Scheduled Castes, there are some categories who have received more inhuman treatment for centuries and generations as compared to the other categories. The hardships and the backwardness which these categories have suffered historically would differ from category to category. In my view, therefore, merely because they are part of a single or a combined Presidential List, it cannot be said that they form part of a homogeneous group. I therefore have no hesitation in holding that E.V. Chinnaiah has been wrongly decided.

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

263. Dr. Ambedkar had foreseen such a difficulty. In his speech in the Constituent Assembly, Dr. B.R. Ambedkar said that 'backward community" will have to be left to be determined by each local government. On a query by Shri T.T. Krishnamachari, as to whether this rule will be justiciable, he observed that it would be a justiciable matter.

He stated that if the local Government included in this category of reservations such a large number of seats, one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner.

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

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

266. In a case, like the present one, if a classification is made, it will have to be established that the group carved out from the larger group is more disadvantageous and not adequately represented. The result of classification would be to provide more preferential treatment to this more disadvantageous and less represented group. The ultimate object would be to achieve real equality among all the sub-groups in the larger group.

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

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

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

270. The categories in the Presidential List who have already enjoyed a major chunk of reservations should not object to the State providing a special treatment to those who have been deprived of such a benefit and particularly when such a benefit is not being taken away from them. Only part of that benefit is being reserved for percolating the same to the more disadvantageous and less represented.

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

VI. THE WAY FORWARD

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

273. No doubt that in Indra Sawhney, Jeevan Reddy, J. while considering the applicability of 'means test' and 'creamy layer' has observed that the discussion therein is confined only to Other Backward Classes, and it has no relevance in the case of Scheduled Castes and Scheduled Tribes.

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

"792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps.

They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line - how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter.

If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become - say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling.

For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would

be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other.

The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life.

His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward.

It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes)."

275. It has been observed that the very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. It is observed that if some of the members are far too advanced socially (which in the context, necessarily means economically and may also mean educationally) the connecting thread between them and the remaining class snaps. He observed that they would be misfits in the class. It is further observed that after excluding them alone, would the class be a compact class. It is observed that in fact, such exclusion would benefit the truly backward.

276. His Lordship gave an example that, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status

in society rises; he is no longer socially disadvantaged. His children would get full opportunity to realize their potential. They are in no way handicapped in the race of life. It is observed that it is logical that in such a situation, his children are not given the benefit of reservation. It is further observed that by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit.

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

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

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

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

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

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

the judgment of 7-Judge Bench of this Court in N.M. Thomas. The view taken in Jarnail Singh has also been approved in Davinder Singh.

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

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

285. In N.M. Thomas, Krishna Iyer, J., in more than one place, had observed that the State is entitled to take steps for weeding out the socially, economically and educationally advanced sections of the Scheduled Castes and Scheduled Tribes from the applicability of reservation.

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

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

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

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

289. The education facilities and the other facilities that would be available to a child of a parent of the first category would be much higher, maybe the facilities

for additional coaching would also be available; the atmosphere in the house will be far superior and conducive for educational upliftment.

290. Per contra, the child of parent of the second category would be having only the bare minimum education; the facilities of coaching, etc., would be totally unavailable to him. He will be living in the company of his parents who do not have education and have not even been in a position to guide such a child.

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

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

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

294. However, I may observe that taking into consideration that the Constitution itself recognizes the Scheduled Castes and Scheduled Tribes to be the most backward section of the society, the parameters for exclusion from affirmative action of the person belonging to this category may not be the same that is applicable to the other classes. If a person from such a category, by bagging the benefit of reservation achieved a position of a peon or maybe a sweeper, he would continue to belong to a socially, economically and educationally backward class.

At the same time, the people from this category, who after having availed the benefits of reservation have reached the high echelons in life cannot be

considered to be socially, economically and educationally backward so as to continue availing the benefit of affirmative action. They have already reached a stage where on their own accord they should walk out of the special provisions and give way to the deserving and needy. I may gainfully refer to the observations of Dr. B.R. Ambedkar as under:

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

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

VII. CONCLUSION

296. I, therefore, hold:

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

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

(iii) that for doing so, the State will have to justify that the group for which more beneficial treatment is provided is inadequately represented as compared to the other castes in the said List;

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

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

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

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

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

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

.....J. [B.R. Gavai]

New Delhi;

August 01, 2024

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

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

IN THE SURPEME COURT OF INDIA

State of Punjab & Ors.
Vs.
Davinder Singh & Ors.

[Civil Appeal No. 2317 of 2011 Etc. Etc.]

JUDGMENT

Vikram Nath, J.

1. I am generally in agreement with the reasons and conclusions arrived at in the opinions of Hon'ble the Chief Justice and Brother Justice Gavai in particular that the holding in E.V.Chinnaih, that sub-classification within Scheduled Castes was impermissible, does not lay down good law and stands over-ruled. Further, any exercise involving sub-classification by the State must be supported by empirical data.

2. I am also in agreement with the opinion of Brother Justice Gavai that 'creamy layer' principle is also applicable to Scheduled Castes and Scheduled Tribes, and that the criteria for exclusion of creamy layer for the purpose of affirmative action could be different from the criteria as applicable to the Other Backward Classes.

.....J. (Vikram Nath)

New Delhi

August 01, 2024

IN THE SURPEME COURT OF INDIA

State of Punjab & Ors.
Vs.
Davinder Singh & Ors.

[Civil Appeal No. 2317 of 2011]
[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]

JUDGMENT

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 Court1, 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, 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 Others4, 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.

(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 Others5 concerning the Other Backward Class?

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 Others6 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 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 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 subclassify 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 subclassification 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 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 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.*

"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.

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 subclassification 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 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 subclassification 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 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 Others8, while examining the propriety 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 & Others9, 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 & Another10 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 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 Another12 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. 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 REGROUPING 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) Constitutional Interpretation

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

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 Another14, 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- 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 Others15 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 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) The Object, Purpose and Limits of Article 341: -

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 renumbered 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 & others16 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. 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 Singh17 A similar view has been also taken by another Five-Judge Bench in case of State of Maharashtra vs. Milind and Others18, 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 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 Others19, 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:

"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 Other20 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 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 Others21

"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 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 subclassify 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 subdividing 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 "Scheduled Castes" much less had dealt with the State's power to subclassify 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 Others22, 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 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 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 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 Rana23. It was also observed in ADM Jabalpur vs. Shivakant Shukla24 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.

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 Another25.

"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 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 nondiscrimination. 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 1st, 2024.

1 Bernard Schwartz, A Book of Legal Lists: The Best and Worst in American Law P.283

2 193 U.S. 197 (1903)

3 (2020) 8 SCC 65

4 (2005) 1 SCC 394

5 (1992) Suppl. 3 SCC 217

6 (2020) 8 SCC 65

* (2005) 1 SCC 394

7 (1976) 2 SCC 310

* (1992) Supp. 3 SCC 217

* (2005) 1 SCC 394

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* (2020) 8 SCC 1

* (2020) 8 SCC 1

* (2005) 1 SCC 394

8 2002 (1) SCC 1

9 (1974) 2 SCC 402

10 AIR 1961 SC 532

11 AIR 1965 SC 1636

12 (2020) 4 SCC 1

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

14 (2011) 4 SCC 36

15 (2021) 8 SCC 1

16 AIR (1965) SC 1269

17 AIR (1965) SC 1557

18 (2001) 1 SCC 4

19 (2018) 10 SCC 312

20 (1976) 2 SCC 310

21 (1990) 4 SCC 557

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

22 (2008) 6 SCC 1

* (2008) 6 SCC 1

* (2008) 6 SCC 1

* (2006) 8 SCC 212

23 (2006) 5 SCC 167

24 (1976) 8 SCC 521

25 (1998) 4 SCC 409

IN THE SURPEME COURT OF INDIA

State of Punjab & Ors.
Vs.
Davinder Singh & Ors.

[Civil Appeal No. 2317 of 2011]
[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]

JUDGMENT

Pankaj Mithal, J.

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INTRODUCTION

1. The issue under reference to this Constitution Bench as succinctly described by the Chief Justice in his opinion is whether sub-classification of the scheduled castes is constitutionally permissible for the purposes of reservation.

2. The issue arose as the Punjab legislature enacted the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006, inter alia providing for reservation of 25% in favour of scheduled castes and that 50% of the aforesaid percentage shall be offered to particular scheduled castes such as Balmikis and Mazhbi Sikhs in direct recruitment.

3. The validity of providing 50% reservation in favour of the above two categories of scheduled castes, out of the various mentioned in the Presidential list of scheduled castes, was challenged before the High Court by invoking the writ jurisdiction under Article 226 of the Constitution of India. The High Court of Punjab and Haryana relying upon the Constitution Bench decision of this Court in E.V. Chinnaiah vs. State of Andhra Pradesh and Ors.1 declared Section 4(5) of the aforesaid Act which sub-classified the scheduled castes and provided for 50% reservation of the 25% admissible to the scheduled castes in favour of the above two categories of scheduled castes only to be invalid.

4. The Chinnaiah case (supra) arose from the decision of the Andhra Pradesh High Court whereby it rejected the challenge to the provision of Andhra Pradesh Scheduled Castes (Rationalization of Reservations) Act, 2000, which provided for apportionment of reservation among scheduled castes by classifying them into four groups: 1% for Group A, 7% for Group B, 6% for Group C and 1% again for Group D.

5. The Constitution Bench in Chinnaiah's case was of the unanimous opinion that the provision of the above Act of subclassifying the scheduled castes into four groups and apportioning the reservation criteria group wise was unconstitutional. It was held that the sub-classification permitted by Indra Sawhney and Ors. vs. Union of India and Ors.2 was limited only to backward and other backward classes and is not applicable to scheduled castes.

6. It is in the above background that the Constitution Bench dealing with one of the cases at hand i.e. State of Punjab and Ors. vs. Davinder Singh and Ors. held that the matter requires to be revisited by a larger Bench.

7. In somewhat similar fashion, a matter came to be referred from the State of Haryana and another from the State of Tamil Nadu wherein by notification in the

State of Haryana scheduled castes were classified into two categories i.e. A and B for the purposes of applying reservation and in the State of Tamil Nadu by an Act of 2009, reservation of seats was provided to Arunthathiyar's in educational institution and for appointment in services.

8. All the three categories of matters i.e. from the State of Punjab, State of Haryana and the State of Tamil Nadu are before the Bench in the form of Civil Appeals, Writ Petitions, TP (C) & TC (C) and Special Leave Petition (Civil) and have been taken up as clubbed matters as the issue is common as described in the beginning.

9. The issue of sub-classification of scheduled castes has been appropriately answered by the Chief Justice and my esteemed brother Justice Gavai by their separate opinions with which I respectfully agree but at the same time since the matter in issue is basically concerning "reservation", I consider it to be of utmost importance and, therefore, deem it appropriate to pen down my own views separately.

10. Man/human as rightly understood is a social animal and has to live in a society. An ideal form of society is one which progresses on merit or where merit alone prevails. This is evident from Articles 14 and 15 of the Constitution which provides for equality before law and that State shall not discriminate on grounds of religion, race, caste, sex or place of birth. Articles 14 and 15 (as it originally stood) are quoted below:

"Article14- 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) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

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

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

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

11. However, no society can exist in its ideal form as all citizens are not alike. The basic needs of everyone are different and have to be taken into account to carry the society forward. Therefore, there is pressing need to consider the social, economic and political need of all persons or classes of persons.

In the context of India, the trinity of social, economic and political justice has to be balanced and to promote social justice, provisions have to be made for the upliftment of the so-called marginalized citizens or the depressed classes of persons who later came to be known as backward class of persons and scheduled castes as well as scheduled tribes etc. It is to achieve the above social objective of bringing every citizen or a class of citizen on equal level and at par in law that provision for reservation came to be made in the Constitution.

12. The provision for reservation for any class of persons at first sight may appear to be anti-merit but if weighed on the scales of social justice, it is imperative.

13. The poor and the downtrodden sections of the Indian society were earlier described by the ruling class as the "depressed classes" which included a wide range of persons such as untouchables, persons of various backward communities and those living in tribes in hills and forests or in remote areas of the country. Slowly, these depressed classes of persons came to be classified into various groups according to their vocation such as scavengers, leather workers, ironsmiths, carpenters, watchman and other menial workers and were referred to as scheduled castes; and those living in tribes in hills, forests or remote areas came to be recognized as scheduled tribes. The remaining depressed classes of persons or marginalized classes were later classified as other backward classes.

14. The Government of India Act, 1935, for the first time, recognized the above referred depressed classes of persons as scheduled castes and the primitive tribes as backward tribes and inter alia provided reservation of seats for the scheduled castes and backward tribes in the federal legislature. The objective was of bringing about political equality only.

15. The Constitution of India as enacted and adopted on 26th November, 1949 and enforced w.e.f. 26th January, 1950, originally provided for two categories of reservation, one for the political purposes and the other for social purposes vide Articles 330 & 332 and Articles 15(3) & 16(4).

16. Articles 330 and 332 of the Constitution aimed to achieve political justice by providing reservation of seats for scheduled castes and scheduled tribes in Lok

Sabha and State Legislatures whereas Article 15(3) and 16(4) were aimed at social justice and provided for special provision for women & children and for reservation in the services in favour of backward classes of persons respectively.

AMENDMENTS TO CONSTITUTION WITH REFERENCE TO CASE LAWS

17. On the legislative front, in the wake of various verdicts of the apex court concerning reservation, a constitutional amendment regime commenced bringing about amendments after amendments in the Constitution to overcome the difficulties in the implementation of the reservation policy in the light of the decisions of the courts in context with reservation.

18. The Constitution (First Amendment) Act, 1951 w.e.f. 18th June, 1951, was brought about in order to solve the problems posed by the decision of 5 Judges Constitution Bench of this Court in State of Madras vs. Champakam Dorairajan3 which struck down caste-based reservation for admission in medical colleges being violative of Article 29(2) of the Constitution and by an other 5 Judges Constitution Bench decision in B. Venkataramana vs. State of Madras and Ors.4 which held that the appointment of judicial officers as unconstitutional as Article 16(4) permitted reservation for backward classes of citizens only. Thus, Sub-Article (4) to Article 15 of the Constitution of India was introduced so as to empower the State for making special provision for the advancement of any socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes.

19. In this manner, Articles 16(4), 15(3) and 15(4) as introduced, envisaged to bring about social justice amongst the citizens of the country.

20. After the Constitution Bench decision in Indra Sawhney (supra), there was a spate of amendments in the Constitution to overcome the difficulties caused by various observations of the court.

21. The Constitution (Seventy-seventh Amendment) Act, 1995 added Article 16(4)(A) to the Constitution so as to provide reservation in promotion in favour of scheduled castes and scheduled tribes which are not adequately represented in the services of the State.

22. It was followed by the Constitution (Eighty-first Amendment) Act, 2000 which inserted Article 16(4)(B) so as to make provisions for carry forward of unfilled vacancies of the reserved category. The new Article 16(4)(B) provided that the State is not denuded of power to consider any unfilled vacancies of a year reserved for being filled up in that year in accordance with the provisions for reservation made under Clause 4 or Clause 4(A) of Article 16 to be carried

forward to be filled up in any succeeding year or years and that such carried forward vacancies shall not be counted for determining the sealing of 50% reservation in total number of vacancies of that year.

23. In immediate succession came the Constitution (Eighty-second Amendment) Act, 2000 which was necessitated to overcome one of the decisions of this Court in case of S. Vinod Kumar and Anr. vs. Union of India and Ors.5 which held that even if reservation in promotion is permissible, no lower qualifying marks or lesser level of evaluation for promotion is legally permissible for the reserved categories. The said amendment permitted provision for relaxation in qualifying marks in any examination or for lowering the standards of evaluation for reservation in the matters of promotion to any class or classes of services for posts in connection with the affairs of the Union or the State.

24. In Union of India vs. Virpal Singh Chauhan6, this Court held that the accelerated promotion to the persons of the reserved categories would not give them consequential seniority and that their seniority in promoted category shall be governed by their seniority in the feeder cadre.

25. The above view was reaffirmed in Ajit Singh Januja vs. State of Punjab7 and it was held that reserved category persons are entitled only for accelerated promotion and not consequential seniority.

26. The above two decisions were followed by Ajit Singh (II) vs. State of Punjab8 wherein upholding the principles of accelerated promotion and consequential seniority as laid down in the above two cases it was clarified that the general candidates on promotion will get seniority over reserved candidates who were already promoted by way of accelerated promotion, if both were in the same cadre.

27. The Constitution (Eighty-Fifth Amendment) Act, 2002, was enacted to undo the principles laid down by the above decisions especially in Ajit Singh (II) case (supra) and the expression "with consequential seniority" was inserted in Article 16 (4)(A) of the Constitution. This amendment was given retrospective effect w.e.f. 07.06.1995, the date on which Article 14(4)(A) was inserted into Article 16 of the Constitution by the Constitution (Seventy-Seventh Amendment) Act, 1995.

28. In the meantime, following the directions of the Supreme Court in Indra Sawhney's case (supra), an office memorandum was issued by the Government of India on 08.09.1993 designating certain categories of people as "creamy layer". The State of Bihar and Uttar Pradesh vide The Bihar Reservation of Vacancies in Post and Services (For Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995, and Uttar Pradesh Public Services

Reservation for Scheduled Castes and Scheduled Tribes and Other Backward Classes Act, 1994, provided that IAS and IPS Officers would be within "creamy layer" if they have a (i) salary of Rs.10,000/- per month; (ii) either of the spouse is a graduate; and (iii) one of them owns a house in an urban area. Similarly, professionals with income of Rs.10 lakhs per annum were also categorized under the "creamy layer" with additional criteria that either of the spouse should be a graduate and the family owns an immovable property of at least Rs.20 lakhs.

29. In Ashoka Kumar Thakur vs. State of Bihar9, this Court struck down the additional conditions of education and property prescribed in the Bihar and by U.P. enactment to be unconstitutional for identifying the "creamy layer" as violative of Articles 16(4) and 14 of the Constitution.

30. In Indra Sawhney (II) vs. Union of India10, the Kerala State Backward Classes Act, 1995, which provided that there are no socially advanced sections in any backward classes of the State and that the backward classes in the State are not adequately represented in the services under the State and as such backward classes would continue to avail the benefit of reservation, thus, declaring that there was no 'creamy layer' amongst the OBC in the State, was struck down holding that 'creamy layer' in the backward classes is to be treated at par with the forward classes and are not entitled to benefit of reservation. It was also observed that "creamy layer" is to be excluded otherwise it will be discriminatory and violative of Articles 14 and 16 as "forwards" and "creamy layer of backward classes" cannot be treated unequally.

31. In M. Nagaraj vs. Union of India11, the validity of the constitutional amendments namely Constitution (Seventy- Seventh Amendment) Act, 1995, Constitution (Eighty-first Amendment) Act, 2000, Constitution (Eighty-second Amendment) Act, 2000 and Constitution (Eighty-fifth Amendment) Act, 2002, were upheld.

32. In TMA Pai Foundation vs. State of Karnataka12, the 11 Judges Constitution Bench of this Court laid down various principles regarding right to establish educational institutions, the procedure for grant of admission, the right of minorities and the extent of State regulatory mechanism. The said judgment came to be interpreted and clarified by Islamic Academia Education vs. State of Karnataka13.

In P.A. Inamdar vs. State of Maharashtra14, the 7 Judges Constitution Bench held that the 5 Judges Constitution Bench in Islamic Academia Education case did not interpret the TMA Pai Foundation case correctly. In such a situation, Constitution (Ninety-Third Amendment) Act, 2006, was brought about to overcome the confusion alleged to have been created in the interpretation of

TMA Pai Foundation case and Sub-Article (5) was inserted in Article 15 of the Constitution which reads as under:

"Article 15 (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."

33. The validity of the Constitution (Ninety-Third Amendment) Act, 2006, was upheld by the 5 Judges Constitution Bench in Ashok Kumar Thakur case (supra) which provided reservation for socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes in educational institutions insofar as it relates to State maintained institutions and Government aided educational institutions.

34. A similar view was expressed in Pramati Educational & Cultural Trust vs. Union of India15, wherein also the constitutional validity of the Constitution (Ninety-Third Amendment) Act, 2006, was upheld and reservation for socially and educationally backward classes of citizens or for scheduled castes and scheduled tribes in unaided private institutions as well was upheld.

35. In Ram Singh vs. Union of India16, reservation for Jats in various States was struck down as no such reservation in their favour was recommended by the National Commission for Backward Classes and there was no quantifiable data for justifying reservation in their favour. Accordingly, Constitution (One Hundred and Second Amendment) Act, 2018, was brought about and Articles 338B & 342A were inserted constituting a separate commission for socially and educationally backward classes and empowering the President to specify socially and educationally backward classes.

36. In Jaishri Laxmanrao Patil vs. State of Maharashtra17, 5 Judges Constitution Bench struck down the reservation for Marathas in the State of Maharashtra on the ground that the State does not have power to declare any class of people as socially and educationally backward classes.

37. In order to overcome the difficulty created by the above decision, Constitution (One Hundred and Fifth Amendment) Act, 2021 was brought about amending Article 342A so as to provide that the list of socially and educationally backward classes of citizens prepared by the President is only for the Central Government but the State can also prepare its own list.

38. In between, Constitution (One Hundred and Third Amendment) Act, 2019, was enacted whereby Sub-Article (6) was inserted in Articles 15 and 16 in the following terms:

"Article 15 (6)- Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,-

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

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) 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, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Article 16 (6)- Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

39. The validity of the aforesaid amendment was upheld in Janhit Abhiyan vs. Union of India (EWS Reservation)18.

40. The various amendments carried out in the Constitution since its adoption in relation to making provision for reservation can be summarised as under:-

1.	Constitution (First Amendment) Act, 1951	Inserting Sub-Article (4) to Article 15 providing reservation for socially and educationally backward classes.
2.	Constitution (Seventyseventh Amendment) Act, 1995	Inserting Sub-Article (4)(A) to Article 16 providing reservation in promotion.
3.	Constitution (Eighty-first Amendment) Act, 2000	Inserting Sub-Article (4)(B) to Article 16 providing for carry forward of vacancies.
4.	Constitution (Eighty-second Amendment) Act, 2000	Inserting proviso to Article 335 providing relaxation of qualifying marks for the reserved category of persons.
5.	Constitution (Eighty-Fifth	Inserting the phrase "with consequential

	Amendment) Act, 2002	seniority" in Article 16(4)(A) providing not only accelerated promotion but consequential seniority as well to the reserved category.
6.	Constitution (Ninety-Third Amendment) Act, 2006	Inserting Sub-Article (5) to Article 15 providing for mechanism of admission in Education Institution to the reserved category.
7.	Constitution (One Hundred and Second Amendment) Act, 2018, and Constitution (One Hundred and Fifth Amendment) Act, 2021	Providing for identification of backward classes by the Centre and the States by inserting Article 342A.
8.	Constitution (One Hundred and Third Amendment) Act, 2019	Providing for reservation of equally weaker section EWS by inserting Sub-Article (6) of Article 16.

41. The above summary of the constitutional amendments carried out for the purposes of extending the benefit of reservation to the reserved categories would reveal that the Constitution has been amended as many as 9 times in order to implement the reservation policy in a fair and impartial manner so that the socalled depressed classes may be elevated at par with the forward classes.

Most of the times the amendments to the Constitution were carried out either to undo the decisions of this Court or to carry out the directions or the observations made by this Court in implementation of the reservation policy in a more fair and reasonable manner so that the benefit of reservation trickles down to the most backward of the other backward classes/scheduled castes/scheduled tribes.

CENTRAL GOVERNMENT AND STATE GOVERNMENT COMMISSIONS ON SC/ST AND OBCs

42. Apart from the above legislative exercise, the Union Government after independence, set up a Backward Class Commission in the year 1953 under the chairpersonship of Kaka Saheb Kalelkar. The Commission in its Report recommended inter alia that all women as a 'class' be treated as 'backward'; all qualified students of backward classes be granted benefit of 70% seats reservation in all technical and professional Institutions; in all Government services and local bodies backward classes should be provided minimum reservation that is 25% in Class-I, 33-┼ū% in Class-II, 40% in Class-III and 40% in Class-IV. The said Commission in its Report observed:

"if entire communities, with some exceptions, are treated to be backward, actual needy would lose in the mob and they seldom attract attention towards them and get sufficient help."

43. The Commission also observed that in certain States such as Rajasthan vagabond/restless movers/wanderers who groom and breed animals should be given special protection. The report was placed in the Parliament with an action plan but it went undebated. The Central Government at that time had spent a sum of Rs. 4.5 lakh which is equivalent to about Rs. 5 crore as of today.

44. In 1965, the Central Government appointed a Committee to advise on the revision of the existing list of scheduled castes and scheduled tribes. This Committee popularly known as B.N. Lokur Committee, reported and concluded that the question of de-scheduling (or excluding) of relatively advanced communities should receive serious and urgent consideration.

It recommended for the intensive periodical survey of the socioeconomic progress made by each of the scheduled castes and scheduled tribes, probably to exclude certain communities that have progressed and to include those that have been left behind. It further recommended that in framing of development schemes for scheduled castes and scheduled tribes, priority ought to be given to the welfare of the most backward amongst them. It also prepared a list of communities (castes/tribes) that were relatively forward and recommended to de-schedule or exclude 14 scheduled tribes and 28 scheduled castes from the list.

45. The Constitution though aimed at a casteless society, it defined certain depressed/disadvantageous classes as Scheduled Castes and certain tribes living in forest, hilly areas and other remote areas as Scheduled Tribes. However, a significant segment of the population that was otherwise socially, economically and politically backward were not given any privileges or benefits of upliftment. They were marginalised and were left behind in education as well as employment.

In order to address this anomaly, the most talked about second backward class Commission was constituted on 1st January, 1979 by the Government of India which is popularly known as B. P. Mandal Commission. This Commission was entrusted with the job to investigate the conditions of socially and educationally backward classes, to recommend the criteria for defining such classes of citizens, steps to be taken for their advancement and upliftment and the manner in which they can be extending the benefit of the reservation.

46. The Commission submitted its report on 31st December, 1980. The Commission on the basis of 1961 census compiled a national list of 3743 classes

of persons under the heading 'Other Backward Classes' out of which 2108 were classified as 'depressed backward classes'. The Commission recorded that 52 per cent (including 44 per cent hindus and 8 per cent nonhindus) of the citizens are Other Backward Classes whereas 22.5 per cent are Scheduled Castes and Scheduled Tribes in India.

47. The Government while implementing the recommendations of the Mandal Commission took a historic decision on 6th August, 1990 to introduce 27 per cent reservation for Other Backward Classes which were socially and educationally backward classes. This was in addition to 22.5 per cent reservation for Scheduled Castes and Scheduled Tribes. The 27 per cent reservation in favour of other backward classes was confined as this Court in M.R Balaji vs. State of Mysore19 has put a cap of 50 per cent mark for the purposes of reservation.

48. The Mandal Commission thus recommended for 27 per cent reservation for OBCs in public sector and Government jobs and in promotion at all levels. It is also recommended that in the event the above quota remains unfilled in a particular year, the remaining vacancies be carried forward for a period of 3 years whereupon the unfilled vacancies if any would stand dereserved. It further recommended for age relaxation to the OBCs at par with the Scheduled Castes & Scheduled Tribes. The validity of the aforesaid 27 per cent reservation in favour of OBCs was upheld by this Court in the year 1992 in Indra Sawhney (supra).

49. In addition to the above exercise of the Government on the executive/administrative side, on the direction of this Court in the case of E.V. Chinnaiah's (supra), the Government of India appointed a single Member Justice Usha Mehra Commission of a National level to examine the issue of sub-categorization of scheduled castes in Andhra Pradesh.

This Commission appointed in the year 2006 was followed by another Commission set up by the Central Government in 2007 under the chairpersonship of Justice G. Rohini. It was also entrusted with the task of studying the entries in the Centre list of the OBCs and to examine the extent of equitable distribution of benefits of reservation amongst the OBCs. One important aspect which was also entrusted to this Commission was to work out a mechanism for sub-categorization of OBCs.

50. This apart, different States on different occasions had set up various State Level Committees and Commissions to study and report about the improvements to be made in reservation policy and the smooth implementation of the provisions of reservations vis-a-vis the concerned State. In this context, it may be beneficial to refer to some of the such Committees and Commissions set up by different States:

1.	1961	Dr R. Naganna Gowda Committee, Karnataka	It suggested 50% reservation in technical and professional institutions and 45% in Government services.
2.	1963	V.K. Vishwanathan Commission, Kerala	It recommended reserving 40% seats in technical and professional colleges for OBC students and 10% for SC/ST students.
3.	1964	B.D. Deshmukh Committee, Maharashtra	It recommended grouping of backward classes into four categories and reservation in Government services and educational institutions related in the ratio of their percentage in the State.
4.	1969	A.N. Sattanathan Commission, Tamil Nadu	It submitted its Report in 1970 and recommended 33% reservation in State Government jobs and in educational institutions.
5.	1970	Manohar Pershad Commission, Andhra Pradesh	It identified four different categories of OBCs and recommended reservations in their favour, in both professional colleges and in Government services.
6.	1970	J.N. Wazir Committee, Jammu and Kashmir	On the basis of the recommendations of this Committee "The Jammu and Kashmir Scheduled Castes and Backward Classes (Reservation) Rules, 1970" were framed by the State Government.
7.	1973	Dhebar Commission Ministry of Tribal Affairs	This Commission was set up to study the vulnerable tribal groups. It suggested creation of separate category for the less developed among the tribal groups. In 1975 Government of India carried out an exercise to identify the most vulnerable tribal groups as a separate category and declared 52 of them to be in such a group wherein 23 new groups were added in 1993 making it a total of 75 out of 705 scheduled tribes.
8.	1975	L.G. Havanur Commission, Karnataka	It recommended 16% reservation for backward communities, 10% for backward castes and 6% for backward tribes in Government vacancies and educational institutions.
9.	1976	Mungeri Lal Commission, Bihar	It identified 128 communities as backward and 94 of them as most backward. It recommended 20% reservation in Government services and 24% in professional institutions.
10.	1976	A.R. Bakshi	It listed 82 castes and communities as socially and

		Commission, Gujarat	educationally backward and recommended 10% reservation in Government services and in professional institutions.
11.	1977	Chhedi Lal Sathi Commission, Uttar Pradesh	It is one of the most talked about Commission on most backward classes. It recommended classification of backward classes into 3 categories and suggested reservation in Government services and educational institutions under a separate quota.
12.	1990	Justice Gurnam Singh Commission, Haryana	The Commission found that reservation benefits have been primarily availed by one particular scheduled caste and the overall benefits have not percolated down to rest of the 36 scheduled castes. Consequently, the scheduled castes' list for the purposes of reservation in Haryana was divided into Block 'A' and Block 'B' putting the 36 scheduled castes in Block 'A' and the one that has availed most of the benefits in Block 'B'.
13.	1997	Justice P. Ramchandra Raju Commission, Andhra Pradesh	This Commission was set up on the demand of the extremely backward castes within the scheduled castes of the State of Andhra Pradesh. The Report opined that largely the benefits of reservation had gone to a particular caste among the scheduled castes and therefore recommended for categorizing of the scheduled castes into Group A, B, C and D. It is on the basis of the recommendation of this Commission that scheduled castes in Andhra Pradesh were categorized in Group A, B, C and D which enactment led to E.V. Chinnaiah where this Court declared such classification as unconstitutional opining that scheduled castes/scheduled tribes are one homogenous class and cannot be subcategorised for the purposes of reservation.
14.	2001	Hukam Singh Committee, Uttar Pradesh	The Committee upon study found that the benefits of reservation was not percolating down to the most depressed classes of persons rather the Yadav's alone had a maximum share of jobs. Thus, it recommended subcategorisation of list of scheduled castes/OBC.

15.	2003	Lahuji Salve Commission, Maharashtra	This Commission was appointed to study the socioeconomic condition of Mangs caste which was within the list of scheduled castes. The Commission recommended the sub-classification of the scheduled castes as Mangs being the lowest in the hierarchy of caste system were not being adequately benefited.
16.	2005	Justice A.J. Sadashiva Commission, Karnataka	This Commission was appointed to identify the castes, races and tribes of scheduled castes in the State to whom the benefit of reservation was not being adequately extended. The Commission recommended the division of 101 castes specified in the Presidential List into four categories with 15% of the total reservation of scheduled castes to each of the categories.
17.	2007	Mahadalit Commission, Bihar	The Commission was to identify the castes within the scheduled castes that lagged behind. The Commission recommended inclusion of 18 castes as extremely weaker castes from amongst the list of scheduled castes.
18.	2007	Justice Jasraj Chopra Committee, Rajasthan	The Committee reported that Gurjar's live in remote, isolated and uninhabited areas and are extremely backward and therefore recommended that they may be provided with better facilities than those available to the other backward classes.
19.	2008	Justice Thiru M.S. Janarthanam Committee, Tamil Nadu	The Committee recommended that the Arunthathiyar's deserve differential treatment in reservation.
20.	2017	K. Ratna Prabha Committee, Karnataka	Based upon the recommendation of this Committee, The Karnataka Extension of Consequential Seniority to Govt. Servants Promoted on the Basis of Reservation (to the posts in the Civil Services of the State) Act, 2018 was enacted and the matter came up to the Supreme Court wherein the validity of the Act was upheld and it was opined that the reserved category candidates are not only entitled to accelerated promotion but to consequential seniority.
21.	2018	Justice Raghvendra	According to the Report there are 79 castes under

		Kumar Committee, Uttar Pradesh	the OBC category in the State out of which 9 are backward, 37 are more backward and 33 are most backward classes. Therefore, it recommended splitting of 27% quota of OBC in the State: 7% for backward classes, 11% for more backward classes and 9% for most backward classes.

THE RAMIFICATIONS OF RESERVATION

51. The above history of "Reservation" in the country would amply indicate that tremendous amount of effort has been put in by all the three organs of the State i.e. the Legislature, the Executive and the Judiciary to bring about social justice by promoting the reservation policy and its implementation in such a manner that not only the backwards but the most backwards of the backwards are brought into the forefront with the mainstream.

So the question arises that how far has the reservation policy succeeded in someone's wild guess? Notwithstanding, the success or failure of the reservation policy, one thing is for sure that it has burdened the Judiciary at all levels specially the High Courts and the Supreme Courts with enormous litigation which could have been avoided if a robust reservation policy with a vision would have been envisaged under the constitutional provisions in the very beginning instead of making piecemeal changes.

52. It is a matter of experience that every kind of process of selection and appointment in the government services and admission at higher level has come to be challenged before the courts interalia on the grounds of misapplication of the rule of reservation. Most of the times, the appointments and admissions get stuck up for years on account of litigation.

This has caused enormous delay in the recruitment process and the vacancies remaining unfilled for long, giving rise to stop-gap/ad-hoc appointments resulting in further litigation. It is also noticeable that enough time and energy has been spent by all the three wings of the State in streamlining the process of reservation and to evolve a flawless mechanism for implementing the reservation policy but still the non-visionary approach to handle the upliftment of the backward castes has created more difficulties rather than ironing them out.

53. It is a matter of record that in pro-reservation agitations and anti-reservation agitations, the peace and tranquillity of the entire country, at times, stood disturbed. Specially, during the anti-Mandal Commission agitation somewhere in 1990, most of the States witnessed large scale disturbances. The turmoil so

created by such agitations and demonstrations particularly in the months of August-November of 1990 is the ample indication of the wide spread violence.

54. It may not be out of context to point out that apart from the anti-Mandal Commission violence, the country witnessed similar violence in the year 2006 when the students of IITs and AIIMS came out on the streets opposing reservation. Also, there was violence in Maharashtra against the Maratha reservation, to talk about the few.

55. After independence, a special provision was made in the Directive Principles of State Policy to provide compulsory primary education to all children within a period of 10 years but the target could not be achieved even after 77 years of independence. The Central Government, few years back, in order to provide free education to children enacted Right to Education Act, 2009. The aforesaid Act proved to be a very weak legislation and have not been able to provide primary education to one and all irrespective of the caste, creed, race, religion and sex as most of the children of the so-called depressed class either fail to attend schools or drop out after one and two years of education.

There is no compulsion to give education to such children. The policy of reservation is applicable at the higher level only and for the purposes of employment. Thus, depriving such children or the drop outs, at the primary level of the benefit of reservation or upliftment in any other manner, as a result of which these children ultimately remain the most backward of the backwards.

56. The statistics proves that the deprived and the marginalized persons have not been able to achieve the benefit of reservation which is permissible at higher level as about 50% of the students from the most backward classes drop out of school before Class-V and 75% drop out before Class-VIII. The figure goes to even 95 per cent when it comes to the level of high school. Thus, only the children of some of the castes, who are already affluent or urbanized, are able to obtain higher education and the benefits of reservation.

57. By referring to the above agitations, disturbances, violence, litigation and shortcomings, I do not to intend to suggest that the task of upliftment of the downtrodden be brought to an end or that the government should give up the reservation policy. But the issue is how to carry out the process to bring about equality and development of all, the manner of identification of the so-called depressed classes or the downtrodden and the form/nature of steps to be taken for their upliftment.

The Government has used caste as the basis for the upliftment rather than identifying the class of people on the basis of vocation or their social and

economic conditions who actually requires help to be promoted to the level of the forward class. It is for this reason, today we are grappling with a situation of sub38 classification of the castes notified for the purpose of reservation. The experience shows that the better of the class amongst the backwards eats up most of the vacancies/seats reserved leaving the most backward with nothing in their hands.

58. This may be illustrated and better explained by taking three students namely 'A', 'B' and 'C'. Both 'A' & 'B' are equals in every manner as they come from well-to-do family having same kind of status, family background, education and financial capacity. 'A' being a general category candidate, qualifies for admission in higher education on merits whereas 'B' who belongs to a backward class competes and qualifies for admission in the reserved category.

The student 'C' who is also of the backward class but has no advantage as that which is available to both 'A' and 'B', despite competing in the backward category remains unsuccessful. He continues to remain unsuccessful in the following years as well, as again and again backward category candidates having the status equivalent to that of a forward class or that which is available to 'A' and 'B' keeps on qualifying leaving the most backward of the backwards far behind. In this manner, the most backward of the backward category loses the battle even with the backward classes who are practically enjoying the status of the forward class people.

CASTELESS SOCIETY-CASTE SYSTEM VIS-À-VIS THE VARNA SYSTEM

59. The Constitution virtually visualises a casteless society and a unified society but in the name of 'equality' to accord facility and privileges to the depressed class/downtrodden, it is said that we have continued with the so-called Manuwadi System of caste. I am not an expert of religious scriptures nor do I claim that I have any knowledge of any one of them though I may have gone through Bhagwad Gita and Ramcharit Manas some times.

According to my limited understanding of the scriptures specially the Gita, I am of the firm view that in primitive India there was no existence of any caste system rather there was categorisation of the people according to their profession, talent, qualities and nature. This can very well be reflected by verse 13 of chapter 4 and verse 41 of chapter 18 of the Bhagwat Gita which I quote below.

60. *चातुर्वर्ण्यं मया सृष्टं गुणकर्मविभागशः* / **(Chapter 4, Verse 13, Bhagwat Gita)**
ब्राह्मणक्षत्रियविशां शूद्राणां च परन्तप।
कर्माणि प्रविभक्तानि स्वभावप्रभवैर्गुणैः // **(Chapter 18, Verse 41, Bhagwat Gita)**

Lord Krishna says that I have categorised humans in 4 varnas according to their nature and characteristics. Gita thus only promotes varna system which is different from present day caste system. It lays emphasis on abilities, qualities and consciousness of a person to have a balanced structure of society and to bring out the best in every person. The four varnas (occupational categories) are: -

1.	Bharama	Teachers, Priests and Intellectuals (Priestly class)
2.	Kshatriyas	Warriors, Police and Administrators (Administrative class)
3.	Vaishayas	Farmers, Merchants, Traders and Businessman (Mercantile and Farmer class)
4.	Shudras	Artisans, Workers and Labour class (Worker class)

61. The Bhagvad Gita in subsequent verses describes the intrinsic qualities of each of the varnas. The varna system depicting occupational categories can also be explained with the physical body of a person wherein the head of a person which does intellectual work is called 'Bharaman'. The hands which protect him and his family does the job of a 'Kshatriya'. The abdomen which requires food to convert it into energy refers to 'Vaishayas', who are predominantly the farmers and the merchants invested to earn livelihood. The lower limbs (legs) do all kind of labour work and are referred to as 'Shudras'.

62. The Skanda Purana also contains a shloka:

जन्मना जायते शूद्रः संस्कारात् द्विज उच्यते[20] ।

which means that everyone is born as Shudra i.e. to work and slowly each one of them elevates himself to a higher status of Vaishya, Kshatriya and Brahmin on the strength of his talent, quality, character and nature. 63. It means the duties of Brahmins, Kshatriyas, Vaishyas and Shudras were distributed according to their qualities (guns) and nature (and not by birth). All people have different nature and characteristics. Their personality is shaped according to their qualities (gunas). Thus, different professionals duties are suited to persons of different nature and character. Since the center of society is God (Parmatma), everyone (atma) works according to their intrinsic qualities to sustain themselves and the society.

64. According to the varna system no one is to be considered as lower or higher, rather it is preached that everyone is equal fragment and a part and parcel of Him, the Almighty. Gita nowhere preaches that the aforesaid varnas are on the basis of birth and are not interchangeable. However, with the passage of time, the varna system deteriorated and the people started labelling these varnas on the basis of birth, ignoring the nature and characteristics of a person which is exactly the

opposite to what is preached in Gita. The varnas were given the nomenclature of castes in a very loose manner.

65. Later, children of Brahmins started calling themselves as Brahmins, irrespective of whether they possessed the corresponding qualities or not. Similarly, the children of other varnas also adopted the varna of their father ignoring their own nature, talent and qualities. When this system grew rigid & birth based, it became dysfunctional.

66. In short, what is intended to be conveyed is that according to Gita there is no caste system and the varna system (categorization) referred to therein is quite distinct, based upon persons nature & qualities. Thus, there was no caste system in ancient India i.e., Bharat. The misconstruction of the varna system as a caste system was a social defect that crept in with time and was not considered to be good as it divided the society and brought about discrimination & inequality.

67. The social problems created by the so-called caste system or the problem of untouchability etc. were widely considered to be bad practices prevailing in the Indian society. Thus, social reformers always propagated giving up of such malpractices.

68. Mahatma Gandhi, the Father of the Nation, during the entire freedom struggle strenuously worked for the upliftment of the so-called depressed classes including 'untouchables'. He described the untouchables as 'persons of God' - 'Harijans'. After independence with the adoption of the constitution, we decided to move towards the unified casteless society and vide Article 17 envisaged to abolish the practice of untouchability in any form and contemplated to make untouchability 'a punishable offence'.

Notwithstanding, the objective of casteless society and the principle of equality; the original Constitution made provision by Article 15 (3) enabling the State to make special provision for women and children despite prohibition of discrimination on grounds religion, race, caste, sex or place of birth. Similarly, Article 16 (4) enabled the State for making special provision for reservation of appointments or post in favour of any backward class of citizens. This was done with the object to bring about social equity and justice.

69. The Constitution at the same time vide Article 341 conferred power upon the President to notify certain castes, races or tribes or part of such caste, races and tribes to be deemed to be Scheduled Castes. In fact, the constitution otherwise does not recognise any caste except for the above deeming provision. The country as such had moved into a casteless society except for the above legal fiction only for the purposes of the constitution and not otherwise.

70. In other words, to put it summarily there was no caste system in primitive India. Slowly the varna system prevalent was misconstrued to be a caste system which practice was found to be socially non-acceptable and as such after independence with the adoption of the Constitution we again tried to move into a casteless society but in the name of social welfare to uplift the depressed and the backward classes, we again fell into the trap of caste system. We gave privilege of reservation to the depressed or the backward class or the Scheduled Caste to bring about equality.

71. It is common understanding that what is conceded once to appease any class cannot be taken back. So are the benefits extended to the reserved category of persons under the constitution. Each concession once made, just goes on swelling like a raisin/balloon. This actually happened with the policy of reservation also.

RESERVATION IS ONLY A MEDIUM OF FACILITY BUT ITS EXECUTION REVIVES CASTEISM

72. 'Reservation' is one of the modes of helping or uplifting the status of the OBCs/SCs/STs. Anyone who suggests another or a better way of helping the so-called depressed classes or the downtrodden or the marginalised persons of the society is immediately pounced upon as 'Anti Dalit'. At the cost of being called 'Anti Dalit', I quote Nani A Palkiwala from his book 'We, The Nation, The Lost Decades)21 "The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism, the judgment fractures the nation and disregards the basic structure of the Constitution.

The decision would revitalise casteism, cleave the nation into two - forward and backward - and open new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgments will revive casteism which the Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the roles reversed - the erstwhile underprivileged would not become the privileged."

73. In fact, Scheduled Castes, Scheduled Tribes and other backward classes simply deserve equality with the other forward classes of people. Justice O. Chinnappa Reddy in K C Vasantha Kumar & Anr. vs. State of Karnataka22 said "they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of rights and not of philanthrophy. They ask for parity and not charity."

74. In State of Kerala vs. N M Thomas23, Justice V R Krishna Ayer said "you can't throw to the winds considerations of administrative capability and grind the wheels of Government to a hault in the name of 'harijan welfare'."

75. This Court in A. Periakaruppan Chettiar vs. State of Tamil Nadu & Ors.24 observed that reservations should not be allowed to become a vested interest. In Akhil Bharatiya Soshit Karamchari Sangh vs. Union of India & Ors. 25 it was observed that efficacy of the reservation policy will depend upon how soon reservations can be done away with. The then Chief Justice of India Y.V. Chandrachud counselled in Vasanth Kumar (supra), "the policy of reservation in employment, education and legislative institutions should be reviewed every five years or so."

76. Pandit Jawahar Lal Nehru in his letter dated 27th June 1961 addressed to all the Chief Ministers of all the States laments upon the habit of giving reservations and privileges to any caste or group and expresses that such practice ought to be given up and emphasis to help the citizens on economic considerations and not on caste basis and that the Scheduled Castes and Scheduled Tribes do deserve help but not in the shape of any kind of reservation more particularly in services. He wrote:

"I want my country to be a first-class country in everything. The moment we encourage the second-rate, we are lost. The only real way to help a backward group is to give opportunities of good education, this includes technical education which is becoming more and more important. Everything else is a provision of some kind of crutches which do not add to the strength or health of the body."

In the same letter he went on to speak about two very important decisions, "one is, universal free elementary education that is the base; and the second is scholarship on a very wide scale at every grade of education to the bright boys and girls". He went on to express if reservation on communal and caste basis continues, India will remain second rate or third rate. He said "This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency."

CONCLUSION

77. Our predecessors, not only the Judges but also the former Prime Minister have appeared to be against providing reservation to any class or caste of persons on purely caste basis and wanted to take the country forward on merit basis. Despite the views so expressed, the Constitutional amendments envisaged to promote the depressed and the backward classes of persons to bring them to the level of the privileged class enjoying the status of an urban elite. Thus, the

reservation policy was rightly applied and since its implementation faced difficulties as some in the backward classes have marched ahead, it has become imperative to uplift the backward of the backwards, for which purpose sub-classification has become the order of the day.

78. I had the privilege of going through the erudite judgments of the Chief Justice and my esteemed brother Justice Gavai.

79. The Chief Justice in his opinion has dwelled upon the legal aspects to answer the core issue whether sub-classification of the scheduled castes is constitutionally permissible for the purposes of reservation. He has clearly opined that this Court in Indra Sawhney (Supra) never intended to limit the application of sub-classification to the other backward classes only. If any class is not integrated it can be further classified and such sub-classification of a class would not be violative of Article 14 of the Constitution, so long persons in a class are not similarly situated. There is no violation of Article 341(2) of the Constitution in sub-classification within the scheduled caste as by such sub-classification no caste is being included or excluded from the list of scheduled castes.

80. His Lordship Justice Gavai in his opinion quoted an example where a member of a backward class becomes an IAS or an IPS or any other officer of the All India Service and improves upon his status in the society but even then his children get full benefits of reservation. No doubt, "one swallow does not make a summer" meaning thereby that if few members of a particular caste/class advances in the society the entire caste or class would not cease to be backward.

Nonetheless if any member of designated backward class acquires a higher status and attains equality with the forward class, it is difficult to comprehend how his children would be treated as depressed, downtrodden or backward in any manner be it socially, economically or educationally. Therefore, the caste to which this person belongs may not be excluded as a whole from the benefit of reservation but certainly the family which has obtained the benefit once shall not be allowed to take advantage of reservation in the next generation. The reservation to such families has to be confined to one generation only.

81. It has rightly been stated by my brother Justice Gavai in his opinion that Justice Krishna Iyer in N. M. Thomas (supra) has repeatedly observed that State is entitled to take steps for weeding out socially, economically and educationally advanced sections of scheduled castes and scheduled tribes from the ambit of reservation.

82. It has rightly been observed that a child studying in St. Stephen's College or any good urban college cannot be equated with a child studying in a rural school/college and that he cannot be grouped into a same bracket.

83. In these circumstances my brother Justice Gavai has rightly concluded that the State must evolve a policy of identifying the creamy layer even from the scheduled castes and scheduled tribes so as to exclude them from the benefit of reservation.

84. Agreeing with the scholarly separate opinions authored by the Chief Justice and Brother Gavai, J., I summarise my views as under:

(i) The policy of reservation as enshrined under the Constitution and by its various amendments requires a fresh re-look and evolvement of other methods for helping and uplifting the depressed class or the downtrodden or the persons belonging to SC/ST/OBC communities. So long no new method is evolved or adopted, the system of reservation as prevailing may continue to occupy the field with power to permit sub-classification of a class particularly scheduled caste as I would not be suggesting dismantling of an existing building without erecting a new one in its place which may prove to be more useful;

(ii) In the Constitutional regime, there is no caste system and the country has moved into a casteless society except for the deeming provision under the Constitution for the limited purposes of affording reservation to the depressed class of persons, downtrodden or belonging to SC/ST/OBC. Therefore, any facility or privilege for the promotion of the above categories of persons has to be on a totally different criteria other than the caste may be on economic or financial factors, status of living, vocation and the facilities available to each one of them based upon their place of living (urban or rural);

(iii) The reservation, if any, has to be limited only for the first generation or one generation and if any generation in the family has taken advantage of the reservation and have achieved higher status, the benefit of reservation would not be logically available to the second generation; and

(iv) It is reiterated that periodical exercise has to be undertaken to exclude the class of person who after taking advantage of reservation has come to march, shoulder to shoulder with the general category.

85. The reference is accordingly answered and it is held that subclassification of scheduled castes is permissible in law for the purposes of reservation.

.....J. (Pankaj Mithal)

New Delhi;

August 1, 2024.

1 (2005) 1 SCC 394

2 (1992) Supp (3) SCC 217

3 AIR (1951) SC 226

4 AIR (1951) SC 229

5 (1996) 6 SCC 580

6 (1995) 6 SCC 684

7 (1996) 2 SCC 715

8 (1999) 7 SCC 209

9 (1995) 5 SCC 403

10 (2000) 1 SCC 168

11 (2006) 8 SCC 212

12 (2002) 8 SCC 481

13 (2003) 6 SCC 697

14 (2005) 6 SCC 537

15 (2014) 8 SCC 1

16 (2015) 4 SCC 697

17 (2021) 8 SCC 1

18 (2023) 5 SCC 1

19 AIR 1963 SC 649

20 Skanda Purana Vol.18 Book VI, Nagar Kanda, Chapter 239, Verse 31-34.

21 NANI PALKIWALA, WE, THE NATION: THE LOST DECADES 179 (Mehta Publishing House 1995)

22 1985 SCC Suppl. 714

23 (1976) 2 SCC 310

24 (1971) 1 SCC 38

25 (1981) 1 SCC 246

IN THE SUPREME COURT OF INDIA

State of Punjab & Ors.
Vs.
Davinder Singh & Ors.

[Civil Appeal No. 2317 of 2011 Etc. Etc.]

JUDGMENT

Satish Chandra Sharma, J.

1. I have had the privilege of reading the lucid and detailed opinion(s) authored by Hon'ble Dr. Justice D.Y.Chandrachud, Chief Justice of India and Hon'ble Mr. Justice B.R. Gavai, respectively. I am fully in agreement with both opinions to the extent that the validity of sub-classification within Scheduled Castes has been held to be constitutionally permissible.

Moreover, I am fully in agreement with the opinion(s) to the extent that any exercise involving sub-classification by the State, must be supported by empirical data that ought to underscore the more 'disadvantaged' status of the sub-group to which such preferential treatment is sought to be provided vis-à-vis the Constitutional Class as a whole.

2. However, on the question of applicability of the 'creamy layer principle' to Scheduled Castes and Scheduled Tribes, I find myself in agreement with the view expressed by Justice Gavai i.e., for the full realisation of substantive equality inter se the Scheduled Castes and Scheduled Tribes, the identification of the 'creamy layer' qua Scheduled Castes and Scheduled Tribes ought to become a constitutional imperative for the State.

.....J. [Satish Chandra Sharma]

New Delhi

August 01, 2024.

IN THE SUPREME COURT OF INDIA

Government of NCT of Delhi
Vs.
Office of Lieutenant Governor of Delhi

[Writ Petition (C) No. 348 of 2023]

HEADNOTE – Lieutenant Governor (LG) of Delhi has the power to nominate aldermen to the Municipal Corporation of Delhi without the aid and advice of the Delhi Government.

JUDGMENT

Pamidighantam Sri Narasimha, J.

1. Section 3(3)(b)(i) of the Delhi Municipal Corporation Act, 1957[1] provides that the Lieutenant Governor[2] of National Capital Territory of Delhi[3] shall nominate 10 persons with special knowledge in municipal administration to the DMC. The question for our consideration is whether the Lt. Governor can exercise that power of nomination as a statutory duty attached to his office or he is bound by the aid and advice of the Council of Ministers of NCTD as provided in Article 239AA(4) of the Constitution.

2. Facts: Before we take up a detailed analysis of the law and precedents on the subject, a short reference to the facts leading to the filing of the present writ petition is necessary to understand the contextual relevance of the issue under consideration. Delhi Municipal Corporation is composed of: (a) councillors chosen by direct elections from the wards[4] and (b) persons represented through nominations.[5]

3. In the recent elections to the DMC held on 4th December, 2022, Aam Aadmi Party obtained simple majority by winning 134 out of 250 wards and Bharatiya Janata Party came second winning 104 wards. By the end of the month, i.e., 02.01.2023, Municipal Secretary, DMC sent a note, countersigned by the Commissioner, DMC that Lt. Governor will nominate ten persons to the Corporation as provided under Section 3(3)(b)(i) of the DMC Act. In fact, on the very next day, by his order dated 03.01.2023, the Lt. Governor nominated ten members and it was notified in the Delhi Gazette. There was a minor correction and the same was carried out and the corrigendum was also published in the Gazette on the next day, i.e., on 04.01.2023.

4. Challenging the legality and propriety of nominations by the Lt. Governor, the instant writ petition was filed by the Government of NCTD under Article 32 for a Writ of Certiorari to quash the notifications dated 03.01.2023 and 04.01.2023 and also for a direction to the Lt. Governor to nominate persons under Section 3(3)(b)(i) only in accordance with the aid and advice of the Council of Ministers.

5. Submissions: Dr. Abhishek Manu Singhvi, learned Senior Advocate assisted by Shri Shadan Farasat, AOR, appearing on behalf of the Government of NCTD submitted that the 'Lt. Governor can act in his discretion only when it is expressly provided by a law or where no other interpretation of a legal provision is possible'. After taking us through the mandate of Article 239AA, in particular, sub-Article (4), read in conjunction with Section 41 of the Government of National Capital Territory Act of 1991,[6] he submitted that these provisions mirror Article 163 of the Constitution, requiring the Governor to act only on the aid and advice of the popularly elected Government.

For this purpose, the principles laid down in Samsher Singh v. State of Punjab[7] and Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly[8] were relied on to put forth the point that the satisfaction of the Lt. Governor in the cabinet system of Government is the satisfaction of his Council of Ministers.

5.1 Referring to Section 3(3)(b)(i) of the DMC Act, it is also argued that the provision cannot be construed as expressly vesting any discretion in the Lt. Governor to nominate persons to the Corporation. He further submitted that the issue, if any, is conclusively decided by the Constitution Bench decisions of this Court in State (NCT of Delhi) v. Union of India,[9] and the recent pronouncement in the case of Government of NCT of Delhi v. Union of India.[10]

6. Shri Sanjay Jain, Learned Additional Solicitor General, representing the Lt. Governor has not joined issue on the interpretation of Article 239AA, or on the ratio in Samsher Singh (supra) and the two Constitution Bench Judgments of this Court on Article 239AA. It is his submission that the relevant provision of the DMC Act must be read in consonance with Part IXA of the Constitution relating to grant of Constitutional Status to 'Municipalities'.

6.1 Mr. Jain has taken us through certain provisions of the GNCTD Act, as well as the DMC Act to demonstrate the distribution of powers and duties among various authorities. Interpreted in this context, he submitted it will be evident that the Lt. Governor is specifically empowered under Section 3(3)(b)(i) to nominate persons of his own accord and that obligation does not fall within the duty to act on the aid and advice of the Council of Ministers.

7. In rejoinder, Dr. Singhvi submitted that there is a long-standing practice of over 30 years of the Administrator/Lt. Governor nominating councillors only on the aid and advice of the Council of Ministers and that there is no justification for deviating from the established past practice.

Legislative history of election and nomination of Aldermen:[11]

8. Municipal administration in Delhi is governed by and under the DMC Act enacted by the Parliament in 1957. Interestingly, there was no provision for appointment or nomination of Aldermen in the Delhi Municipal Corporation Bill[12] as it was originally introduced in the Parliament by Shri Govind Ballabh Pant on 2nd September, 1957.

However, when the Act was notified on 28th December, 1957, Section 3[13] relating to Constitution of the Corporation comprised of councillors as well as Aldermen was introduced. The procedure for election of Aldermen was provided in Section 13[14] of the Act, as per which they were to be elected by the councillors from persons who are qualified to be councillors, but were neither councillors nor had contested in the election to the post of councillors.

Constitution (Sixty-Ninth) Amendment and establishment of Legislative Assembly for NCTD and introduction of Articles 239AA and 239AB:

9. A little after three decades of passing of the DMC Act, the Union Government felt the need to reorganize the administrative and municipal authorities in the Union Territory of Delhi and constituted a committee (popularly referred to as the Balakrishnan Committee) to study and make recommendations on the same. The Committee recommended the decentralization of Delhi administration and the constitution of a legislative assembly for NCTD by way of a Constitutional Amendment. In so far as municipal administration is concerned, the Committee interalia touched upon the then position relating to election of Aldermen and made certain recommendations.[15]

10. Following acceptance of Balakrishnan Committee Report on decentralization, through the Constitution (Sixty-Ninth Amendment) Act, 1991, Articles 239AA and 239AB were introduced in Part VII of the Constitution. This led to the constitution of Legislative Assembly for the NCTD under Article 239AA with certain special features including redesignation of the Administrator as Lt. Governor.

11. The provision relevant for the purpose of this case is sub-Article (4) of Article 239AA, as per which the Council of Ministers are to aid and advice the Lt. Governor in relation to matters where the Legislative Assembly has the power to make laws. The same sub-Article also provides an exception to this rule, that is

where the Lt. Governor is, by or under any law, required to act in his discretion. Article 239AA, being crucial for our determination, is reproduced hereinbelow for ready reference:

"Article 239AA. Special provisions with respect to Delhi-:

(1) As from the date of commencement of the Constitution (Sixtyninth Amendment) Act, 1991, the Union territory of Delhi shall be called the National Capital Territory of Delhi (hereafter in this Part referred to as the National Capital Territory) and the administrator thereof appointed under article 239 shall be designated as the Lieutenant Governor."

(2) (a) There shall be a Legislative Assembly for the National Capital Territory and the seats in such Assembly shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory.

(b)...

(c)...

(3) (a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory:

Provided further that nothing in this sub-clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

(4) There shall be a Council of Ministers consisting of not more than ten per cent of the total number of members in the Legislative Assembly, with the Chief Minister at the head to aid and advise the Lt. Governor in the exercise of his functions in relation to matters with respect to which the Legislative Assembly has power to make laws, except in so far as he is, by or under any law, required to act in his discretion.

Provided that in the case of difference of opinion between the Lieutenant Governor and his Ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

(5)...

(6)..."

12. Following the introduction of Articles 239AA and 239AB, Parliament enacted the GNCTD Act, 1991 to give full effect to the constitutional amendment. Part IV of the GNCTD Act relates to 'Lieutenant Governor and Ministers' and Sections 41 to 45 falling under this Part are relevant for our purpose and we will refer them at the relevant place.

Judicial Interpretation of Article 239AA and GNCTD Act:

13. The distribution of legislative powers between the Parliament and the Legislative Assembly of NCTD, as well as the distribution of the executive powers between the Union Government and the Government of NCTD was discussed and basic principles were laid down in the two Constitution Bench judgments of 2018 in State (NCT of Delhi) v. Union of India[16] and of 2023 in Government of NCT of Delhi v. Union of India.[17]

14. The 2023 decision of the Constitution Bench in Government of NCT of Delhi v. Union of India reaffirmed the unique position of NCTD enunciated in the 2018 decision- that its Legislative Assembly has competence to make laws for all matters enumerated in List II and List III (except with respect to entries 1, 2 & 18 of List II). While Union has executive power with respect to matters concerning

entries 1, 2 & 18 of List II, the Government of NCTD has executive power with respect to all matters in List II as well as List III (except of course for matters with respect to entries 1, 2 & 18 of List II).

15. Article 239AA(3)(b) confers legislative power on the Parliament to make laws on any and all matters in Lists II and III. Article 239AA(3)(c) further provides that in case the Parliament exercises such legislative power, any law passed by the Legislative Assembly of NCTD shall be void to the extent of repugnancy with the Parliamentary law. Paragraphs 22 to 27 of the 2023 judgment authored by the Hon'ble Chief Justice (Dr. D Y Chandrachud) are relevant for our consideration and the same are reproduced herein for ready reference. These will conclusively establish the principle that if the Parliament makes a law in relation to any subject in List II and List III, the executive power of GNCTD shall then be limited by the law enacted by the Parliament.

"Legislative and executive power of NCTD

22. Article 239AA(3)(a) stipulates that the Legislative Assembly of Delhi shall have the power to make laws for the whole or any part of NCTD with respect to matters in the State List and the Concurrent List "insofar as any such matter is applicable to Union Territories" except for certain subjects expressly excluded. The provisions expressly excludes entries 1, 2, and 18 of the State List, and entries 64, 65 and 66 of List II insofar as they relate to the entries 1, 2, and 18. Article 239AA(3)(b) confers on Parliament the power "to make laws with respect to any matter" for a Union Territory or any part of it.

Thus, while the Legislative Assembly of NCTD has legislative competence over entries in List II and List III except for the excluded entries of List II, Parliament has legislative competence over all matters in List II and List III in relation to NCTD, including the entries which have been kept out of the legislative domain of NCTD by virtue of Article 239AA(3)(a). This is where there is a departure from the legislative powers of Parliament with respect to States. While Parliament does not have legislative competence over entries in List II for States, it has the power to make laws on entries in List II for NCTD. This was the view taken in the 2018 Constitution Bench judgment.

23. As the concurring opinion of Justice Chandrachud held:

"316. Unlike State Legislative Assemblies which wield legislative power exclusively over the State List, under the provisions of Article 246(3), the legislative assembly for NCT does not possess exclusive legislative competence over State List subjects. By a constitutional fiction, as if it were, Parliament has

legislative power over Concurrent as well as State List subjects in the Seventh Schedule.

Sub Clause (c) of Clause 3 of Article 239AA contains a provision for repugnancy, similar to Article 254. A law enacted by the legislative assembly would be void to the extent of a repugnancy with a law enacted by Parliament unless it has received the assent of the President. Moreover, the assent of the President would not preclude Parliament from enacting legislation in future to override or modify the law enacted by the legislative assembly."

24. The 2018 Constitution Bench judgment held that the executive power of NCTD is co-extensive with its legislative power, that is, it shall extend to all matters with respect to which it has the power to legislate. Article 239AA(4) provides that the Council of Ministers shall aid and advise the Lieutenant Governor in the exercise of the functions of the latter in relation to matters with respect to which the Legislative Assembly has the power to make laws.

Thus, the executive power of NCTD shall extend over entries in List II, except the excluded entries. After analysing the provision of Article 239AA(4), it was held in the opinion of the majority in the 2018 Constitution Bench judgment that the Union has executive power only over the three entries in List II over which NCTD does not have legislative competence, that is, entries 1,2, and 18 in List II. It was held:

"222. A conjoint reading of Article 239-AA(3)(a) and Article 239-AA(4) reveals that the executive power of the Government of NCT of Delhi is coextensive with the legislative power of the Delhi Legislative Assembly which is envisaged in Article 239- AA(3) and which extends over all but three subjects in the State List and all subjects in the Concurrent List and, thus, Article 239-AA(4) confers executive power on the Council of Ministers over all those subjects for which the Delhi Legislative Assembly has legislative power.

223. Article 239-AA(3)(a) reserves Parliament's legislative power on all matters in the State List and Concurrent List, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have coextensive executive powers.

224. Article 239-AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is

coextensive with Parliament's legislative power. Further, the ideas of pragmatic federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers.

Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239-AA(3)(a). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution.

284.16. As a natural corollary, the Union of India has exclusive executive power with respect to NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This, however, is subject to the proviso to Article 239-AA(4) of the Constitution. Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution."

25. The judgment of the majority, however, clarified that if Parliament makes a law in relation to any subject in List II and List III, the executive power of GNCTD shall then be limited by the law enacted by Parliament. It was held:

"284.15. A conjoint reading of clauses (3)(a) and (4) of Article 239-AA divulges that the executive power of the Government of NCTD is coextensive with the legislative power of the Delhi Legislative Assembly and, accordingly, the executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects, in the State List. However, if Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by Parliament. (sic)"

26. The above view was also taken by Justice Chandrachud in his concurring opinion:

"316. the provisions of Clause 2 and Clause 3 of Article 239AA indicate that while conferring a constitutional status upon the legislative assembly of NCT, the Constitution has circumscribed the ambit of its legislative Powers firstly, by

carving out certain subjects from its competence (vesting them in Parliament) and secondly, by enabling Parliament to enact law on matters falling both in the State and Concurrent lists. Moreover, in the subjects which have been assigned to it, the legislative authority of the Assembly is not exclusive and is subject to laws which are enacted by Parliament."

27. The 2018 Constitution Bench judgment authoritatively held that the legislative and executive power of NCTD extends to all subjects in Lists II and III, except those explicitly excluded. However, in view of Article 239AA(3)(b), Parliament has the power to make laws with respect to all subjects in List II and III for NCTD."

16. It is in the above referred constitutional position of NCTD that we will examine the law enacted by the Parliament on Municipality, i.e. the Delhi Municipal Corporation Act, 1957.

Delhi Municipal Corporation Act 1957, as amended by Act 67/93:

17. The Delhi Municipal Corporation Act is a law which relates to Entry 5 of State List.[18] This is an Act to consolidate and amend the law relating to the Municipal Government of Delhi. We are concerned with Section 3(3)(b)(i) of the Act, introduced by an amendment in 1993, after introduction of Article 239AA in 1991, which requires the Lt. Governor to nominate persons to be represented in the Corporation. Section 3 being central to our consideration, we will extract a substantial part of it for ready reference:-

"3. Establishment of the Corporation-

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be a Corporation charged with the municipal Government of Delhi, to be known as the Municipal Corporation of Delhi.

(2) The Corporation shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and may by the said name sue and be sued.

(3) (a) The Corporation shall be composed of the councillors;

(b) the following persons shall be represented in the Corporation, namely:-

(i) ten persons, who are not less than 25 years of age and who have special knowledge or experience in municipal administration, to be nominated by the Administrator:

Provided that the persons nominated under this sub-clause shall not have the right to vote in the meetings of the Corporation;

(ii) members of the House of the People representing constituencies which comprise wholly or partly the area of the Corporation and the members of the Council of States registered as electors within the area of the Corporation;

(iii) as nearly as possible one-fifth of the members of the Legislative Assembly of the National Capital Territory of Delhi representing constituencies which comprise wholly or partly the area of the Corporation to be nominated by the Speaker of that Legislative Assembly, by rotation, every year:

Provided that while nominating such members, by rotation, the Speaker shall ensure that as far as possible all the members are given an opportunity of being represented in the Corporation at least once during the duration of the Corporation;

(iv) the Chairpersons of the Committees, if any, constituted under sections 39, 40 and 45, if they are not councillors.

(4) Councillors shall be chosen by direct election on the basis of adult suffrage from various wards into which Delhi shall be divided in accordance with the provisions of this Act ***."

18. The Parliamentary enactment on the subject of Municipality for Delhi, being the DMC Act as amended in 1993, the legislative power of the Legislative Assembly of NCTD to make laws is to be considered. The 'Sui Generis' status of NCTD has been analysed and declared by both the Constitution Bench judgments. In the 2018 Constitution Bench Judgment on NCT, Delhi, Justice Dipak Misra, speaking for the majority held: "284.15. However, if Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by Parliament."

19. A similar observation is made by Justice D.Y. Chandrachud in his concurring Judgment. In Para 316 of the Judgment, it is observed that;

"316. The provisions of Clause 2 and Clause 3 of Article 239AA indicate that while conferring a constitutional status upon the legislative assembly of NCT, the Constitution has circumscribed the ambit of its legislative Powers firstly, by

carving out certain subjects from its competence (vesting them in Parliament) and secondly, by enabling Parliament to enact law on matters falling both in the State and Concurrent lists. Moreover, in the subjects which have been assigned to it, the legislative authority of the Assembly is not exclusive and is subject to laws which are enacted by Parliament."

20. Reiterating the same position, even in the 2023 Constitution Bench Judgment, Chief Justice Dr. D.Y. Chandrachud observed that:

"The judgment of the majority, however, clarified that if Parliament makes a law in relation to any subject in List II and List III, the executive power of GNCTD shall then be limited by the law enacted by Parliament."

21. In view of the distinct constitutional position as it exists for NCTD, we cannot agree with the submissions of Dr. Singhvi that the position of Lt. Governor is akin to that of a Governor in a State under Article 163 of the Constitution. There is a clear distinction between the discretionary power of the Governor under Article 163 and that of the Lt. Governor under Article 239AA(4).

While Article 163 requires Governor of a State to act on the aid and advice of the Council of Ministers, 'except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion', the exception in so far as the Lt. Governor, under Article 239AA(4) is concerned, he will act in his discretion, 'in so far as he is required by or under any law'. Article 239AA of the Constitution takes into account the unique position of NCTD and therefore adopts the mandate of 'law' as a distinct feature for exercise of discretion.

22. In view of the constitutional position and the decisions of this Court, a restatement of the relations between the Union and the NCTD is necessary before we proceed to interpret Section 3(3)(b)(i) of DMC Act to consider whether the Lt. Governor is to nominate on the aid and advice of the Council of Ministers or is to act as per his discretion.

A. Legislative Relationship

(i) Legislative Assembly of NCTD shall have power to make laws (legislative power) for NCTD with respect to 'any of the matters' enumerated in State List or Concurrent List. (except entries 1, 2 and 18 of State List). (Article 239AA(3)(a)).

(ii) Notwithstanding the above, Parliament shall have power to make laws (legislative power) for NCTD with respect to 'any matter' in the three lists. This is where there is a departure from the legislative powers of Parliament with respect to States. While Parliament does not have legislative competence over entries in

List II for States, it has the power to make laws even with respect to matters enumerated in List II for NCTD [(Article 239AA(3)(b)].

(iii) Law made by the Parliament shall prevail, whether made before or after any law made by the Legislative Assembly of NCTD, and the law made by the Legislative Assembly, to the extent of repugnancy, shall be void. Only exception is when the law made by Legislative Assembly of NCTD receives Presidential assent. (proviso to Article 239AA(3)(c))

(iv) Once Parliament exercises its legislative power and makes a law on a subject in List II or List III, the Legislative Assembly of NCTD is denuded of its legislative competence to make laws with respect to that subject. Once there is no legislative power for Legislative Assembly of NCTD, there would be no executive power as executive power is always coextensive and coterminous with legislative power.

B. Executive Relationship

(v) Government of NCTD has the executive power in relation to all matters with respect to which Legislative Assembly of NCTD has power to make laws. The executive power extends to all matters enumerated in the Concurrent List as well as State List (Except Entries 1, 2 and 18 of State List).

(vi) Union of India shall have exclusive executive power with respect to matters in Entries 1, 2 and 18 of the State List, which are specifically excluded from the legislative power of NCTD.

(vii) The executive power of Government of NCTD shall be exercised through the Lt. Governor who shall act on the aid and advice of the Council of Ministers [Art 239AA(4)] read with Section 44 of the GNCTD Act. Another constitutionally recognized departure for NCTD is that while Governor of a State under Article 163 acts on the aid and advice of Council of Ministers on all matters except when he is by or under the Constitution required to exercise his functions in his discretion, the Lt. Governor, under Article 239AA(4) is to exercise discretion, 'in so far as he is, by or under any law, required to act in his discretion'. 'Law' requiring him to act in his discretion could be a law of the Legislative Assembly of NCTD or a Parliamentary law.

C. Statutory Regulation

(viii) Once Parliament makes Law on a subject over which NCTD also has legislative competence and consequently executive power, the powers, duties and obligations of the authorities will then be governed by the mandate of the Law made. This position is already mentioned in statements (iii) and (iv). If the Law

vests a power, duty or an obligation on the Lt. Governor, the Lt. Governor will act under the mandate of the Act and not as per the 'executive power' of Government of NCTD. Therefore, statutory provision alone will determine whether the power is intended to be exercised by the Lt. Governor on his own accord or on the aid and advise of the Council of Ministers.

23. Before examining the statute, i.e., DMC Act in detail, we will deal with yet another submission of the petitioner. It is argued by Dr. Singhvi that vesting of power in the name of Administrator/Lt. Governor in Section 3(3)(b)(i) is nothing but a 'semantic lottery', as the word 'administrator' has been used in many pre-1991 legislations which relate to subjects that now fall within the purview of the Legislative Assembly of NCTD.

24. We will examine if this apparent vesting of the power in the name of Administrator, to nominate councillors under Section 3(3)(b)(i) is by default, as the old statutory regime would have continued without incorporating the Legislative status for NCTD after the introduction of Article 239AA in 1991.

25. For giving effect to the Constitutional 69th Amendment introducing Articles 239AA and 239AB and the specific recommendations of Balakrishnan Committee for reorganizing municipalities, the Delhi Municipal Corporation (Amendment) Bill, 1992 was introduced in the Lok Sabha on 24th November, 1992.

26. While the Bill was pending consideration, another constitutional development took place. In its Winter Session, Parliament passed the Constitution (Seventy-fourth Amendment) Bill relating to 'Panchayats' and 'Municipalities'. Part IX-A relating to Municipalities comprising of Articles 243P to Articles 243ZG came into effect from 01.06.1993.

The Constitutional recognition of Municipalities, coupled with provisions granting autonomy for municipal administration, its elections, composition, duration, reservation, etc. had to be incorporated in the DMC Act. In order to 'harmonize' the position, Government withdrew the pending Bill and introduced the new Bill No. 66 of 1993. The Bill was passed and was notified on 17.09.1993 as the Delhi Municipal Corporation (Amended) Act No. 67 of 1993.

27. The DMC Act, as amended in 1993 is of seminal importance. The amendment gives effect to two Constitutional developments. While the first relates to the recognition and grant of quasi-statehood to Delhi with the introduction of Articles 239AA and 239AB, the other relates to grant of a Constitutional status to the Municipalities. The statement of objects and reasons

of Amendment Act 67 of 1993 record the circumstance in which amendments to the principal Act were brought about:

"STATEMENT OF OBJECTS AND REASONS

The need for reorganization of administrative and municipal set up in Delhi was being felt and the matter has been under the consideration of the Government for some time. For making an indepth study, the Government appointed a Committee to go into the various issues connected with the administrative and municipal set up of Delhi and to recommend measures, inter alia, for streamlining of the municipal set up. The Committee on re-organisation of the Delhi set up (popularly known as Balakrishnan Committee) went into the matter in great detail and recommended a decentralized municipal administration.

2. To give effect to the recommendation of the Committee, and decision of the Government thereto, the Delhi Municipal Corporation (Amendment) Bill, 1992 was introduced in Lok Sabha on 24th November, 1992. Meanwhile, during the Winter Session of the Parliament, the Constitution (Seventy-second Amendment) Bill, 1992 relating to Panchayats and the Constitution (Seventy-third Amendment) Bill, 1992, relating to the municipalities were passed.

These Bills have now become Acts. As the provisions of the aforesaid two Constitutional Amendments have a bearing on the composition, duration reservation of seats and responsibilities of Panchayats and Municipalities, it has become necessary to make further changes in the Delhi Municipal Corporation (Amendment) Bill, 1992 so as to harmonise the provisions of the Delhi Municipal Corporation Act, 1957 with the provisions of the aforesaid two Constitutional Amendments.

3. Government has, therefore, proposed to withdraw the Delhi Municipal Corporation (Amendment) Bill, 1992 to introduce a new Amendment Bill in harmony with aforesaid Constitution Amendment Acts, with such modifications as are necessary in view of the special requirements of the Union Territory of Delhi.

4. The important changes sought to be brought about by the Bill are-

(i), (ii).....

(iii) Provision has been made for ten persons of not less than 25 years of age and possessing special knowledge or experience in municipal administration, to be nominated by the Administrator to the Corporation;

(iv) to (xv).....

Notes on Clauses

Many of the clauses of the Bill provide for amendments to the Delhi Municipal Corporation Act, 1957 in order to bring its provisions, as far as possible, in consonance with the provisions contained in the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 as well as consequent on the transfer of certain functions now being performed by the Municipal Corporation of Delhi to other agencies.

Clause 3 provides for the increase in the number of Councillors from one hundred to one hundred and thirty-four. It also provides for representation of ten persons, having special knowledge or experience in municipal administration (without voting right) to be nominated by the Administrator and representation of MPs from Delhi and Members of Legislative Assembly of Delhi."

The 1993 Amendment to the DMC Act:

28. The DMC Act, as amended in 1993 (by Act 67/93) recognizes five authorities exercising distinct powers and duties under the Act. They are the, i) Central Government, ii) Government of NCTD, iii) Administrator, iv) Corporation, and v) the Commissioner. These authorities are also defined under the Act. Section 2(21A) defines 'Government' as 'the Government of National Capital Territory of Delhi', 'Administrator' is defined under Section 2(1) as 'the Lt. Governor of the National Capital Territory of Delhi', the 'Corporation' is defined under Section 2(7) as 'the Municipal Corporation of Delhi' and finally the 'Commissioner' is defined under Section 2(6) as 'the Commissioner of the Corporation appointed under Section 54 of the Act'.

29. The (Amendment) Act carries out as many as 136 amendments to the principal Act to give effect to a scheme by which powers, duties, and responsibilities are allocated to the authorities, depending on the functions that they perform under the Act. This also includes comprehensive amendments to Section 3(3)(b)(i) of the Act.

For instance, while the power of nomination of Aldermen is given to the Lt. Governor under Section 3(3)(b)(i), the power of nomination of MLA's is given to the Speaker of the House under this very Section. It is therefore incorrect to suggest that the power vested in the Lt. Governor continued by default or 'Semantic Lottery'. In fact, the power to nominate is brought into the Statute for the first time with the introduction of the 1993 amendment to the DMC Act. This submission is therefore rejected as it is oblivious of the 1993 amendment to the Act.

The 'Text' and the 'Context' of Section 3(3)(b)(i) of DMC Act:

30. We will now examine Section 3(3)(b)(i) and also the 'context' in which it is located with other provisions of the Act to gather the true purpose and intention of the Parliament. The text of the provision is clear. Section 3(3)(b)(i) provides that 'ten persons to be nominated by the Administrator'.

31. It is now necessary to refer to the statutory scheme involving power, functions and duties of the Lt. Governor and that of the Government of NCTD in order to appreciate the true intendment behind Section 3(3)(b)(i), i.e., whether the power is to be exercised by the Lt. Governor on the aid and advice of the Council of Ministers or it is a statutory duty to be exercised at its own discretion as the Lt. Governor.

32. Provisions of the DMC Act imposing certain duties on the Lt. Governor are as follows:

(i) Section 3(3)(b)(i) provides that ten persons who have special knowledge and experience in municipal administration are to be nominated by the Administrator.

(ii) Section 7 relates to the duty, superintendence, direction and control of elections by the Election Commissioner and the Administrator is given the duty to appoint the Election Commissioner. The other power relates to a duty to maintain the integrity of the elections.

(iii) Section 33 relates to the duty to decide if any councillor has become subject to disqualification. The duty is entrusted to the Administrator and the Section provides that "the question shall be referred to the decision of the Administrator and his decision shall be final". Sub-Section 4 of the same Section provides that before giving any decision on the question, the Administrator shall obtain the opinion of the Election Commissioner and the Lt. Governor shall act in accordance with the opinion of the Election Commission.

(iv) Section 73 relates to the duty of the Administrator to convene the first meeting of the Corporation after the General Elections.

(v) Section 77 prescribes the duty of the Administrator to nominate a presiding officer for the election of the Mayor. This duty is prescribed in terms that the "Administrator shall nominate a Councillor".

(vi) Section 82 relates to the power of the Lt. Governor to decide the time, place and procedure of the first meeting of the Corporation after the General Elections.

(vii) Section 95 provides for the Administrator being the Appellate Authority against imposition of punishment on municipal officer and other employees who are appointed by the Commissioner.

(viii) Section 107A provides that the Administrator shall constitute the Finance Commission.

(ix) Section 347D also provides an appeal to the Administrator for adjudicating disputes against the order of the Appellate Tribunal made under Section 343 or 347B.

33. In contrast, we will now examine the powers and duties entrusted to the Government of NCTD by the DMC Act.

(i) Under Section 479, the Government of NCTD has the power to make Rules. The Government also has the power to approve Bye-Laws made by the Corporation.

(ii) Section 7B relates to the preparation of Electoral Rolls in which the Electoral Registration Officer shall be appointed in consultation with the Government.

(iii) Section 43 empowers the Government to give general or special orders with respect to any function that the Corporation may perform in exercise of its duty.

(iv) Under Section 52, the Government has the power to pass general or special orders as specified in Fifteenth Schedule of the Act, with respect to exercise of powers and functions of the Ward Committees.

(v) Under Section 89, the appointment of the Municipal Chief Auditor shall be made with the previous approval of the Government. Similarly, all the officers mentioned in Section 89(1), except the Municipal Chief Accountant and Municipal Secretary, shall be subject to confirmation by the Government.

(vi) Under Section 92A, direct recruitment to category B and C posts shall be made by the Government and it may prescribe the agencies for performing its function.

(vii) Under Section 116, the Government has the power to appoint and notify the Municipal Valuation Committee which comprises a Chairperson and such other members as the Government may determine.

(viii) Under Section 150 the power of the Corporation to levy taxes is subject to the sanction of the Government.

(ix) Under Section 169 the Government shall have the power to constitute the Municipal Taxation Tribunal and such other members as the Government may determine.

(x) Under Section 207 the Government has the power to appoint an Auditor for the purpose of making a special audit of the Municipal Fund and reporting thereon to the Government.

(xi) Under Section 347A the Government also has the power to constitute one or more Appellate Tribunal for deciding appeals under section 343 and 347B.

(xii) Under Section 347A(4) the Government has the power to appoint one or more persons having special knowledge or experience in the matters involved in such appeals to act as assessors to advice the Appellate Tribunal. In this very context it is important to note that in so far as appointment of person manning the Appellate Tribunal is concerned, the power is given to the Central Government.

(xiii) Under Section 469, the Government has the power to appoint Municipal Magistrates for conducting the trial of offences under the Act. Under sub- Section (3) the Government has the power to prescribe the salary, pension, and leave etc.

34. Apart from the powers and duties of Lt. Governor and the Government of NCTD as noted in Paras 32 and 33, the DMC Act also refers to powers, functions and duties of other authorities such as the Central Government, the Corporation,[19] and the Commissioner.[20] The specific powers that are entrusted to them are mentioned in the footnote for the purpose of brevity as we are concerned only with the competing power structure between the Lt. Governor and the Government of NCTD.

35. The provisions of the Act relating to the Lt. Governor are relating to matters such as nomination of experts, Election Commissioner, constituting Finance Commission, convening the first meeting of the Corporation, acting as an appellate authority, etc. These functions seem to suggest that they are intended to enable the authority (Lt. Governor) in which the power is vested to act as an independent body.

36. On the other hand, powers and duties entrusted to the Government under the DMC Act are very distinct from that of the Lt. Governor. Para 30 evidences this fact. Powers and duties of Government of NCTD relate to matters such as making of subordinate legislation, having superintendence, making direct recruitment, imposing taxes, establishment of Tribunals, appointment of Authorities such as the Municipal Chief Auditor, Valuation Committee, etc.

37. Having examined Section 3(3)(b)(i) of the DMC Act empowering the Lt. Governor to nominate persons having special knowledge to the DMC, we will underscore the point that it is law made by Parliament. As the law requires the Lt. Governor to exercise the power of nomination, it satisfies the exception contemplated under Article 239AA(4) to act in his discretion as he is by or under

any law so required to act. We also reject the submission that the word 'Administrator' is a relic of the pasta pre-1991 legislation when there was no Legislative Assembly for Delhi, for the reason that Section 3(3)(b)(i) was introduced only in 1993 to give effect to the two constitutional amendments.

Apart from the 'text' of Section 3(3)(b)(i) specifically requiring the Lt. Governor to nominate, we have also examined the 'context' in which the said provision is located, and it evidences the existence of a statutory scheme in which powers and duties are entrusted to different authorities under the Act to subserve the constitutional purposes. The statutory regime makes it clear that the entrustment of the powers is intended to be exercised by Lt. Governor as a statutory duty.

38. We would therefore proceed to add the following two principles to the statement of the relations between Union and NCTD in para 22:

(ix) The statutory power under Section 3(3)(b)(i) to nominate persons of special knowledge was vested in the Lt. Governor for the first time by the 1993 amendment to the Delhi Municipal Corporation Act, 1957 to incorporate the Constitutional changes through Articles 239AA, 239AB and introduction of Part IX-A relating to municipalities. The power to nominate is therefore not a vestige of the past or a power of the Administrator that is continued by default. It is made to incorporate change in the Constitutional structure of NCTD.

(x) The 'text' of Section 3(3)(b)(i) of the DMC Act, 1957 as amended by Act 67/1993 expressly enables the 'Lt. Governor' to nominate persons having special knowledge to the Corporation. The power expressed by the statute in the name of Lt. Governor, also seen in the 'context' of other provisions of the statute, demonstrates the statutory scheme in which powers and duties are distributed among authorities under the Act. The context in which the power is located confirms that the Lt. Governor is intended to act as per the mandate of the statute and not to be guided by the aid and advice of the Council of Ministers.

39. Having examined the provisions of the Act, we are of the opinion that Section 3(3)(b)(i) of the Delhi Municipal Corporation Act is a Parliamentary enactment vesting the power of nomination of persons with special knowledge in municipal administration with the Lt. Governor. The power is to be exercised as a statutory duty of the Lt. Governor and not as the executive power of the Government of NCTD.

40. For the reasons stated above, the notifications dated 03.01.2023 and 04.01.2023 issued by the Lt. Governor under Section 3(3)(b)(i) are not in violation of Article 239AA read with Section 41 of the GNCTD Act.

41. Accordingly, this Writ Petition (C) No. 348 of 2023 under Article 32 of the Constitution of India is dismissed.

42. No order as to costs.

.....CJI. [Dr. Dhananjaya Y. Chandrachud]

.....J. [Pamidighantam Sri Narasimha]

.....J. [J.B. Pardiwala]

New Delhi;

August 05, 2024

1 Hereinafter referred to as the 'DMC Act' and 'DMC' for Delhi Municipal Corporation.

2 After the establishment of Legislative Assembly for the Union Territory of Delhi, the Administrator is redesignated as Lieutenant Governor.

3 Hereinafter referred to as NCTD.

4 Under Section 3(3)(a)

5 Under Section 3(3)(b)

6 Hereinafter referred to as GNCTD Act.

7 (1974) 2 SCC 831

8 (2016) 8 SCC 1

9 (2018) 8 SCC 501

10 (2023) 9 SCC 1

11 DMC Act initially used the expression 'Aldermen' to represent persons other than councillors who were represented in the Corporation. However, after the 1993 Amendment to the DMC Act, the term 'Aldermen' was dropped and substituted by the descriptive language-'persons who have special knowledge and experience in municipal administration'.

12
"**3. Establishment of the Corporation**

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be a Corporation charged with the municipal government of Delhi, to be known as the Municipal Corporation of Delhi.

(2) The Corporation shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and may by the said name sue and be sued.

(3) The Corporation shall consist of eighty councillors chosen by direct election on the basis of adult suffrage from various wards into which Delhi shall be divided in accordance with the provisions of section 5:

Provided that twelve out of the eighty seats of councillors shall be reserved for the members of the Scheduled Castes."

Gazette of India Extraordinary, Jan-Dec 1957, Part 2 Section 2 pg. 552.

13
"**3. Establishment of the Corporation**

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be a Corporation charged with the municipal government of Delhi, to be known as the Municipal Corporation of Delhi.

(2) The Corporation shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property and may by the said name sue and be sued.

(3) The Corporation shall be composed of councillors and aldermen.

(4) .....

(5) .....

(6) .....

(7) The total number of aldermen shall always be six."

Gazette of India Extraordinary, Jan-Dec 1957, Part 2 Section 1 pg. 696.

14
"13. (1) The six aldermen referred to in sub-section (7) of section-3 shall be elected at a meeting of the councillors immediately after the publication of the results of the general election of councillors under section 14. or

(2) No person shall be entitled to stand as a candidate at any election of an alderman if at any election of a councillor immediately preceding the election of any alderman he stood as a candidate and failed to be elected as a councillor.

(3) In the case of an equality of votes at any election of an alderman the person presiding at the meeting whether or not entitled to vote in the first instance shall have and exercise a casting vote.

(4) As many persons as there are vacancies to be filled being persons who have the largest number of votes shall be declared by the person presiding at the meeting to be elected.

(5) As soon as may be after the occurrence of any casual vacancy in the office of an alderman election shall be held to fill such casual vacancy."

15
"11.6.5. The Act makes provision for the election of six Aldermen by the elected members of the Corporation. The only qualification for an Alderman prescribed by the Act is that every such person should be qualified to be elected as a Councillor and should, not already be a Councillor. This means that the Aldermen are no different from Councillors, except for their mode of election. There is obviously no apparent purpose in providing for the institution of Aldermen if they are also to belong to the same category of persons as the Councillors. It only stands to reason that Aldermen should be elderly men with a measure of maturity, experience and standing in the public so as to enable them to provide a valuable input to the deliberations of the Corporations by reason of their expertise or experience in public affairs.

The present provisions in the Act do not ensure this. We consider that an Alderman, if he is to play any useful role, should be a person elected from members of the public, residing within the limits of the Corporation concerned, with adequate knowledge, reputation and experience of public affairs and with a background of public service. They can be chosen from persons who have retired after rendering service as teachers, doctors, engineers or government servants. Delhi is full of such men of experience and it will be in the public interest that the talents of such experienced men should be utilized usefully in the civic administration.

We recommend that the Act should prescribe these qualifications. The Aldermen should be elected by the Councillors from among persons so qualified by the method of proportional representation by means of a single transferable vote. We recommend accordingly. We also recommend that the actual number of Alderman may be fixed for each corporation at a figure not less than two but more than four." Committee on Reorganisation of Delhi Set-up Report, December 1989 Part II."

16 Supra no. 9

17 Supra no. 10

18 This is an admitted position as can be seen from para 2.2 of the written submission of Dr. Singhvi that, "In the present case, the DMC Act relates to Entry 5 of State List".

19 See Sections 39, 89, 98, 209

20 See Sections 89, 90, 92, 98

IN THE SUPREME COURT OF INDIA

Mool Chandra
Vs.
Union of India & Anr.

[Civil Appeal Nos. 8435 - 8436 of 2024
@ SLP (Civil) Nos. 2733-2734 of 2024]

HEADNOTE – It is not the length of delay that would be required to be considered while examining the plea for condonation of delay, it is the cause for delay which has been propounded will have to be examined. If the cause for delay would fall within the four corners of "sufficient cause", irrespective of the length of delay same deserves to be condoned. However, if the cause shown is insufficient, irrespective of the period of delay, same would not be condoned.

JUDGMENT

Aravind Kumar, J.

1. Heard.

2. Leave Granted.

3. Appellant has laid challenge in these appeals to the Order dated 14.09.2023 passed by the High Court of Delhi in WP (C) No.5350 of 2022 and CM Appls. 16008 of 2022 and 46942 of 2023 whereby the Writ Petition and connected applications came to be dismissed and Review Petition No.305 of 2023 filed against said Order also came to be rejected on 03.11.2023 and consequently the Order dated 10.12.2020 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as the "Tribunal" for brevity) came to be affirmed whereunder the Tribunal dismissed the application for condonation of delay in challenging the Order dated 22.11.2006 imposing the penalty of stoppage of one increment with cumulative effect, on the ground of delay of 425 days in filing the OA and held penalty imposed on the appellant was justified given the nature of charge.

4. It would be apt and appropriate to narrate the factual background for appreciating the rival contentions raised in these appeals and the parties are referred to hereinafter as per their rank in the High Court.

BRIEF BACKGROUND

5. The appellant was appointed to Indian Statistical Services in the year 1982 and after being promoted as Deputy Director (STS) on regular basis in 1987 came to be promoted as Joint Director (JAG) on ad hoc basis in the year 1992 and regularised in 1993. In the light of the Judgment of this Court in Union of India and Others v. Tushar Ranjan Mohanty and Others (1994) 5 SCC 450 the appellant along with others was reverted in the year 1996 to the post of Deputy Director and again was promoted to the post of Joint Director w.e.f. 08.06.2005.

6. Appellant came to be placed under suspension on 13.10.1997 followed by issuance of charge memorandum under Rule 14 of CCS (CCA) Rules, 1965. The only charge against the appellant was that he had deserted his family consisting of his wife and two school going children in December 1985 and was residing separately along with another woman without judicial separation from his wife. The said charge sheet was issued on the basis of the complaint lodged by his wife during August 1997 and he was not paid salary from May 1996 to July 1997.

7. The Disciplinary Authority appointed an Inquiry Officer to enquire into the memorandum of charge and during the pendency of the inquiry, the wife of the appellant filed an affidavit withdrawing her complaint on the ground that there had been some misunderstanding. Despite the said affidavit the enquiry officer proceeded with the inquiry and submitted enquiry report on 16.12.1998 holding appellant guilty of charge of deserting his family and further held that the charge of appellant living with another woman was not proved. This report resulted in order of dismissal of appellant from service imposed by the disciplinary authority by order dated 17.04.2000 and review petition filed against the same also ended in its dismissal.

8. Being aggrieved by the aforesaid order of dismissal from service, appellant preferred an O.A. No.116 of 2002 before the Tribunal which came to be allowed by Order dated 15.11.2002 and the order of dismissal came to be quashed with the following observations and remitted the case to the disciplinary authority:-

"2. In the enquiry that ensured, it was found that the assertions that applicant was living with another woman are not established but the other facts referred to above have been so established. Keeping in view the findings referred to above that applicant was not maintaining his wife and two children and they were driven to the starvation level, the disciplinary authority on the advice of the U.P.S.C. dismissed the applicant from service.

3. Before us, at the time of arguments, it was pointed out that no allegation against the applicant of extra marital relations has been established and this fact is not in dispute. Taking clue from aforesaid, it was argued that the punishment of dismissal so awarded, is disproportionate to the dereliction of duty of the applicant.

4. We are conscious of the decision that ordinarily this Tribunal is not to go in the said controversy. It is within the domain of the disciplinary authority to consider the relevant facts and pass appropriate orders imposing a particular punishment in a disciplinary authority.

5. However, the well-known exception to the said rule is that if the punishment awarded is totally disproportionate to the alleged dereliction of duty, in judicial review there can be interference.

6. In the present case, the assertions against the applicant established were that he had not been maintaining his wife and children. After dismissal, he cannot maintain his wife and children. When such is the situation, we have no hesitation in concluding that the punishment awarded is disproportionate to the allegations against the applicant that were established.

7. Accordingly we quash the impugned order and remit the case to the disciplinary authority to pass a fresh order in the light of what has been said above.

8. No opinion is expressed on the other contentions of the applicant for the present. O.A. is disposed of."

9. On matter being sent back to the disciplinary authority, appellant came to be reinstated into service on 09.04.2003 and an order dated 23.04.2004 came to be passed imposing minor penalty of stoppage of one increment of pay for a period of one year, without cumulative effect. Further order came to be passed on 02.08.2004 treating period of suspension as on duty for all purposes. However, no promotion was granted during the period of suspension. Seeking complete exoneration appellant filed a revision petition and same was said to be pending.

On account of revision petition filed by the appellant having not been disposed of representations dated 27.07.2015, 16.03.2016 and 17.03.2016 was said to have been submitted by the appellant urging grant of promotion on par with his juniors who had already been promoted and prayed for grant of financial benefits in that regard by complete exoneration of charge levelled. In the meanwhile, appellant attained the age of superannuation and retired from service with effect from 31.10.2016.

10. O.A. No.1579 of 2017 came to be filed by the appellant seeking direction to the respondent authorities to consider his representation and same came to be disposed of by the Tribunal vide Order dated 08.05.2017 directing the respondents to dispose of the representation dated 27.07.2015 within a period of 90 days. This resulted in same being disposed of and intimation/communication was forwarded to the appellant on 09.11.2017 informing the appellant thereunder that representation dated 27.07.2015 has been considered & rejected.

Appellant was also intimated that his representations had already been disposed of and same had been intimated vide communication dated 20/22-11-2016 itself and also forwarded copy thereof to the appellant along with communication dated 09.11.2017. The communication dated 09.11.2017 came to be challenged by the appellant in O.A. No.3034 of 2018 as well as the communication dated 20/22.11.2016. The said O.A. is said to have been withdrawn by the Ld. Counsel appearing for the appellant purportedly without his consent and knowledge on 10.08.2018. The said order of the Tribunal dismissing the O.A. as withdrawn reads:

"Learned Counsel for applicant seeks permission of the Tribunal to withdraw the O.A.

2. Permission is accorded. The O.A. is dismissed as withdrawn without prejudice to the right of the applicant to pursue his remedy in accordance with law."

11. Appellant claims that he came to know about this fact namely withdrawal of his application before the Tribunal only in the last week of August 2019 and immediately thereafter he had applied for certified copy of the order dated 10.08.2018 and filed another O.A. No.2066 of 2020 before the Tribunal along with Miscellaneous Application No. 3679 of 2019 for condoning the delay in filing the O.A. as he had been given opportunity to pursue his remedy in accordance with law. The application for condonation of delay came to be rejected by the Tribunal vide order dated: 10.12.2020 by observing thus:

"3. The delay involved is more than one year. It is not as if the applicant was not aware of the proceedings. As a matter of fact, the OA is filed against the order of dismissal, passed against him was allowed and relief was granted. It is in compliance with the order by the Tribunal, that the revised order of punishment was passed. The appellate authority rejected the appeal in the year 2016. It is not the case of the applicant that he did not receive the same. Further, the applicant was very much free to pursue the proceedings, ever since he retired. Except stating that his earlier counsel did not take proper steps, the applicant did not substantiate the reasons for delay.

4. We are not convinced with the reasons given in the MA. The same is accordingly dismissed. The OA shall also stand dismissed."

12. Being aggrieved by the same appellant filed Writ Petition (Civil) No.5350 of 2022 before the Delhi High Court which dismissed the writ petition by impugned order while affirming the order of the Tribunal and observed that justifiable penalty had been imposed by the disciplinary authority. Hence, this appeal.

CONTENTIONS OF LEARNED ADVOCATES

13. It is the contention of Shri Vardhman Kaushik, learned counsel appearing for the appellant that High Court on the one hand having opined not to entertain the writ petition on the ground of alleged unexplained delay, yet proceeded to deal with the matter on merits of the case, that too without affording an opportunity to the appellant and as such the appeal deserves to be allowed by setting aside the impugned order.

He would further elaborate his submissions by contending that Tribunal had committed an error in not condoning the delay of 425 days in filing O.A. No.2066 of 2020 and the delay was due to the mistake of the counsel, who without the knowledge and consent of the appellant had withdrawn the earlier O.A. No.3034 of 2018 and also without prejudice to the right of the appellant to pursue his remedy in accordance with law and it is on account of lack of knowledge of the appellant's application having been withdrawn and on acquiring knowledge about such unilateral withdrawal appellant had taken immediate steps to prosecute his legitimate claim before the Tribunal by filing O.A. No.2066 of 2020 afresh along with an miscellaneous application No.3679 of 2019 for condonation of delay and as such Tribunal ought to have condoned the delay which refused to do so and same has been erroneously affirmed by the High Court.

He would submit that a party should not suffer for the mistake of his counsel or the conduct of the counsel and he has placed reliance on Rafiq and Another Vs. Munshilal and Another (1981) 2 SCC 788 and N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123.

14. He would further contend that term 'sufficient cause' ought to receive liberal construction by the constitutional courts to advance substantial justice and the facts obtained in the instant case were sufficient to hold that the delay in filing fresh O.A. was not attributable to any laxity exhibited by the appellant.

On merits the learned counsel appearing for the appellant would contend that it is an undisputed fact that complainant (wife of appellant) had withdrawn her complaint and an affidavit to the said effect had been filed before the Inquiry

Officer itself and she had also not deposed before inquiry though cited as a witness on behalf of employer and as such the finding of the enquiry officer holding appellant guilty of alleged misconduct was an erroneous finding and liable to be set aside. Hence, he prays for appeals being allowed.

15. Per contra Shri N. Visakamurthy, learned counsel appearing for the respondents would support the impugned orders and submits that purported representations submitted by the appellant vide letters dated 19.10.2004, 16.03.2016 and 17.03.2016, had been examined by the Ministry and had been rejected vide OM dated 20/22-11-2016 and this was challenged in O.A. No.3034 of 2018 and same had been withdrawn by the appellant unconditionally and as such no fault can be laid at the doors of the respondents. Hence, he prays for dismissal of the appeals.

16. Having heard the learned advocates appearing for the parties and after bestowing our careful and anxious consideration to the rival contentions raised at the bar, we are of the considered view that the impugned orders are not sustainable and they are liable to be set aside for the reasons assigned hereafter.

DISCUSSION AND FINDINGS

17. It is an undisputed fact that appellant was issued with the article of charge alleging that he had deserted his wife and two school going children and was residing along with another lady. The said disciplinary proceedings came to be initiated on account of a complaint lodged by the wife of the appellant. When the Inquiry Officer commenced the inquiry, she filed an affidavit stating thereunder that she had filed the complaint under mistaken notion and she withdrew the complaint.

In fact, in the articles of charge issued to the appellant she was cited as a witness by the respective authority and neither she appeared before the Inquiry Officer nor she had deposed in the inquiry proceedings. Though, she had already filed an affidavit withdrawing her complaint against the appellant, yet the Inquiry Officer proceeded with the inquiry and submitted the report as already noticed herein above, holding appellant guilty of the charge of deserting his wife and children and exonerating him of charge of residing with another lady.

This resulted in order of dismissal being passed against the appellant and same was challenged before the Tribunal in O.A. No.116 of 2002 by the appellant which came to be allowed and matter was remitted to the disciplinary authority to pass fresh order, which resulted in reinstatement of appellant into service and imposing of minor penalty namely, stoppage of one increment of pay for a period of one year without cumulative effect.

18. On account of the said penalty having been imposed on the appellant representation was submitted to the authorities for complete exoneration and grant of promotion on par with his juniors. In the meanwhile, appellant attained superannuation and thereafter O.A. No.1579 of 2017 was filed for a direction to the respondents to consider the representation which was unattended and a direction came to be issued by the Tribunal on 08.05.2017 directing the respondents to dispose of the representation within a period of 90 days and accordingly it was disposed of as already noticed herein supra and intimated to the appellant by communication dated 09.11.2017.

19. Being aggrieved, appellant challenged the same in O.A. No.3034 of 2018. However, the counsel appearing for the appellant is said to have withdrawn the said O.A. On the one hand appellant claims that he had not authorized his counsel to withdraw the O.A. No.3034 of 2018 and on the other hand, learned counsel appearing for the respondents has submitted that OA had been withdrawn by the appellant through his counsel without prejudice to the right of the appellant to pursue his remedy in accordance with law. This oath against oath cannot be tested in absence of any proof. The fact remains that there was no memo duly signed by the appellant came to be filed for withdrawal of the application before the Tribunal.

20. Be that as it may. On account of liberty having been granted to the appellant to pursue his remedy in accordance with law, yet another O.A. No.2066 of 2020 along with an application for condonation of delay came to be filed. The delay was not condoned by the Tribunal on the ground that it was filed more than one year after the impugned order came to be passed. No litigant stands to benefit in approaching the courts belatedly.

It is not the length of delay that would be required to be considered while examining the plea for condonation of delay, it is the cause for delay which has been propounded will have to be examined. If the cause for delay would fall within the four corners of "sufficient cause", irrespective of the length of delay same deserves to be condoned. However, if the cause shown is insufficient, irrespective of the period of delay, same would not be condoned.

21. In this background when we turn our attention to the facts on hand, it would emerge from the records that appellant being aggrieved by the dismissal of the O.A. No.2066 of 2020 on the ground of delay had approached the Delhi High Court challenging the same.

The High Court on the ground of penalty imposed being a minor penalty, refused to entertain the writ petition or in other words confirmed the order impugned before the Tribunal on merits. This Court in Commissioner, Nagar Parishad,

Bhilwara Vs. Labour Court, Bhilwara and Another reported in 2009 (3) SCC 525 has taken a view that while deciding an application for condonation of delay the High Court ought not to have gone into the merits of the case. It has been further held:-

"5. While deciding an application for condonation of delay, it is well settled that the High Court ought not to have gone into the merits of the case and would have only seen whether sufficient cause had been shown by the appellant for condoning the delay in filing the appeal before it. We ourselves have also examined the application filed under Section 5 of the Limitation Act before the High Court and, in our opinion, the delay of 178 days has been properly explained by the appellant. That being the position, we set aside the impugned order of the High Court. Consequently, the appeal filed before the High Court is restored to its original file. The High Court is requested to decide the appeal on merit in accordance with law after giving hearing to the parties and after passing a reasoned order."

22. If negligence can be attributed to the appellant, then necessarily the delay which has not been condoned by the Tribunal and affirmed by the High Court deserves to be accepted. However, if no fault can be laid at the doors of the appellant and cause shown is sufficient then we are of the considered view that both the Tribunal and the High Court were in error in not adopting a liberal approach or justice oriented approach to condone the delay. This Court in Municipal Council, Ahmednagar and Anr. Vs. Shah Hyder Beig and Ors. 2000 (2) SCC 48 has held:

"6. Incidentally this point of delay and laches was also raised before the High Court and on this score the High Court relying upon the decision in Abhyankar case (N.L. Abhyankar v. Union of India [(1995) 1 Mah LJ 503]) observed that it is not an inflexible rule that whenever there is delay, the Court must and necessarily refuse to entertain the petition filed after a period of three years or more which is the normal period of limitation for filing a suit. The Bombay High Court in Abhyankar case [(1995) 1 Mah LJ 503] stated that the question is one of discretion to be followed in the facts and circumstances of each case and further stated:

"The real test for sound exercise of discretion by the High Court in this regard is not the physical running of time as such but the test is whether by reason of delay, there is such negligence on the part of the petitioner so as to infer that he has given up his claim or where the petitioner has moved the writ court, the rights of the third parties have come into being which should not be allowed to be disturbed unless there is reasonable explanation for the delay."

23. Applying the aforesaid principles which we are in complete agreement to the facts on hand and test the same it would not detain us for too long to set aside the impugned orders, in as much as the delay of 425 days in filing fresh O.A. No.2066 of 2020 has been succinctly explained by the appellant before the Tribunal, namely, it has been contended that there was no intimation of withdrawal of the earlier OA by his counsel and the order of withdrawal dated 10.08.2018 does not reflect that such withdrawal was based on any memo duly signed by the appellant.

Further, The High Court has proceeded to confirm the order of the Tribunal on the footing that penalty imposed on appellant is only a minor penalty namely withholding of one increment without cumulative effect, by completely ignoring the fact that in the earlier round of litigation it had been clearly held that punishment of dismissal imposed on the appellant was totally disproportionate to the alleged act.

24. In the normal circumstances we would have remitted the matter back to the Tribunal or High Court or to the disciplinary authority for reconsideration of the matter but we desist from doing so for reasons more than one firstly, the age of the appellant is 68 years (as on date); and, secondly, there being no evidence whatsoever available on record to arrive at a conclusion that appellant is guilty of the charge; Thirdly, the complainant herself had withdrawn the complaint made and she was not even examined on behalf of the employer to prove the charge.

Thus, the findings of the enquiry officer cannot be sustained by any stretch of imagination as it is contrary to the facts and records on hand. There cannot be judicial review of nature of penalty to be imposed by disciplinary authority.

Hence, we set aside the impugned orders and hold that appellant is entitled for all consequential benefits flowing from the setting aside of the orders of penalty and respondents are directed to take steps in this regard expeditiously and at any rate within 3 months from the date of receipt of copy of this order. Accordingly appeals stand allowed with no order as to costs.

.....J. (Aravind Kumar)

.....J. (Sandeep Mehta)

New Delhi,

August 05, 2024

IN THE SUPREME COURT OF INDIA

In Re: Order of Punjab and Haryana High Court, Dated 17.07.2024 and Ancillary Issues

[Suo Motu Writ (Civil) No. 8 of 2024]

HEADNOTE – Expunges P&H High Court's Unwarranted Observations against SC's Stay Order

JUDGMENT

Dr. Dhananjaya Y. Chandrachud, CJI

1. The Court has taken up these proceedings suo motu in the context of an order dated 17 July 2024 passed by Justice Rajbir Sehrawat, Judge of the High Court of Punjab and Haryana, while entertaining a contempt proceeding titled Naurty Ram v Devender Singh IAS and Anr1.

2. The underlying facts which gave rise to the contempt proceeding do not need to engage the attention of this Court. However, while dealing with the contempt proceedings, Justice Sehrawat has made observations in regard to the Supreme Court of India. Those observations are a matter of grave concern. Since the order forms part of the public record of the High Court, it is unnecessary for this Court to extract those observations, particularly, given the course of action which this Court proposes to adopt.

3. The principles governing the comity between the High Courts, on one hand, and the Supreme Court as the apex judicial institution of the country, on the other, are dealt with in numerous decisions of this Court. We may only reiterate the principles which have been laid down in the decision of this Court in Tirupati Balaji Developers (P) Ltd v State of Bihar2.

4. Judicial discipline in the context of the hierarchical nature of the judicial system is intended to preserve the dignity of all institutions, whether at the level of District, High Court or Supreme Court. The observations in the order of the Single Judge dated 17 July 2024 were totally unnecessary for the ultimate order which was passed. Gratuitous observations in regard to previous orders passed by the Supreme Court or for that matter in the course of the same proceedings are absolutely unwarranted.

Compliance with the orders passed by the Supreme Court is not a matter of choice, but a matter of bounden constitutional obligation, bearing in mind the structure of the Indian legal system and the authority of the Supreme Court which heads the process of judicial adjudication of the country. In passing its orders,

including orders of the nature that gave rise to the observations of the Single Judge, this Court discharges its plain duty. Parties may be aggrieved by an order. Judges are never aggrieved by an order which is passed by a higher constitutional or appellate forum.

5. The Attorney General for India and the Solicitor General, while dilating on the background of the case which led to the passing of the order dated 17 July 2024, have submitted that the order of the Single Judge has affected the dignity not only of this Court, but of the High Court as well.

6. This Court is constrained to take suo motu notice of the contents of the order dated 17 July 2024 passed by the Single Judge in view of the fact that such observations tend to bring the entire judicial machinery into disrepute. This affects not only the dignity of this Court, but of the High Courts as well.

We are accordingly of the view that such observations were wholly unnecessary for the conduct of the judicial proceedings before the High Court and ought to have been eschewed. Though there is a merit in the submission which has been urged by the Attorney General and the Solicitor General, we are inclined to exercise a degree of restraint in pursuing a further course of action based on the observations of the Single Judge.

7. The Court is apprised of the fact that the Division Bench of the High Court presided over by the Chief Justice has taken suo motu notice3 of the observations made by the Single Judge and stayed the operation of the order of the Single Judge.

8. Notwithstanding the aforesaid exercise which has been carried out bona fide by the Bench presided over by the Chief Justice, we are of the view that in a situation where the authority of this Court is undermined by gratuitous observations made by the Single Judge, it is the plain function of this Court to set right any attempt to dislocate the sanctity of judicial authority and maintenance of judicial discipline. We accordingly expunge the observations which have been made by Justice Rajbir Sehrawat in the order dated 17 July 2024 and expect that greater caution should be exercised in the future while dealing with orders of the Supreme Court and, for that matter, the orders passed by the Division Bench of the High Court.

Whether individual judges are in agreement with the merits or otherwise of an order passed by a superior court is besides the point. Every Judge is bound by the discipline which the hierarchical nature of the judicial system imposes within the system. No Judge is personally affected by the orders passed either by the Division Bench of the High Court or, as the case may be, by the Supreme Court.

9. The order dated 17 July 2024 is compounded by a video which has been circulating indicating random, gratuitous and unwarranted remarks made by Justice Rajbir Sehrawat during the course of the hearing. In an age where there is widespread reporting of every proceeding which takes place in the Court, particularly in the context of live streaming which is intended to provide access to justice to citizens, it is all the more necessary that Judges should exercise due restraint and responsibility in the observations which are made in the course of proceedings. Observations of the nature which have proliferated in the video of the proceedings of the Single Judge can cause incalculable harm to the sanctity of the judicial process. We hope and trust that circumspection shall be exercised in the future.

10. We are not inclined to issue notice to the Single Judge of the High Court whose observations form the subject matter of the order dated 17 July 2024. Doing so would place the Judge in a situation of being subject to a judicial adjudication or inquiry by this Court, which we are inclined to desist from doing, at this stage.

However, this Court in the exercise of its affirmative obligations as the custodian of the adjudicatory process would be failing in its duty if it were not to intervene by expunging the remarks which were made in the order dated 17 July 2024. The observations in the order dated 17 July 2024 are accordingly expunged with an expression of caution. We hope that it would not be necessary for this Court to intervene any such matter in the future either in relation to the same Judge or any other Judge in the country.

10. The present proceedings are accordingly disposed of.

.....CJI. [Dr. Dhananjaya Y. Chandrachud]

.....J. [Sanjiv Khanna]

.....J. [B.R. Gavai]

.....J. [Surya Kant]

.....J. [Hrishikesh Roy]

New Delhi;

August 07, 2024

1 COCP-87-2022 (O&M)

2 (2004) 5 SCC 1

3 CWP-19068-2024 (O&M) dated 7 August 2024

Item No. 301

In Re: Order of Punjab and Haryana High Court Dated 17.07.2024 and Ancillary Issues

[Suo Motu Writ (C) No(s). 8/2024]

Date: 07-08-2024 This petition was called on for hearing today.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE SURYA KANT
HON'BLE MR. JUSTICE HRISHIKESH ROY

For Petitioner(s)
By Courts Motion

For Respondent(s)
Mr. R. Venkataramani, Attorney General
Mr. Tushar Mehta, SG
Mr. Kanu Agrawal, Adv.
Mr. Lokesh Sinhal, Sr AAG Haryana

UPON hearing the counsel the Court made the following

ORDER

The proceedings are disposed of in terms of the reportable judgment.

(SANJAY KUMAR-I) (SAROJ KUMARI GAUR)
ADDITIONAL REGISTRAR ASSISTANT REGISTRAR
(Signed reportable judgment is placed on the file)

IN THE SUPREME COURT OF INDIA

Tusharbhai Rajnikantbhai Shah
Vs.
State of Gujarat

[Contempt Petition(Civil) No(s)._____ of 2024 D. No. 1106 of 2024]
[Special Leave Petition (Crl.) No(s). 14489 of 2023]
[Special Leave Petition (Crl.) No(S). 14489 of 2023]
[Special Leave Petition (Crl.) No(s). 537 of 2024]
[Special Leave Petition (Crl.) No(s). 1116 of 2024]

By the Court
Contempt Petition(Civil) No(s)._____ of 2024 D.No. 1106 of 2024 in SLP(Crl.) No(s). 14489 of 2023

HEADNOTE – Before exercising the power to grant police custody remand, the Courts must apply judicial mind to the facts of the case so as to arrive at a satisfaction as to whether the police custody remand of the accused is genuinely required. The Courts are not expected to act as messengers of the investigating agencies and the remand applications should not be allowed in a routine manner.

JUDGMENT

1. The instant petition under Section 12 of the Contempt of Courts Act, 1971 read with Article 129 of the Constitution of India has been filed by the petitioner alleging wilful disobedience by the respondents-contemnors of the order dated 8th December, 2023 passed by this Court in SLP(Crl.) No. 14489 of 2023.

Brief facts:-

2. The petitioner, along with other co-accused, was arraigned as an accused in FIR No. 11210068230266 dated 21st July, 2023 filed by the contemnor-respondent No. 6 herein(the complainant), with an allegation that the petitioner had received a sum of Rs.1.65 crores in cash from the complainant towards the sale of 15 shops but the possession thereof was not handed over to the complainant despite the assurance given by the accused at the time of entering into an oral agreement.

3. The petitioner, apprehending his arrest in connection with the said FIR, sought anticipatory bail from the Sessions Court, which was denied whereafter, an application for anticipatory bail was filed before the High Court, which also came

to be rejected. Being aggrieved, the petitioner approached this Court by filing SLP(Crl.) No. 14489 of 2023 seeking anticipatory bail.

4. This Court granted interim anticipatory bail to the petitioner vide order dated 8th December, 2023(hereinafter being referred to as 'the order under contempt'), which is reproduced hereinbelow:-

"1. Perusal of the impugned order would reveal that the High Court has not even considered the case on merits.

2. In that view of the matter, issue notice, returnable in four weeks.

3. In addition to the usual mode, liberty is granted to the petitioner to serve notice through the Standing Counsel for the respondent/State.

4. By way of ad interim order, in the event of arrest petitioner be released on bail in connection with FIR being No.11210068230266 dated 21.07.2023 registered with Vesu Police Station, Surat City, subject to him executing personal bonds for a sum of Rs.25,000/- (Rupees Twenty Five Thousand only), with one or more sureties in the like amount.

5. However, the petitioner is directed to cooperate with the investigation and report to the Investigating Officer as and when directed to do so."

5. The petitioner appeared at Vesu Police Station on 11th December, 2023 with a copy of the order under contempt dated 8th December, 2023 intending to join and cooperate with the investigation. Shri R.Y. Raval, Investigating Officer(contemnor-respondent No. 4) arrested the petitioner and thereafter, released him on bail upon execution of the requisite bail bonds in terms of order dated 8th December, 2023. On the very same day, the petitioner was served with a notice under Section 41A of the Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC') requiring him to remain present at the police station before the Investigating Officer for recording of further statement.

When the petitioner appeared at the police station, another notice dated 12th December, 2023 was served upon him requiring him to remain present before the Court of concerned Additional Chief Judicial Magistrate for the purpose of seeking remand. The contents of the notice dated 12th December, 2023 are relevant and shall have a material bearing on the outcome of the instant contempt petition and hence, the same are reproduced below for the sake of ready reference:-

"NOTICE

It is hereby given to you this notice in written form that, for the matter of offence committed u/s. 420, 120(b) of Indian Penal Code registered before Vesu Police Station vide Part-A- 11210068230366/2023 Complainant Abhishek Vinodkumar Goswami aged: 28 years, occupation: Business Real Estate Residing at C/405, Surya Palace, Ct Light, Surat City Mobile No 9879215044 filed a complaint against you and others for which you are remained present as per order passed by Hon'ble Supreme Court of India in the matter of Special Leave Application No.14489/2023 on 08/12/2023 and you were arrested on 11/12/2023 at 2100 hrs and thereafter, released on bail on basis of the order of the court.

During course of investigation proceedings of the offence, you are hereby informed to remain in(sic) present by yourself or through your advocate on 13/12/2023 at 1500 hrs before 5th Additional Senior Civil Judge and ACJM Surat Court No 608, New Court Building, Athwalines Surat for the matter of remand which please note seriously.

Date 12/12/2023

R.Y. Raval
Police Inspector
Vesu Police Station
Surat City

To,
Tushar Rajnikant Shah
Residing at
Flat No E/902, Florence Building,
Opp Rajhans Cinema, VIP Road,
Vesu, Surat City Mobile No 9825038475"

6. It is apposite to note that this notice makes a distinct reference to the order dated 8th December, 2023 passed by this Court. However, the notice is blissfully silent on the aspect that the petitioner had not cooperated with the investigation.

7. In compliance of the said notice, the petitioner appeared before learned 6th Additional Chief Judicial Magistrate, Surat('contemnor-respondent No.7') on 13th December, 2023 on which date, the Investigating Officer, filed an application seeking his police custody remand for seven days. When the remand application was taken up, learned counsel representing the petitioner produced a copy of the order under contempt dated 8th December, 2023 and made a fervent submission that the Supreme Court, while providing interim protection to the petitioner had not granted any liberty to the Investigating Officer to seek police custody remand and thus, the application seeking remand ought to be rejected.

However, the 6th ACJM, Ms. Deepaben Sanjaykumar Thakar, the contemnor-respondent No. 7 in gross derision to the order dated 8th December, 2023 passed by this Court granting interim protection to the petitioner, observed that the order of Supreme Court did not indicate that the Investigating Officer could not seek remand of the accused or that the Court cannot grant remand and accordingly, she proceeded to remand the petitioner to police custody till 16th December, 2023. The order dated 13th December, 2023 which is the foundation of these contempt proceedings is reproduced hereinbelow: -

"ORDER PASSED BELOW APPLICATION TO AVAIL POLICE CUSTODY REMAND OF THE ACCUSED TUSHAR RAJNIKANT SHAH IN THE MATTER OF VESU POLICE STATION CRIMINAL BEARING REGISTER NO. 11210068230266/2023.

1. Application produced is taken into consideration similarly; the record of the matter is also taken into consideration. Heard arguments advanced by Learned APP Shri S.P. Chauhan for Prosecution side and Learned Advocate Shri Dipesh Dalal for Accused Person.

2. It is the representation of Learned APP Shri Saurabhbhai Chauhan that, an offence against accused person for offence committed u/s. 420, 120[b] of Indian Penal code is registered for maximum sentence of seven years in which the main role played by the present accused and total of 15 shops were shown to be present along with Accused No. Sumit Goyenka and gave the information that he is the builder and accordingly the Complainant and witness obtained A sum of Rs. 1,65,00,000/- as consideration and also by way of cheque a sum of Rs.54,00,000/- also obtained and in that regard accused no.5, 6 and 7 given payment Diaries and then planned delinquency by the accused Conspirator committed the offense of cheating [deception] fraud.

According to the ground for remand, they submit that the main accused has taken total of 9 cheques from the complainant which cheques are important for the present matter and same are required to be collected for the purpose of investigation proceedings. Recovery of Rs. 1,65,00,000/- is pending and in furtherance, addition of other offence of Umra Police Station First Criminal Register No 62/2019 for offence committed u/s. 447, 448, 451, 427, 114 of Indian Penal Code is registered and accordingly, accused person having criminal history and does not cooperate with police investigations The other co-accused are absconding, and hence, requested to allow police custody remand of Days-7.

3. On 05/10/2023, Learned Advocate Shri Dipesh Dalal on behalf of accused person produced copy of order of R/Criminal Misc. Appln [For Anticipatory Bail] No 15242/2023 and order passed by Hon'ble Supreme Court in the matter

of Special Leave to Appeal [Cri] No 14489/2023 dated 05/12/2023 submitted and it was submitted that there is an order to release the bail if the accused is detained and there is no mention of remand. In furtherance, they submit that the petitioner has cooperated with the police investigation and will continue to cooperate in the future as well so there is no need for remand.

In furtherance, they submit that the provision of maximum punishment in the present matter is seven years, therefore, in the matter of Satender Antil versus CBI of the Hon'ble Supreme Court A remand application cannot be granted mechanically as held in the judgment of the further submit that the accused has been present in the police station frequently and has cooperated fully in the investigation, hence the said application is proposed to be rejected.

4. Heard, on 21/7/2023 for the present matter, the complainant filed u/s 420, 120[b] of Indian Penal Code against a total 7 accused in Vesu Police Station. A complaint under section 4R0, 120(b) is lodged which provides for a maximum sentence of seven years. In the present matter, the co-accused is yet to be arrested, if we take the matter diary regarding the behavior of the accused Tushar Rajinikanth Shah mentioned in the remand petition. they will be called on 8/12/2023 for the matter of Special Leave to Appeal No 14486/2023 is not present at the police station for investigation till the order of "releasing the applicant from bail due to arrest" is passed. The facts of the matter diary become significant.

The police have visited the house of the main accused, issued notices and reminders under section 41(A) but the accused himself was not found present at the house, his wife or his mother was present and replied that he was there for the last two months. Not present means the accused person did not cooperate with the police investigation proceedings. Taking into consideration the matter diary dated 11/12/2023, appeared after the order of the Hon'ble Supreme Court and wrote his answer which answer taking into account the facts of the main complaint, it is prima facie evident on the record that the present accused has been dealt with other coaccused, the prime of the present matter.

Accused Sumit Goenka is yet to be arrested, other accused are yet to be arrested, police investigation is pending in that direction. In the present matter it is pending investigation as to which accused took the paid compensation of the project property; the main accused has admitted in his statement that the diary was written by him. So, it becomes clear that their criminal role is there and if we note the extreme importance, in the present matter the prosecution has made serious allegations of preplanned and criminal conspiracy, then a thorough investigation is pending in that regard.

In the present matter it becomes necessary to bring the modus operandi of the accused on record. At this stage, it is to be noted that in the present time, the amount of offence related to property like land and houses has increased, in which most of the builder level people are also involved, while in the present matter, there is a deal of 15 shops, so the compensation amount is Rs. 1,65,00,000/- paid, thorough investigation of the offence becomes necessary so the reasons stated in the remand application are true. The present application is eligible to be granted if the co-accused is investigated properly and the modus operandi of the offence is placed on record. In furtherance at this stage there is truth in the reasons stated.

The present application is eligible to be granted if the co- accused is investigated properly and the modus operandi of the crime is placed on record. In furtherance, it is to be noted at this stage that Learned Advocate Shri Dipesh Dalal has emphasized on the order of the Hon'ble Supreme Court but in that order no order has been made that the investigating officer cannot ask for remand or the court here cannot grant remand so the Hon'ble Supreme Court in the matter of Satender Antil versus CBI All the principles laid down in the judgment have been followed by this Court. In the present matter Remand application not automatically but taking into consideration the circumstances of the matter, diary and conduct of the accused, I consider the following order to be appropriate just and appropriate in the interest of justice.

(emphasis supplied)

//ORDER //

Remand application is partly allowed.

Police custody remand of Accused Tushar Rajnikant Shah is granted till 16/12/2023 at 1500 hrs.

Signature of accused person and Investigation Officer shall be obtained below order passed.

Investigation Officer shall strictly adhere [follow] the guideline of Hon'ble Supreme Court and send a copy of this order to Chief Judicial Magistrate.

Pronounced this order on 13/12/2023 in the open court.

13/12/2023
Surat

Deepaben Sanjaykumar Thakar
6th Addl. Chief Judicial city
Surat [GJ00943]

Seen
Sign Illegible

Seen
Sign Illegible

Accused is taken into custody
And remand order copy is received.
Sign Illegible

Today explanation of remand order is received,
Sign Illegible"

8. The petitioner has alleged that during the period of police custody remand, he was tortured by the Deputy Commissioner of Police(contemnor-respondent No. 3) and the Police Inspector(contemnor-respondent No. 4). It is further alleged that upon completion of the period of remand, the petitioner was compelled by the 6th ACJM, i.e., contemnor-respondent No. 7 to move a regular bail application under Section 437 CrPC which was objected to by the learned Assistant Public Prosecutor(in short 'APP'). The 6th ACJM(contemnor-respondent No. 7) proceeded to allow the application for bail vide order dated 16th December, 2023.

9. On 16th December, 2023, when the petitioner was presented before the 6th ACJM(contemnor-respondent No. 7) at the end of the remand period, he made a complaint regarding torture in police custody which fact was noted by the 6th ACJM(contemnor-respondent No. 7) in the order sheet dated 16th December, 2023.

The 6th ACJM(contemnor-respondent No. 7) proceeded to record the statement of the petitioner virtually as if he was being cross-examined. She also undertook an exercise of self-observation of the legs of the accused-petitioner and made a remark in the proceeding sheet that no signs of beating were visible thereupon. These proceedings are relevant to the issue at hand in a limited sphere and thus, the same are reproduced hereinbelow for the sake of ready reference:-

"My name is Tushar Rajnikant Shah, I am 43 years old. I want to say many things, but my mental condition is not proper so that I can properly dictate everything.

Question:	What is your complaint against police?
Answer:	Yes, I am beaten a lot, tortured also.
Question:	On which part of body beaten?
Answer:	Allowing me to sit and on the bottom of the leg beaten and beaten

	with belt written as Satyashodahk Yantra.
Question:	Who has beaten?
Answer:	Three officers were there, (1) ACP Gurjar Saheb, IPS and other two I can identify if I see them and they were in simple dress and name plate was not there. I have not given food since I went there. Complainant Abhishek or Akhilesh on whose face black spot is there was doing torturing arriving there.
Question:	What torturing was done?
Answer:	To give money, do settlement, this all belongs to my father and will not spare you.
Question:	Except this what is your complaint?
Answer:	Now I will state after taking lunch peacefully.
Question:	You are standing on your legs?
Answer:	Yes
Question:	Do you have any problem in standing?
Answer:	In left leg I feel more problem.
Question:	Do you came walking on your leg in the court?
Answer:	Yes
Question:	Any other thing you want to say against police now?
Answer:	Nothing now
Above statement is read by me and thereafter I put my signature.	
After taking said statement of the accused on bottom portion of the leg of the accused I have done self-observation wherein no sign of beating is found. Before me Sd/- Illegible 16/12/23 (Kum. D.S. Thaker)	

Today, the accused who is present after completion of remand, made a complaint against the police stating that they have illtreated him which has been registered as per the said statement of the accused. However, after a detailed checking from the bottom of the legs of the accused, no signs are found, as alleged. It is the complaint of the accused that he is beaten by "Satyashodhak Yantra written belt", however, it is to be noted that the clothes the accused was wearing on the day when remand was granted to the accused are different from the clothes he is wearing today after three days of remand, it could be seen that the same is clean and proper.

Even looking at the physical condition of the accused, it could be concluded that he was kept in good condition and he was provided with clean clothes by his family which was handed over to the accused by the police. It is the submission

of the accused that he had not been provided with food on the day when he went on remand. Even if the statement of the accused is to be noted and believed to be correct, it could not be possible that after beaten with the belt, as alleged, the accused could stand properly on his leg today. Therefore, the statement made by him that he has not been provided with food cannot be believed.

The accused in the beginning had stated that, he has a lot of things to say but due his mental condition, he has not been able to express everything clearly. However, it is peculiar to note that during the aforesaid statement made by the accused, he was frequently looking at his Ld. Advocate while giving reply due to which the accused was asked that, "why are you looking at your Advocate and giving reply, ill-treatment is done with you then you must be aware what has happened and it is you who have to give your statement." Thereafter, he has given his statement.

The accused has not complained that he is mentally tortured. At this stage, it is notable to mention that the accused is working as a builder having a reputation in society and in such condition and circumstances, remaining in police custody for interrogation, could have been uncomfortable to him. Taking into consideration the mental state of the accused, the serious allegations made by him against the police could not be found reasonable and justifiable in view of the present case and circumstances. All the aforesaid observations and evaluations made today is noted by directly observing the accused.

Sd/-Illegible
16/12/23
6th Add. Sr. Civil Judge &
A.C.J.M., Surat."

10. It is noteworthy that pursuant to the order dated 16th December, 2023 granting regular bail, the petitioner was compelled to file fresh bail bonds and was ultimately released from custody on 18th December, 2023. Apparently thus, the petitioner was kept in confinement for a period of nearly 48 hours even after the period of police custody remand had come to an end. Immediately after being released from custody, the petitioner filed a complaint(Annexure P-10) to the Commissioner of Police alleging torture by the Deputy Commissioner of Police(contemnor-respondent No. 3), Police Inspector(contemnor-respondent No. 4), Police Constable(contemnor-respondent No. 5) and other police officials of Vesu Police Station.

A prayer was made in said complaint to call for and preserve the CCTV footage of the police station, lest the police officials of Vesu Police Station tamper with the evidence in form of the recording and thereby, cause grave prejudice to the

petitioner's complaint case. The Commissioner of Police, however, did not take any cognizance of the said complaint of the petitioner whereupon, the petitioner filed a private complaint against contemnor-respondent Nos. 3, 4 and 5 as well as the complainant i.e. contemnor-respondent No. 6. The petitioner categorically alleged in the complaint that he was tortured in Vesu police station, where the complainant of the case was also present, and was pressurised to make payment to the complainant and compromise the matter.

11. Since the 6th ACJM(contemnor-respondent No. 7) was on leave, the learned Magistrate on duty (8th Additional Chief Judicial Magistrate) took cognizance of the said complaint vide order dated 21st December, 2023, with a clear finding that the acts complained of were not committed by the concerned police officials while discharging official duties and therefore, sanction to prosecute was not required under Section 197 CrPC. The complaint was kept for verification on 3rd January, 2024.

12. Later, the 6th ACJM(contemnor-respondent No.7) took up the complaint and proceeded to reject the same vide order dated 6th January, 2024 without recording the statements of the complainant and his witnesses as mandated by Sections 200 and 202 CrPC. The contents of this order are also considered germane for the purpose of adjudication of the instant contempt petition since the same has a direct bearing upon the conduct of contemnor-respondent No. 7 and hence, the same are being reproduced hereinbelow for the sake of ready reference:-

"Criminal Inquiry No. 280/2023

ORDER BELOW EX-1

1. The said private complaint is filed by complainant Tushar Rajnikant Shah against police officers u/s 323, 342, 344, 363, 384, 504, 506(2), 120(b) of IPC. It is submitted in complainants application that against him in Vesu Police Station A-part CR No.11210068230266/23 is filed u/s 420, 120(b) on date 21.7.2023 wherein he was mentioned as accused no. 4. Investigation officer has taken his statement. The complainant has filed in the Hon'ble Court of Principal District and Sessions Judge at Surat Anticipatory bail application no. 5922/2023 on date 27.7.2023 which was rejected on date 1.8.2023.

Thereafter he has filled in the Hon'ble Gujarat High Court CRMA No. 15242/2023 and made order partly allowing the same, being aggrieved by it the complainant filed SLP in Hon'ble Supreme Court on date 5.10.2023 bearing No. 14489/2023 and order was passed allowing his anticipatory bail application. Pursuance to the said order complainant has given his statement on date

11.12.2023 in Vesu Police Station as an accused no. 4 and given bail bond and surety. Thereafter I.O, has Issued notice on date 12.12.2023 to remain present and therefore on date 12.12.2023 remained present at 1/00 and till night up to 10/00 given his reply.

Thereafter, on date 13.12.2023 LO. has demanded 7 days remand for him and Hon'ble Lower Court made order allowing 3 days remand. It is submitted by him that during police remand custody with Satyashodhak Yantra belt beating 35 to 40 belt and to do compromise made, him physically uneasy have done unbearable coercion and therefore he became mentally unwell and family members gave courage and he filed present complaint. The complainant has prayed to do legal Inquiry against accused.

2. As per complaint of the complainant on date 3.1.2024 verification is taken and in the said verification he has not stated facts as per his complaint. He has not stated fact about which police officer has beaten him. Compare to complaint application in his verification different facts are coming out like "one person was standing on leg and beat me in bottom of the leg ". As this one person which police officer was there no such facts are stated. Asking about who used to come to give clothes, no one has come from his home, his friend Rajendranbhai Rawal came, such facts he has stated but no such friend's name is mentioned by him as his witness or such witness affidavit as a documentary evidence list is produced along with original complaint.

The said complainant has not made satisfactory clarification about any person coming from his family to give clothes. Thereafter he was clearly asked that on completion of remand prior to bringing him in this Court he was taken to medical checkup and its reply is given by him in affirmative. At this stage it is notable that in said original case i.e. Vesu Police Station A-part CR No. 11210068230266/23 medical checkup produced it is clearly mentioned that on body portion of the said accused no apparent injury is there. Further it is notable that he during checkup ha not submitted to the Doctor that he has been assaulted.

And in reference to the question he has stated that, "I am not allowed to speak such", but at that time the said complaint accused paikee which accused did not allow him to speak such, no such facts are stated. Thereafter he was clearly asked that on completion of remand and on producing in this Court he has stated his facts willingly as per his desire which is replied by him in affirmative. Thereafter he was asked that this Court has at the same time ask him to sit down and checked his bottom of the legs but no signs of beating was found such is stated and he gave his reply in affirmative.

Thus, said verification considering entirely with the complaint in Vesu Police Station A-part CR No.11210068230266/23, the accused has filed ill-treatment complaint and therefore in the present separately given complaint nothing remains to be done. Main notable facts is such that in medical certificate of the accused no signs of assault are seen and this Court has personally done observation but no such signs are seen. Further, this Court has on the same day after observing the accused personally in details of observation and evaluation noted and considering it the complainant's private complaint is not maintainable.

The accused naturally remained in police custody and in police lock up, have dissatisfaction against police employees which is very casual and natural reaction. No person would like to remain in police custody and therefore the said complaint is prima facie is filed keeping grudge against the police with a feeling of revenge is made self-clear. As per the said complaint no facts are recorded by accused after completion of remand immediately is not stated in his ill-treatment and therefore the said complaint is not valid and tenable and therefore following order I understand is reasonable and justified.

(emphasis supplied)

ORDER

1. The order is made to cancel the said complaint u/s. 203 of Cr. P.C.

Order declared today on date 06.01.2023 in open Court.

Date: 06.01.2024
Surat.
Seen
Sd/- Illegible

Sd/- Illegible 6.1.24
(Kum. Deepaben Sanjaykumar Thaker)
6th Add. Chief. Judi. Magistrate
Surat (GJ00943)

13. A perusal of the order reveals that the 6th ACJM(contemnor-respondent No.7) proceeded to deal with the complaint in a predetermined manner and rejected the same without recording the statements of the petitioner(complainant) and his witnesses as per the mandate of Sections 200 and 202 CrPC. Acting purely on her own whims and fancies, the contemnor-Respondent No.7 concluded that ex facie the complaint was filed keeping grudge against the police and with the feeling of seeking revenge.

The order dated 6th January, 2024 passed by 6th ACJM(contemnor-respondent No.7) has been set aside by the High Court of Gujarat and rightly so, in our opinion, vide order dated 22nd February, 2024 while accepting the revision petition filed by the petitioner, being R/Criminal Revision Application No. 273 of 2024. Relevant observations made by the High Court are reproduced hereinbelow:-

"11. As per Section 203 of the Code, the learned Magistrate ought to have recorded the statement on oath of the complainant and of the witnesses and when in-charge Magistrate has directed the complainant to remain present with his witnesses and the witnesses were present before the learned Magistrate, learned Magistrate without giving any reasons for not recording the statements of the witnesses has dismissed the complaint which is illegal and improper. That if the statements of the witnesses were recorded, learned Magistrate could have applied her mind and form the judgment whether there is sufficient ground for proceeding against the accused or not. That learned Magistrate has acted erroneously and has passed the impugned order which is illegal and improper and hence, the same is required to be set aside.

12. On perusal of the impugned order, it appears that the complainant was directed to remain present with his witnesses and as per the submission of the learned senior advocate for the applicant, witnesses were present before the learned Magistrate, but their statements have not been recorded. No reasons have been given by the learned Magistrate for nonrecording of the statements of the witnesses and hence, the applicant original complainant has not been given full opportunity for putting up his case before the learned Magistrate. That the impugned order is improper and perverse and is required to be set aside. Learned(sic)

13. Under the circumstances, the application is allowed. The impugned order dated 6.1.2024 passed below Exh.1 in Criminal Inquiry No.280 of 2023 is quashed and set aside. The learned Magistrate is directed to record the statements of the witnesses and then after applying judicial mind to the material placed before the Court, form the judgment whether or not, there is sufficient ground to proceed."

14. It is in the aforesaid backdrop, that the petitioner has approached this Court by way of the instant contempt petition with a prayer seeking prosecution of the respondents and to convict and sentence them for wilful disobedience and gross contempt of this Court's order dated 8th December, 2023.

15. Notice of the contempt proceedings was issued to the respondents on 10th January, 2024.

16. The High Court of Gujarat was subsequently impleaded in the matter vide order dated 29th January, 2024.

17. Reply affidavits in response to the notice for contempt, have been filed on behalf of the respondents arraigned in the contempt petition. The petitioner has also filed separate rejoinder affidavits.

Submissions on behalf of the petitioner:-

18. Mr. Iqbal Syed, learned senior counsel appearing for the petitioner advanced the following pertinent submissions:-

18.1 That the order dated 8th December, 2023 passed by this Court was explicit to the effect that the petitioner was to be released on bail in event of his arrest. No liberty was ever granted by this Court to the Investigating Officer to seek police custody remand of the petitioner while he was under the protective umbrella of the interim anticipatory bail order passed by this Court.

18.2 That the SLP seeking anticipatory bail filed by the petitioner was still pending consideration before this Court and thus, if at all, the Investigating Officer desired to seek police custody remand of the petitioner on the alleged ground of non-cooperation in investigation, then the appropriate procedure would have been to move an application before this Court to seek such liberty.

18.3 That the Investigating Officer had already accepted the bail bonds of the petitioner on 11th December, 2023 and hence, there could not have been any occasion for grant of police custody remand of the petitioner because such course of action resulted into fresh arrest of the petitioner which is clearly in teeth of the order passed by this Court.

18.4 That a pertinent objection was raised before the 6th ACJM(contemnor-respondent No. 7) that there was no scope for granting police custody remand of the petitioner in view of this Court's order, but the 6th ACJM No. 6(contemnor-respondent No. 7) totally glossed over the interim order passed by this Court and granted 3 days' police custody remand of the petitioner by assigning a totally flimsy justification that this Court had not precluded the Investigating Officer from seeking police custody remand of the petitioner nor was the Magistrate prohibited from exercising such power. In support of the submission that there was no scope to remand the petitioner to police custody, learned senior counsel for the petitioner placed reliance on the judgment passed by this Court in the case of Siddhram Satlingappa Mhetre v. State of Maharashtra1.

18.5 He urged that in spite of the interim order of anticipatory bail granted by this Court being in currency, the petitioner was not released from custody even at the

end of the police remand period, and rather, he was compelled to file a regular bail application under Section 437 CrPC to which the learned Assistant Public Prosecutor(APP) objected. However, the application was allowed, and the bail bonds of the petitioner were accepted, and he was released from custody on 18th December, 2023 which aggravates the contemptuous acts of the contemnor-respondent No. 7 because the petitioner was kept in illegal custody for more than 48 hours. As per learned senior counsel, it is a clear case of the petitioner being kept in illegal custody for a period of 6 days in teeth of the interim order granted by this Court and that too, during pendency of the special leave petition.

18.6 He urged that the biased, pre-determined and prejudiced bent of mind of the 6th ACJM(contemnor-respondent No.7) is fortified from the fact that when the petitioner made a complaint regarding torture in police custody on being produced before the Court at the end of the remand period, the 6th ACJM(contemnor-respondent No. 7) proceeded to record a calculated finding that the accused-petitioner was not having signs of injury by even going to the extent of personally examining the feet of the petitioner which procedure was purely within the domain of a Medical Expert.

18.7 Over and above this, the private complaint filed by the petitioner alleging torture in police custody was rejected in an arbitrary and high-handed fashion even without recording the statements of the complainant(petitioner herein) and the witnesses under Sections 200 and 202 CrPC which is the mandate of law. The High Court of Gujarat, vide order dated 22nd February, 2024 while reversing the order passed by the 6th ACJM(contemnor-respondent No.7) rejecting the complaint has taken note of the fact that learned Magistrate committed grave legal error in ignoring the provisions of CrPC while rejecting the complaint filed by the petitioner.

18.8 That the petitioner after being released from custody lodged a prompt complaint to the Commissioner of Police, Surat(contemnor-respondent No.2) on 20th December, 2023 with a pertinent prayer to preserve the CCTV footage of Vesu Police Station. However, no action was forthcoming on the said complaint, and it is only after this Court took cognizance of the contempt proceedings and issued notice that an inquiry was initiated in this regard.

18.9 That the Commissioner of Police, Surat (contemnor-respondent No. 2) has admitted in his affidavit that CCTV cameras installed at Vesu Police Station by a private agency were not functional and this fact was brought to notice of Mr. R.Y. Raval, Police Inspector(contemnor-respondent No. 4) by the PSO in charge on 21st December, 2023. He contended that the clear omission and negligence on part of the concerned police officials in not ensuring the functioning of the CCTV

cameras is in sheer disobedience of the mandate of this Court's judgment in the case of Paramvir Singh Saini v. Baljit Singh and Another2.

18.10 That as per the reply affidavit filed by the Commissioner of Police, Surat(contemnor-respondent No. 2), the FSL examination carried out on the internal storage(hard disk) and the DVR reveals that the CCTV footage of Vesu Police Station from 13th December, 2023 to 16th December, 2023 was not found in hard disk which clearly establishes that the police officials had tampered with the DVR and deleted the data saved between 13th December, 2023 to 16th December, 2023, in order to destroy the evidence of custodial violence committed upon the petitioner.

18.11 That the very fact, that the police officials registered the FIR on the basis of complaint filed by complainant(contemnor-respondent No. 6), being FIR No. 11210068230266 for allegations which ex facie disclose a civil dispute plain and simple, reflects their mala fide and biased approach.

On these grounds, the learned senior counsel implored the Court to prosecute and suitably punish the respondents while holding them guilty of wilful disobedience/gross contempt of this Court's order dated 8th December, 2023. He also prayed that the interim protection granted to the petitioner vide order dated 8th December, 2023 passed in SLP(Crl.) No. 14489 of 2023 may be made absolute.

Submissions on behalf of the respondents:-

19. Shri R. Basant, learned senior counsel appearing for the freshly impleaded respondent, the High Court of Gujarat (respondent No. 8) advanced the following submissions:-

19.1 The contention of learned counsel for the petitioner that the Investigating Officer could not have sought remand of the petitioner is misplaced since, the judgment relied upon by the petitioner i.e. Siddhram Satlingappa Mhetre(supra) wherein, it was held that tenure of anticipatory bail order cannot be limited has been explicitly overruled by a larger Bench of this Court in the case of Sushila Aggarwal v. State(NCT of Delhi)3. He placed reliance on the following paras from the above judgment in support of this contention:-

"92.6- An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7- An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail."

19.2 He submitted that the Courts in Gujarat based on the view taken by the Division Bench of High Court of Gujarat in the case of Sunilbhai Sudhirbhai Kothari v. State of Gujarat4, have been following a consistent practice of incorporating a condition in the orders granting anticipatory bail that the Investigating Officer would be entitled to seek police custody remand of the accused as and when required. In Sunilbhai Sudhirbhai Kothari(surpa), the reference was made to the Division Bench to answer the following question of law: -

"Whether the Investigating Agency has power to get police custody under Section 167 of the Code of Criminal Procedure, 1973, when an accused is already granted bail under the provision of Section 438 of the Code of Criminal Procedure, 1973."

The Division Bench answered the reference in affirmative and thus, there was no impediment for the Investigating Officer to have sought police custody remand of the petitioner and that the learned Magistrate was also acting well within the jurisdiction conferred upon her by CrPC while granting police remand of the petitioner.

20. The learned counsel representing the contemnor-respondent Nos. 2 to 7 submitted in cohesion that all the contemnors have tendered unconditional apology in their reply affidavits for the alleged contumacious acts. They urged that the contemnors had no intention whatsoever to disobey or disregard this Court's order dated 8th December, 2023 and the infraction, if any, in this regard is purely unintentional and thus, a lenient view may be taken and the contempt notices may be discharged.

21. Mr. S.V. Raju, learned ASG appearing on behalf of Commissioner of Police, Surat(contemnor-respondent No. 2) advanced the following submissions:-

21.1 That respondent No. 2 has no direct role in the contempt proceedings and thus the contempt notice issued to him may be discharged.

21.2 That Commissioner of Police(contemnor-respondent No. 2) has tendered an unconditional apology for any of the alleged action/omission which may have resulted in contempt of this Court's order dated 8th December, 2023.

21.3 That Vesu Police Station was a newly established police station and thus, CCTV cameras installed in the police station were not properly functional.

21.4 That the DVR and hard disks of the CCTV cameras installed in the police station were forwarded for analysis to the FSL, from where a report has been received that there was some technical defect in the DVR and that the video footage from 13th December, 2023 to 16th December, 2023 could not be preserved therein. The fact regarding the technical defect in the DVR was not brought to the knowledge of the Commissioner of Police(contemnor-respondent No.2) and hence, he cannot be held guilty of wilful negligence in discharge of duties.

21.5 That Commissioner of Police(contemnor-respondent No. 2) has already initiated departmental proceedings against the erring police officials. The Police Inspector/Investigating Officer(contemnor29 respondent No. 4) and Police Constable(contemnor-respondent No. 5) have been placed under suspension. He thus implored the Court to discharge the contempt notice issued to the Commissioner of Police, Surat(contemnor-respondent No.2).

22. Ms. Aishwarya Bhati, learned ASG, appearing on behalf of Deputy Commissioner of Police, Surat(contemnor-respondent No. 3) advanced the following submissions:-

22.1 That the said contemnor has tendered an unconditional apology for any act or omission which may have contributed to the noncompliance/ contempt of this Court's order dated 8th December, 2003. Learned ASG reiterated the averments made in the reply affidavit filed on behalf of the officer and urged that he was, in no manner, connected with the investigation of the subject FIR and thus he cannot be held responsible for the contumacious acts. She fervently contended that the contemnor-respondent No. 3 had no role to play either in the investigation of the case or the custodial torture allegedly meted out to the petitioner during the period of police custody. She also urged that no injuries were found on the person of the petitioner as per the medical report.

22.2 Regarding the issue of the non-functioning of the CCTV cameras in the Vesu Police Station, she submitted that the CCTV cameras had been installed some time back and were functional but there was some problem with the DVR storage not just during the 3 days of custodial period of the petitioner but was persisting since November, 2023. On these grounds, Ms. Bhati, learned ASG implored the Court to accept the unconditional apology filed on behalf of contemnor-respondent No.3 and discharge the contempt notice issued to him.

23. Mr. K. Parameshwar, learned counsel appearing on behalf of Shri R.Y. Raval, Police Inspector(contemnor-respondent No. 4) urged that the officer had no intention whatsoever to disregard or wilfully disobey this Court's order. He advanced the following submissions:-

23.1 At the outset, Investigating Officer(contemnor-respondent No. 4) in his reply affidavit has tendered an unconditional apology for any contumacious act/conduct arising of inadvertent action/omission attributed to him in the contempt proceedings.

23.2 That when the petitioner appeared at the police station with the order of this Court dated 8th December, 2023, he was immediately released on bail by accepting his bail bonds. However, the petitioner gave evasive replies upon being interrogated and was totally non-cooperative in the process of investigation and thus, the Investigating Officer, contemnor-respondent No. 4 felt a genuine requirement to seek police custody remand of the petitioner to effect discovery of incriminating evidence.

23.3 That there prevails a long-standing practice being followed by all the Courts in the State of Gujarat whereby the Investigating Officer is given liberty to seek police custody remand in orders granting anticipatory bail to the accused. Swayed by this misconception based on the practice consistently being followed in the State, the Inspector bona fide moved the application for police custody remand of the petitioner herein.

23.4 That even the learned Magistrate misconstrued this Court's order and granted police custody remand of the petitioner and hence, the Inspector cannot be faulted and punished for contempt just for moving the remand application.

23.5 That no maltreatment was ever meted out to the petitioner during the period of police custody which fact is borne out from the observations made in the proceedings recorded by the learned Magistrate on 16th December, 2023.

23.6 That the Police Inspector(contemnor-respondent No.4) had joined Vesu Police Station on 5th October, 2023 and thus, the allegation that he was hands in glove with the complainant(contemnor-respondent No. 6) is totally misplaced.

23.7 That contemnor-respondent No.4 was sincerely discharging his official duties while investigating the FIR No. 11210068230266 dated 21st July, 2023 wherein, the petitioner was alleged to have cheated the complainant of a huge sum of money running into more than Rs. 1.65 crores and thus, he cannot be attributed the motive of colluding with the complainant.

23.8 That the cheques given by the complainant to the accused-petitioner were illegally retained and, the recovery thereof was imperative for fair investigation of the case and therefore, the Police Inspector had sought police custody remand of the petitioner herein in an absolutely bona fide and unbiased manner.

23.9 That the petitioner's claim of being tortured during the period of police custody is yet to be adjudicated in the complaint filed by the petitioner which is pending enquiry.

23.10 In addition to above, learned counsel submitted that contemnor-respondent No.4 is already facing departmental proceedings in relation to these very allegations and hence, these contempt proceedings would tantamount to double jeopardy. On strength of the above submissions, learned counsel implored the Court to take a sympathetic view and discharge the contempt notice issued to contemnor-respondent No. 4.

24. Learned senior counsel, Mr. D.N. Ray, representing 6th ACJM No.6(contemnor-respondent No. 7), at the outset, submitted that the judicial officer is having an impeccable service record. She had no intention whatsoever of committing wilful or intentional disobedience of this Court's order and that the judicial officer has expressed unconditional and unqualified apology for the acts done in discharge of judicial functions which are wrongly branded as contumacious by the petitioner. He advanced the following submissions: -

24.1 On perusing the remand application filed by the Investigating Officer, the contemnor-respondent No.7 inculcated a reasonable belief that the petitioner was not cooperating with the investigation in terms of the order passed by this Court.

24.2 She was also guided by the long prevailing practice being followed in the State of Gujarat wherein, the Courts, while granting anticipatory bail, incorporate a condition that in case the accused in whose favour the order of anticipatory bail has been passed does not cooperate in investigation then, the concerned Magistrate would be empowered to direct police custody remand of such accused.

24.3 He submitted that it is purely based on this long-standing practice prevalent in the State of Gujarat that 6th ACJM(contemnor-respondent No. 7), in bona fide discharge of her judicial functions allowed the application filed by the Investigating Officer and remanded the petitioner to three days' police custody. He urged that at the end of the remand period, the petitioner voluntarily filed an application under Section 437 CrPC seeking bail, which was routed through the Registry of the Court and that is why the Magistrate, was left with no other option but to pass an order on the said application requiring the accused petitioner to furnish bail bonds in lieu of release on bail. However, on a pertinent query being put, Mr. Ray, was not in a position to dispute the fact that the petitioner herein was released from custody after a delay of nearly 48 hours from the date i.e. 16th December, 2023, the period when the police custody remand had come to an end.

24.4 Regarding the proceedings taken on the complaint of custodial violence made by the petitioner, learned counsel urged that contemnor-respondent No. 7 was acting well within her jurisdiction by virtue of provisions contained in CrPC when she questioned the petitioner and also conducted preliminary body examination so as to take note of the injuries, if any, suffered by him owing to the alleged custodial violence.

These facts were recorded in the court order sheet as per the observations made during the course of judicial proceedings. The formal complaint was dismissed by the contemnor while exercising judicial discretion conferred upon a Magistrate by virtue of Section 203 CrPC. The order rejecting the complaint has already been set aside by the High Court and since the said complaint is sub judice, any expression by this Court on this issue may have an adverse reflection on the service record of the contemnor.

24.5 Mr. Ray reiterated that 6th ACJM(contemnor-respondent No. 7) was deluded by the prevailing practice referred to supra while passing the order of police custody remand. She had no intention whatsoever to flout or disregard the order passed by this Court and that she tenders unconditional apology for any act or omission committed by her which may be construed to be in disregard to the order dated 8th December, 2023. On these submissions, he implored the Court to condone the unintentional act of the contemnor-respondent No.7 and to discharge the contempt notice issued to her.

25. By way of additional submissions, Shri S.V. Raju, learned ASG appearing on behalf of Kamal Dayani, Additional Chief Secretary, Government of Gujarat(contemnor-respondent No. 1) and Shri R. Basant, learned senior counsel appearing on behalf of the High Court of Gujarat(respondent No. 8) tried to persuade the Court that no contempt was committed by any of the contemnors, by harping upon the prevailing practice in the State of Gujarat that the Courts, be it the Sessions Court or the High Court while passing pre-arrest bail orders under Section 438 CrPC, invariably incorporate a clause to the effect that in case the Investigating Officer wants to seek police custody of the accused, an application in this regard may be filed before the concerned Magistrate who would be empowered to direct that the accused in whose favour the anticipatory bail order is passed, could be detained in police custody under valid order of the concerned Magistrate.

Learned counsels thus, urged that the contemnors-respondent Nos. 1 and 8 who were acting under this misconception based on a longstanding practice formed by virtue of the Division Bench judgment in Sunilbhai Sudhirbhai Kothari(supra) may not be castigated as having acted in wilful disobedience of this Court's order

and therefore, the contempt notices may be discharged while accepting the unconditional apology tendered on behalf of them.

26. So far as contemnor-respondent Nos. 1 and 6 are concerned, they have neither filed any affidavits nor any significant contest was made on behalf of these contemnors-respondents to the contempt proceedings presumably because the thrust of the petitioner's allegations regarding non-compliance/flouting of this Court's order is directed against the other respondents.

27. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material available on record.

Discussion:-

28. Before proceeding to consider the rival submissions, at the outset, we may note that a bare perusal of the order under contempt dated 8th December, 2023 would leave no room for doubt that the interim protection of anticipatory bail granted by this Court to the petitioner was absolute, until modified or altered upon final disposal of the Special Leave Petition(Crl.) No. 14489 of 2023 which is still pending consideration before this Court. The language of the order was clear and unambiguous, hence, none of the contemnors-respondents could have entertained any doubt in their minds nor was there any scope for the interpretation that the petitioner could be remanded to police custody during the currency of the interim order dated 8th December, 2023.

29. Shri Ajay Kumar Tomar, Commissioner of Police, Surat(contemnor-respondent No. 2) had no role to play in the investigation or the proceedings pertaining to the remand of the petitioner and thus, prima facie, he cannot be held responsible for the contumacious acts. His role is limited to the aspect of non functionality of the CCTV cameras, and we would be dealing with this aspect later. The contempt notice issued to contemnor-respondent No.2 is thus, discharged.

30. Shri Vijaysinh Gurjar, contemnor-respondent No. 3 being the Deputy Commissioner of Police, Zone-4, Surat has sworn an affidavit tendering unconditional apology for any of the acts/omissions which may have led to the order of this Court being flouted.

31. We may note that the reply affidavit of this Officer(contemnor-respondent No.3) is relevant only in context of non-functioning of the CCTV cameras and the custodial torture allegedly meted out to the petitioner during police custody for the period between 13th December, 2023 and 16th December, 2023, wherein it is alleged that the petitioner was beaten in the presence of the said contemnor.

The following averments are made in the reply affidavit filed by contemnor-respondent No. 3:-

31.1 At para 6 of the reply affidavit, it has been stated that the respondent was busy in the preparation and deployment on account of visit of the Hon'ble Prime Minister of India in Surat on 17th December, 2023. In connection with the said preparations, he had briefly visited Vesu Police Station on 13th December, 2023. He has denied having any role to play in the investigation of the FIR lodged against the petitioner. The issue regarding custodial violence allegedly meted out to the petitioner is subject matter of departmental proceedings and is also sub judice in proceedings of the criminal complaint filed by the petitioner. Thus, it is neither necessary nor justified to make any observation thereupon because the said aspect has no live link to the contempt proceedings.

31.2 Regarding the aspect of non-functioning of CCTV cameras installed at Vesu Police Station and storage thereof, the contemnor-respondent No. 3 has come out with the following details in para 7 of the reply affidavit:-

7. "That in so far as the CCTV footage of the Vesu Police Station for the period 13.12.2023 to 16.12.2023 is concerned, it is humbly that my office has received the FSL Report dated 25.01.2024 sent by the Directorate of Forensic Science, Gujarat State, Gandhinagar, regarding the recording of the CCTV cameras installed at the Vesu Police Station, which has inter-alia opined that the DVR and the Hard disc of the CCTV cameras were not physically damaged and were found in working condition and that One lakh four thousand seven hundred ninety-nine(1,04,799) CCTV video footages and clips were found present in the Hard disk, which occupied the entire space of the hard disk i.e. 1.81 TB/1.81 T. The footages shows the time period from 09.01.2000 to 13.01.2000, 29.05.2020 to 20.07.2020, 23.10.2023 to 28.11.2023 and 12.01.2024 to 12.01.2024. However, "the CCTV video footage(s)/clip(S) having date stamp i.e. 13.12.2023 to 16.12.2023 were not found in the Hard disk Exh-H1 of the DVR Exh-1".

32. Going by the above averments, it is clear that the mandate to install and ensure functionality of CCTV cameras in all police stations by virtue of this Court's judgment in the case of Paramvir Singh Saini(supra) has not been complied in letter and spirit by the concerned police officials.

Even if we accept the fact that CCTV cameras were installed in some parts of Vesu Police Station and it is the DVR which was not functional, the fact remains that no CCTV camera was installed in the interrogation room of the police station which is an admitted position as evident from the record. However, we feel that these shortcomings should be dealt with at the departmental level rather than

being made subject of these contempt proceedings. The contempt notice issued to contemnor-respondent No.3 is thus, discharged.

33. The language of the remand application filed by the Investigating Officer, Shri R.Y. Raval(contemnor-respondent No.4) would be relevant for dealing with his case and hence, the same is reproduced hereinbelow: -

"To
5th Additional Senior Civil Judge and Additional Civil Judicial Magistrate,
New Court Building, Surat City

SUB TO ALLOW REMAND FOR DAYS-7 OF ACCUSED PERSON

I, R.Y.Rawal, I/c Police Inspector Vesu Police Station Surat City respectfully submitting that,

On 21/07/2023 Complainant Abhishek Vinodkumar Goswami Aged: 28 years Occupation: Business of Real Estate residing at C/405, Surya Palace, City Light, Surat City Mobile No 9879215044 preferred complaint before Vesu Police Station Part A 11210068230266/2023 for offence committed under Section 420,120(B) of Indian Penal Code against Accused persons (1) Partners of Shrestha Group Developers Bhavinbhai Durhabbhai Patel Resident of Navi Colony Sarthana Village Surat Mobile No 9925112073 (2) Pradip Tamakuwala Mobile No 9227906150 (3) Vasant Patel (4) Tusharbhai Rajnikantbhai Shah Mobile No 9825038475 (5) Sumit Goenka Mobile No 7710827133 (6) Rajsing Mobile No 6353949599 (7) Omkarsing Mobile No 9106115519 and the facts of the compliant are that,

On 28/01/2023 at around 1600 hrs Accused person no 4 and 5 of the matter shown shop no 204, 301, 302, 303, 304, 305, 306, 307, 308, 309, 404, 405, 407, 408, 409 in total 15 shops situated at Vesu VIP Road, Solarium Business Center and accused no 4 Tushar Shah himself informed that he was the builder and assured that the project was his, the Complainant and witness Akhil Ramanuj Bhattar were ready to buy 15 shops and paid Rs. 1,65,00,000/- (in words One Crore Five Sixty Lakh only) was paid to accused no. 4 and cheque of Rs. 54,00,000/-(in words Rupees Fifty four lakhs only) was also paid, after which a diary of full payment was also produced in presence of accused no. 5, 6, 7 and even after frequently informing all the accused of this matter neither the Deed of shops executed nor returning the money and committed the offence by making pre-planned criminal conspiracy by accused person against complainant and witness.

For said matter accused in the above offence, Tushar Rajinikanth Shah, aged: 43 years Occupation: Business Residing at Flat No. E/902, Florence Building, Opposite Rajhans Cinema, VIP Road, Vesu Suraj City having Mobile No 9825038475 was arrested on 11/12/2023 at 2100 hrs and on 08/12/2023 the accused allowed anticipatory bail application vide order passed by Hon'ble Supreme Court of India Special in the matter of Leave Application No. 14489/2023 so that the accused in this matter released on bail on furnishing suitable sureties based on the order of the Supreme Court of India and they While obtaining a detailed statement, they are concealing the truth during the investigation proceedings so that the accused should be remanded in police custody for day-07 to investigate the offence.

GROUNDS FOR REMAND

1. During course of investigations proceeding of this matter, on prima facie evidence found against the accused Tusharbhai Shah in which the complainant himself stated to be the builder of said Builder which is the fact that the present accused had prima facie intention with the accused in a pre-planned manner with the other accused in this matter. It was found that there is disloyalty [betrayal]of the complainant so that it is necessary to investigate the entire pre-planned conspiracy with the other accused so that the present accused is required to be in police custody.

2. Accused person of this matter Tushar Shah issued cheques to the complainant of Kotak Mahindra Bank, Kumbhariya Cheque No. (1) 000394 dated 31/01/2023 signed in the name of authorized signatory of Branch, Surat for a sum of Rs. 2,00,000/- and (2) 000395 dated 31/01/2023 for a sum of Rs. 2,00,000/-(3) 000396 dated 31/01/23 a sum of Rs. 2,00,000/-(4) 000397 dated 31/01/2023 a sum of Rs. 2,00,000/- (5) 000398 31/01/2023 a sum of Rs.2,00,000/-(6) 000022 14/02/2023 a sum of Rs. 11,00,000/- (7) 000021 10/02/2023 a sum of Rs. 11,00,000/- (8) 000023 dated 18/02/2023 a sum of Rs. 11,00,000/- (9) 00024 dated 20/02/23 a sum of Rs. 11,00,000/- and with regard to said cheques, Accused have not disclosed any material fact that they are not cooperating with the investigation proceedings regarding the places where the Cheques are kept and also all the above Cheques are important circumstantial evidences which have to be grabbed [seized] for the purpose of investigation proceedings so the presence of the accused in the police custody is required.

3. The complainant and the witness paid a sum of Rs. 1,65,00,000/- (in words Rupees One Crore Sixty Lakh only) to the accused in various installments which they have not admitted to have taken even in cash and what was the use of such a huge amount. Investigation proceedings are to be conducted so that the presence of the accused in the police custody is required.

4. Against the accused of this matter, Umra Police Station First Criminal Register No. 62/2019 for offence committed u/s 447, 448, 451, 427, 114 of Indian Penal Code registered so that the accused has a criminal history apart from this how many other offences have they committed while during course of interrogation, they are passing the time by giving wayward replies and many important information from this inquiry may come out during the course of investigation proceedings which cannot be obtained without presence during their investigation so the police custody of accused person is essential.

5. Ever since the offence was filed against the accused in this matter, he is on the run till date and the other co-accused in this matter are hiding information about them, which also needs to be investigated so that the police custody of accused person is essentially required. Considering the above grounds, we request to approve the police custody remand of the accused on Day-07. A copy of the diary is enclosed herewith which please note by Your Honor. 13/12/2023 R.Y Raval Police Inspector I/c Vesu Police Station Surat City"

34. At para No. 3 of the remand application, the Investigating Officer(contemnor-respondent No.4) has noted that the accused-petitioner did not admit having taken cash to the tune of Rs. 1.65 crores which the complainant claims to have paid to the accused-petitioner in various instalments. Para No. 4 of the application reads that Crime No. 62/2019 had been registered against the accused at P.S. Umra for the offences punishable under Sections 447, 448, 451, 427 and 114 of the Indian Penal Code, 1860 and it was imputed that the accused had a criminal history and that he was giving evasive replies to the questions being put to him.

However, it is pertinent to note that the Investigating Officer never made any effort to re-summon the accused for investigation even for a single time after 12th December, 2023 when abruptly a notice to appear before the Additional Chief Judicial Magistrate was given to the accused for seeking his police remand. The language of the notice has been reproduced at para 5(supra) and it does not give a whisper of indication that the accused was not cooperating in the investigation.

35. We are of the firm opinion that non-cooperation by the accused is one matter and the accused refusing to confess to the crime is another. There would be no obligation upon the accused that on being interrogated, he must confess to the crime and only thereafter, would the Investigating Officer be satisfied that the accused has cooperated with the investigation. As a matter of fact, any confession made by the accused before a police officer is inadmissible in evidence and cannot even form a part of the record.

36. This Court vide order dated 12th July, 2024 passed in Petition for Special Leave to Appeal (Crl.) No.10536/2023 titled as 'Sanuj Bansal v. The State of Uttar Pradesh & Anr.' has held that such confessions recorded in the interrogation notes of the accused cannot form part of the charge sheet.

37. Looking at the allegations in the FIR, we are of the firm view that the Investigating Officer should have, at the first instance, put the complainant to serious questioning and strict proof because while alleging in FIR that he had given a huge sum of Rs. 1.65 crores to the accused-petitioner, the complainant(contemnor-respondent No. 6) himself had acted in gross contravention of the provisions of the Income Tax Act, 1961 and the Prevention of Money Laundering Act, 2002(for short 'PMLA').

By blindly placing reliance on the unverified allegations of the complainant based on a huge cash transaction and registering the FIR without even making a basic enquiry on this vital aspect, the police officials to be specific, the Investigating Officer(contemnor-respondent No. 4) clearly colluded with the complainant(contemnor-respondent No. 6) by trying to give the civil dispute, based on allegation of breach of oral agreement, the colour of a crime.

38. The complainant(contemnor-respondent No. 6) categorically stated in the FIR that it was he who had given cheques of about Rs. 54 lakhs to the petitioner and it was agreed that on clearance of the cheques, the accused-petitioner would execute the registered sale deed in respect of the subject property in favour of the complainant.

In clear contradiction to this allegation of the complainant, the Investigating Officer at para No. 2 of the remand application(supra) noted that the cheques of Kotak Mahindra Bank had been signed by accused-petitioner for being given to the complainant(contemnor-respondent No. 6) and that he was not getting the same recovered. The above statement made in the remand application seems to be at sheer variance with the allegation set out in the FIR that the cheques were given by the complainant to the petitioner i.e., Tusharbhai Shah and not vice versa.

The assertion made in the FIR, that the accused-petitioner was not lodging the cheques of the complainant(contemnor-respondent No. 6) in his bank and was holding on to the same was clearly a wishful allegation created somehow or the other for framing the accused in a criminal case, rather than resorting to civil proceedings. It is not even the stated case of the complainant that before lodging the FIR, he had asked the accused-petitioner to return the cheques to him.

39. We may also state, had the accused-petitioner suffered an information under Section 27 of the Indian Evidence Act, 1872, which gave rise to a reasonable belief that such information could lead to discovery of an incriminating fact, perhaps the remand application could have been justified to some extent. However, that is not the situation in the case at hand.

40. The narration made in the remand application that the Investigating Officer wanted to find out about the criminal antecedents of the accused is also fanciful on the face of it. With the digitisation of the records, the criminal antecedents/records of accused would be readily available on CCTNS i.e., Crime and Criminal Tracking Network System and thus, the Investigating Officer could not have sought police custody remand of the accused in order to find out his criminal antecedents.

41. Apparently thus, the Investigating Officer(contemnor-respondent No. 4), while filing the remand application, made blatant misinterpretations and procured the police custody of the accused-petitioner who was under the protective umbrella of this Court's order dated 8th December, 2023.

42. If at all, by any stretch of imagination, the Investigating Officer felt genuine and bona fide requirement to seek police custody remand of the petitioner, then the proper course of action would have been to move this Court for seeking appropriate directions rather than moving the Magistrate by way of the remand application, which was tainted, malicious and a contemptuous act on the face of the record.

43. Now, we shall take up the case of the contemnor-respondent No. 7 being the 6th Additional Chief Judicial Magistrate, Surat who passed the order dated 13th December, 2023 granting police custody remand of the petitioner. The contemnor has made the following averments in her reply affidavit:-

43.1 At para No. 2 of the reply affidavit, the officer has offered unconditional apology for what has been termed to be a bona fide mistake in interpretation of the order of this Court.

43.2 In para No. 3 of the reply affidavit, the contemnor-respondent No. 7 has emphatically stated that this Court had granted ad-interim relief to the petitioner subject to the condition of cooperating with the Investigating Agency and being the Court of 6th ACJM, the officer was vested with the jurisdiction under Section 167 CrPC to grant police custody remand of the accused. The officer has projected in the reply affidavit that by granting police remand of the accused-petitioner, she rather ensured the compliance of this Court's order with bona fide objective of ensuring that the investigation is carried out fairly.

43.3 At para No. 3.1 of the reply affidavit, the contemnor-respondent No. 7 has sworn that upon receiving the remand application from the Investigating Agency, alleging non-cooperation in the investigation by the petitioner, she merely followed the practice and procedure prevalent in the State of Gujarat, wherein the Courts issue anticipatory bail orders with a direction to the accused-petitioner to cooperate with investigation and upon failure to do so, liberty is given to the Investigating Officer to seek police remand. The contemnor-respondent No. 7 has annexed certain orders of the High Court of Gujarat to buttress this plea taken in the affidavit in reply to the contempt notice.

43.4 That the petitioner was served with the notice directing him to remain present before the Court of 6th ACJM for the purpose of seeking his police remand. This notice was at the behest of the Investigating Officer and was routed through the Assistant Public Prosecutor(APP). The Investigating Officer sought 7 days remand of the petitioner on the ground that he was not cooperating with the investigation as directed by this Court.

The petitioner, neither filed any written protest nor any affidavit to oppose the remand application. He also did not make an affirmative statement of having cooperated with the Investigating Agency by providing information and documents in his possession. An emphatic denial has been given by the contemnor-respondent No. 7 to the plea of the petitioner that the order granting police remand was passed without providing a fair opportunity of hearing to the petitioner or his Advocate.

43.5 At para No. 5.3 of the reply affidavit, the contemnor-respondent No. 7 has reiterated that this Court vide order dated 8th December, 2023, granted adinterim relief in favour of the petitioner with a direction to the petitioner to cooperate with the investigation and thus, order of remand was passed considering the purport of para 5 of the order(supra) dated 8th December, 2023.

43.6 At para No. 5.4 of the reply affidavit, contemnor-respondent No. 7 has stated that as the order of this Court was not being complied with by the petitioner and since investigation was permitted to be continued, the contemnor was under a bona fide belief of having the power to hear and allow the remand application. It is in the course of exercise of judicial discretion conferred on the officer by law, that the order dated 13th December, 2023 came to be passed.

43.7 The complaint of ill-treatment made by the petitioner was dealt with by the contemnor-respondent No. 7 by following the procedure prescribed in para 14 of the Criminal Manual, Gujarat High Court. Since the petitioner made a complaint of ill-treatment by police in presence of his Advocates, the contemnor-respondent No.7 proceeded to make physical observation of the petitioner wherein no

external injury or mark of violence was found on his body which fact was recorded in the statement of the petitioner which was also signed by him.

43.8 At para No. 7 of the reply affidavit, it is stated that the petitioner filed a bail application under Section 437 CrPC without there being any order taking him in judicial custody. The said application was submitted before the Registry of the Court and was registered in the Central Filing System and thereafter, placed before the Court. The Assistant Public Prosecutor(APP) objected to the prayer for bail, but the contemnor-respondent No. 7 considering the facts and circumstances of the case and the ad-interim relief granted to the petitioner by this Court, directed his release on bail.

43.9 At para No. 8 of the reply affidavit, it has been stated that 8th Additional Chief Judicial Magistrate, Surat passed an order to keep the complaint filed by the petitioner alleging ill-treatment in police custody for verification, but since the petitioner had admitted that his complaint of custodial violence had already been recorded by the contemnor-respondent No.7 on the very date of the completion of the remand period, i.e., 16th December, 2023, she thought it fit to pass a detailed order dismissing the complaint on 6th January, 2024 by exercising jurisdiction under Section 203 CrPC. The contemnor-respondent No. 7 has pleaded that to her knowledge, the petitioner has not challenged the said judicial order.

At this stage, it would be apposite to note that the contemnor-respondent No. 7 has assigned no reasons in the reply affidavit as to how the order dated 21st December, 2023 passed by the predecessor, i.e., 8th Additional Chief Judicial Magistrate directing that the complaint should be placed for verification which would mean recording the statements under Sections 200 and 202 CrPC could have been reviewed by her. Be that as it may, the order dated 6th January, 2024 passed by the contemnor-respondent No. 7 has already been set aside by the High Court of Gujarat by exercising revisional jurisdiction vide order dated 22nd December, 2024 passed in R/Criminal Revision Application No. 273 of 2024.

43.10 At para Nos. 10 and 10.1 of the reply affidavit, it has been pleaded that the contemnor-respondent has served the judiciary honestly, sincerely and with total commitment since 2010 and that she continues to discharge her duties within the four corners of law. She had bona fide misinterpreted the order of this Court and her sole intention was to secure the interest of justice and hence, the acts alleged should not be termed to be wilful and deliberate disobedience of this Court's order dated 8th December, 2023 as alleged by the petitioner.

44. The contemnor-respondent No. 7 has placed emphatic reliance on the following lines from this Court's order dated 8th December, 2023:-

"5. However, the petitioner is directed to cooperate with the investigation and report to the Investigating Officer as and when directed to do so."

It was contended on her behalf that by directing the petitioner to cooperate with the investigation, this Court had given liberty to the Investigating Officer to seek his police custody, in case, he did not cooperate with the investigation. She tried to make out a case that by passing the order granting police custody remand of the petitioner, she rather ensured the compliance of the above direction issued by this Court.

45. The 6th ACJM(contemnor-respondent No.7) has laid much stress in her affidavit upon the fact that the Investigating Officer had noted in his application that the accused-petitioner was not cooperating with the investigation. We fail to comprehend as to what could be construed to be cooperation in a criminal case based on allegations which prima facie appear to be in relation to a civil dispute.

The transaction inter se between the parties pertained to sale and purchase of property. However, there was no written agreement for documenting the alleged sale transaction. Undisputedly, the accused-petitioner had appeared before the Investigating Officer on 11th December, 2023 with the copy of the order under contempt, immediately upon being summoned, at the police station. Thus, there was neither bona fide nor genuine need for grant of police custody of the petitioner.

46. The contemnor-respondent No. 7 in her reply affidavit has tried to explain that the order granting police custody was passed on the basis of a perception arising from the practice being followed in the State of Gujarat based on the Division Bench judgment of the High Court of Gujarat in the case of Sunilbhai Sudhirbhai Kothari(supra). The said explanation is neither convincing nor tenable in view of the fact that it is not a case wherein a Court in Gujarat had passed an order of anticipatory bail under Section 438 CrPC which was vague or open to different interpretations or contained a stipulation that the Investigating Officer could seek police remand of the accused.

The order under contempt dated 8th December, 2023 was passed by this Court while exercising its jurisdiction under Article 136 of the Constitution of India wherein there was no such stipulation that the accused could be remanded to police custody. The approach of contemnor-respondent No. 7 in first granting police custody of the petitioner on a clearly frivolous and mala fide remand application filed by Investigating Officer(contemnor-respondent No. 4), and in trying to justify the same in her reply affidavit, that it was based on so called prevalent practice in the State of Gujarat cannot be countenanced.

It is noteworthy that despite the period of police custody remand having come to an end on 16th December, 2023, the accused petitioner was further detained till 18th December, 2023 on which date, he was released on bail upon furnishing fresh bail bonds, which is clearly in teeth of this Court's order dated 8th December, 2023. The contemnor-respondent No. 7 has clearly stated in the reply affidavit that no order was passed remanding the accused-petitioner to judicial custody.

In this background, detention of the accused till 18th December, 2023 was absolutely unconstitutional and contrary to the letter and spirit of Articles 20 and 21 of the Constitution of India. This Court has placed the individual freedom and right to liberty at the highest pedestal in numerous decisions. Reference in this regard may be to the decision of this Court in the case of Rekha v. State of T.N.,5 wherein it was held as under:-

"14. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical and arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India."

(emphasis supplied)

47. If the order granting police custody remand was passed bona fide based on some misconception, then, the contemnor-respondent No. 7 should have ensured that the accused-petitioner be released from custody immediately at the end of the period of police custody remand without imposing any further conditions and without any delay. The special leave petition filed on behalf of the petitioner had not been finally decided and was still pending adjudication, when the remand application was entertained and hence, there was no occasion for the 6th ACJM(contemnor-respondent No. 7) to have proceeded to interpret this Court's order in a fanciful manner and that too while acting on a tainted remand application filed by the Investigating Officer.

48. Criminal jurisprudence requires that before exercising the power to grant police custody remand, the Courts must apply judicial mind to the facts of the case so as to arrive at a satisfaction as to whether the police custody remand of the accused is genuinely required. The Courts are not expected to act as messengers of the investigating agencies and the remand applications should not be allowed in a routine manner.

49. As discussed above, the FIR against the accused-petitioner was pertaining to a dispute which prima facie appears to be of a civil nature and hence, the learned Magistrate ought not to have toed the line of the Investigating Officer while granting police custody remand of the accused-petitioner.

50. As a matter of fact, the application seeking police custody remand of the petitioner could not have been entertained without seeking permission of this Court as observed in the case of Sushila Agarwal(supra).

51. In this regard, we are benefitted by the judgment of this Court in the case of Ashok Kumar v. Union Territory of Chandigarh6 wherein, it has been held that a mere assertion on the part of the State while opposing the plea for anticipatory bail that custodial investigation is required would not be sufficient. The State would have to show or indicate more than prima facie case as to why custodial investigation of the accused is required for the purpose of investigation.

52. Moving further, it must be noted that at the end of the remand period, the 6th ACJM(contemnor-respondent No. 7) entertained an application filed on behalf of the accused-petitioner under Section 437 CrPC and directed his release on bail on furnishing bail bonds. Indisputably, the accused had already furnished bail bonds to the Investigating Officer pursuant to his appearance on 11th December, 2023 and hence, the direction given by the contemnor-respondent No. 7 in requiring the accused to furnish a fresh set of bail bonds for his release from custody was improper and clearly contumacious.

The explanation sought to be offered regarding the misconception that had played in the mind of contemnor-respondent No. 7 may have been accepted, had the accused been released without insisting for fresh bail and bonds. However, the fact that a formal application was taken under Section 437 CrPC and only thereafter, the accused-petitioner was released on bail is in clear defiance of this Court's order dated 8th December, 2023.

The period between the culmination of the police custody remand and the release of the accused-petitioner upon furnishing bail bonds i.e. from 16th December, 2023 to 18th December, 2023 is a grey area in which there was no order authorising the custody of the petitioner and thus clearly the petitioner was illegally detained for nearly 48 hours.

53. It is pertinent to note that the learned senior counsel appearing for the petitioner had taken a strong exception to the remand application which fact is noted in the proceedings sheet dated 13th December, 2023. However, the contemnor-respondent No. 7 brushed aside the said objection which according to us, was bound to be sustained without any exception, since this Court's order was

unambiguous and only possible interpretation was that the petitioner should be released on bail, in the event of his arrest.

54. We, prima facie feel that the contemnor-respondent No. 7 seems to have acted in defence of the police officials when she made a note on the complaint of custodial violence made by the petitioner on 16th December, 2023, that after personally examining the feet of the accused, she did not find any injury thereupon. Law requires that the moment the accused had made a complaint of torture in police custody, it was incumbent upon the concerned Magistrate to have got the accused subjected to medical examination as per the mandate of Section 54 CrPC.

The formal complaint lodged by the petitioner herein was proceeded with by 8th Additional Chief Judicial Magistrate who took cognizance thereof on 22nd December, 2023 and directed that the complaint be posted for verification. The only permissible action as per law after cognizance had been taken on a private complaint, would be to record the statements of the complainant and his witnesses by taking recourse to the mandatory procedure prescribed under Sections 200 and 202 CrPC.

However, in sheer disregard to the order dated 22nd December, 2023 passed by 8th Additional Chief Judicial Magistrate, the 6th ACJM(contemnor-respondent No.7) dismissed the complaint filed by the petitioner vide order dated 6th January, 2024 which has been rightly reversed by the High Court of Gujarat vide order dated 22nd February, 2024 passed in R/Criminal Revision Application No. 273 of 2024. This conduct of contemnor-respondent No. 7 gives a strong indication of her biased approach in the matter.

55. The arguments advanced by learned senior counsel appearing for the Additional Chief Secretary, Government of Gujarat as well as the High Court of Gujarat about the long-standing practice prevailing in the State, that the Investigating Officer(s) are given liberty to seek police custody remand of the accused after competent Court has granted anticipatory bail does not appeal to us for a moment. Such an interpretation does not appear to be in consonance with the unambiguous position of law.

The provisions of anticipatory bail enumerated under Section 438 CrPC or the newly enacted Section 482 of the Bhartiya Nagarik Suraksha Sanhita, 2023(hereinafter being referred to as 'BNSS'), which has come into force with effect from 1st July, 2024, do not contemplate any such liberty to the Investigating Officer. However, the Court adjudicating an application for anticipatory bail may, in a given case, restrict the tenure of anticipatory bail in

view of the law laid down by this Court in the case of Sushila Agarwal(supra) and may also impose suitable conditions in light thereof.

However, it does not stand to reason that as a matter of course, the High Court or the Court of Sessions, as the case may be, while exercising anticipatory bail jurisdiction, grants pre-arrest bail to the accused and yet, invariably the Investigating Officer is given blanket liberty to keep the accused in custody for prolonged periods in a routine manner. This would virtually frustrate the very purpose and intent behind the grant of anticipatory bail to an accused. The relevant excerpts in this regard from the Constitution Bench judgment of this Court in the case of Sushila Agarwal(supra) are reproduced below for the sake of ready reference:-

"85.3. Section 438 CrPC does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While weighing and considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.

The courts would be justified - and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The necessity to impose other restrictive conditions, would have to be weighed on a case-bycase basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

85.4-85.7.....

85.8. It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. The court, in this context, is the court which grants anticipatory bail, in the first instance, according to prevailing authorities."

(emphasis supplied)

56. The ratio of the above judgment makes it clear that Section 438 CrPC does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. The necessity to impose restrictive conditions other than those spelt out in Section 437(3) CrPC would have to be weighed on a case-by-case basis and depending upon the materials produced by the State or the Investigating Agency. Such special or other restrictive conditions may be imposed if the factual context of the case warrants but should not be imposed in a routine manner and the Court would have to act with circumspection depending on the particular facts of each case before endeavouring to impose such conditions.

57. This Court has time and again held that the discretion to grant pre-arrest bail should be exercised with great degree of circumspection. Reference in this regard may be made to P. Chidambaram v. Directorate of Enforcement7.

58. Thus, the power to grant anticipatory bail is not to be exercised in a routine manner and the Courts are expected to use this provision with a great degree of circumspection. Once, a Court bearing in mind the strict parameters applicable to grant of anticipatory bail exercises such power, then in such a situation, giving a handle to the Investigating Officer to seek police custody remand of the accused, would virtually negate and frustrate the very purpose behind the order of anticipatory bail.

Hence, we have no hesitation in holding that the practice prevalent in the State of Gujarat that the Courts while dealing with the anticipatory bail application routinely impose the restrictive condition whereby, the Investigating Officers are granted blanket permission to seek police custody remand of the accused, in whose favour the order of anticipatory bail is passed, is in direct contravention to the ratio of the Constitution Bench judgment of this Court in the case of Sushila Agarwal(supra). The Division Bench judgment of the Gujarat High Court in the case of Sunilbhai Sudhirbhai Kothari(supra) does not hold good in law as the same runs contrary to the ratio of Sushila Agarwal(supra) and thus, the same stands impliedly overruled.

Conclusion:-

59. Having considered the rival submissions and upon a threadbare discussion of the material available on record, we conclude as below:-

59.1 Having considered the role attributed to contemnor-respondent No. 2, the Commissioner of Police, Surat, we find that there is not even a whisper of an allegation against the said officer other than the aspect relating to the non-

functioning of the CCTV cameras at the Vesu Police Station. Thus, the said respondent cannot be held responsible for the noncompliance/ contempt of this Court's order dated 8th December, 2023 and hence, the contempt notice issued to the contemnor-respondent No.2 i.e, Ajay Kumar Tomar, Commissioner of Police, Surat, is discharged.

59.2 That contemnor-respondent No.3, Deputy Commissioner, Surat, is not directly responsible for non-compliance of this Court's order dated 8th December, 2023. However, his role in failing to ensure proper installation and maintenance of CCTV cameras in the police station can be made a subject matter of enquiry at a departmental level, if so desired. Thus, the contempt notice issued to contemnor-respondent No. 3, Vijaysinh Gurjar, Deputy Commissioner of Police, Zone-4, Surat, is discharged.

59.3 That the Investigating Officer, contemnor-respondent No. 4, Police Inspector acted in flagrant defiance and gross contempt of this Court's order dated 8th December, 2023 by applying for police custody remand of the petitioner herein. The portrayal made by the Investigating Officer in the remand application to claim that the accused-petitioner was not cooperating in the investigation was totally cooked up and a clear attempt to draw wool over the Court's eyes.

During subsistence of this Court's order dated 8th December, 2023, there was neither any authority with the Investigating Officer to seek police custody remand of the accused nor was the prayer for remand justified in the backdrop of the fact that the FIR itself was lodged in relation to a civil dispute which arose from an oral agreement for sale of property. A clear misrepresentation was made in the remand application wherein, the Investigating Officer projected that the cheques issued by the accused-petitioner had to be recovered.

It is an admitted position as per the FIR, that the cheques had been issued by the complainant to the accused-petitioner and not vice versa. By failing to test the truth of the complainant's allegations regarding transmission of huge cash amount to the tune of Rs. 1.65 crores to the accused, the Investigating Officer acted in sheer ignorance to the mandate of the Income Tax Act, 1961 as well as the provisions of PMLA. Admittedly, the Investigating Officer(contemnor-respondent No. 4) had only made investigation from the accused for a few hours on 12th December, 2023 and immediately thereafter, the police custody remand application came to be submitted.

The notice for remand to the accused on 12th December 2023 does not indicate that he had not cooperated in the investigation. We are, therefore, inclined to hold that there was not even a shred of bona fide in the actions of the Investigating

Officer(contemnor-respondent No.4) while seeking police custody remand of the accused on the purported ground of non-cooperation in investigation.

The exercise of seeking police custody remand during currency of the interim protection granted to the petitioner was in sheer defiance of this Court's order dated 8th December, 2023 and tantamounts to contempt on the face of the record. Hence, we have no hesitation in holding that while seeking for and procuring the police custody remand of the accused in the teeth of the order dated 8th December, 2023, the Investigating Officer, R.Y. Raval, Police Inspector, Vesu Police Station, Surat(contemnor-respondent No. 4) is guilty of gross contempt.

59.4 That the explanation offered by 6th ACJM(contemnor-respondent No.7), that the order dated 13th December, 2023 granting police custody remand of the petitioner was passed in the bona fide exercise of jurisdiction, based on a genuine misunderstanding of the legal position does not appeal to us. In view of the findings recorded in preceding paras, it is clear that contemnor-respondent No. 7 acted with bias and in a high-handed manner while granting police custody remand of the accused.

The reason offered by her that she was acting under a misconception owing to settled and prevailing practice in the State of Gujarat, is clearly in disregard to the order passed by this Court. The said plea does not hold water since the order under contempt dated 8th December, 2023 allowed only one interpretation i.e. the accused-petitioner had to be released on bail in the event of arrest.

The action of the contemnor-respondent No.7 in granting police custody remand of the petitioner and in failing to release him upon completion of the aforesaid period is clearly in teeth of this Court's order dated 8th December, 2023 and tantamounts to contempt. The contemnor-respondent No. 7's contumacious actions also contributed to the illegal detention of the petitioner for almost 48 hours after the period of police remand had come to an end.

60. Accordingly, the contempt notices issued to respondent Nos. 2 i.e., Ajay Kumar Tomar, Commissioner of Police, Surat, respondent No. 3 i.e., Vijaysinh Gurjar, Deputy Commissioner of Police, Zone-4, Surat and respondent No. 6 i.e., Abhishek Vinodkumar Goswami(complainant) stand discharged.

61. As a result of the above discussion, we hold R.Y. Raval, Police Inspector, Vesu Police Station, Surat (contemnor-respondent No.4) and Deepaben Sanjaykumar Thakar, 6th Additional Chief Judicial Magistrate, Surat (contemnor-respondent No.7) guilty of having committed contempt of this Court's order dated 8th December, 2023.

62. The orders dated 8th December, 2023, 11th January, 2024 and 23rd January, 2024 passed by this Court in SLP Nos. 14489 of 2023, 537 of 2024 and 1116 of 2024, respectively are made absolute and it is directed that the ad-interim anticipatory bail granted to the petitioners shall enure till culmination of the proceedings from the FIR No. 11210068230266 of 2023 dated 21st July, 2023.

63. The special leave petitions are accordingly disposed of.

64. Pending application(s), if any, shall stand disposed of.

.....J. (B.R. Gavai)

.....J. (Sandeep Mehta)

New Delhi;

August 07, 2024

1 (2011) 1 SCC 694

2 (2021) 1 SCC 184

3 (2020) 5 SCC 1

4 2014 SCC OnLine Guj 14451

5 (2011) 5 SCC 244

6 2024 SCC OnLine SC 274

7 (2019) 9 SCC 24

IN THE SUPREME COURT OF INDIA

Manish Sisodia
Vs.
Directorate of Enforcement

[Criminal Appeal No._____ of 2024
arising out of SLP (Criminal) No. 8781 of 2024]

[Criminal Appeal No._____ of 2024
arising out of SLP (Criminal) No. 8772 of 2024]

HEADNOTE – Grants bail to Manish Sisodia. Right to speedy trial denied in liquor policy case

JUDGMENT

B.R. Gavai, J.

1. Leave granted. Appeals heard on merits.

2. The present appeals challenge the judgment and order dated 21st May 2024 passed by the learned Single Judge of the High Court of Delhi at New Delhi in Bail Application Nos. 1557 and 1559 of 2024, thereby rejecting the said applications filed by the present appellant for grant of bail. The aforesaid two applications were filed seeking bail in connection with ED Case No. HIU-II/14/2022 registered against the appellant by the Directorate of Enforcement (for short, 'ED') and First Information Report (FIR) No. RC0032022A0053 of 2022 registered against the appellant by the Central Bureau of Investigation (for short, 'CBI').

3. FIR No. RC0032022A0053 of 2022 came to be registered by the CBI on 17th August 2022, and ED Case No. HIU-II/14/2022 came to be registered by the ED on 22nd August 2022.

4. Since both the cases arise out of similar facts, the latter being the predicate offence and the former being a case registered on the basis of the predicate offence, both these appeals are heard and decided together.

FACTS IN BRIEF:

5. The present case travelled two rounds before the trial court, the High Court and this Court. This is now the third round before this Court wherein the appellant is seeking bail in connection with the aforesaid two cases.

6. On the basis of a letter dated 20th July 2022 addressed by Shri Vinai Kumar Saxena, the Lieutenant Governor of Delhi, alleging irregularities in the framing and implementation of Delhi's Excise Policy for the year 2021-22, the Director, Ministry of Home Affairs had directed an enquiry into the said matter vide Office Memorandum dated 22nd July 2022. On 26th February 2023, the appellant came to be arrested by the CBI. Subsequently, the appellant was arrested by the ED on 9th March 2023.

7. After investigation, CBI filed charge-sheet on 25th April 2023 for the offences punishable under Sections 7, 7A, 8 and 12 of the Prevention of Corruption Act, 1988 (for short, 'PC Act') read with Sections 420, 201 and 120B of the Indian Penal Code, 1860 (for short, 'IPC'). Upon completion of investigation, the ED filed a complaint under Section 3 of the Prevention of Money Laundering Act, 2002 (for short, 'PMLA') on 4th May 2023.

8. The first application for regular bail of the appellant in CBI matter came to be rejected by the High Court on 30th May 2023. Subsequently, the first application for regular bail of the appellant in ED matter came to be rejected by the High Court on 3rd July 2023. This Court, vide common order dated 30th October 2023 (hereinafter referred to as "the first order of this Court") rejected the regular bail applications of the appellant in the CBI matter and the ED matter, with certain observations which we will refer to in the subsequent paragraphs.

9. Subsequently, in view of the liberty granted by this Court, the appellant filed second bail application before the trial court on 27th January 2024. In the said proceedings, the appellant was granted interim protection. However, by an order dated 30th April 2024, the trial court rejected the said bail application on the ground that there was no change in the circumstances.

10. The appellant thereafter filed second bail application before the High Court on 2nd May 2024. Vide impugned judgment and order dated 21st May 2024, the learned Single Judge of the High Court rejected the said bail application also.

11. Being aggrieved thereby, the appellant had approached this Court by filing Special Leave Petition (Criminal) Nos. 7795 and 7799 of 2024.

12. The matter was heard on 4th June 2024. This Court, in the said order (hereinafter referred to as "the second order of this Court") recorded the submissions of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at

any rate on or before 3rd July 2024 and immediately thereafter, the trial court would be free to proceed with the trial. This Court recorded the submissions made by the learned Solicitor General and observed that having regard to the fact that the period of "6-8 months" fixed by this Court by order dated 30th October 2023 had not yet come to an end, disposed of the said petition with liberty to revive his prayer afresh after filing of the final complaint/charge-sheet.

13. Accordingly, after filing of the final complaint/chargesheet, the appellant has approached this Court by way of the present appeals. This Court, vide order dated 16th July 2024 had issued notice. In response thereto, counter affidavit has been filed on behalf of the ED as well as the CBI opposing the present appeals.

SUBMISSIONS:

14. We have extensively heard Dr. Abhishek Manu Singhvi, learned Senior Counsel appearing on behalf of the appellant and Shri Suryaprakash V. Raju, learned Additional Solicitor General (ASG) appearing on behalf of the respondents.

15. A preliminary objection has been raised on behalf of the learned ASG that the appellant cannot be permitted to file second set of SLPs to challenge the order of the High Court dated 21st May 2024 when the earlier SLPs arising out of the same order were disposed of. He submitted that the liberty granted by this Court vide order dated 4th June 2024 has to be construed as a liberty to apply to the trial court afresh.

It is submitted that, only after the appellant approaches the trial court and in the event he does not succeed before the trial court, thereafter he approaches the High Court and in the event he also does not succeed before the High Court, then only he would be entitled to approach this Court. He therefore submitted that the present appeals deserve to be rejected thereby relegating the appellant to approach the trial court afresh. To buttress his submission, Shri Raju relied on the judgment of this Court in the case of Kunhayammed and Others v. State of Kerala and Others1.

16. The said preliminary objection has been opposed by Dr. Singhvi, learned Senior Counsel appearing on behalf of the appellant contending that this Court had specifically, vide its first order dated 30th October 2023, granted liberty to the appellant to move a fresh application for bail in case the trial does not conclude within next 6-8 months and also in case the trial is protracted and proceeds at a snail's pace in next three months. He submitted that, admittedly, the trial has not been concluded within a period of 6-8 months from the date of the first order of this Court.

He further submitted that the record would show that the trial was protracted and proceeded at a snail's pace in the period of three months after the first order of this Court was passed. He submitted that the second order of this Court clearly reserves the right of the appellant to revive the request afresh after filing of the final complaint/charge-sheet as assured by the learned Solicitor General. Dr. Singhvi therefore prays for rejection of the preliminary objection.

17. On merits, Dr. Singhvi submitted that this Court, vide its first order dated 30th October 2023, has given various findings in favour of the appellant. It is submitted that, a perusal of the same would clearly reveal that at number of places, this Court has given findings which would show that the respondents have not been in a position to make out a prima facie case. Dr. Singhvi further submitted that a perusal of the record would reveal that even the investigation in the case is not complete.

He therefore submitted that unless the investigation is complete, the trial cannot proceed. He submitted that three more supplementary complaints have been filed on 10th May 2024, 17th May 2024 and 20th June 2024 in the ED matter and as on 27th July 2024, there were 40 persons who have been arrayed as accused in the proceedings with more than 8 complaints. He further submitted that, in the ED matter, the ED has cited 224 witnesses and produced 32,000 pages of documents.

He further submitted that, in the CBI matter, the CBI has cited 269 witnesses and produced around 37,000 pages of documents. It is therefore submitted that in all there are 493 witnesses, excluding the ones in the 4th Supplementary Charge-sheet filed by the CBI, who will have to be examined and that in total the documents are running into around 69,000 pages.

18. Dr. Singhvi submitted that the ED has deliberately concealed the documents it acquired during investigation by putting documents exculpating the accused persons in the category of "un-relied upon documents". It is submitted that, as such, it was necessary for the appellant to inspect such "un-relied upon documents". He further submitted that there was an inordinate delay on the part of the ED and the CBI in producing the list of "un-relied upon documents".

19. Dr. Singhvi submitted that, taking into consideration the voluminous number of witnesses and documents, there is no possibility of the trial seeing the light of the day and therefore the appeals filed by the appellant deserve to be allowed.

20. Shri Raju vehemently opposed the present appeals. He submitted that this Court, in its first order, after enumerating various factors on merits of the matter in paragraph 25 has held that the Court was not inclined to accept the prayer for

grant of bail. It is therefore submitted that the appeals of the present appellant on merits were specifically rejected.

21. Shri Raju further submitted that, though the Court granted liberty to file a fresh application in the circumstances enumerated in paragraph 29, it was held that the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail applications including the said first order. It is therefore submitted that the trial court as well as the High Court were required to take into consideration the merits of the matter.

However, the present appellant opposed the consideration of the application on merits and insisted on consideration of the application only on the ground of delay in trial. It is therefore submitted that both the courts have rightly considered the merits of the matter and after considering the merits, found that the appellant was not entitled to grant of bail. He submitted that no interference would be warranted.

22. Shri Raju submitted that the trial court and the High Court have specifically come to a finding that the appellant has delayed the pre-charge proceedings by taking recourse to the provisions of Section 207 of Criminal Procedure Code, 1973 (for short, 'Cr.P.C.'). He submitted that more than hundred applications have been filed out of which many are under Section 207 Cr.P.C. These applications have been filed only for the purpose of delaying the trial.

It is submitted that though in view of the law laid down by this Court in the case of P. Ponnusamy v. State of Tamil Nadu2, such applications could have been filed only after framing of the charges, the same have been intentionally filed at a precharge stage of the trial, so as to delay the framing of the charges. He submitted that though the appellant is entitled to file an application for discharge, the same has not been filed only in order to protract the trial. He submitted that the totality of the circumstances would reveal that it is the appellant who has been protracting the trial. It is submitted that as the appellant himself is responsible for protracting the trial, he cannot be permitted to take the benefit of the same.

23. The learned ASG submitted that unless the triple conditions as stipulated under Section 45 of the PMLA are satisfied, no person accused of an offence shall be released on bail. It is submitted that, in the present case, this Court itself by the first order has found that the appellant was not entitled for bail on merits and as such, the second condition stipulated under Section 45 of the PMLA that there are reasonable grounds for believing that he is not guilty of such offence, would not be satisfied in the present case.

24. The learned ASG further submitted that the appellant is a very influential person having occupied the office of Deputy Chief Minister of Delhi when the crime was committed. He submitted that if the appellant is released on bail, there is every possibility of him influencing the witnesses or tampering with the evidence.

25. Dr. Singhvi, in rejoinder, has submitted that the contention that the trial is being delayed due to the applications being filed by the appellant under Section 207 Cr.P.C. is totally incorrect. He submitted that the said applications were required to be filed since the prosecution had not placed on record the documents exculpating the accused persons by placing the same in the category of "unrelied upon documents".

He submitted that in order to avail the right of a fair trial and in adherence to the principles of natural justice as encapsulated in Section 207 Cr.P.C., the appellant was forced to file such applications. However, each of these applications were vehemently opposed by the prosecution. It is submitted that the said material ought to have been placed on record by the prosecution themselves, however, for the reasons best known to the prosecution, they have not done so.

He submitted that the appellant has filed only 14 applications in ED case and 13 applications in CBI case and that all these applications have been allowed by the learned trial judge. He lastly submitted that even as per the prosecution, if the entire "un-relied upon documents" are to be supplied in digital form, it will take a long time. To support his submission, Dr. Singhvi places reliance on the compliance report dated 7th May 2024 filed by the Assistant Director of ED which would fortify this position.

CONSIDERATION OF PRELIMINARY OBJECTION:

26. We will first deal with the preliminary objection of the learned ASG with regard to the filing of the second set of appeals before this Court challenging the order of the High Court dated 21st May 2024 i.e., on the point of maintainability.

27. Undisputedly, the appellant had earlier challenged the same order dated 21st May 2024 vide SLP (Criminal) Nos. 7795 and 7799 of 2024. On doing so, a Division Bench of this Court passed the order dated 4th June 2024. It will be apposite to refer to the observations made by this Court in the said order, which read thus:

"Though, elaborate arguments have been made, we do not propose to go into the said arguments or dwell upon it and then record our reasons for the simple reason that Co-ordinate Bench while dismissing the appeals vide order dated 30.10.2023, as noticed hereinabove has granted liberty to the appellant, i.e., the

petitioner herein to move a fresh application for bail by placing reliance on the assurance given on behalf of the prosecution that they would conclude the trial by taking appropriate steps within next 6-8 months and as such the liberty was extended to the petitioner herein to move a fresh application in case of change in circumstances, or in case the trial is protracted and proceeds at a snail's pace in next three months.

It was also observed that if such an application is filed in the aforesaid circumstances, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail application including the judgment of this Court. Shri Tushar Mehta, learned Solicitor General on instructions would submit that the investigation would be concluded and final complaint/charge sheet would be filed expeditiously and at any rate on or before 03.07.2024 and immediately thereafter, the trial court will be free to proceed with trial.

In the light of the said submissions made and having regard to the fact that the period of "6-8 months" fixed by this Court by Order dated 30.10.2023 having not come to an end, it would suffice to dispose of these petitions with liberty to the petitioner to revive his prayer afresh after filing of the final complaint/Charge-sheet as assured by learned Solicitor General. Needless to state that in the event of such an application being filed, the same would be considered on its own merits as already observed by this Court vide paragraph 29 (supra). Contentions of both parties kept open. Accordingly, these petitions stand disposed of. All pending applications consigned to record."

28. Before considering the submissions of the learned ASG with regard to maintainability of the present appeals on account of the second order of this Court, it will be apposite to refer to certain observations made by this Court in its first order, which read thus:

"26. However, we are also concerned about the prolonged period of incarceration suffered by the appellant - Manish Sisodia. In P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791, the appellant therein was granted bail after being kept in custody for around 49 days [P. Chidambaram v. Central Bureau of Investigation (2020) 13 SCC 337], relying on the Constitution Bench in Shri Gurbaksh Singh Sibbia and Others v. State of Punjab (1980) 2 SCC 565, and Sanjay Chandra v. Central Bureau of Investigation (2012) 1 SCC 40, that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case. Ultimately, the consideration has to be made on a case to case basis, on the facts.

The primary object is to secure the presence of the accused to stand trial. The argument that the appellant therein was a flight risk or that there was a possibility of tampering with the evidence or influencing the witnesses, was rejected by the Court. Again, in Satender Kumar Antil v. Central Bureau of Investigation and Another (2022) 10 SCC 51, this Court referred to Surinder Singh Alias Shingara Singh v. State of Punjab (2005) 7 SCC 387 and Kashmira Singh v. State of Punjab (1977) 4 SCC 291, to emphasise that the right to speedy trial is a fundamental right within the broad scope of Article 21 of the Constitution.

In Vijay Madanlal Choudhary (supra), this Court while highlighting the evil of economic offences like money laundering, and its adverse impact on the society and citizens, observed that arrest infringes the fundamental right to life. This Court referred to Section 19 of the PML Act, for the in-built safeguards to be adhered to by the authorised officers to ensure fairness, objectivity and accountability. [See also Pankaj Bansal v. Union of India and Ors. 2023 SCC OnLine SC 1244] Vijay Madanlal Choudhary (supra), also held that Section 436A of the Code can apply to offences under the PML Act, as it effectuates the right to speedy trial, a facet of the right to life, except for a valid ground such as where the trial is delayed at the instance of the accused himself.

In our opinion, Section 436A should not be construed as a mandate that an accused should not be granted bail under the PML Act till he has suffered incarceration for the specified period. This Court, in Arnab Manoranjan Goswami v. State of Maharashtra and Others (2021) 2 SCC 427, held that while ensuring proper enforcement of criminal law on one hand, the court must be conscious that liberty across human eras is as tenacious as tenacious can be.

27. The appellant - Manish Sisodia has argued that given the number of witnesses, 294 in the prosecution filed by the CBI and 162 in the prosecution filed by the DoE, and the documents 31,000 pages and 25,000 pages respectively, the fact that the CBI has filed multiple charge sheets, the arguments of charge have not commenced. The trial court has allowed application of the accused for furnishing of additional documents, which order has been challenged by the prosecution under Section 482 of the Code before the High Court. It was stated at the Bar, on behalf of the prosecution that the said petition under Section 482 will be withdrawn. It was also stated at the Bar, by the prosecution that the trial would be concluded within next six to eight months.

28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those

punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded.

The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years.

29. In view of the assurance given at the Bar on behalf of the prosecution that they shall conclude the trial by taking appropriate steps within next six to eight months, we give liberty to the appellant - Manish Sisodia to move a fresh application for bail in case of change in circumstances, or in case the trial is protracted and proceeds at a snail's pace in next three months.

If any application for bail is filed in the above circumstances, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail application, including the present judgment. Observations made above, re.: right to speedy trial, will, however, be taken into consideration. The appellant - Manish Sisodia may also file an application for interim bail in case of ill health and medical emergency due to illness of his wife. Such application would be also examined on its own merits."

29. A perusal of the aforesaid would reveal that this Court was concerned about the prolonged period of incarceration suffered by the appellant. After considering various earlier pronouncements, this Court emphasised that the right to speedy trial is a fundamental right within the broad scope of Article 21 of the Constitution. Relying on Vijay Madanlal Choudhary and Others v. Union of India and Others3, this Court observed that Section 436A Cr.P.C. should not be construed as a mandate that an accused should not be granted bail under the PMLA till he has suffered incarceration for the specified period.

This Court recorded the assurance given by the prosecution that they shall conclude the trial by taking appropriate steps within next 6-8 months. This Court, after recording the said submissions, granted liberty to the appellant to move a fresh application for bail in case of change in circumstances or in case the trial was protracted and proceeded at a snail's pace in next three months. This Court

observed that if any application was filed, the same would be considered by the trial court on merits without being influenced by the dismissal of the earlier bail applications including its own judgment. It further observed that the observations made regarding the right to speedy trial will be taken into consideration.

30. Since the trial proceeded at a snail's pace in the period after three months of the first order of this Court, the appellant filed the second application for bail before the trial court. The same came to be rejected by the trial court on 30th April 2024. It can thus be seen that it took a period of almost three months for the trial court to decide the said application. By the time the appellant approached the High Court, a period of more than six months had elapsed from the date on which the first order of this Court was passed. The same also came to be rejected on 21st May 2024.

31. When the appellant approached this Court in the second round and when the second order was passed by this Court on 4th June 2024, a period of 7 months and 4 days had elapsed from the date of the first order of this Court. However, this Court took into consideration the statement of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at any rate on or before 3rd July 2024 and thereafter, the trial court would be free to proceed with the trial. It, after observing that "having regard to the fact that the period of 6-8 months fixed by this Court in its first order having not come to an end", disposed of the petitions with liberty to the appellant to revive his prayer afresh after filing of the final complaint/charge-sheet.

32. It could thus be seen that this Court had granted liberty to the appellant to revive his prayer after filing of the chargesheet. Now, relegating the appellant to again approach the trial court and thereafter the High Court and only thereafter this Court, in our view, would be making him play a game of "Snake and Ladder". The trial court and the High Court have already taken a view and in our view relegating the appellant again to the trial court and the High Court would be an empty formality. In a matter pertaining to the life and liberty of a citizen which is one of the most sacrosanct rights guaranteed by the Constitution, a citizen cannot be made to run from pillar to post.

33. A careful reading of the second order of this Court dated 4th June 2024 would show that this Court recorded that they did not propose to go into the arguments or dwell upon it in view of the liberty granted in the first order of this Court. Thereafter, this Court noticed the assurance of the learned Solicitor General that the investigation would be concluded and final complaint/charge-sheet would be filed at any rate on or before 3rd July 2024.

This Court further observed in its second order that since the period of 6-8 months fixed by it in its first order had not come to an end, it was inclined to dispose of this petition with liberty to the appellant to revive his prayer. It will be a travesty of justice to construe that the carefully couched order preserving the right of the appellant to revive his prayer for grant of special leave against the High Court order, to mean that he should be relegated all the way down to the trial court. The memorable adage, that procedure is a hand maiden and not a mistress of justice rings loudly in our ears.

34. In this respect, we may also gainfully refer to one of the recent pronouncements by a bench of this Court to which one of us (B.R. Gavai, J.) was a member in the case of Prabir Purkayastha v. State (NCT of Delhi)4, which reads thus:

"21. The Right to Life and Personal Liberty is the most sacrosanct fundamental right guaranteed under Articles 20, 21 and 22 of the Constitution of India. Any attempt to encroach upon this fundamental right has been frowned upon by this Court in a catena of decisions. In this regard, we may refer to following observations made by this Court in the case of Roy V.D. v. State of Kerala3:-

"7. The life and liberty of an individual is so sacrosanct that it cannot be allowed to be interfered with except under the authority of law. It is a principle which has been recognised and applied in all civilised countries. In our Constitution Article 21 guarantees protection of life and personal liberty not only to citizens of India but also to aliens.""

35. In our view, the liberty reserved by this Court vide its second order, to revive the request of the appellant will have to be construed as a liberty given by this Court to revive his prayer afresh after filing of the final complaint/charge-sheet. Undisputedly, the present appeals have been filed after the final complaint/charge-sheet has been filed by the respondents. In that view of the matter, we are not inclined to entertain the preliminary objection and the same is rejected.

CONSIDERATION AS TO WHETHER THE APPELLANT IS ENTITLED FOR BAIL:

36. Having rejected the preliminary objection, we will proceed to consider as to whether in the facts and circumstances of the present case, the appellant is entitled to grant of bail or not.

37. Insofar as the contention of the learned ASG that since the conditions as provided under Section 45 of the PMLA are not satisfied, the appellant is not entitled to grant of bail is concerned, it will be apposite to refer to the first order

of this Court. No doubt that this Court in its first order in paragraph 25, after recapitulating in paragraph 24 as to what was stated in the charge-sheet filed by the CBI against the appellant, observed that, in view of the aforesaid discussion, the Court was not inclined to accept the prayer for grant of bail at that stage.

However, certain paragraphs of the said order cannot be read in isolation from the other paragraphs. The order will have to be read in its entirety. In paragraph 28 of the said order, this Court observed that the right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 Cr.P.C. and Section 45 of the PMLA. The Court held that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted that he be ensured and given a speedy trial.

It further observed that when the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, would be guided to exercise the power to grant bail. The Court specifically observed that this would be true where the trial would take years. It could thus clearly be seen that this Court, in the first round of litigation between the parties, has specifically observed that in case of delay coupled with incarceration for a long period and depending on the nature of the allegations, the right to bail will have to be read into Section 45 of PMLA.

38. A Division Bench of this Court in the case of Ramkripal Meena v. Directorate of Enforcement5 was considering an application of the petitioner therein who was to receive a bribe of rupees five crore and from whom, an amount of Rs.46,00,000/- was already recovered. In the said case, the petitioner was arrested on 26th January 2022 in connection with FIR No. 402/2021 registered against him for the offences punishable under Sections 406, 420, 120B of IPC and Section 4/6 of the Rajasthan Public Examination (Prevention of Unfair Means) Act, 1992. He was released on bail by this Court vide order dated 18th January 2023. Thereafter, the petitioner was arrested by the ED on 21st June 2023. The Court observed thus:

"7. Adverting to the prayer for grant of bail in the instant case, it is pointed out by learned counsel for ED that the complaint case is at the stage of framing of charges and 24 witnesses are proposed to be examined. The conclusion of proceedings, thus, will take some reasonable time. The petitioner has already been in custody for more than a year. Taking into consideration the period spent in custody and there being no likelihood of conclusion of trial within a short span, coupled with the fact that the petitioner is already on bail in the predicate offence, and keeping in view the peculiar facts and circumstances of this case, it

seems to us that the rigours of Section 45 of the Act can be suitably relaxed to afford conditional liberty to the petitioner. Ordered accordingly."

39. In the light of the specific observations of this Court in paragraph 28 of the first order, we are not inclined to accept the submission of the learned ASG that the provisions of Section 45 of the PMLA would come in the way of consideration of the application of the appellant for grant of bail.

40. From the first order of this Court, it would be clear that an assurance was given at the Bar on behalf of the prosecution that they shall conclude the trial by taking appropriate steps within next 6-8 months. In view of the said statement, this Court did not consider the application of the appellant for bail at that stage, however, granted liberty to the appellant to move a fresh application for bail in case of change in circumstances, or in case the trial is protracted and proceeded at a snail's pace in next three months.

Though, this Court observed that if any application for bail was filed on the grounds mentioned in paragraph 29, the same would be considered by the trial court without being influenced by the dismissal of the earlier bail applications including the present judgment, however, it clarified that the observations made by the Court with regard to right to speedy trial would be taken into consideration. The liberty was also granted to the appellant to file an application for interim bail in case of ill-health and medical emergency due to illness of his wife.

41. A perusal of the impugned judgment and order would reveal that though the learned Single Judge of the High Court has dismissed the applications for bail on merits, on medical grounds, it has permitted the appellant to visit his residence to meet his wife in custody once every week.

42. It could thus clearly be seen that this Court expected the trial to be concluded within a period of 6-8 months. The liberty was reserved to approach afresh if the trial did not conclude within the period of 6-8 months. The liberty was also granted in case the trial proceeded at a snail's pace in next three months.

43. A perusal of the material placed on record would clearly reveal that far from the trial being concluded within a period of 6-8 months, it is even yet to commence. Though in the first order of this Court, liberty was reserved to move afresh for bail if the trial proceeded at a snail's pace within a period of three months from the date of the said order, the commencement of the trial is yet to see the light of the day.

In these circumstances, in view of the first order of this Court, the appellant was entitled to renew his request. When the appellant renewed his request, the learned

Special Judge (trial court) as well as the High Court was required to consider the said applications in the light of the observations made by this Court in paragraphs 28 and 29 of the first order. In paragraph 29 of the first order, this Court specifically observed that though the observations on the aspect of merit were not binding, the observations of right to speedy trial were required to be taken into consideration.

44. The learned Special Judge and the learned Single Judge of the High Court have considered the applications on merits as well as on the grounds of delay and denial of right to speedy trial. We see no error in the judgments and orders of the learned Special Judge as well as the High Court in considering the merits of the matter. In view of the observations made by this Court in the first order, they were entitled to consider the same.

However, the question that arises is as to whether the trial court and the High Court have correctly considered the observations made by this Court with regard to right to speedy trial and prolonged period of incarceration. The courts below have rejected the claim of the appellant applying the triple test as contemplated under Section 45 of the PMLA. In our view, this is in ignorance of the observations made by this Court in paragraph 28 of the first order wherein this Court specifically observed that right to bail in cases of delay coupled with incarceration for a long period should be read into Section 439 Cr.P.C. and Section 45 of the PMLA.

45. The trial court, in its order, has held that the appellant individually and along with different accused persons have been filing one or the other applications/making oral submissions frequently. It further observed that some of them were frivolous. It was observed that this was apparently done as a concerted effort for accomplishing the shared purpose of causing delay in the matter.

The trial court therefore rejected the contention of the appellant that he had not contributed to delay in proceedings or that the case has been proceeding at a snail's pace. However, in the very subsequent paragraph i.e., paragraph 80, the court observed that, in order to avoid any delay and considering the time being taken by the counsel for the accused in inspecting the "un-relied upon documents", it had vide order dated 18th April 2024 put a query to the prosecution if the entire "unrelied upon documents" can be provided to the accused persons in a digitized form.

It further recorded that the ED accepted the suggestion that it would expedite the proceedings. However, some time was sought to consider the same. A perusal of the compliance report filed by the Assistant Director of ED dated 7th May 2024 which could be found at page 757 of the paperbook, would reveal that the Cyber

Lab has informed that it would take 70-80 days to prepare one copy (cloning) of the data contained in the said unrelied digital devices.

46. It could further be seen that, though it has been submitted on behalf of the ED that hundreds of applications have been filed for supply of "un-relied upon documents", the record would not substantiate the said position. Though various applications have been filed by different accused persons, insofar as the present appellant is concerned, he has filed only 13 applications in the CBI matter and 14 in the ED matter. It would reveal that some of the applications are for seeking permission to meet his wife or permission to file vakalatnama, to put signature on the documents, seeking permission to sign a cheque etc.

Most of the applications are for supply of missing documents and legible copies under Section 207/208 Cr.P.C. Some of the applications are for inspection of the "un-relied upon documents". It is pertinent to note that all these applications have been allowed by the learned trial court. It is further pertinent to note that some of these orders were also challenged before the High Court wherein stay was granted.

However, a statement was made on behalf of the prosecution before this Court when the first order was passed that the said petitions filed under Section 482 Cr.P.C would be withdrawn. The said statement is recorded in paragraph 27 of the first order of this Court. We may state that, when we specifically asked the learned ASG to point out any order wherein the learned trial judge found any of the applications of the appellant to be frivolous, not a single order could be pointed out.

47. In that view of the matter, we find that the finding of the learned trial judge that it is the appellant who is responsible for delaying the trial is not supported by the record. The learned Single Judge of the High Court endorses the finding of the trial court on the ground that the accused persons have taken three months' time from 19th October 2023 to 19th January 2024 for inspection of "un-relied upon documents" despite repeated directions from the learned trial court to conclude the same expeditiously.

It is to be noted that there are around 69,000 pages of documents involved in both the CBI and the ED matters. Taking into consideration the huge magnitude of the documents involved, it cannot be stated that the accused is not entitled to take a reasonable time for inspection of the said documents. In order to avail the right to fair trial, the accused cannot be denied the right to have inspection of the documents including the "un-relied upon documents".

48. It is further to be noted that a perusal of the second order of this Court would itself reveal that this Court recorded the submissions of the learned Solicitor General, which were made on instructions, that the investigation would be concluded and final complaint/charge-sheet would be filed expeditiously and at any rate on or before 3rd July 2024. Accordingly, 8th charge-sheet has been filed on 28th June 2024 by the ED. It could thus be seen that, even according to the respondents, the investigation was to be concluded on or before 3rd July 2024.

In that view of the matter, we find that the contention raised by the learned ASG is self-contradictory. If the investigation itself was to conclude on or before 3rd July 2024, the question is how could the trial have commenced prior to that? If the investigation itself was to conclude after a period of 8 months from the date of the first order of this Court, there was no question of the trial being concluded within a period of 6-8 months from the date of the first order of this Court. We find that both the High Court and the trial court have failed to take this into consideration.

49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

51. Recently, this Court had an occasion to consider an application for bail in the case of Javed Gulam Nabi Shaikh v. State of Maharashtra and Another6 wherein the accused was prosecuted under the provisions of the Unlawful Activities (Prevention) Act, 1967. This Court surveyed the entire law right from the judgment of this Court in the cases of Gudikanti Narasimhulu and Others v. Public Prosecutor, High Court of Andhra Pradesh7, Shri Gurbaksh Singh Sibbia and Others v. State of Punjab8, Hussainara Khatoon and Others (I) v. Home Secretary, State of Bihar9, Union of India v. K.A. Najeeb10 and Satender Kumar Antil v. Central Bureau of Investigation and Another11. The Court observed thus:

"19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."

52. The Court also reproduced the observations made in Gudikanti Narasimhulu (supra), which read thus:

"10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in Gudikanti Narasimhulu v. Public Prosecutor, High Court reported in (1978) 1 SCC 240. We quote:

"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox]:

"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.""

53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception".

54. In the present case, in the ED matter as well as the CBI matter, 493 witnesses have been named. The case involves thousands of pages of documents and over a lakh pages of digitized documents. It is thus clear that there is not even the remotest possibility of the trial being concluded in the near future. In our view, keeping the appellant behind the bars for an unlimited period of time in the hope of speedy completion of trial would deprive his fundamental right to liberty under Article 21 of the Constitution. As observed time and again, the prolonged incarceration before being pronounced guilty of an offence should not be permitted to become punishment without trial.

55. As observed by this Court in the case of Gudikanti Narasimhulu (supra), the objective to keep a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial.

56. In the present case, the appellant is having deep roots in the society. There is no possibility of him fleeing away from the country and not being available for facing the trial. In any case, conditions can be imposed to address the concern of the State.

57. Insofar as the apprehension given by the learned ASG regarding the possibility of tampering the evidence is concerned, it is to be noted that the case largely depends on documentary evidence which is already seized by the prosecution. As such, there is no possibility of tampering with the evidence. Insofar as the concern with regard to influencing the witnesses is concerned, the said concern can be addressed by imposing stringent conditions upon the appellant.

CONCLUSION:

58. In the result, we pass the following order:

(i) The appeals are allowed;

(ii) The impugned judgment and order dated 21st May 2024 passed by the High Court of Delhi in Bail Application Nos. 1557 and 1559 of 2024 is quashed and set aside;

(iii) The appellant is directed to be released on bail in connection with ED Case No. HIU-II/14/2022 registered against the appellant by the ED and FIR No. RC0032022A0053 of 2022 registered against the appellant by the CBI on furnishing bail bonds for a sum of Rs.10,00,000/- with two sureties of the like amount;

(iv) The appellant shall surrender his passport with the Special Court;

(v) The appellant shall report to the Investigating Officer on every Monday and Thursday between 10-11 AM; and

(vi) The appellant shall not make any attempt either to influence the witnesses or to tamper with the evidence.

59. Pending application(s), if any, shall stand disposed of in the above terms.

.....J. (B.R. Gavai)

.....J. (K.V. Viswanathan)

New Delhi;

August 09, 2024.

1 (2000) 6 SCC 359 : 2000 INSC 339

2 2022 SCC OnLine SC 1543 : 2022 INSC 1175

3 (2022) SCC OnLine SC 929 : 2022 INSC 756

4 2024 SCC OnLine SC 934 : 2024 INSC 414

5 SLP(Crl.) No. 3205 of 2024 dated 30.07.2024

6 2024 SCC OnLine SC 1693

7 (1978) 1 SCC 240 : 1977 INSC 232

8 (1980) 2 SCC 565 : 1980 INSC 68

9 (1980) 1 SCC 81 : 1979 INSC 34

10 (2021) 3 SCC 713 : 2021 INSC 50

11 (2022) 10 SCC 51 : 2022 INSC 690

IN THE SUPREME COURT OF INDIA

Jalaluddin Khan
Vs.
Union of India

[Criminal Appeal No. 3173 of 2024]

HEADNOTE – 'Bail is the rule, jail is the exception' even in special statutes like the Unlawful Activities (Prevention) Act 1967.

JUDGMENT

Abhay S. Oka, J.

Factual Aspects

1. The appellant is being prosecuted for the offences punishable under Sections 121, 121A and 122 of the Indian Penal Code (for short, 'the IPC') and Sections 13, 18, 18A and 20 of the Unlawful Activities (Prevention) Act, 1967 (for short, 'the UAPA'). A charge sheet was filed on 7th January 2023. He is shown as accused no.2 in the charge sheet. The appellant applied for bail before the Special Court under the UAPA, which was rejected. Hence, the appellant and some co-accused applied for bail before the High Court. By the impugned judgment, the prayer for bail made by the appellant was rejected, while bail was granted to a co-accused.

Submissions

2. The submission of Ms Mukta Gupta, learned senior counsel, is that there is absolutely no material to link the appellant with the offences under the UAPA. She pointed out that, at highest, the allegation is that the appellant's wife was the owner of a building known as Ahmad Palace and that the appellant had clandestinely shown that premises on the first floor of the said building were given on rent to one Athar Parwez - accused no. 1.

The allegation is that, the first floor premises are being used for objectional activities of an organisation called Popular Front of India (PFI). She submitted that taking the charge sheet as it is, no connection has been established between the activities of PFI and the appellant. Even prima facie material for connecting the appellant with PFI is not available. She submitted that various people occupy other premises in the building. The building has a pathology laboratory, a clinic,

and shops. She pointed out that, therefore, CCTV cameras were fixed on the property.

She submitted that if the activities of PFI were really being carried out in the building with the connivance of the appellant, he would not fix CCTV cameras inside the property. She would submit that the appellant's case satisfies the tests laid down by Section 43D (5) of the UAPA, as there are no reasonable grounds for believing that the accusations against the appellant are prima facie true. Learned senior counsel relied upon a decision of this Court in the case of Shoma Kanti Sen v. State of Maharashtra and another1.

3. Ms Aishwarya Bhati, learned Additional Solicitor General of India, invited our attention to statements of the protected witnesses V, Y, and Z, tendered on record, in a sealed cover. She pointed out that CCTV footage seized by the Investigating Agency of the building Ahmad Palace shows that on 6th and 7th July 2022, the appellant and accused no. 1 were seen shifting certain items from the first floor of the building. When the police conducted a raid on 11th July 2022, those items were not found, and therefore, the appellant tampered with the evidence.

Relying upon paragraph 17.16 of the charge sheet, she submitted that protected witness Z disclosed that on 29th May 2022, the appellant attended a meeting-cum-training on the first floor of the building Ahmad Palace along with several other accused who were associated with PFI. During this meeting, the subjects relating to the expansion of the organisation, basic and advanced training of PFI members, Muslim empowerment, and future plans for PFI were discussed.

She pointed out that the protected witness Z stated that after considering the remarks made by one Nupur Sharma on the Prophet Mohammed, directions were issued to the trained PFI members to attack and kill the selected targets who were involved in making derogatory remarks against the religion. Learned ASG pointed out that paragraph 17.26 of the charge sheet shows that on 12th May 2022, a sum of Rs. 25,000/- was transferred to the account of the appellant's son, from an account of an absconding accused.

She submitted that the rent agreement was bogus and was made to mislead the police, and the appellant had knowingly allowed the first floor premises to be used for PFI's activities. She would submit that there was enough material in the documents produced along with the charge sheet, which shows that a strong prima facie case is made about the appellant's involvement in the offences punishable under Sections 13, 18, 18A and 20 of the UAPA. She pointed out that accused no.1, in whose name the tenancy of the first floor was shown, had been

an active member of a banned terrorist organisation - the Student Islamic Movement of India (SIMI).

Consideration of Submissions

4. The appellant was arrested on 12th July 2022. The Trial has not made any progress. The building Ahmad Palace stands in the name of the appellant's wife. The appellant is a retired police constable. The allegation is that on 11th July 2022, in the evening, the police carried out a raid on the first floor premises of Ahmad Palace. At that time, there was a recovery and seizure of incriminating articles and documents relating to PFI. Paragraph 17.1 of the charge sheet reads thus:

"17.1 Bihar Police had received information about a plan to disturb the proposed visit of Hon'ble Prime Minister to Bihar by some suspected persons who had assembled in Phulwarisharif area. On 11.07.2022 at about 1930 hrs, on secret information, a raid was carried out by the Police Officers of PS Phulwarisharif, Patna at the rented house/premises of Athar Parvej (A-1) and recovered 05 sets of document "India 2047 Towards Rule of Islamic India, Internal Document: Not for circulation", Pamphlets "Popular front of India 20 February, 2021"- 25 copies in Hindi and 30 copies in Urdu, 49 cloth Flags, 02 magazines "Mulk ke liye Popular front ke saath" and one copy of rent agreement on non Judicial Stamp by Farhat Bano w/o Md Jalaluddin Khan (A-2) with tenant Athar Parvej (A-1) son of Abdul Qayum Ansari. The recovered articles and a Samsung mobile phone having SIM card of accused Mohammed Jalaluddin (A-2) were seized in the instant case. They were related to anti-India activities."

5. Following are the other paragraphs in the charge sheet relied upon by the respondent:

"17.16 Protected witness-"Z" further stated that on 29th May 2022, a meeting cum training was organized in Ahmad Palace, Phulwarisharif Parna, a rented accommodation arranged by Athar Parvej (A-1) and others in this criminal conspiracy. This meeting was chaired by Riyaz Firangipet (A-20) of Karnataka and approximate 40-45 persons including Mahboob Alam Nadvi (A-7), Sanaullah (A-5), Riyaz Mourif (A-4), Mehboob- Ur-Rehman (A-11), Ehsan Parvez (A-7), Ansarul Huque (A-21), Riyaz Ahmed (A-17), Perwez Alam (A-26), Tausif Alam (A-6), Athar Parvej (A-1), Md. Jalaluddin (A-2) and others, who are associated with PFI, attended this meeting.

During this meeting, the points related to expansion of organisation, basic and advance training of PFI members, Muslim empowerment and future plan of PFI were discussed. Protected Witness-Z also stated that after the remark of Nupur

Sharma on Prophet Mohammad, directions were given to the trained PFI cadres to attack and kill selected targets who were involved in making derogatory remarks against Islam."

"15.5 During the investigation, Hard Disk/DVR of the CCTV installed in Ahmad Palace was seized by the investigating officer of police station Phulwarisharif, Patna. The mirror images of CCTV footages have been received from CDAC, Thiruvananthapuram, Kerala. The CCTV footage confirmed the presence of FIR named accused persons including Athar Parvej (A-1) in the Ahmad Palace, Phulwarisharif, Patna on 6th and 7th July, 2022. The CCTV footage also confirmed that the Police of PS Phulwarisharif carried out raid at the first floor of Ahmad Palace Phulwarisharif on 11.07.2022 at around 7 PM in presence of Athar Parvej (A-1) and Md. Jalaluddin (A-2). It also established that Md Jalaluddin (A-2) tampered the evidence by shifting of items from the first floor of Ahmad Palace, Phulwarisharif, Patna before raid of Police dated 11.07.2022."

"17.2 Investigation brought out that during preliminary questioning by Police of PS Phulwarisharif, Patna, Md. Jalaluddin (A-2), owner of the house, revealed that the first floor of his house was taken on rent by Athar Parvej (A-1) for imparting training. On 6th and 7th July 2022, the training was conducted here, in which participants from other states were also present."

"17.26 During the investigation, the account statement of SBI account No. 33767976372 was sought from the State Bank of India, Branch Walmi, Patna and analysed. On analysis it revealed that on 12.05.2022, Rs. 25000/- were transferred into the account of Aamir Jalal s/o Md. Jalaluddin (A-2) from the Punjab National Bank, Bharwara, Distt- Muzaffarpur account no. 0772010316309 of Saqeeb Ahmad, s/o Md. Nayaj Ahmad Ankhuli Bhandhpur Katra, Muzaffarpur, Bihar. On analysis of the call data records of mobile number 9262711612 of said Saqeeb Ahmad, it was found that this mob no. was connected with accused Sanaullah (A-3) on the relevant dates which corroborated that the said amount was transferred on the direction of Sanaullah (A-5)."

6. Regarding giving the first floor of the building on rent, the prosecution's case is that though the land and the building stand in the name of the appellant's wife, she is merely a name lender. The appellant purchased the property on 19th April 2005 for the consideration of Rs. 1,25,000/-. In the counter, the respondent has relied upon the appellant's disclosure /confessional statement. Whether such a statement is admissible in evidence or not is another thing. In the statement of the appellant relied upon by the respondent, it is stated that accused no.1, Athar Parvez, met his elder son - Aamir Jalal Khan, in April 2022 and discussed renting the first floor of the building to him.

The appellant's elder son - Aamir Jalal Khan, quoted rent of Rs 25,000/- per month. After that, there were negotiations, and finally, the rent was fixed at Rs. 16,000 per month. Accused no.1 gave Aamir Jalal Khan an advance of Rs. 5,000/-. Thereafter, a sum of Rs. 25,000/- was transferred by accused no.1 to the account of Aamir Jalal Khan and the remaining amount of Rs. 2,000/- was paid at the time of execution of the lease. In the appellant's statement, it is stated that this amount of Rs. 32,000/- was paid as advance rent for two months.

In the statement, the appellant stated that accused no.1 gave him information about the PFI organisation. The appellant stated that people from Bihar and other States used to visit the premises taken on rent by accused no.1. He stated that as he suspected that there would be a police raid, he removed items kept on the first floor premises, like gas cylinders, etc. Even the statement of accused no.1 relied upon in the counter gives the same facts.

Thus, the material on record, including the so-called discovery statement of the appellant and co-accused, shows that the premises on the first floor of the building Ahmad Palace were let out to accused no.1, who agreed to pay rent of Rs. 16,000/- per month and gave an advance of Rs. 32,000/- towards rent for two months. We may note here that, assuming that the appellant knew that coaccused Athar Parvez was associated with PFI, it is not listed as a terrorist organisation within the meaning of Section 2(m) of UAPA. Moreover, the charge sheet does not contain any material to show any connection of the appellant with PFI before letting out first floor premises to accused no.1.

7. About the sum of Rs. 25,000/- received by the appellant's son in his account, there is an explanation in the so-called discovery statement of the appellant relied upon by the respondent. Therefore, what is brought on record is that after the appellant's son negotiated with accused no.1, the premises on the first floor were let out to accused no.1 at the monthly rent of Rs. 16,000/- per month, and the amount received by appellant's son in his account was towards the part payment of the advance of rent for two months.

8. Now, we come to the other circumstances against the appellant. In paragraph 15.5 of the charge sheet, it is alleged that the appellant shifted certain items from the first floor before the raid was conducted on 11th July 2022. In the discovery statement of the appellant relied upon by the respondent in its counter, the appellant stated that he had kept items like gas cylinders, etc., in the first floor premises, which he removed.

9. In the raid on the first floor premises on 11th July 2022, certain documents were recovered as stated in paragraph 17.1 of the charge sheet. No recovery has been shown from the appellant. The charge sheet describes in detail the contents

of the document styled "India 2047 Towards Rule of Islamic India". It is alleged in the charge sheet that the scrutiny of the said documents revealed that the said documents were about establishing Islamic rule in India. It is pertinent to note that there is no mention in the charge sheet about the nature of the articles allegedly shifted earlier by the appellant from the first floor premises.

If the appellant intended to shift incriminating material circulated by PFI, he would have shifted the material mentioned in paragraph 17.1 of the charge sheet. A statement by Syed Abu Monawwar discloses that there were commercial premises, such as shops, pathology labs, etc., on the ground floor of the said building. If the appellant intended to allow the conduct of the objectionable activities of PFI by giving first floor premises on rent, he would not have installed CCTV cameras.

10. Now, we turn to the circumstance relied upon by learned ASG, which is in paragraph 17.16. Paragraph 17.16 purports to reproduce what protected witness Z stated. We again reproduce the said paragraph, which reads thus:

"17.16 Protected witness-"Z" further stated that on 29th May 2022, a meeting cum training was organized in Ahmad Palace, Phulwarisharif Parna, a rented accommodation arranged by Athar Parvej (A-1) and others in this criminal conspiracy. This meeting was chaired by Riyaz Firangipet (A-20) of Karnataka and approximate 40-45 persons including Mahboob Alam Nadvi (A-7), Sanaullah (A-5), Riyaz Mourif (A-4), Mehboob- Ur-Rehman (A-11), Ehsan Parvez (A-7), Ansarul Huque (A-21), Riyaz Ahmed (A-17), Perwez Alam (A-26), Tausif Alam (A-6), Athar Parvej (A-1), Md. Jalaluddin (A-2) and others, who are associated with PFI, attended this meeting.

During this meeting, the points related to expansion of organisation, basic and advance training of PFI members, Muslim empowerment and future plan of PFI were discussed. Protected Witness-Z also stated that after the remark of Nupur Sharma on Prophet Mohammad, directions were given to the trained PFI cadres to attack and kill selected targets who were involved in making derogatory remarks against Islam."

Thus, paragraph 17.16 purports to reproduce the statement of protected witness Z. In terms of our earlier order, the translated version of the statement of protected witness Z, recorded before the Additional Chief Judicial Magistrate, Patna, has been produced in a sealed envelope. We find that the statement substantially differs from what is narrated in paragraph 17.16 of the charge sheet.

11. The perusal of the statement shows that protected witness Z did not expressly state that the appellant participated in the meeting held on 29th May 2022. He has

set out the names of several persons who attended the meeting. The appellant's name is not included in the names set out. In fact, the statement of protected witness Z indicates that after the meeting, the appellant was introduced as the owner of the building. Paragraph 17.16 alleges that protected witness Z stated that in the meeting, subjects such as the expansion of the organisation, basic and advanced training of PFI members and future PFI plans were discussed, and a direction was given to trained PFI cadre to eliminate one Nupur Sharma.

In the statement of protected witness Z, all that is not found. In fact, protected witness Z stated that during the meeting, emphasis was given on strengthening the status of Muslims, imparting them basic and advanced training and strengthening the status of education, politics and administration of Muslims and Muslim empowerment. Going by the witness's version, we find that there was no discussion about the activities of PFI in the meeting held on 29th May 2022. According to the witness, the direction to kill Nupur Sharma was issued in June 2022 and not in the meeting of 29th May 2022.

We are not reproducing the statement of the protected witness Z as it has been kept in a sealed cover. Suffice it to say that what is reproduced in paragraph 17.16 is not correct. The material portion of witness Z's actual statement has been completely distorted in paragraph 17.16 of the charge sheet. Several things which protected witness Z did not state have been incorporated in paragraph 17.16. Unfortunately, paragraph 17.16 attributes certain statements to protected witness Z, which he did not make. NIA owes an explanation for that. The investigating machinery has to be fair. But, in this case, paragraph 17.16 indicates to the contrary.

12. Now, we come to the provision relating to bail under the UAPA, which is sub-Section 5 of Section 43D of the UAPA, which reads thus:

"43-D. Modified application of certain provisions of the Code.-

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

13. Learned ASG relied upon a decision of this Court in the case of Gurwinder Singh v. State of Punjab and Another2. This Court extensively considered its

earlier decision in the case of National Investigation Agency v. Zahoor Ahmad Shah Watali3, which deals with interpretation of Section 43D(5). Paragraph 32 of the said decision reads thus:

"32. In this regard, we need to look no further than Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] which has laid down elaborate guidelines on the approach that courts must partake in, in their application of the bail limitations under the UAP Act. On a perusal of paras 23 to 24 and 26 to 27, the following 8-point propositions emerge and they are summarised as follows:

32.1.Meaning of "prima facie true":

On the face of it, the materials must show the complicity of the accused in commission of the offence. The materials/evidence must be good and sufficient to establish a given fact or chain of facts constituting the stated offence, unless rebutted or contradicted by other evidence.

32.2. Degree of satisfaction at pre chargesheet, post charge-sheet and post-charges - compared:

"26. once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 of CrPC), do not make out reasonable grounds for believing that the accusation against him is prima facie true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case."

32.3. Reasoning, necessary but no detailed evaluation of evidence:

"24. the exercise to be undertaken by the Court at this stage-of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage."

32.4. Record a finding on broad probabilities, not based on proof beyond doubt:

"The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise."

32.5. Duration of the limitation under Section 43-D(5):

"26. the special provision, Section 43-D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof."

32.6. Material on record must be analysed as a "whole"; no piecemeal analysis

"27. the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance."

32.7. Contents of documents to be presumed as true:

"27. The Court must look at the contents of the document and take such document into account as it is."

32.8. Admissibility of documents relied upon by prosecution cannot be questioned:

The materials/evidence collected by the investigation agency in support of the accusation against the accused in the first information report must prevail until contradicted and overcome or disproved by other evidence. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible."

(emphasis added)

14. There is one more decision of this Court in the case of Thwaha Fasal v. Union of India4, which again deals with the scope of Section 43D(5) of UAPA. After considering the decision in the case of Zahoor Ahmad Shah Watali3, in fact, in paragraph 24, the case has been extensively reproduced. Thereafter, in paragraph 26, this Court held thus:

"26. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the court is satisfied after examining the material on record that there are no reasonable grounds for

believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI.

The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the court while examining the issue of prima facie case as required by subsection (5) of Section 43-D is not expected to hold a mini trial. The court is not supposed to examine the merits and demerits of the evidence. If a charge-sheet is already filed, the court has to examine the material forming a part of charge-sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the court has to take the material in the charge-sheet as it is."

(emphasis added)

15. As held in the case of Thwaha Fasal4, the Court has to examine the material forming part of the charge sheet to decide whether there are reasonable grounds for believing that the accusations against the person applying for bail are prima facie true. While doing so, the court must take the charge sheet as it is.

16. Now, we come to the offences alleged against the appellant. Offences punishable under Sections 13, 18, 18A, and 20 of the UAPA have been alleged against the appellant. Section 13 reads thus:

"13. Punishment for unlawful activities.-

(1) Whoever-

(a) takes part in or commits, or

(b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

(3) Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the Government of any other

country or to any negotiations therefor carried on by any person authorised in this behalf by the Government of India."

The term unlawful activity has been defined in Section 2(o), which reads thus:

"2 Definitions.- .....

(o) "unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),-

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;"

Sections 18 and 18A of UAPA read thus:

"18. Punishment for conspiracy, etc.-

Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directly or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

18A. Punishment for organising of terrorist camps.-

Whoever organises or causes to be organised any camp or camps for imparting training in terrorism shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine." There is nothing in the charge sheet which shows that the appellant has taken part in or has committed unlawful activities as defined in the UAPA. There is no specific material to show that the appellant advocated, abetted, or incited commission of any unlawful activities.

A terrorist act is defined in Section 15(1). Assuming that the co-accused were indulging in terrorist acts or were making any act preparatory to the commission

of terrorist acts, there is absolutely no material on record to show that there was any conspiracy to commit any terrorist act to which the appellant was a party. There is no material produced on record to show that the appellant advocated, abetted, advised, or incited the commission of terrorist acts or any preparatory activity.

17. We must note here that the appellant's son conducted the negotiations for giving the first floor on rent. Taking the charge sheet as correct, it is not possible to record a prima facie finding that the appellant knowingly facilitated the commission or preparation of terrorist acts by letting out the first floor premises. Again, there is no allegation in the charge sheet against the appellant that he organised any camps to impart training in terrorism.

18. Now, we come to Section 20 of UAPA, which reads thus:

"20. Punishment for being member of terrorist gang or organisation.- Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine."

Terrorist gang has been defined in Section 2(L), which reads thus:

"2 Definitions.-.....

(L) "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;"

There is not even an allegation in the charge sheet that the appellant was a member of any terrorist gang. As regards the second part of being a member of a terrorist organisation, as per Section 2(m), a terrorist organisation means an organisation listed in the first schedule or an organisation operating under the same name as the organisation was listed. The charge sheet does not mention the name of the terrorist organisation within the meaning of Section 2(m) of which the appellant was a member. We find that the PFI is not a terrorist organisation, as is evident from the first schedule.

19. Therefore, on plain reading of the charge sheet, it is not possible to record a conclusion that there are reasonable grounds for believing that the accusation against the appellant of commission of offences punishable under the UAPA is prima facie true. We have taken the charge sheet and the statement of witness Z as they are without conducting a mini-trial. Looking at what we have held earlier, it is impossible to record a prima facie finding that there were reasonable grounds for believing that the accusation against the appellant of commission of offences

under the UAPA was prima facie true. No antecedents of the appellant have been brought on record.

20. The upshot of the above discussion is that there was no reason to reject the bail application filed by the appellant.

21. Before we part with the Judgment, we must mention here that the Special Court and the High Court did not consider the material in the charge sheet objectively. Perhaps the focus was more on the activities of PFI, and therefore, the appellant's case could not be properly appreciated. When a case is made out for a grant of bail, the Courts should not have any hesitation in granting bail. The allegations of the prosecution may be very serious. But, the duty of the Courts is to consider the case for grant of bail in accordance with the law.

"Bail is the rule and jail is an exception" is a settled law. Even in a case like the present case where there are stringent conditions for the grant of bail in the relevant statutes, the same rule holds good with only modification that the bail can be granted if the conditions in the statute are satisfied. The rule also means that once a case is made out for the grant of bail, the Court cannot decline to grant bail. If the Courts start denying bail in deserving cases, it will be a violation of the rights guaranteed under Article 21 of our Constitution.

22. Hence, the impugned orders are set aside. The appeal is allowed. The appellant is directed to be enlarged on bail on the terms and conditions as may be fixed by the Special Court. For that purpose, the appellant shall be produced before the Special Court within a maximum of 7 days from today. The Special Court shall enlarge the appellant on bail until the conclusion of the trial on appropriate terms and conditions. The Special Court shall hear the counsel for the respondent before fixing the terms and conditions.

23. We make it clear that the tentative findings recorded in this judgment are only for considering the prayer for bail. The reasons are confined to the case of the appellant. The same will have no bearing on the trial and cases of the co-accused.

.....J. (Abhay S. Oka)

.....J. (Augustine George Masih)

New Delhi;

August 13th, 2024.

1 (2024) 6 SCC 591

2 (2024) 5 SCC 403

3 (2019) 5 SCC 1

4 (2022) 14 SCC 766

IN THE SUPREME COURT OF INDIA

James Kunjwal
Vs.
State of Uttarakhand & Anr.

[Criminal Appeal No._____ of 2024
arising out of SLP (Crl.) No. 9783/2023]

HEADNOTE – Laid down the yardsticks which should be fulfilled for initiating proceedings for the offence of perjury under Section 193 of Indian Penal Code, 1860.

JUDGMENT

Sanjay Karol, J.

1. Leave Granted.

2. Impugned in the present appeal is the final order dated 1st October 2022, passed by the High Court of Uttarakhand at Nainital in Bail Cancellation Application No.24/2022, whereby, although the said application was dismissed, it was observed that James Kunjwal, the present appellant had intentionally filed a false affidavit before the High Court and as such, a direction was issued to the Registrar (Judl.) of the High Court to file a complaint against him. This, in a nutshell, forms the basis for this appeal.

3. It would be necessary to appreciate the background in which the impugned order came to be passed. Briefly stated, the facts are:-

3.1 The appellant was made an accused in FIR No.109 of 2021 dated 2nd May, 2021 under Sections 376 & 504 of the Indian Penal Code, (45 of 1860)1 by the second respondent 'X'2 on the ground that the appellant had established relations with her on the false pretext of marriage, and the same continued after efforts towards marriage by the complainant repeatedly fell through.

3.2 In reference to the said FIR, the appellant applied for bail, before the learned Additional District and Sessions Judge, Nainital which was rejected.3 Aggrieved thereby, the appellant pleaded his case for bail before the High Court.4 Vide order dated 8th June, 2021, such an application was allowed.

3.3 The complainant sought cancellation of such order of bail by way of Bail Cancellation Application No.24/2022. Various grounds were urged therein, including the appellant having made contradictory statements.

3.4 The High Court, while dismissing the application for cancellation of bail, vide impugned judgment made observations and issued directions, now the subject matter of adjudication in appeal before this Court.

4. The order dated 1st October, 2022 of the learned Single Judge, while dismissing the bail cancellation application, made reference to the conflict of facts in the affidavits filed by the complainant and the present appellant. While the complainant submitted in her affidavit that certain events took place, the present appellant denied the same with certain explanations.

It was further noted that the State's affidavit supported the position of the present respondent. Despite the said contradiction having been brought to the notice of the present appellant, he "did not assist the Court in finding the truth about the incident of 24.07.2022". It was, as such, concluded that the appellant had intentionally filed a false affidavit before the Court. Accordingly, in the penultimate paragraph of the judgment, issued the following directions:

"28. The above narration establishes that the respondent no.2 intentionally filed false affidavit before the Court, Therefore, this Court requests Registrar, Judicial of this Court to file a complaint against the respondent no.2 in, the court of competent jurisdiction for filing a false affidavit."

5. Pursuant to such an Order by the High Court, a complaint under Section 193 of the IPC was filed before the Chief Judicial Magistrate, Nainital bearing the following particulars - Criminal Complaint No.2991 of 2022, titled as State Through Registrar (Judicial), Hon'ble High Court of Uttarakhand at Nainital v. James Kunjwal.

6. By way of the special leave petition it is urged that mere denial of the averments in the pleadings would not constitute the offence of perjury. Further, it was urged that a Court is not "bound" to make a complaint under Section 195(1)(b), Code of Criminal Procedure, 1973, unless it is of the opinion that it is expedient in the interest of justice to do so. Reliance is placed on a Constitution Bench judgment of this Court in Iqbal Singh Marwah v. Meenakshi Marwah5.

7. In the counter affidavit it has been claimed that the appellant has misrepresented and twisted certain facts, for instance, that he continued to have relations with the 2nd Respondent despite his marriage being fixed with someone else; that the appellant had forced the complainant to terminate her pregnancy etc. The respondent, in view of the above, has submitted that the High Court was

justified in directing the filing of the complaint against the appellant. At this juncture, for ready reference, we extract the relevant portion of what the complainant had said in her bail cancellation application. It reads as under:-

"9 That the applicant want to seek the kind attention of the Hon'ble court that on today's date. It is evident and obvious that the personal status of the applicant and her family would be again in knowledge of the accused but still accused James Kunjwal is chasing applicant opting various ways, asking and pressurizing her to settle down the case by stating that he loves applicant, giving her love proposal, asking her to meet, to call etc and also sending obscene text, and status to applicant and on denial by the applicant and asking him to put his words before the respected hon'ble court and trial court started abusing her and her family badly also talking obscene to her. For the kind perusal of this Hon'ble court a true photo copy of the WhatsApp messages and status text and instagram messages are being filed herewith and marked as Annexure No.7 to this bail cancellation application.

10. That being aggrieved by the aforesaid objectionable activities of the accused the applicant/complainant made a complaint before the police station - kathgodam on 24-7-2022. For the kind perusal of this Hon'ble court a true photo copy of the complaint letter along with its type copy is being filed herewith and marked as Annexure No.8 to this bail cancellation application.

11. That pursuant to this complaint the accused was called at police station and before police station he made a statement that he made a statement he will not repeat the any action in any manner but after returning from the police station when he reach his home the accused again started abusing her badly and also passing obscene comments to applicant through Whatsapp text status. For the kind perusal of this Hon'ble court a true photo copy of the whatsapp text status is being filed herewith and marked as Annexure No.9 to this bail cancellation application.

12. That despite the promise made before the police station the accused did not stop the sending 10 abusing watsapp status messages therefore she again informed to the concerned police station kathgodam, on the perusal of which they called accused again where he accepted that he is doing this intentionally therefore police gave warning to him not to repeat the same again and again and police told the applicant that thought they can lodge the F.I.R. against the accused but the applicant cannot proof just on the basis of the various messages through social media platforms (WhatsApp and Instagram)."

8. In response thereto, the appellant in his affidavit had averred as under:

"9. That the contents of the para no 9 are denied.

10. That the contents of the Para no 10 are matter of record and hence need no comments.

11. That the contents of the para no 10, 11 & 12 are denied. That the no such incident took place in the Police station and there is no material evidence to prove this. The respondent no 2 did not approach the applicant in fact it was the applicant who messaged and abused the respondent no.2 and communicated said indecent things about respondent no.2. The applicant alleged regarding depicting whatsapp status, but the respondent no2 denies communicating the status to the applicant. It is pertinent to mention here that Whatsapp status is not a message and is not sent or deliver to a specific person.

It requires positive act by viewer to look into somebody status which is his own privacy. If someone is seeing a whatsapp status than that person is invading/barging into the privacy of other person who has allegedly depicted his status. Thus it cannot be said that respondent no.2 somehow threatened or abused the applicant. It is a case where the applicant is hoodwinking the whole process, moreover the applicant has not mentioned on which dates these status were uploaded, the applicant is just using these random screenshot to file a frivolous case."

9. Hence, in the attending facts, the short question that falls for consideration of this Court is whether the contents of the affidavit filed before the High Court, as taken note of in the impugned order, constitutes an offence under Section 193 IPC, as defined in Section 191 IPC?

10. Section 191 IPC which defines the offence, reads as under:-

"191. Giving false evidence. Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.- A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.- A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know."

Section 193 IPC, under which the appellant is sought to be prosecuted is extracted below for reference.

"193. Punishment For False Evidence. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.- A trial before a Court-martial is a judicial proceeding.

Explanation 2.- An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice."

11. Section 195(b)(1) of Cr.P.C. (relevant portion reproduced hereinbelow) provides that no Court shall take cognizance of an offence committed under Sections 193 to 196, 199, 200, 205-211; except on the complaint in writing of the Court or by an officer of the Court, duly authorized. Section 340 mentions the procedure in respect of the prosecution as delineated under Section 195.

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-

(1) No Court shall take cognizance-

(a) .....

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) .....

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii)...

(2) ...

(3) ...

(4) ..."

12. The proper approach in cases where Section 193 is in play, it has been held by this Court in Dr. S.P. Kohli, Civil Surgeon, Ferozepur v. High Court of Haryana Through Registrar6 as under:

"16. It is true that what the courts have to see before issuing the process against the accused is whether there is evidence in support of the allegations made by the complainant to justify the initiation of proceedings against the accused and not whether the evidence is sufficient to warrant his conviction, but this does not mean that the courts should not prima facie be of the opinion that there are sufficient and reasonable grounds for setting the machinery of criminal law in motion against the accused. The moment this guiding principle is overlooked, the prosecution degenerates itself into persecution which often is fraught with evil consequences."

(Emphasis supplied)

Referred to in Himanshu Kumar & Ors. v. State of Chhattisgarh & Ors.7

13. When prosecution should be sanctioned under this Section by Courts has been expounded on by a Bench of three learned Judges in Chajoo Ram v. Radhey Shyam & Anr.8

"7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose.

Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge."

(Emphasis supplied)

Referred to in Himanshu Kumar (supra); Narendra Kumar Srivastava v. State of Bihar & Ors.9

14. In this regard we may also notice the pronouncement in R.S. Sujatha v. State of Karnataka10, referred to in Aarish Asgar Qureshi v. Fareed Ahmad Qureshi11 wherein it was observed:

"9. Both these judgments were referred to and relied upon with approval in R.S. Sujatha v. State of Karnataka [R.S. Sujatha v. State of Karnataka, (2011) 5 SCC 689 : (2011) 2 SCC (Cri) 757] (at paras 15 and 16). This court, after setting down the law laid down in these two judgments concluded : (SCC pp. 694-95, para 18)

"18. Thus, from the above, it is evident that the inquiry/contempt proceedings should be initiated by the court in exceptional circumstances where the court is of the opinion that perjury has been committed by a party deliberately to have some beneficial order from the court. There must be grounds of a nature higher than mere surmise or suspicion for initiating such proceedings. There must be distinct evidence of the commission of an offence by such a person as mere suspicion cannot bring home the charge of perjury. More so, the court has also to determine as on facts, whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed."

(Emphasis supplied)

15. The three essential factors which can be said to be sine qua non for the application of Section 193 IPC as held in Bhima Razu Prasad v. State Rep. by Deputy Supdt. of Police, CBI/SPE/ACU-II12 are:-

(1) false statement made on oath or in affidavits;

(2) that such statements be made in a judicial proceeding; or (3) such statement be made before an authority that has been expressly deemed to be a 'Court'.

16. What we may conclude from a perusal of the above-noticed judicial pronouncements is that:-

(i) The Court should be of the prima facie opinion that there exists sufficient and reasonable ground to initiate proceedings against the person who has allegedly made a false statement(s);

(ii) Such proceedings should be initiated when doing the same is "expedient in the interests of justice to punish the delinquent" and not merely because of inaccuracy in statements that may be innocent/immaterial;

(iii) There should be "deliberate falsehood on a matter of substance";

(iv) The Court should be satisfied that there is a reasonable foundation for the charge, with distinct evidence and not mere suspicion;

(v) Proceedings should be initiated in exceptional circumstances, for instance, when a party has perjured themselves to beneficial orders from the Court.

17. The statement made by the appellant, that has been deemed to be befitting the offence of giving false evidence before the Court, which is known commonly as perjury, was more in the nature of denial of the statements made in the affidavits of the complainant herein.

18. We are of the view that, in the present facts, a denial simpliciter cannot meet the threshold, as described in the judgments above, particularly when no malafide intention/deliberate attempt can be understood from the statement made by the appellant in the affidavit. As has already been observed, mere suspicion or inaccurate statements do not attract the offence under the Section. It cannot be disputed that the statements made in the affidavit were only to state his version of events and/or deny the version put forth by the complainant.

19. We are also of the firm opinion that such statements do not make it expedient in the interest of justice, nor constitute exceptional circumstances in which such Sections may be invoked. Given that these proceedings would constitute an offence, independent of the one for which the appellant is already facing trial, it cannot be unequivocally held that there was deliberate falsehood on a matter of substance.

20. We find that at least three of the possible scenarios, as discussed supra, in which a court would be justified in invoking these powers on the face of it appear to be unmet, prosecution, therefore, would be unjust. We say so for the reason that the respondent in her counter affidavit filed before this Court makes no particular allegation nor does she provide any of the material that was allegedly placed before the competent prosecuting authorities or the Court.

She only alleges untruth on the part of the appellant 8/12/2024stating that the Court was correct in initiating proceedings against him for making the false statement. She further makes certain statements that fall outside the scope of the present adjudication and pertain to the trial of the main offence pending before the court of competent jurisdiction.

21. Consequent to the above discussion, we set aside the direction of the High Court of Uttarakhand in regard to registering a complaint against the present appellant. Any proceedings arising therefrom shall stand quashed.

The appeal is, accordingly allowed. Before parting with the matter, it stands clarified that the decision in this appeal shall have no bearing on the criminal case pending against the appellant which shall proceed on its own merits as per law.

Pending application(s), if any, shall stand disposed of.

.....J. (B.R. Gavai)

.....J. (Sanjay Karol)

.....J. (K.V. Viswanathan)

New Delhi.

August 13, 2024

1 'IPC' hereinafter

2 Complainant

3 First Bail Petition No.180 of 2021, at Annexure P-3

4 First Bail Application No.1190 of 2021, at Annexure P-4

5 (2005) 4 SCC 370

6 (1979) 1 SCC 212

7 2022 SCC OnLine SC 884

8 (1971) 1 SCC 774

9 (2019) 3 SCC 318

10 (2011) 5 SCC 689

11 (2019) 18 SCC 172

12 (2021) 19 SCC 25

IN THE SUPREME COURT OF INDIA

In Re: Right to Privacy of Adolescents

[Suo Motu Writ Petition (C) No. 3 of 2023]
[Criminal Appeal No. 1451 of 2024]

HEADNOTE – A judgment of the Court cannot contain the Judge's personal opinions on various subjects. Similarly, advisory jurisdiction cannot be exercised by the Court by incorporating advice to the parties or advice in general. The Judge has to decide a case and not preach. The judgment cannot contain irrelevant and unnecessary material. A judgment must be in simple language and should not be verbose. Brevity is the hallmark of quality judgment. We must remember that judgment is neither a thesis nor a piece of literature. However, we find that the impugned judgment contains personal opinion of the Judges advice to the younger generation and advice to the legislature.

JUDGMENT

Abhay S. Oka, J.

Factual Aspects

1. Criminal Appeal no.1451 of 2024 has been preferred by the State of West Bengal, aggrieved by the judgment and order dated 18th October 2023, passed by a Division Bench of the High Court of Judicature at Calcutta. The learned Special Judge appointed under the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act'), Baruipur, South 24 Parganas, convicted the accused for the offences punishable under Section 6 of the POCSO Act and Sections 363 and 366 of the Indian Penal Code, 1860 (for short, 'the IPC').

For the offence punishable under Section 6 of the POCSO Act, the accused was sentenced to undergo rigorous imprisonment for twenty years and pay a fine of Rs.10,000/-. He was sentenced to rigorous imprisonment for four and five years, respectively, for the offences punishable under Sections 363 and 366 of the IPC. Though the learned Special Judge under the POCSO Act concluded that the accused was guilty of the offences punishable under clause (n) of sub-section (2) and sub-section (3) of Section 376 of the IPC, in view of the sentence imposed for the offence punishable under Section 6 of the POCSO Act, no separate punishment was imposed.

2. The victim girl was fourteen years old at the time of the incident. The victim's mother lodged a First Information Report (FIR) on 29th May 2018. The victim's mother stated in her complaint that the victim, who was her minor daughter, escaped from her home at 5:30 p.m. on 20th May 2018 without informing anyone. On inquiry, it was found that the accused enticed her to leave her house. The accused did so with the help of his two sisters.

The victim's mother repeatedly visited the house of the accused and requested him to facilitate the return of her daughter. However, the victim did not come back. A female child was born to the victim. Admittedly, the accused is the biological father of the child. There was a gross delay in the investigation, and the accused was arrested on 19th December 2021. The chargesheet was filed on 27th January 2022 against the accused for the offences for which he was convicted.

In addition, the accused was charged with the offence punishable under Section 9 of the Prohibition of Child Marriage Act, 2006. The prosecution examined seven witnesses. We may note here that as the learned Special Judge under the POCSO Act found that there was no evidence of marriage between the victim and the accused, the charge under Section 9 of the 2006 Act was held as not substantiated.

3. By the impugned judgment, the High Court held that the offences punishable under Sections 363 and 366 of the IPC were not made out, and therefore, the High Court acquitted the accused for the said two offences. Considering the factual scenario that the High Court noticed, it purported to exercise its jurisdiction under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Cr. PC') to set aside the conviction of the accused for the offences punishable under Section 6 of the POCSO Act and sub-sections 2(n) and (3) of Section 376 of the IPC. The High Court noted that the mother of the victim had disowned her and therefore, the victim was continuously residing with the accused along with their minor child.

4. The Suo Motu writ petition was initiated based on the directions issued by the Hon'ble Chief Justice of India for challenging the impugned judgment. The State Government has preferred the criminal appeal to challenge the order of acquittal.

5. Considering the nature of the observations made by the High Court and the findings recorded by it, this Court appointed Ms. Madhavi Divan and Ms. Liz Mathew, the learned senior counsel, as amicus curiae to assist the Court. Both of them have rendered valuable assistance to the Court. Along with them, Ms. Nidhi Khanna, Advocate-on-Record, has also assisted the Court.

We have heard Mr.Huzefa Ahmadi, the learned senior counsel appearing for the State Government and the learned counsel representing the accused and the victim. The learned senior counsel for the State Government has taken a fair stand. The accused and the victim are on the same page and want to continue their cohabitation.

Analysis of Evidence

6. We have perused the evidence of the prosecution witnesses and the statement of the accused under Section 313 of the Cr. PC. From the statement and the evidence on record, it becomes an admitted position that the age of the victim on the date of the incident was fourteen years, and the age of the accused was about twenty-five years. When the statement of the accused was recorded, the age of the victim's daughter was about ten months. Though it is the case of the prosecution that the marriage between the accused and the victim was solemnised on 20th May 2018 in a temple, there is no evidence adduced by the prosecution on this aspect.

7. The evidence of the victim reveals that she also claimed that she married the accused. She stated that her daughter was ten months old. She stated in the cross-examination that she left her house of her own will and married the accused. She stated that since the year 2019, she has been residing in the house of the accused. She stated in the cross-examination that she would like to stay in the house of the accused.

8. The first informant, the victim's mother, deposed that on 20th May 2018, the victim was fourteen years and three months old. She produced the victim's birth certificate in the evidence. She stated that her daughter was kept in Narendrapur Sanlaap home, from where she was brought to her house. After staying in the house for a few months, she again went to the house of the accused.

9. We are not referring to the medical evidence as it is an admitted position that the accused kept physical relations with the victim, and the victim has given birth to a female child. There is no dispute that the accused is the biological father of the child. There is no explanation for the gross delay in investigation and the delay in arresting the accused. As stated earlier, the accused was arrested on 19th December 2021. Later on, he was enlarged on bail.

Guilt of The Accused

10. Section 6 of the POCSO Act reads thus:

"6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

'Penetrative sexual assault' is defined under Section 3 of the POCSO Act. In this case, there is no dispute about the fact that the accused committed penetrative sexual assault on the victim. As the victim became pregnant as a consequence of the sexual assault, in view of sub-clause (ii) of clause (j) of Section 5 of the POCSO Act, it became a case of aggravated penetrative sexual assault. On facts, there cannot be any dispute that the commission of the offence punishable under Section 6 of the POCSO Act by the accused was duly proved.

11. Under Section 375 of the IPC, having penetrative intercourse with a victim who is under 18 years of age with or without her consent becomes an offence of rape. As the offence was repeatedly committed on the victim, clause (n) of sub-section (2) of Section 376 of the IPC is attracted. Therefore, the accused was liable to be punished in accordance with Section 376(2)(n) of the IPC. Sub-section (3) of Section 376 provides for a minimum punishment of twenty years for the offence of rape when the victim is less than sixteen years of age.

12. Section 361 of the IPC defines "Kidnapping from lawful guardianship". The said provision reads thus:

"361. Kidnapping from lawful guardianship.-

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

In the facts of the case, there is no evidence to prove that the accused took the victim out of the keeping of the lawful guardian. Similarly, there is no evidence of enticing the victim. The mother of the victim deposed that the victim left her house on her own. That is also the version of the victim. Hence, the prosecution did not establish kidnapping. Therefore, the offences punishable under Sections 363 and 366 of the IPC are not made out. But, there is no doubt that the offences punishable under Section 6 of the POCSO Act and Subsections (2)(n) and (3) of Section 376 of the IPC were made out.

Judgment

13. When a Court deals with an appeal against an order of conviction, the judgment must contain (i) a concise statement of the facts of the case, (ii) the

nature of the evidence adduced by the prosecution and the defence, if any, (iii) the submissions made by the parties, (iv) the analysis based on the reappreciation of evidence, and (v) the reasons for either confirming the guilt of the accused or for acquitting the accused. The appellate court must scan through the evidence, both oral and documentary, and reappreciate it. After reappreciating the evidence, the appellate court must record reasons for either accepting the evidence of the prosecution or for disbelieving the evidence of the prosecution.

The Court must record reasons for deciding whether the charges against the accused have been proved. In a given case, if the conviction is confirmed, the Court will have to deal with the legality and adequacy of the sentence. In such a case, there must be a finding recorded on the legality and adequacy of the sentence with reasons. The ultimate object of writing a judgment is to ensure that the parties before the Court know why the case is decided in their favour or against them. Therefore, judgment must be in a simple language. The conclusions recorded by the Court in the judgment on legal or factual issues must be supported by cogent reasons.

14. No doubt, the Court can always comment upon the conduct of the parties. However, the findings regarding the conduct of the parties must be confined only to such conduct which has a bearing on the decision-making. A judgment of the Court cannot contain the Judge's personal opinions on various subjects. Similarly, advisory jurisdiction cannot be exercised by the Court by incorporating advice to the parties or advice in general.

The Judge has to decide a case and not preach. The judgment cannot contain irrelevant and unnecessary material. A judgment must be in simple language and should not be verbose. Brevity is the hallmark of quality judgment. We must remember that judgment is neither a thesis nor a piece of literature. However, we find that the impugned judgment contains personal opinion of the Judges advice to the younger generation and advice to the legislature.

Objectionable Portions of The Impugned Judgment

15. Ms Madhavi Divan, the learned senior counsel appointed as amicus curiae, has culled out the portions of the impugned judgment which, according to her, are highly objectionable. We are reproducing the same:

i. "We feel it prudent to mention here that we noticed a rustic lady with a rumpled saree and unkempt hair, looking more aged than her age standing in a corner of the Court with a baby in her arms." (Para 2)

ii. "Non-exploitative sexual relationship without any intent is in rise among adolescents in our country. We may only say that may be for the reason of

climatic change, change in food habits etc. girls are attaining puberty now-a-days in a younger age and sexuality develop in them very early may be owing to peer pressure, influence by social media, free availability of porn materials and free mixing with friends of opposite sex in a taboo free atmosphere. This being, however, sociological study by experts, we do not want to comment on these aspects. To top it all we do not want to go to the pathology of the offence(s) statutorily outlined in the POCSO Act." (Para 13)

iii. "The discussion so far stresses on a "Rights based approach" so far as adolescents are concerned. We may sound narrow in our view, but the practicality of the facts is that a "Rights based approach" as a panacea for all the problems that come is not the solution, and in our view, not the just and correct approach. For conferring the Rights suggested in the aforesaid discussion on the "captioned group" i.e. adolescents between the age fold of 16 to 18 in "romantic relationship", some test are to be satisfied first. Those are:

i) Whether conferment of suggested Rights on the "captioned group" is/are in their best interest?

ii) Whether the captioned group has the discretion and maturity to use that Rights for their best interest?

iii) Whether such rights at such age is conducive for over all development of their personality or it is destructive of their self development?

iv) Who are the persons on whom such Rights are to be conferred, are they disciplined adolescents or a wayward lot, who have no control on their trivial urge to have sex?

v) Whether conferment of such Rights on the captioned group is in the best interest of the society?" (para 29)

iv. "To find answers to these tests opinions of some individuals, Rights activists, or view of so called liberals are not at all sufficient." (Para 29.1)

v. "Fundamental Rights in the Constitution and various other Rights in different statutes have been given to individuals for a balance in society, to check arbitrariness of the Government and development of best self of an individual. If we go deep into our old texts, we find that Rights are not conferred but they are earned by action of an individual. If we look at Bentham's theory, it is found that every right has corresponding duty/duties or obligation/ obligations. By performing the obligation, you have to earn the Right/Rights. It is somewhat similar to the old oriental philosophy "Do your duty and earn your Right." (para 30)

vi. "The principal androgenic steroid is testosterone, which is secreted primarily from the testes in men and ovaries in women and in small amounts from the adrenal glands, both in men and women. Hypothalamus and pituitary gland control the amount of testosterone, which is primarily responsible for sex urge and libido (in men). It's existence is there in the body, so when the respective gland becomes active by stimulation, sexual urge is aroused. But activation of the respective responsible gland is not automatic.

It needs stimulation by our sights, hearing, reading erotic materials and conversation with opposite sex. So sexual urge is created by our own action. Sex in adolescents is normal but sexual urge or arousal of such urge is dependent on some action by the individual, may be a man or woman. Therefore, sexual urge is not at all normal and normative. If we stop some actions), arousal of sexual urge, as advocated in our discussion supra, ceases to be normal." (Para 30.1)

vii. "Ask any parents of an adolescent, may be a boy or girl, you shall get the answer how difficult it is to give a right upbringing to him/her in view of free flow of negative materials from the web and social media, which hamper their thinking process and living. We, therefore, propose to take a "Duty/obligation based approach" to the issue in hand." (Para 30.2)

viii. "It is the duty/obligation of every female adolescent to:

(i) Protect her right to integrity of her body.

(ii) Protect her dignity and selfworth.

(iii) Thrive for overall development of her self transcending gender barriers.

(iv) Control sexual urge/urges as in the eyes of the society she is the looser (sic) when she gives in to enjoy the sexual pleasure of hardly two minutes.

(v) Protect her right to autonomy of her body and her privacy. It is the duty of a male adolescent to respect the aforesaid duties of a young girl or woman and he should train his mind to a respect a woman, her self worth, her dignity & privacy, and right to autonomy of her body." (Para 30.3)

ix. "Similarly, parental guidance and education so far as boys are concerned is to include how to respect a woman; how to keep dignity of a woman; how to protect the integrity of body of a woman; and how to befriend a woman without being aroused by sexual urge even if there is advances from the other side till he becomes capable to maintain a family. [.]." (Para 31)

x. "We do not want our adolescents to do anything that shall push them from dark to darker side of life. It is normal for each adolescent to seek the company of opposite sex but it is not normal for them to engage in sex devoid of any commitment and dedication. We want them to spread their wings high with a view to realise their best selves. Sex shall come automatically to them when they grow self-reliant, economically independent and a person which they dreamt one day to be.

Along with sex in such a stage shall come love with commitment and dedication towards each other as they shall have the discretion and maturity to understand each other, adjust with each other and forgive each other. We beseech our adolescents to follow a salutary legal principle of Mahabharata "Dharmo Rakshyati Rakshyita" (one who protects law is protected by law) and proceed in their path of selfdevelopment without being influenced by bashful urge of urgent sex." (Para 32)

xi. "So far as the case of criminalisation of romantic relationship between two adolescents of opposite sex is concerned it should better be left to the wisdom of the judiciary. Each judiciary in the world has the nicety of pluralism. Each individual judge has his/her own opinion. He/She has his/her own unique style of addressing an issue. We are, therefore, of the view that the grey area of adolescent consensual sex about which much commotion is made should be left to the discretion and wisdom of the judiciary. It is also found from decisions of different Hon'ble High Courts that such matters have been dealt with in proper perspective taking into consideration the peculiarity of case placed before the court" (Para 33)

xii. "Coming to the present case we find that this is a case of nonexploitative consensual sexual relationship between a minor girl and an older adolescent or may be a young adult." (Para 38)

xiii. "In the present case things are even on better footing. The girl was 14+ when the occurrence happened. The boy was also an old adolescent or a young adult at that time. [.]" (Para 39)"

(emphasis added)

15.1 We need not waste pages dealing with every observation/finding quoted above. The observations are utterly irrelevant for deciding the controversy. To say the least, these observations are shocking, which will ex-facie invite a finding of perversity.

Reasons Recorded by The High Court for Acquittal

16. Now, we come to the reasons recorded by the Division Bench. The Division Bench has invited a very peculiar concept of "non-exploitative sexual acts" while dealing with the offences punishable under Section 376(2)(n) of the IPC and Section 6 of the POCSO Act. We fail to understand how a sexual act, which is a heinous offence, can be termed as non-exploitative.

When a girl who is fourteen years old is subjected to such a horrific act, how can it be termed as "non-exploitative"? In paragraph 17, the High Court refers to "marital rape". In this case, there is no evidence of marriage. The Bench has also invented a non-existent category of "older adolescents" and lamented about the lack of recognition of the consensual behaviour of older adolescents. We fail to understand this concept of "older adolescents". Further, the Division Bench goes on to observe that sexual behaviour in adolescents, particularly from the onset of puberty, is established as being a natural, normative and integral part of an adolescent's development.

17. We must deal with some of the observations made by the High Court. The High Court concluded that by equating Suo Motu Writ Petition (C) no.3 of 2023 etc. Page 16 of 50 consensual and non-exploitative sexual acts with rape and aggravated penetrative sexual assault, the law undermines the bodily integrity and dignity of adolescents. The High Court was not called upon to discuss the merits and demerits of the existing laws. What is shocking is the observation made in paragraph 23 of the impugned judgment where the High Court observed that while achieving ostensible objectives to protect all children below 18 years from sexual exploitation, the law's unintended effect has been the deprivation of liberty of young people in consensual relationship.

The Court, surprisingly, carved out a non-existing category of romantic cases in the rape cases. While dealing with the offences under the POCSO Act, shockingly, the Court observed that the law undermines the identity of adolescent girls by casting them as victims, thereby rendering them voiceless. The Court says that, on the other hand, adult boys are discriminately treated as children in conflict with the law. Thereafter, in paragraph 25, the Court proceeded to criticise the POCSO Act by observing that it clubs all persons below eighteen years without considering their developing sexuality, evolving capacity and the impact of such criminalisation on their best interests.

In paragraph 28, the Court went further. It held that instead of protecting the adolescents from abuse, the law exposes them in factually consensual and non-exploitative relationships to the risk of criminal prosecution. It compromises the mandate of protecting the children. Therefore, the Court observes that an amendment is necessary to decriminalise consensual sexual acts involving adolescents above sixteen years. The High Court, while dealing with an appeal

against the order of conviction, was not called upon to make the observations which we have referred to above.

Perhaps these were the subjects on which only the experts could have debated at a different forum. The judges ought to have avoided expressing their personal views even assuming that there was some justification for holding the views. While the High Court observed this, it forgot that in the facts of the case, the Court was not dealing with the sexual acts involving adolescents above sixteen years, as the age of the victim was fourteen years and the accused was twenty-five years at the relevant time.

18. In paragraph 29, the Court went into the question of rights based approach, which was completely unwarranted. In paragraph 30.1, the Court referred to the generation of androgenic steroids and secretion from the pituitary gland. Thereafter, the Court laid down the duties and obligations of every female and adolescent in paragraph 30.3, which we have quoted above.

No reasons are required to be recorded for holding that incorporation of the same in the judgment is entirely irrelevant and unwarranted. After that, the Court proceeded to lay emphasis on incorporating the aspects of reproductive health and hygiene into the school curriculum. There are several statements and conclusions in the impugned judgment which, to say the least, are shocking. Perversity is writ large on the face of the judgment, which can be seen in several paragraphs of the impugned judgment.

19. The duty of the High Court was to ascertain on the evidence whether the offences under Section 6 of the POCSO Act and Section 376 of the IPC were made out. In view of "sixthly" in Section 375 of the IPC, penetrative intercourse with a woman under eighteen years of age, with or without her consent, constitutes an offence of rape. Therefore, whether such offence arises from a romantic relationship is irrelevant.

How can an act that is an offence punishable under the POSCO Act be described as "a romantic relationship"? The High Court went to the extent of observing that the case of criminalisation of a romantic relationship between two adolescents of opposite sex should be best left to the wisdom of the judiciary. The Courts must follow and implement the law. The courts cannot commit violence against the law. The findings and observations in the impugned judgment, except the finding on the applicability of Sections 363 and 366 of the IPC, cannot be sustained.

Exercise of Plenary Powers to Quash the Order of Conviction

20. Now, coming to the conviction of the offences punishable under Section 6 of the POCSO Act and Section 376(2)(n) of the IPC, the Division Bench proceeds

on the footing that the said offences have been established. However, the Court purported to exercise its "plenary powers" under Section 482 of the Cr.PC coupled with Article 226 of the Constitution of India to set aside the conviction of the accused. In short, as we can see from the last few paragraphs of the impugned judgment, the High Court was swayed away by the following aspects:

(a) There was a "non-exploitative" consensual sexual relationship between the two consenting adolescents;

(b) The ground reality was that after the birth of the child, the accused is taking care of the victim and the infant/small child;

(c) The victim has no support from her parents, and

(d) A humane view is required to be taken to do complete justice.

21. On a plain reading of "sixthly" in Section 375 read with Section 376(2)(n) of the IPC, notwithstanding the consensual sexual relationship, the offence punishable under clause (n) of sub-section (2) of Section 376 of the IPC, was made out. One of the objectives of the POSCO Act is to effectively address sexual exploitation and sexual abuse of children, as both offences are very heinous. To give effect to the United Nations Convention on the Rights of Children ratified by India on 11th December 1992, the POCSO Act has been enacted.

As noted earlier, in the facts of the case, the accused was not an adolescent, but his age was about twenty-five years on the date of the commission of the offence, and the victim was only fourteen years old. When such offences of rape and aggravated penetrative sexual assault are committed, by exercising its jurisdiction under Article 226 of the Constitution of India and/or Section 482 of the Cr.PC, the High Court cannot acquit an accused whose guilt has been proved.

22. Perhaps the consideration of sympathy and the so-called welfare of the victim and her child prevailed on the Judges of the High Court. The Court was influenced by the fact that the victim's parents did not support her, and therefore, by sending the accused to jail, she and her child would be miserable as the accused and his family were taking care of them.

23. There are various decisions of this Court holding that the High Court can exercise jurisdiction under Section 482 of the Cr.PC to quash a prosecution on the grounds of settlement or by consent. One such judgment is in the case of Gian Singh v. State of Punjab & Anr.1. Paragraph 58 of the said decision reads thus:

"58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor.

No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the wellbeing of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court.

In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all.

However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hardand- fast category can be prescribed."

(emphasis added)

23.1 Therefore, in view of the settled position of law, in the facts of the case, even if the accused and the victim (who has now attained majority) were to come out with a settlement, the High Court could not have quashed the prosecution.

Helpless Position of The Victim

24. The situation in which the victim was placed after the commission of the offence needs a bit of elaboration. As noted earlier, the victim left her house on

20th May 2018, and her mother filed a complaint on 29th May 2018. On 1st June 2018, PW-5 (ASI Gopal Chandra Saha) brought the victim from the house of the accused to the police station.

After her medical examination was conducted, she was sent for safe custody at Alor Disha Child Line at Champahati. PW-2, mother of the victim, without giving any particulars stated that she got her daughter back from Narendrapur Sanlaap home. She claimed in the cross-examination that the victim remained in her house for one year and, later on, went back to the house of the accused. She admitted that she never went to the home of the accused, not even to see her grandchild. The victim's parents completely abandoned her, at least from the year 2019.

25. Ms Madhavi Divan, the learned amicus curiae, rightly emphasized that no opportunity was made available to a girl of fourteen or fifteen years of age to make an informed choice to decide whether to stay with the accused. She did not get any support from her parents and the State machinery when she required it the most. As held by us hereafter, the State machinery failed to act according to the law to take care of the victim. The situation in which she was placed at that time was such that she had no opportunity to make an informed choice about her future. She had no option but to seek shelter where it was provided to her i.e. in the house of the accused. In any event, it is doubtful whether she could have made an informed choice at the age of fourteen or fifteen.

The Failure of the State

26. The question before us is whether the State was under an obligation to take care of the victim of an offence under the POCSO Act, who was fourteen years old. Apart from the State's constitutional obligations, the statutes have enough provisions to address this situation. Though the existing law of the land could have taken adequate care of the poor victim in this case, the machinery created by the law failed. These conclusions need more elaboration.

27. The first relevant statutory provision is Section 19 of the POCSO Act. Section 19 of the POCSO Act reads thus:

"19. Reporting of offences.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under subsection (1) shall be-

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)."

(emphasis added)

27.1 Thus, under sub-section (6) of Section 19, it was the duty of the police to report the matter to the Child Welfare Committee (for short, 'CWC') and the Special Court within a period of twenty-four hours from the time the police had the knowledge about the commission of the offence. There is nothing placed on record which shows that compliance was made by reporting the case to CWC.

28. Section 27 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'the JJ Act') provides for setting up the CWC. The powers of the CWC have been laid down in Section 29 of the JJ Act, which reads thus:

"29. Powers of Committee.-

(1) The Committee shall have the authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.

(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force, but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."

(emphasis added)

28.1 Thus, the authority of the CWC is to dispose of the cases for care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection. The authority conferred on the CWC creates a corresponding obligation. A child in need of care and protection has been defined under sub-section (14) of Section 2 of the JJ Act, which reads thus:

"2. Definitions:-

(14) "child in need of care and protection" means a child-

(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or

(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or

(iii) who resides with a person (whether a guardian of the child or not) and such person-

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and wellbeing of the child; or

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;

(15)....."

(emphasis added)

28.2 If a child is residing with a person who has injured, exploited or abused the child or has violated any other law for the time being in force meant for the protection of the child, the said child becomes a child in need of care and protection. Thus, if a child who is a victim of an offence under the POCSO Act is residing with the accused, the child becomes a child in need of care and protection. Even a child who has a parent or guardian and if such parent or

guardian is found to be unfit to take care of the child, in such a case, the child is covered by the definition under sub-section (14) of Section 2 of the JJ Act. Therefore, the CWC has to exercise the power to provide basic needs and protection to such children in need of care and protection.

29. Giving information of the commission of offence under the POCSO Act, as required by Section 19(6) of the POCSO Act, is not an empty formality. The CWC has to immediately step in and take action as provided under Section 30 of the JJ Act, which reads thus:

"30. Functions and responsibilities of Committee.-

The functions and responsibilities of the Committee shall include-

(i) taking cognizance of and receiving the children produced before it;

(ii) conducting inquiry on all issues relating to and affecting the safety and well-being of the children under this Act;

(iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(v) directing placement of a child in foster care;

(vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(vii) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(viii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

(xiv) dealing with cases referred by the Board under sub-section (2) of section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed."

(emphasis added)

29.1 Under clause (vi) of Section 30, it is the duty of the CWC to ensure care, protection, appropriate rehabilitation or restoration of children in need of care and protection based on the child's individual care plan. The CWC cannot wait till the children in need of care and protection are produced before it. Under clause (xii) of Section 30, the CWC must take suo motu cognizance of the cases and reach out to the children in need of care and protection. What is important here is clause (xiii) of Section 30, which mandates that it is the duty of the CWC to take

action for the rehabilitation of sexually abused children who are children in need of care and protection.

30. Section 31 of the JJ Act reads thus:

"31. Production before Committee.-

(1) Any child in need of care and protection may be produced before the Committee by any of the following persons, namely:-

(i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit or inspector appointed under any labour law for the time being in force;

(ii) any public servant;

(iii) Childline Services or any voluntary or non-governmental organisation or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer;

(v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home:

Provided that the child shall be produced before the Committee without any loss of time but within a period of twenty-four hours excluding the time necessary for the journey.

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to children's home or fit facility or fit person, as the case may be, during the period of the inquiry."

(emphasis added)

30.1 Sub-section (2) of Section 31 confers power on the State Government to provide for the manner of submitting the report to the CWC and the manner of sending and entrusting a child to a children's home or a fit facility. The West Bengal Juvenile Justice (Care and Protection of Children) Rules, 2017 (for short, 'the WB Rules') and in particular Rule 18, deal with the production of children before the CWC. Section 32 of the JJ Act enjoins an individual or police officer

to make a report regarding a child found separated from his/her guardian. Non-reporting is made an offence.

31. Then comes Section 36 of the JJ Act which provides for inquiry to be made by the CWC on production of child or on receipt of a report under Section 31. Sub-section (1) of Section 36 provides that the CWC may pass an order to send the child to a children's home or a fit facility or a fit person. Sub-section (2) of Section 36 contemplates speedy social investigation by social welfare or child welfare officers. The social investigation is required to be completed within fifteen days. This enables the CWC to pass final orders. After completion of the inquiry, the final order is to be passed in accordance with sub-section (3) of Section 36, which reads thus:

"36. Inquiry.-

(3) After the completion of the inquiry, if Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection, it may send the child to a Specialised Adoption Agency if the child is below six years of age, children's home or to a fit facility or person or foster family, till suitable means of rehabilitation are found for the child, as may be prescribed, or till the child attains the age of eighteen years: Provided that the situation of the child placed in a children's home or with a fit facility or person or a foster family, shall be reviewed by the Committee, as may be prescribed."

32. Then comes the crucial provision of Section 39 incorporated under Chapter VII. Section 39 deals with the process of rehabilitation and social re-integration, which reads thus:

"39. Process of rehabilitation and social re-integration.-

(1) The process of rehabilitation and social integration of children under this Act shall be undertaken, based on the individual care plan of the child, preferably through family based care such as by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care:

Provided that all efforts shall be made to keep siblings placed in institutional or non-institutional care, together, unless it is in their best interest not to be kept together.

(2) For children in conflict with law the process of rehabilitation and social integration shall be undertaken in the observation homes, if the child is not released on bail or in special homes or place of safety or fit facility or with a fit person, if placed there by the order of the Board.

(3) The children in need of care and protection who are not placed in families for any reason may be placed in an institution registered for such children under this Act or with a fit person or a fit facility, on a temporary or long-term basis, and the process of rehabilitation and social integration shall be undertaken wherever the child is so placed.

(4) The Children in need of care and protection who are leaving institutional care or children in conflict with law leaving special homes or place of safety on attaining eighteen years of age, may be provided financial support as specified in section 46, to help them to re-integrate into the mainstream of the society."

(emphasis added)

33. There are various provisions, such as foster care, providing a sponsor to the children, etc. Section 46 is another salutary provision that provides that any child leaving child care on completion of eighteen years of age may be provided with financial support to facilitate re-integration into the mainstream of society in the manner as may be prescribed by law. Section 46 of the JJ Act reads thus:

"46. After care of children leaving child care institution.-

Any child leaving a child care institution on completion of eighteen years of age may be provided with financial support in order to facilitate child's reintegration into the mainstream of the society in the manner as may be prescribed."

33.1 "After care" has been defined in Section 2(5) of the JJ Act. It is a provision for financial or otherwise support to persons in the age group of 18 to 21 years. Rule 25 of the WB Rules has been enacted to give effect to Section 46. Rule 25 reads thus:

"25. After Care of Children Leaving Institutional Care.-

(1) The State Government shall prepare a programme for children who have to leave Child Care Institutions on attaining eighteen years of age by providing for their education, giving them employable skills and placement as well as providing them places for stay to facilitate their reintegration into the mainstream of society in consultation with concerned committees on After Care.

(2) Any child who leaves a Child Care Institution may be provided after care till the age of twenty-one years on the order of the Committee or the Board or the Children's Court, as the case may be, as per Form 37 and in exceptional circumstances, for two more years on completing twenty-one years of age.

(3) The District Child Protection Unit shall prepare and maintain a list of organisations, institutions and individuals interested in providing after care as per their area of interest such as education, medical support, nutrition, vocational training etc. and the same shall be forwarded to the Board or the Committee and all Child Care Institutions for their record.

(4) The Probation Officer or the Child Welfare Officer or Case Worker or social worker, shall prepare a post release plan and submit the same to the Board or the Committee, through the concerned committees on After Care, two months before the child is due to leave the Child Care Institution, recommending after care for such child, as per the needs of the child.

(5) The Board or the Committee or the Children's Court, while monitoring the post release plan will also examine the effectiveness of the aftercare programme, particularly whether it is being utilized for the purpose for which it has been granted and the progress made by the child as a result of such after-care programme.

(6) Children who are placed in aftercare programme, shall be provided funds by the State Government for their essential expenses; such funds shall be transferred directly to their bank accounts.

(7) The services provided under the after-care programme may include:

(i) community group housing on a temporary basis for groups of six to eight persons;
(ii) provision of stipend during the course of vocational training or scholarships for higher education and support till the person gets employment;
(iii) arrangements for skill training and placement in commercial establishments through coordination with National Skill Development Programme, Indian Institute for Skill Training and other such Central or State Government programmes and Corporates, etc.;
(iv) provision of a counsellor to stay in regular contact with such persons to discuss their rehabilitation plans;
(v) provision of creative outlets for channelising their energy and to tide over the crisis periods in their lives;
(vi) arrangement of loans and subsidies for persons in aftercare, aspiring to set up entrepreneurial activities; and
(vii) encouragement to sustain themselves without State or institutional support.

(emphasis added)"

33.2 Section 46, read with Rule 25, is one of the most critical provisions that needs to be effectively implemented. Thus, the JJ Act has adequate provisions to ensure the care, protection, treatment, and rehabilitation of the victim of an offence under the POCSO Act. The ultimate object is to integrate the child in need of care and protection into society to lead a dignified and meaningful life.

34. If sub-section (6) of Section 19 is implemented in relation to the victims of the offences under the POCSO Act and thereafter, the CWC strictly implements the provisions of the JJ Act which we have referred to above, no victim will face the situation which the victim in this case had to face. The JJ Act is a complete code that makes provisions for the care, protection, treatment, and development of children in need of care and protection. The JJ Act provides for making available their basic needs and protection.

The Act takes care of all the needs of the victims under the POCSO Act who fall under the category of children in need of care and protection. The object is to undertake the rehabilitation and social re-integration process of such victims based on individual care plans as provided under Section 39 of the JJ Act. Section 46 is a provision that requires the State Governments to frame rules to provide financial support to any child living in a child care institution upon completion of 18 years of age. The financial support has to be very exhaustive as the object of financial support is to facilitate a child's re-integration into mainstream society.

35. However, at the grassroot level, sub-section (6) of Section 19 is not being implemented. Even if the information is provided to the CWC, the children in need of care and protection are not being produced before the CWC. Even if the information is given under sub-section (6) of Section 19 of the POCSO Act, the CWCs are not taking any action, though, under clause (xii) of Section 30, CWC has the duty to take suo motu congnizance of the cases and reach out to the children in need of care and protection who are not produced before the CWC.

Under sub-section (6) of Section 19, the police are under a mandate to report the matter to the jurisdictional Special Court or the jurisdictional Sessions Court, in the event the Special Court has not been established. On getting information, it will be ideal if the Special Courts or the Sessions Courts forward the information to the jurisdictional CWC. It is very crucial that sub-section (6) of Section 19 is scrupulously implemented and the CWCs take immediate action to protect the victim.

Therefore, we are directing that a copy of this judgment should be forwarded to the Secretaries of the Law Department of each State and Union Territories. The Law Secretaries must coordinate with the concerned departments and ensure that

the benefits of these statutory provisions under the JJ Act are extended to the victims of the offences under the POCSO Act. The Secretaries will also ensure that the State Governments undertake the process of framing rules as required by Section 110(1), including the rules provided under Section 46, to make the measures provided under the JJ Act more effective.

36. It is nobody's case that, in the present case, recourse was taken to the provisions starting from sub-section (6) of Section 19 of the POCSO Act. As these statutory provisions were overlooked entirely, a situation was created which did not allow the victim to make an informed choice about her future. She did not get that opportunity even after attaining majority.

37. It is the responsibility of the State to take care of helpless victims of such heinous offences. Time and again, we have held that the right to live a dignified life is an integral part of the fundamental right guaranteed under Article 21 of the Constitution of India. Article 21 encompasses the right to lead a healthy life. The minor child, who is the victim of the offences under the POCSO Act, is also deprived of the fundamental right to live a dignified and healthy life.

The same is the case of the child born to the victim as a result of the offence. All the provisions of the JJ Act regarding taking care of such children and rehabilitating them are consistent with Article 21 of the Constitution of India. Therefore, immediately after the knowledge of the commission of a heinous offence under the POCSO Act, the State, its agencies and instrumentalities must step in and render all possible aid to the victim children, which will enable them to lead a dignified life.

The failure to do so will amount to a violation of the fundamental rights guaranteed to the victim children under Article 21. The police must strictly implement subsection (6) of Section 19 of the POCSO Act. If that is not done, the victim children are deprived of the benefits of the welfare measures under the JJ Act. Compliance with Section 19(6) is of vital importance. Non-compliance thereof will lead to a violation of Article 21.

38. Unfortunately, in our society, due to whatever reasons, we find that there are cases and cases where the parents of the victims of the offences under the POSCO Act abandon the victims. In such a case, it is the duty of the State to provide shelter, food, clothing, education opportunities, etc., to the victim of the offences as provided in law. Even the child born to such a victim needs to be taken care of in a similar manner by the State.

After the victim attains the majority, the State will have to ensure that the victim of the offence can stand on his/her legs and, at least, think of leading a dignified

life. That is precisely what Section 46 of the JJ Act provides. Sadly, in the present case, there is a complete failure of the State machinery. Nobody came to rescue the victim of the offence, and thus, for her survival, no option was left to her but to seek shelter with the accused.

39. We may note here that the Ministry of Women and Child Development, Government of India, has framed a scheme for care and support to the victims under Sections 4 and 6 of the POSCO Act. The scheme is very exhaustive and even contains a provision for providing accommodation to girl child victims up to the age of eighteen years and aftercare support up to the age of twenty-three years. It provides health services, counselling, and mental health services.

It provides for helping the victim to acquire education and vocational skills. Apart from the scheme mentioned above of the Ministry of Women and Child Development, Government of India, the National Legal Services Authority (NALSA) has come out with a Compensation Scheme for Women Victims and Survivors of Sexual Assault/other Crimes-2018. Extensive benefits are made available to the victims of sexual offences under the said scheme.

What Next?

40. At this stage, we may note that on 9th May 2024, the learned counsel appearing for the State has filed a written note which records the State's assurance to support the victim. In paragraph 5 of the note, the State has stated thus:

"5. Such support is enumerated below only by way of illustration

a. That the State Govt is committed to finding a home for the victim (Mother) and the minor child in a safe environment and also provide for all the daily requirements.

b. That the State shall further also coordinate with NGOs working in this space to prepare a work-cumlife plan for the victim and the minor child in order to make her independent and ensure that she can make an informed choice about her and her child's future and her stand in the present proceedings.

c. Till such time that the victim is financially independent, state will provide for the educational need of the minor child.

d. Any other logistical support that this Hon'ble Court may deem fit and appropriate."

40.1 We may note here that Mr. Huzefa Ahmadi, the learned senior counsel representing the appellant-State in Criminal Appeal No.1451 of 2024, without taking instructions from the State, had earlier assured the Court to extend support to the victim in the manner mentioned above. The State Government must support the victim's child. In this case, there is a failure of the machinery under the JJ Act in the State to discharge its obligations to the victim. Therefore, the State Government must go out of its way to help the victim.

41. Now, the question is whether we can force the child to take benefit of the support extended by the State Government. It may be argued that it is too late for the State to come out with this offer. Still, the Court must allow the victim to make an informed choice after being informed the details of the support that the State is willing to extend. We must do so as, at no stage, she was given such an option and an opportunity to make an informed choice about her future. Now, the question is how to enable the victim to exercise her option. This must be left to very qualified professionals/experts to ascertain her views.

This can be done by directing the State to constitute a team of two or three experts, including a clinical psychologist and a social scientist, who should meet the victim at a proper place and inform the victim about the offer of the State Government with all its material particulars. The state government can get assistance from expert bodies like the National Institute of Mental Health and Neurosciences (NIMHANS) or the Tata Institute of Social Sciences (TISS) to constitute the team. The experts will have to meet the child on multiple occasions.

While doing so, the experts will have to carefully ascertain the kind of support, if any, the victim and her child are getting from the accused and his family members. For that purpose, the committee can seek the help of the local child welfare officer. We must leave it to the committee of experts to decide how it will do the exercise. The place, the time and the methods must be left to the Committee. The committee will have to perform its duties cautiously and sensitively. The committee must ensure that this exercise does not make the victim more insecure.

Conclusions

42. Thus, to conclude, we hold that the accused is guilty of the offences punishable under sub-sections (2)(n) and (3) of Section 376 of the IPC and Section 6 of the POCSO Act. The issue regarding sentencing will be considered after the committee's report is received.

43. This extraordinary situation was created because the State machinery did not follow the provisions of law starting from sub-section (6) of Section 19 of the POCSO Act. The importance of rehabilitation of the victims of offences under the POCSO Act, which is a mandatory requirement of law, is being overlooked by all stakeholders. Perhaps, at levels, there is a need for introspection and course correction. We include even the Judiciary in that.

44. Hence, we pass the following order:

(a) The impugned judgment of the High Court is set aside and the judgment of the Special Court is restored to the extent of the conviction of the accused for the offences punishable under sub-sections (2)(n) and (3) of Section 376 of the IPC and Section 6 of the POCSO Act. Accordingly, the accused stands convicted. The acquittal of the accused for the offences punishable under Sections 363 and 366 of the IPC is confirmed. The appeal is partly allowed. The issue regarding sentencing will be considered after receiving the report of the committee in terms of clause (h) below.

(b) We direct the Government of West Bengal to constitute a committee of three experts, including a clinical psychologist and a social scientist. The State Government may take the assistance of NIMHANS or TISS for constituting the committee. A child welfare officer shall be appointed to assist the committee as its coordinator and secretary;

(c) The committee shall be formed within three weeks from today;

(d) Within one week from the date of formation of the committee, the State Government shall provide all the material particulars/details of the benefits which it is willing to extend to the victim as stated in paragraph 5 of the note submitted on 9th May 2024 by the learned senior counsel appearing for the State;

(e) Thereafter, the committee shall meet the victim of the offences at such a place as it desires to communicate what the State Government is offering to her. The Committee must also inform the victim about the availability of the benefits of the scheme of the Government of India. The duty of the committee shall be to help the victim to make an informed choice whether she wants to continue to remain in the company of the accused and his family or wants to avail of the benefits offered by the State Government. This exercise will naturally require meetings with the victim on multiple occasions. In what manner this task should be performed is left to the committee to decide;

(f) The committee members must perform their duties very carefully and sensitively while ensuring that the victim does not develop a feeling of insecurity. While doing the exercise, the committee will endeavour to carefully ascertain the

kind of support, if any, the victim and her child are getting from the accused and his family members;

(g) The State Government and its officials shall render all possible facilities and help to the committee members;

(h) The coordinator of the committee shall submit a report in a sealed cover to this Court by 18th October 2024 through the Advocate-on-Record for the State Government. The report can be a preliminary report or a final report. The report should contain the details of the interactions with the victim and the opinion and recommendations of the committee. The committee is free to give its opinion on the action which would be in the best interest of the victim and her child; and

(i) We direct the Registry to forward copies of this judgment to the Secretaries of Law and/or Justice Departments of all the States and Union Territories. The Secretaries shall convene meetings of the Secretaries of the concerned departments and other senior officials. The object of holding such meetings is to ensure that appropriate directions are issued to all concerned to strictly implement the provisions of Section 19(6) of the POCSO Act and the relevant provisions of the JJ Act, which we have elaborated above.

The State/Union Territories must create machinery to do so. The State/Union Territories shall also assist the victims in getting the benefits under the scheme of the Government of India and the scheme of NALSA, which we have referred to above. In the meetings, the issue of framing Rules by the States to give effect to the provisions of Section 46 of the JJ Act, shall also be considered.

The Secretaries shall forward the compliance reports to the Secretary of the Ministry of Women and Child Development, Government of India, within a period of two months from today. The Secretary of the Ministry of Women and Child Development shall compile the reports and submit an exhaustive report before this Court within three months from today. A copy of this judgment shall also be forwarded to the Secretary to the Ministry of Women and Child Development, Government of India.

45. To consider the report submitted by the expert committee and for considering the sentencing, list this petition/appeal on 21st October 2024 at 03:00 p.m. before this Bench.

.....J. (Abhay S. Oka)

.....J. (Ujjal Bhuyan)

New Delhi;

1 (2012) 10 SCC 303

IN THE SUPREME COURT OF INDIA

Shajan Skaria
Vs.
State of Kerala

[Criminal Appeal No. 2622 of 2024

arising out of SLP (Crl.) No. 8081 of 2023]

HEADNOTE – Bar to anticipatory bail under Section 18 of the SC and ST (Prevention of Atrocities) Act, 1989 is not attracted unless a prima facie case under the Act is made out against the accused.

JUDGMENT

J. B. Pardiwala, J.:

For the convenience of exposition, this judgment is divided into the following parts:-

A. FACTUAL MATRIX .....

B. SUBMISSIONS ON BEHALF OF THE APPELLANT .....

C. SUBMISSIONS ON BEHALF OF THE COMPLAINANT .....

D. SUBMISSIONS ON BEHALF OF THE STATE .....

E. RELEVANT STATUTORY PROVISIONS .....

F. ISSUES FOR DETERMINATION .....

G. ANALYSIS .....

i. Evolution of the concept of anticipatory bail .....

ii. Whether Section 18 of the Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act? .....

a. Significance of the expression "arrest of any person" appearing in Section 18 of the Act, 1989 .....

iii. When can it be said that a prima facie case is made out in a given FIR/complaint? .....

iv. Whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) of the Act, 1989? .....

a. Meaning of the expression "intent to humiliate" appearing in Section 3(1)(r) of the Act, 1989 .....

v. Whether any offence under Section 3(1)(u) of the Act, 1989 is prima facie made out in the FIR/complaint in question? .....

vi. Whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the Act, 1989? ....

H. CONCLUSION .....

1. This appeal arises from the judgment and order dated 30.06.2023 passed by the High Court of Kerala at Ernakulam in Criminal Appeal No. 906 of 2023 filed by the appellant herein by which the High Court dismissed the appeal and thereby affirmed the order dated 16.06.2023 passed by the Special Judge for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Ernakulam Division declining to grant anticipatory bail to the appellant herein in connection with the First Information Report No. 899 of 2023 lodged by the complainant (Respondent No. 2) at the Elamakkara Police Station, District Ernakulam for the offence punishable under Sections 3(1)(r) and 3(1)(u) respectively of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (the "Act, 1989").

A. FACTUAL MATRIX

2. On 24.05.2023, the appellant herein, in his capacity as the Editor of an online news channel named "Marunandan Malayali" published a video on YouTube, an online video sharing platform, levelling certain allegations against the complainant. The English translation of the video transcript is reproduced hereinbelow: -

"Thumb
Every one's afraid of P.V. Srinijan who grew up like a mafia don!

Title
Who made P.V. Srinijan a mafia don?

Content
It was before a few days; the outside world knew about the news. The pride of Kerala, Kerala blasters was holding a selection trial which was for children under the age of 17. Children and parents had to wait for hours in front of the stadium at Panampally Nagar, Ernakulam which was owned by the Sports Council.

The Stadium was closed, because P.V. Srinijan, District Sports Council President and MLA of Kunnathunad had alleged that Kerala blasters had a debt to clear with Kerala Sports Council. Media took on the news and people got furious over it. With hesitation the gates were finally opened. Yesterday evening Srinijan said sorry, he said that he knew nothing about the incident and he was being targeted. Former National Sports Star and present Sports Council President, Sharaf Ali came out with strong stand that; one, Kerala blasters didn't owe any money.

Two, even if they owed money it's a matter for the sports council to deal with. The most important fact is that there is not any due, because all the grounds belong to the State Sports Council, the District Sports Council doesn't have any relation. Sharaf Ali also said that P.V. Srinijan doesn't have a say in it. There are no arrears in the contract between Kerala Blasters and Kerala Sports Council. The Kerala State Sports Council has informed the Council in writing.

The District Sports Council has no right to block. So why did Srinijan do the dirty work, who gave him the right to do so? Today evening another news came out. Including the sports hostel at Ernakulam, Panampalli Nagar and district sports development is being obstructed by Srinijan, the former Sports Council President and the National Sports Star Olympian Mercy Kutty said. The hostel at Panampally Nagar Sports Academy was one of the biggest sports hostels in Kerala. With arrival of Srinijan and the present President the administration got completely changed.

After that food was also not served at the hotel. Now vigilance investigation is going on. All the bills are fakes and the Sports Council's investigation is being piled up. Who should Kerala believe, Sharaf Ali, Mercy Kuttan or Srinijan? Sharaf Ali and Mercy Kuttan have shown their skills. They are national sports stars and are responsible and know how to act according to the situation at hand. They aren't political, so Kerala is more likely to believe these sports stars. Srinijan is lying, it's the latest example Srinijan's dramatic moves to slowly bring it under his control.

My question isn't this, whenever a scandal, corruption or illegal activities take place we will find Srinijan name under it. Srinijan is infamous, still the CPM which made Srinijan a candidate should remember he wasn't even a communist. He was a leader of the youth congress. The footage of the DYFI demonstration against Srinijan's relation to corruption and black money transactions are still available. First, CPM gives seat to him. Secondly, the people of the locality elect him. The MLA Post is the best example that the people of Kerala would allow any corrupt and black money dealer to become a leader.

By being at the MLA position, Srinijan has only done damage to the state. We know that it is hard for Kerala to invite industries over, because here political parties will raise red flags against it. Therefore, even those industries in Kerala are leaving. There are only a few industries who are born here and pays taxes correctly to the State. One such industry is the Kitex run by Kitex Sabu. The one who made Kitex Sabu to move to Telangana from Kerala was Srinijan. It was with Srinijan's consent that authorities used to pester Kitex and being a close friend to the CM Pinarayi Vijayan, Sabu had to come out to deal with the issue which made Sabu to leave the state and move his entire industry into Telangana.

This is the situation of an entrepreneur who gave jobs to millions and Srinijan is solely responsible for it. To destroy the enterprise, he made the employees get arrested in false charges, killed a person. The authorities were haunting the enterprise. It is said as Kadambrayar waste water, but investigation hasn't been fruitful. But we know that the waste is being generated from the Bhramapuram Plant which was later burnt. Now the dust and ashes are going to the Kadambrayar Lake. No one has a complaint about it. He made a businessman to move out of the State who was providing jobs to millions. Srinijan has many other allegations against him. Srinijan's father-in-law was the Chief Justice of Supreme Court.

There are allegations that during those days he made crores illegally which were even raised by the CPM. Reason for Srinijan's sudden growth in wealth is due to corruption has been come to knowledge. But no one has the guts to start an investigation against him. Because he has high connections even in the judiciary. Even an audio clip came out that he had used his relations in judiciary to bring down the Kitex Industry. The first was the account of Srinijan's destruction of the sports sector in order to bring it under his jurisdiction. The second was the conspiracy to drive out a businessman out of the State.

Viewers might remember the news I have given out about Prithviraj where it talked about the legal notice he had sent me. After receiving the legal notice, I have studied in depth about the film industry. From what I have learnt, there are some shocking facts related to it. I am just waiting for more proof. Knowingly or unknowingly Srinijan has a presence in the film industry. It is not as we thought, we can see Srinijan at most film sites. Srinijan is the middle man in film industry for many. Which means he is the one who provides funds the most in the film industry. But he does this with legal security.

We are gathering evidences and as we find it true we will publish it. Just focus on one thing. When Srinijan gave affidavit for participating in the competition he had to struggle to gather money because he had lots of black money. If he were to use it, he would get caught. So, he needed money in his account, so it is said that

he borrowed money from some movie producers to show in record. I investigated some of the movie producers listed in the records. These producers borrow from others including Srinijan to make movies.

In short, Srinijan acts as a young mafia don. Srinijan has presence in movie industry, sports sector and politics. Srinijan will go to any extreme to eliminate those who dares to stand against him. Srinijan has high connections in judiciary. We shouldn't question judiciary. But there are some judicial officers who are corrupt and Srinijan aids them. But no one is bold enough to question him. CPM has given Srinijan more power. Even the opposition is afraid to stand up against him. Even the judiciary is turning a blind eye. Even Kitex Sabu who fought against this leaves at one point.

Why is everyone afraid of him? Why is Kerala letting Srinijan to grow as a young mafia don?"

3. The complainant who is a Member of the Kerala Legislative Assembly representing the Kunnathunad constituency, a seat reserved for the members of the Scheduled Castes, aggrieved by the publication of the aforesaid video, filed a written complaint before the ACP, Central Police Station, Ernakulam alleging inter alia that the video was published by the appellant in order to publicise, abuse and insult the complainant, who is a member of a Scheduled Caste. The contents of the complaint are reproduced as under:

"I am the elected candidate for the Kunnathunad Assembly Constituency. Shri Sajan Skaria (Editor, News Reader and Publisher), Smt. Ann Mary George (Managing Editor & CEO), Shri Riju (Chief Editor) are using the online TV Channel named Marunadan Malayali (TC 17/3164 (11) Pattom Palace P.O., Pattom Thiruvananthapuram, PIN 695004) & are continuously concocting and spreading false news against me through different social media, which have no basis of any kind.

Such false news are created and spread in order to ridicule and humiliate me, as a member of the Scheduled Caste Pulaya Community. Shajan Skaria and aforesaid persons used my photo and uploaded a defamatory video against me through the Youtube Channel named Marunadan Malayali on 24.03.2023 with the title reading 'PV Sreenijan, who rose so suddenly as a Mafia Don' and the same was shared through other social media as well. He raised a false allegation against me, who is the President of District Sports Council that there is a vigilance inquiry going on against me regarding running of a sports hostel.

Besides he also alleged that I am trying to destroy the business ventures and I have falsely implicated and jailed the employees of Kitex. He also made a very

serious allegations against me that I have murdered one person. Shajan Skaria and the aforesaid persons are making efforts through their channel and other social media to me as a murderer, without any basis. That after the aforesaid video was uploaded, many people have shared the same on different social media platforms.

On seeing this video, many persons from within the State of Kerala outside telephoned me and talked about this matter and raised doubts as to whether I am such a person or not. I doubt that the above actions of Shajan Skaria, Smt. Ann Mary George and Shri Riju is a part of their efforts to intentionally destroy the public faith that I enjoy in the society.

The video published through the Online News Channel Marunadan Malayali on 24.05.2023 containing only false news and false averments, is knowingly made with the knowledge that I belong to Scheduled Caste Pulaya community and thus only to deliberately humiliate and ridicule me among the general public. Shajan Skaria, Smt. Ann Mary George, Shri Riju who belongs to Christian Community, knowing it fully well that I belong to Scheduled Caste Pulaya Community, has uploaded and spread the video as aforesaid with the deliberate intention of humiliating, ridiculing me among the general public.

The same is an offence and is punishable under Section 3(r) and 3(u) of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. That I faced severe humiliation, loss and damages due to the aforesaid actions of Shajan Skaria, Smt. Ann Mary George and Shri Riju. Hence it is prayed that necessary legal action be taken against Shajan Skaria, Smt. Ann Mary George and Shri Riju against creating and spreading of false news through online channel and other social media under the Sections of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, sections of IT Act and Sections of IPC.

Sd/xx P.V. Sreenijan
Attaching the CD."

4. On the basis of the aforesaid complaint, FIR No. 899 of 2023 dated 09.06.2023 came to be registered against the appellant and two other persons, who are not parties to the present appeal, for offences punishable under Section 120(o) of the Kerala Police Act (the "KP Act") and Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989.

5. A plain reading of the FIR would indicate that the appellant is not a member of the Scheduled Caste and he is alleged to have published and disseminated a video containing disparaging content about the complainant with a view to publicise,

abuse and insult the complainant. The complainant has alleged that the video has caused him a lot of humiliation, mental pain and agony. The complainant has also alleged that the video was uploaded by the appellant with the intention to humiliate and ridicule him among the general public with the knowledge that the complainant is a member of the Pulaya community, which is a Scheduled Caste.

6. Apprehending his arrest, the appellant went before the Court of Special Judge for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, Ernakulam Division, praying for grant of anticipatory bail under Section 438 of the Criminal Procedure Code, 1973 (the "CrPC"). The Special Judge, vide order dated 16.06.2023, rejected the anticipatory bail application of the appellant, holding that the allegations in the FIR are prima facie sufficient to attract the offence under the Act, 1989 and the bar of Section 18 of the said Act prohibits the court from exercising powers under Section 438 of the CrPC.

7. The appellant challenged the order passed by the Special Judge before the High Court of Kerala, wherein the High Court, vide order dated 30.06.2023 ("impugned order"), affirmed the order passed by the Special Judge and refused to grant anticipatory bail to the appellant. Relevant observations made by the High Court in the impugned order are extracted hereinbelow:-

"8. Now the question arises whether the offence under Section 3(1)(r) will be attracted, in the absence of reference to the caste status of the second respondent in the news item. In my opinion that question cannot be decided, oblivious of the object behind the enactment and the reason for amending the Act in 2019. The Act was brought into force for preventing the commission of atrocities against members of the Scheduled Castes and Scheduled Tribes and to establish Special Courts for the trial of such offences and provide relief and rehabilitation to the victims of such offences.

The Act was amended on finding that, despite various measures to improve the socio-economic conditions of the scheduled Castes and Scheduled Tribes, they still remained vulnerable. Of course, as held by the Apex Court in Hitesh Verma and Ramesh Chandra Vaishya (supra), all insults or intimidation will not be an offence under the Act, unless such insult or intimidation is on account of the victim belonging to the Scheduled Castes or Scheduled Tribes. As observed earlier, materials on record do indicate that the video is intended to insult and humiliate the second respondent.

At this stage, the court can only go by the allegations in the complaint and the attendant circumstances. The allegation is specific to the effect that the appellant has been insulting and humiliating the second respondent only for the reason that he belongs to the Scheduled Caste. The attendant circumstances are the wanton

nature of the allegations and the repeated news items published against the second respondent. Going by the wording of Section 3(1)(r), reference to the caste name of the victim is not necessary for attracting the offence.

This is clear from the distinction between the wording of Section 3(1) (r) and 3(1)(s). As such, it is not possible to hold that there are no prima facie materials to attract the offence under Section 3(1)(r). In view of the finding on Section 3(1)(r), I am not venturing to decide whether the offence under Section 3(1)(u) is attracted or not. For the aforementioned reasons, the impugned order of the Special Court is upheld. In the result, the Criminal Appeal is dismissed."

(Emphasis supplied)

8. In view of the aforesaid, the appellant is before this Court with the present appeal.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

9. Mr. Sidharth Luthra and Mr. Gaurav Agrawal, the learned Senior Counsel appearing for the appellant made the following submissions:

a. The appellant had no intention to insult the complainant and merely stated the facts without mentioning the name of the complainant's caste or community. The appellant being a journalist, had published facts gathered through research and sources.

b. The High Court failed to take into consideration that the complainant has not alleged that the appellant intentionally insulted or intimidated him with an intent to humiliate him as a member of the Scheduled Caste or Scheduled Tribe community. A perusal of the telecast makes it clear that the appellant did not refer to the caste or community of the complainant. Even if the statements made in the video are said to be defamatory, the same by itself is not sufficient to attract an offence under the Act, 1989.

c. The complainant has not alleged that the appellant by words, either written or spoken, had promoted or attempted to promote feelings of enmity, hatred or ill-will against the members of the Scheduled Castes or Scheduled Tribes. Thus, no offence under Section 3(1)(u) of the Act 1989 is made out against the appellant.

d. The High Court failed to consider the judgments of the co-ordinate benches in XXX v. State of Kerala reported in ILR 2022 4 Ker. 620 and State of Kerala v. Hassan reported in 2002 (2) KLT 505, wherein it has been reiterated that the offence under Section 3(1)(u) of the Act, 1989 would be attracted only if the feelings of enmity, hatred or ill-will are promoted or attempted to be promoted

against members of the Scheduled Castes or Scheduled Tribes as a class and not on criticizing an individual member.

e. The decision of this Court in Hitesh Verma v. State of Uttarakhand reported in (2020) 10 SCC 710 held that an offence under Section 3(1)(r) is not established merely on the fact that the victim is a member of the Scheduled Caste, unless there is an intention to humiliate a member of the Scheduled Caste or Schedule Tribe for the reason that the victim belongs to such caste.

f. The decision of this Court in Ramesh Chandra Vaishya v. State of Uttar Pradesh & Anr. reported in 2023 SCC OnLine SC 668 held that every insult or intimidation would not amount to an offence under Section 3(1)(x) of the Act, 1989 unless, such insult or intimidation is targeted at the victim because he is a member of a particular Scheduled Caste or Scheduled Tribe.

g. The High Court failed to consider the decision of this Court in Prathvi Raj Chauhan v. Union of India reported in (2020) 4 SCC 727 wherein it was held that if the complaint does not make out a prima facie case for applicability of the provisions of the Act, 1989 then the bar created by Section 18 and Section 18A(i) would not apply.

C. SUBMISSIONS ON BEHALF OF THE COMPLAINANT

10. Mr. Haris Beeran, the learned counsel appearing on behalf of the complainant/Respondent No.2 made the following submissions:

a. The appellant is a habitual offender in creating controversies by intentionally propagating false and defamatory campaigns against respectable members of society with the sole purpose of attracting subscriptions to his web platform.

b. The Act, 1989 was enacted with the object to prevent the commission of offences and atrocities against the members of the Scheduled Caste and Scheduled Tribes. Section 3(1)(r) of the Act, 1989 underscores the crucial aspect of intentional insult and intimidation with the specific intent to humiliate a member of the Scheduled Caste or Scheduled Tribe. The primary aim of the Act, 1989 is to ameliorate the socioeconomic conditions of the community as they have been historically deprived of numerous civil rights. Therefore, an offence under the Act, 1989 is established when a member of these vulnerable sections of society is subjected to humiliation and harassment.

c. The appellant had wilfully disseminated the news against the complainant, containing false assertions, deliberately aimed at portraying the complainant in poor light in society on the ground that he was a member of a Scheduled Caste.

d. The false and derogatory remarks were spread with full awareness of the complainant's status as a person belonging to the Scheduled Caste, having been elected as an MLA in 2021 from a seat reserved for members of the Scheduled Caste community. The appellant's deliberate actions of insult and humiliation undeniably constitute the offence under Section 3(1)(r) of the Act, 1989.

e. The appellant himself has stated that the complainant is an MLA representing the Kunnathunad Constituency. This makes his intentions clear as it is common knowledge that the said constituency is reserved for members belonging to the Scheduled Castes.

f. The complainant has been singled out by the appellant for the sole reason that he belongs to a Scheduled Caste. The Appellant has made unsubstantiated allegations and aspersions against the complainant and has gone to the extent of calling him a 'murderer' and 'mafia don'.

g. The appellant has not spared even the former Chief Justice of India who happens to be the father-in-law of the complainant and a person belonging to a Scheduled Caste. The appellant has intentionally humiliated the father-in-law of the complainant, assassinating his character as he also belongs to the Scheduled Caste community. The appellant has not even spared the judiciary by levelling defamatory allegations.

h. The act of the appellant, as alleged, constitutes an offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989 and anticipatory bail cannot be granted in view of the bar under Section 18 of the Act, 1989.

i. Despite many notices issued by the investigating officers, the appellant has failed to turn up for the purpose of interrogation.

j. The appellant could be said to have exhibited a pattern of wilful noncompliance of the court orders, thereby showcasing a flagrant disregard for the courts. In a different case where anticipatory bail was granted to him, the appellant subsequently stopped attending the court proceedings and failed to cooperate in the investigation. The High Court took note of such behaviour and warned the appellant that his anticipatory bail could be revoked. Therefore, there is a substantial risk in granting anticipatory bail to the appellant.

D. SUBMISSIONS ON BEHALF OF THE STATE

11. Mr. P.V. Dinesh, the learned Senior Counsel appearing on behalf of the State (Respondent No. 1 herein) made the following submissions:

a. The complainant is an MLA from Kunnathunad constituency which is reserved for members of the Scheduled Caste and the telecast of the video was with a clear knowledge that the complainant belongs to a Scheduled Caste community.

b. To constitute an offence under Section 3(1)(r) of the Act, 1989, it is not necessary to mention the caste of the person. The video was uploaded with the intention to cause insult and humiliate the complainant and thereby promote feelings of hatred and ill will.

c. The appellant has filed a petition before the Kerala High Court to quash the FIR and the same is currently pending.

E. RELEVANT STATUTORY PROVISIONS

12. Before adverting to the rival submissions canvassed on either side, it is necessary for us to look into few relevant provisions of the Act, 1989, the CrPC and the KP Act:

Section 3 of the Act 1989:

Punishments for offences of atrocities.-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

(u) by words either written or spoken or by signs or by visible representation or otherwise promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes;

Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine

Section 18 of the Act 1989:

Section 438 of the Code not to apply to persons committing an offence under the Act.-

Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

Section 438 of the CrPC:

Direction for grant of bail to person apprehending arrest.-

[(1) Where any person has reason to believe that he may be arrested on accusation of having committed a nonbailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and.

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under subsection (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.]

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

[(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).]

Section 120 of the KP Act:

Penalty for causing nuisance and violation of public order.- If any person,-

(o) causing, through any means of communication, a nuisance of himself to any person by repeated or undesirable or anonymous call, letter, writing, message, e-mail or through a messenger; shall, on conviction, be punishable with imprisonment which may extend to one year or with fine which may extend to five thousand rupees or with both.

F. ISSUES FOR DETERMINATION

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following issues fall for our consideration:

a. Whether Section 18 of the Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act?

b. When can it be said that a prima facie case is made out in a given FIR/complaint?

c. Whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) of the Act, 1989?

d. Whether any offence under Section 3(1)(u) of the Act, 1989 could be said to have been prima facie made out in the FIR/complaint in question?

e. Whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the Act, 1989?

G. ANALYSIS

i. Evolution of the concept of anticipatory bail

14. The Code of Criminal Procedure, 1898 did not contain any specific provision analogous to Section 438 of the CrPC. In Amir Chand v. The Crown, reported in 1949 SCC OnLine Punj 20, the question before the Full Bench was whether Section 498 of the Criminal Procedure Code, 1898 empowered the High Court or the Sessions Court to grant bail to a person who had not been placed under restraint by arrest or otherwise. The Full Bench answered the reference as under:

"The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued. Section 498, Criminal Procedure Code, does not permit the High Court or the Court of Session to grant bail to anyone whose case is not covered by sections 496 and 497, Criminal Procedure Code.

It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself. No bail can be allowed to a person at liberty for whose arrest no warrants have been issued. The petitioners in the present case are, therefore, not entitled to bail. The question referred to the Full Bench is, therefore, answered in the negative."

(Emphasis supplied)

15. Under the 1898 Code, the concept of anticipatory or pre-arrest bail was absent and the need for introduction of a new provision in the CrPC empowering the High Court and Court of Session to grant anticipatory bail was pointed out by the 41st Law Commission of India in its report dated September 24, 1969. The report pointed out the necessity of introducing a provision in the CrPC enabling

the High Court and the Court of Session to grant anticipatory bail. It observed in para 39.9 of its report (Volume I): Anticipatory bail

"39.9 The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting detained in jail for some days.

In recent times, the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail"

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter. In order to settle the details of this suggestion, the following draft of a new section is placed for consideration:

'497-A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.' We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted.

But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed

as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

(Emphasis supplied)

16. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring express power on the High Court and the Court of Session to grant anticipatory bail. The said clause of the draft bill was enacted with certain modifications and became Section 438 of the CrPC.

17. The Law Commission, in paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised. We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice. It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

(Emphasis supplied)

18. It is apparent on a plain reading of the Statement of Objects and Reasons accompanying the Bill for introducing Section 438 in the CrPC that the legislature felt that it was imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases.

The purpose behind incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. A careful reading of this section reveals that the legislature was keen to ensure respect for the personal liberty by pressing in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court. [See:

Siddharam Satlingappa Mhetre v. State of Maharashtra and Others reported in (2011) 1 SCC 694]

19. Discussing in the context of anticipatory bail, this Court, in Siddharam (supra), discussed the relevance and importance of personal liberty as under:

"36. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilised existence.

37. Origin of "liberty" can be traced in the ancient Greek civilisation. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 BC, an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realise itself as fully as possible through the self-realisation of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the State was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realisation of the people.

43. A distinguished former Attorney General for India, M.C. Setalvad in his treatise War and Civil Liberties observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism.

According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the State. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the State can reach their goal of perfection. In brief, according to this doctrine, the State exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The State exists for the benefit of the individual.

49. An eminent English Judge, Lord Alfred Denning observed:

"By personal freedom I mean freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person. It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

50. An eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol. 18 (1978), p. 133 observed that "Liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body.""

ii. Whether Section 18 of the Act, 1989 imposes an absolute bar on the grant of anticipatory bail in cases registered under the said Act?

20. The Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989 is extracted hereinbelow:

"Statement of Objects and Reasons.

1. Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

2. Because of the awareness created amongst the Scheduled Castes and the Scheduled Tribes through spread of education, etc. they are trying to assert their rights and this is not being taken very kindly by the others. When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them.

When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the Government allotted land by the Scheduled Castes and the Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests.

Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and the Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes. Under the circumstances, the existing laws like the Protection of Civil Rights Act, 1955 and the normal provisions of the Penal Code, 1860 have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

3. The term 'atrocity' has not been defined so far. It is considered necessary that not only the term 'atrocity' should be defined but stringent measures should be introduced to provide for higher punishments for committing such atrocities. It is also proposed to enjoining on the States and the Union territories to take specific preventive and punitive measures to protect the Scheduled Castes and the Scheduled Tribes from being victimised and where atrocities are committed, to provide adequate relief and assistance to rehabilitate them."

21. It is evident from the aforesaid that the purpose of the Act, 1989 is to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes, to provide for establishment of special courts for the trial of such offences and to make provisions for the relief and rehabilitation of the victims of such offences.

22. The Act, 1989 could be said to have been enacted to improve the social and economic conditions of the vulnerable sections of the society as they have been historically subjected to various indignities, humiliations and harassment besides deprivation of life and property on account of their caste identity. The legislation, thus, intends to punish the acts committed against the vulnerable sections of the society for the reason that they belong to a particular community.

23. Section 18 of the Act, 1989 which makes the remedy of anticipatory bail unavailable in cases falling under the Act, 1989 reads thus:

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.- Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

24. It is manifest from a plain reading of Section 18 referred to above that it bars the applicability of Section 438 of the CrPC in respect of offences under the Act, 1989. The legislature in its wisdom thought fit that the benefit of anticipatory bail

should not be made available to the accused in respect of offences under the Act, 1989, having regard to the prevailing social conditions which give rise to such offences and the apprehension that the perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of such offences, if they are allowed to avail the benefit of anticipatory bail.

25. The constitutional validity of Section 18 of the Act, 1989 fell for the consideration of this Court in State of Madhya Pradesh v. Ram Krishna Balothia reported in (1995) 3 SCC 221. The challenge essentially was on the following two grounds:

a. Section 18 is violative of Article 14 of the Constitution as the benefit of Section 438 of the CrPC is available to an accused for offences under the Indian Penal Code, 1860 ("IPC") but the same is not available for offences under the Act, 1989.

b. Section 18 is also violative of Article 21 of the Constitution which protects the life and personal liberty of every person in this country.

26. The Respondents in the aforesaid case had filed writ petitions before the High Court of Madhya Pradesh, challenging the constitutional validity of certain provisions of the Act, 1989. Although the High Court negatived some part of the challenge, yet it held that Section 18 of the Act, 1989 was unconstitutional as it was violative of Articles 14 and 21 respectively of the Constitution of India.

27. The aforesaid decision of the High Court was challenged before this Court which allowed the appeals and held that Section 18 of the Act, 1989 cannot be considered as violative of Articles 14 and 21 respectively of the Constitution. It was held that the offences enumerated under the Act, 1989 fall into a separate and special category. The Court considered Article 17 of the Constitution which expressly deals with abolition of "untouchability" and forbids its practice in any form and took the view that the offences enumerated under Section 3(1) of the Act, 1989 arise out of the practice of "untouchability". Having regard to the same, it was held that Section 18 of the Act, 1989 does not violate Article 14 of the Constitution in any manner.

28. On the aspect of Article 21 of the Constitution, it was held by this Court that although Article 21 protects the life and personal liberty of every person in this country, which also includes the right to live with dignity, yet it cannot be said that Section 438 of the CrPC is an integral part of Article 21. The Court took notice of the fact that there was no provision similar to Section 438 in the Criminal Procedure Code, 1898 and ultimately concluded that anticipatory bail is

not granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. Therefore, it was observed, that the non-application of Section 438 to a certain distinct category of offences cannot be considered as violative of Article 21 of the Constitution. Relevant observations made by the Court are reproduced hereinbelow:

"6. It is undoubtedly true that Section 438 of the Code of Criminal Procedure, which is available to an accused in respect of offences under the Penal Code, is not available in respect of offences under the said Act. But can this be considered as violative of Article 14? The offences enumerated under the said Act fall into a separate and special class. Article 17 of the Constitution expressly deals with abolition of 'untouchability' and forbids its practice in any form. It also provides that enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law. The offences, therefore, which are enumerated under Section 3(1) arise out of the practice of 'untouchability'.

It is in this context that certain special provisions have been made in the said Act, including the impugned provision under Section 18 which is before us. The exclusion of Section 438 of the Code of Criminal Procedure in connection with offences under the said Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. In this connection we may refer to the Statement of Objects and Reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament.

The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences.

7. We have next to examine whether Section 18 of the said Act violates, in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Article 21 enshrines the right to live with human dignity, a precious right to which every human being is entitled; those who have been, for centuries, denied this right, more so. We find it difficult to accept the

contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21.

In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.

9. Of course, the offences enumerated under the present case are very different from those under the Terrorists and Disruptive Activities (Prevention) Act, 1987. However, looking to the historical background relating to the practice of 'untouchability' and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorise their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.

10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even "minor offences" under the said Act. This grievance also cannot be justified. The offences which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.

12. In the premises, Section 18 of the said Act cannot be considered as violative of Articles 14 and 21 of the Constitution."

(Emphasis supplied)

29. However, over a period of time, the courts across the country started taking notice of the fact that the complaints were being lodged under the Act, 1989 out of personal and political vendetta. The courts took notice of the fact that the

provisions of the Act, 1989 were being misused to some extent for purposes not intended by the legislation. To overcome the bar of Section 18 of the Act, 1989, the persons against whom such complaints were being lodged started invoking the writ jurisdiction of the High Court under Article 226 of the Constitution.

30. Taking note of the aforesaid, this Court in Dr. Subhash Kashinath Mahajan v. State of Maharashtra and Another reported in (2018) 6 SCC 454, while quashing the proceedings instituted against the appellant therein under the provisions of the Act, 1989 thought fit to issue the following directions:

"79.1. Proceedings in the present case are clear abuse of process of court and are quashed.

79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.

79.3. In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a nonpublic servant after approval by the SSP which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinised by the Magistrate for permitting further detention.

79.4. To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

79.5. Any violation of Directions 79.3 and 79.4 will be actionable by way of disciplinary action as well as contempt.

79.6. The above directions are prospective."

31. The Parliament took notice of the aforesaid directions and thought fit to carry out certain amendments in the Act, 1989 vide the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018. The relevant portion is extracted hereinbelow:

"2. After section 18 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the following section shall be inserted, namely:-

"18A. (1) For the purposes of this Act,-

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.".

32. The provisions inserted by way of carving out Section 18-A of the Act, 1989 referred to above were made the subject matter of challenge in Prathvi Raj Chauhan (supra). In the said case, it was argued before a three-Judge Bench of this Court that Section 18-A inserted by way of amendment was only with a view to nullify the judgment of this Court in Subhash Kashinath (supra) referred to above.

This Court noted that it was not in dispute that the bar of Section 18-A in the Act, 1989 had been enacted because of the judgment passed by this Court in Subhash Kashinath (supra) more particularly in view of the directions contained in paragraphs 79.3 and 79.5 therein. The court also noted that the review petitions filed by the Union of India in Subhash Kashinath (supra) were allowed and the directions contained in paragraphs 79.3 to 79.5 referred to above were ordered to be recalled.

33. In such circumstances, this Court observed that the examination of the Constitutional validity of Section 18-A brought by way of the amendment had been rendered academic. However, the Bench proceeded to look into the matter. Justice Arun Mishra, speaking for himself and Justice Vineet Saran held as under:

"10. Section 18-A(i) was inserted owing to the decision of this Court in Subhash Kashinath [Subhash Kashinath Mahajan v. State of Maharashtra, (2018) 6 SCC 454 : (2018) 3 SCC (Cri) 124], which made it necessary to obtain the approval of the appointing authority concerning a public servant and the SSP in the case of arrest of accused persons.

This Court has also recalled that direction on Review Petition (Crl.) No. 228 of 2018 decided on 1-10-2019 [Union of India v. State of Maharashtra, (2020) 4 SCC 761]. Thus, the provisions which have been made in Section 18-A are rendered of academic use as they were enacted to take care of mandate issued in Subhash Kashinath [Subhash Kashinath Mahajan v. State of Maharashtra, (2018)

6 SCC 454 : (2018) 3 SCC (Cri) 124] which no more prevails. The provisions were already in Section 18 of the Act with respect to anticipatory bail.

11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions.

12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.

13. The challenge to the provisions has been rendered academic. In view of the aforesaid clarifications, we dispose of the petitions."

34. Justice S. Ravindra Bhat, while concurring with the judgment rendered by Justice Mishra, assigned his own reasons which are reproduced hereinbelow:

"32. As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

33. I would only add a caveat with the observation and emphasise that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament."

35. Thus, the decision in Prathvi Raj Chauhan (supra) makes it abundantly clear that even while upholding the validity of Section 18-A of the Act, 1989, this Court observed that if the complaint does not make out a prima facie case for applicability of the provisions of the Act, 1989 then the bar created by Sections 18 and 18-A(i) shall not apply and thus the court would not be precluded from granting pre-arrest bail to the accused persons.

36. Justice Ravindra Bhat, in his concurring judgment, observed that while considering any application seeking pre-arrest bail in connection with an offence alleged to have been committed under the provisions of the Act, 1989, the courts should balance two interests - On one hand they should ensure that the power is not exercised akin to the jurisdiction under Section 438 of the CrPC while on the other hand they should ensure that the power is used sparingly in exceptional cases where no prima facie offence is made out as shown in the FIR or the complaint. It was observed that in cases where no prima facie materials exist in a complaint which would warrant the arrest of the accused, the court would have the inherent power to direct a pre-arrest bail.

37. The applicability of Section 438 of the CrPC to cases registered under the Act, 1989 was also dealt with by a two-Judge Bench of this Court in Vilas Pandurang Pawar and Another v. State of Maharashtra and Others reported in (2012) 8 SCC 795. The specific issue framed and answered by this Court was whether an accused charged with various offences under the IPC along with offences under the Act, 1989 would be entitled for an anticipatory bail under Section 438 of CrPC.

38. It was observed by this Court that although Section 18 of the Act, 1989 creates a bar for invoking Section 438 of the CrPC yet the courts are entrusted with a duty to verify the averments in the complaint and to find out whether an offence under the Act, 1989 is prima facie made out or not. It was further observed that while considering the application for anticipatory bail, the scope for appreciation of evidence and other material is limited and the courts are not expected to undertake an intricate evidentiary inquiry of the materials on record. The relevant observations are reproduced hereinbelow:

"9. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

10. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out.

Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge

in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence."

(Emphasis supplied)

39. A three-Judge Bench of this Court in Rahna Jalal v. State of Kerala reported in (2021) 1 SCC 733 while discussing in the context of Section 7 of the Muslim Women (Protection of Rights on Marriage) Act, 2019, elaborated on the requirement of the existence of a prima facie case under Section 18 of the Act, 1989 for the bar of anticipatory bail to become applicable, as follows:

"25. Thus, even in the context of legislation, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, where a bar is interposed by the provisions of Section 18 and Sub-section (2) of Section 18-A on the application of Section 438 of the CrPC, this Court has held that the bar will not apply where the complaint does not make out "a prima facie case" for the applicability of the provisions of the Act. A statutory exclusion of the right to access remedies for bail is construed strictly, for a purpose. Excluding access to bail as a remedy, impinges upon human liberty. Hence, the decision in Chauhan (supra) held that the exclusion will not be attracted where the complaint does not prima facie indicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989."

(Emphasis supplied)

40. This Court, in Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others reported in (1994) 4 SCC 602, while discussing a similarly worded provision in the Terrorist and Disruptive Activities (Prevention) Act, 1985, held as follows:

"13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (sic some) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even prima facie attracted."

(Emphasis supplied)

a. Significance of the expression "arrest of any person" appearing in Section 18 of the Act, 1989

41. It is clear from the aforesaid discussion that Section 18 of the Act, 1989 does not impose an absolute fetter on the power of the courts to examine whether a prima facie case attracting the provisions of the Act, 1989 is made out or not. As discussed, Section 18 stipulates that in any case which involves the arrest of any person on the accusation of having committed an offence under the Act, 1989, the benefit of anticipatory bail under Section 438 of CrPC would not be available to the accused.

We have deliberated on the significance of the expression "arrest of any person" appearing in the text of Section 18 of the Act, 1989 and are of the view that Section 18 bars the remedy of anticipatory bail only in those cases where a valid arrest of the accused person can be made as per Section 41 read with Section 60A of CrPC.

42. Section 60A of CrPC provides that no arrest shall be made except in accordance with the provisions of CrPC or any other law for the time being in force and providing for arrest. Section 41 of CrPC confers upon the police the power to arrest without warrant in certain situations as specified therein. Sections 41(1)(b) and 41(1)(ba) respectively of CrPC read as follows:

"41. When police may arrest without warrant.-

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary-

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing. Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence."

43. A plain reading of the above provision shows that an arrest can be effected if there is a reasonable complaint, credible information or reasonable suspicion and the police officer has a reason to believe that such offence has been committed by the accused person and the arrest is necessary. It is worth noting that the words 'complaint', 'information' and 'suspicion' are qualified by the adjectives 'reasonable', 'credible' and 'reasonable' respectively. Similarly, the police officer is required to have a 'reason to believe' based on the information he has received that the accused person has committed the alleged offence.

44. It is settled law that arrest cannot be made merely because it is lawful to do so. The exercise of the power to arrest has been qualified by a twofold requirement - first, of having a reasonable belief that the accused person has committed the offence and secondly, that there is a need to arrest the accused person. This Court in Satender Kumar Antil v. CBI reported in (2022) 10 SCC 51 held that non-observance of the requirements stipulated under Sections 41 and 41A of CrPC respectively before effecting arrest would entitle the accused to be enlarged on bail. The relevant paragraphs are reproduced hereinbelow:

"25. The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offence. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the accused to a grant of bail."

45. In Arnesh Kumar v. State of Bihar and Another reported in (2014) 8 SCC 273, this Court laid emphasis on the phrases "credible information" and "reasonable suspicion" as they appear in Section 41 of CrPC and held as follows:

"5. Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public.

The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

6. Law Commissions, Police Commissions and this Court in a large number of judgments emphasised the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make arrest as they believe that they possess the power to do so. As the arrest curtails freedom, brings humiliation and casts scars forever, we feel differently. We believe that no arrest should be made only because the offence is non-bailable and cognizable and therefore, lawful for the police officers to do so.

The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from the power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation.

Despite this legal position, the legislature did not find any improvement. Numbers of arrest have not decreased. Ultimately, Parliament had to intervene and on the recommendation of the 177th Report of the Law Commission submitted in the year 2001, Section 41 of the Code of Criminal Procedure (for short "CrPC"), in the present form came to be enacted. It is interesting to note that such a recommendation was made by the Law Commission in its 152nd and 154th Report submitted as back in the year 1994. The value of the proportionality permeates the amendment relating to arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 CrPC.

10. We are of the opinion that if the provisions of Section 41 CrPC which authorises the police officer to arrest an accused without an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 CrPC for effecting arrest be discouraged and discontinued."

(Emphasis supplied)

46. The aforesaid discussion indicates that the term 'arrest' appearing in the text of Section 18 of the Act, 1989 should be construed and understood in the larger context of the powers of police to effect an arrest and the restrictions imposed by the statute and the courts on the exercise of such power. Seen thus, it can be said that the bar under Section 18 of the Act, 1989 would apply only to those cases where prima facie materials exist pointing towards the commission of an offence under the Act, 1989. We say so because it is only when a prima facie case is made out that the pre-arrest requirements as stipulated under Section 41 of CrPC could be said to be satisfied.

iii. When can it be said that a prima facie case is made out in a given FIR/complaint?

47. Prima facie is a Latin term that translates to "at first sight" or "based on first impression". The expression "where no prima facie materials exist warranting arrest in a complaint or FIR" should be understood as "when based on first impression, no offence is made out as shown in the FIR or the complaint". This means that when the necessary ingredients to constitute the offence under the Act, 1989 are not made out upon the reading of the complaint, no case can be said to exist prima facie.

48. As a sequitur, if the necessary ingredients to constitute the offence under the Act, 1989 are not disclosed on the prima facie reading of the allegations levelled in the complaint or FIR, then in such circumstances, as per the consistent exposition by various decisions of this Court, the bar of Section 18 would not apply and the courts would not be absolutely precluded from granting pre-arrest bail to the accused persons.

49. In our opinion, the aforesaid is the only test that the court should apply, when an accused prays for anticipatory bail in connection with any offence alleged to have been committed under the provisions of the Act, 1989. In a given case, an accused may argue that although the allegations levelled in the FIR or the complaint do disclose the commission of an offence under the Act, 1989, yet the FIR or the complaint being palpably false on account of political or private vendetta, the court should consider the plea for grant of anticipatory bail despite the specific bar of Section 18 of the Act, 1989.

However, if the accused puts forward the case of malicious prosecution on account of political or private vendetta then the same can be considered only by the High Court in exercise of its inherent powers under Section 482 of the Code or in exercise of its extraordinary jurisdiction under Article 226 of the Constitution. However, powers under Section 438 of the CrPC cannot be exercised once the contents of the complaint/FIR disclose a prima facie case. In other words, if all the ingredients necessary for constituting the offence are borne out from the complaint, then the remedy of anticipatory bail becomes unavailable to the accused.

50. The duty to determine prima facie existence of the case is cast upon the courts with a view to ensure that no unnecessary humiliation is caused to the accused. The courts should not shy away from conducting a preliminary inquiry to determine if the narration of facts in the complaint/FIR in fact discloses the essential ingredients required to constitute an offence under the Act, 1989.

It is expected of the courts to apply their judicial mind to determine whether the allegations levelled in the complaint, on a plain reading, satisfy the ingredients constituting the alleged offence. Such application of judicial mind should be independent and without being influenced by the provisions figuring in the complaint/FIR. The aforesaid role of the courts assumes even more importance when a prima facie finding on the case has the effect of precluding the accused person from seeking anticipatory bail, which is an important concomitant of personal liberty of the individual.

51. The aforesaid position is also apparent from a plain construction of the text of Section 18 of the Act, 1989. The words "having committed an offence under this

Act" denote that it is only when the accusation in the complaint clearly points towards the commission of an offence under the Act, 1989 that the bar of Section 18 would apply. The minimum threshold for determining whether an offence under the Act has been committed or not is to ascertain whether all the ingredients which are necessary to constitute the offence are prima facie disclosed in the complaint or not.

An accusation which does not disclose the necessary ingredients of the offence on a prima facie reading cannot be said to be sufficient to bring into operation the bar envisaged by Section 18 of the Act, 1989. Holding otherwise would mean that even a plain accusation, devoid of the essential ingredients required for constituting the offence, would be enough for invoking the bar under Section 18. In our considered view, such an approach would not be in line with the dictum as laid by this Court while upholding the Constitutionality of Sections 18 and 18-A respectively of the Act, 1989.

52. Having said so, we would also like to state that the case at hand is of a unique nature and one that falls in a separate category. With the advent of internet and social media, cases like the one we are dealing with are likely to come up more frequently. In the present case, the basis of the FIR is the YouTube video and some other digital materials alleged to have been published by the appellant in the public domain.

It is not the case of the complainant that the appellant subjected him to insults or humiliations in some public gathering, the details of which can only be gathered by recording the statements of witnesses. The entire incriminatory material based upon which the complaint came to be lodged was available in the public domain by virtue of having been uploaded on social media platforms. We had the occasion to threadbare go through the transcript of the YouTube video.

We may only say that in cases like the one in hand, the courts should have the discretion to look into the materials based upon which the complaint has been registered, in addition to verifying the averments made in the complaint. If on a prima facie reading of the materials referred to in the complaint and the complaint itself, the ingredients necessary for constituting the offence are not made out, then the bar of Section 18 would not be applicable and it would be open to the courts to consider the plea for the grant pre-arrest bail on its own merits.

iv. Whether the averments in the FIR/complaint in question disclose commission of any offence under Section 3(1)(r) of the Act, 1989?

53. It is the case of the complainant as well as the State that considering the rash and derogatory statements alleged to have been made by the appellant herein, he could be said to have prima facie committed the offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989.

54. We shall first proceed to examine whether the necessary ingredients to constitute the offence under Section 3(1)(r) of the Act, 1989 are prima face disclosed on a plain reading of the FIR. Section 3(1)(r) reads thus:

"Section 3 of the Act 1989:

Punishments for offences of atrocities.-

[(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

(Emphasis supplied)

55. The basic ingredients to constitute the offence under Section 3(1)(r) of the Act, 1989 are:

a. Accused person must not be a member of the Scheduled Caste or Scheduled Tribe;

b. Accused must intentionally insult or intimidate a member of a Scheduled Caste or Scheduled Tribe;

c. Accused must do so with the intent to humiliate such a person; and d. Accused must do so at any place within public view.

56. It is relevant to note that Section 3(1)(r) of the Act, 1989 is similarly worded as the erstwhile Section 3(1)(x) of the Act, 1989 which was in force prior to its substitution with effect from 26.01.2016.

57. In the case at hand, the appellant is alleged to have published a video on YouTube, containing a slew of reckless statements in the form of allegations levelled against the complainant. We are not supposed to look into the veracity or the truthfulness of such allegations as contained in the video. We are only trying to understand that even if all the statements alleged to have been made by the appellant are believed to be true whether any offence under Section 3(1)(r) of the Act, 1989 could be said to have been prima facie committed. In our opinion, the answer should be in the negative.

58. We say so for the reason that all insults or intimidations to a member of the Scheduled Caste or Scheduled Tribe will not amount to an offence under the Act, 1989 unless such insult or intimidation is on the ground that the victim belongs to Scheduled Caste or Scheduled Tribe. There is nothing in the transcript of the uploaded video to indicate even prime facie that those allegations were made by the appellant only on account of the fact that the complainant belongs to a Scheduled Caste. From the nature of the allegations made by the appellant, it appears that he is at inimical terms with the complainant. His intention may be to malign or defame him but not on the ground or for the reason that the complainant belongs to a Scheduled Caste.

59. In the aforesaid context, we may refer to and rely upon a three-Judge Bench decision of this Court in Hitesh Verma (supra). The relevant observations are reproduced below:

"13. The offence under Section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe.

The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment.

Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that Respondent 2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that Respondent 2 is a member of Scheduled Caste.

17. In another judgment reported as Khuman Singh v. State of M.P. [Khuman Singh v. State of M.P., (2020) 18 SCC 763 : 2019 SCC OnLine SC 1104] , this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:

"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar" Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

(Emphasis supplied)

60. Thus, the dictum as laid aforesaid is that the offence under Section 3(1)(r) of the Act, 1989 is not established merely on the fact that the complainant is a member of a Scheduled Caste or a Scheduled Tribe, unless there is an intention to humiliate such a member for the reason that he belongs to such community. In other words, it is not the purport of the Act, 1989 that every act of intentional insult or intimidation meted by a person who is not a member of a Scheduled Caste or Scheduled Tribe to a person who belongs to a Scheduled Caste or Scheduled Tribe would attract Section 3(1)(r) of the Act, 1989 merely because it is committed against a person who happens to be a member of a Scheduled Caste or Scheduled Tribe.

On the contrary, Section 3(1)(r) of the Act, 1989 is attracted where the reason for the intentional insult or intimidation is that the person who is subjected to it belongs to a Scheduled Caste or Scheduled Tribe. We say so because the object behind the enactment of the Act, 1989 was to provide stringent provisions for punishment of offences which are targeted towards persons belonging to the SC/ST communities for the reason of their caste status.

a. Meaning of the expression "intent to humiliate" appearing in Section 3(1)(r) of the Act, 1989

61. The words "with intent to humiliate" as they appear in the text of Section 3(1)(r) of the Act, 1989 are inextricably linked to the caste identity of the person

who is subjected to intentional insult or intimidation. Not every intentional insult or intimidation of a member of a SC/ST community will result into a feeling of caste-based humiliation. It is only in those cases where the intentional insult or intimidation takes place either due to the prevailing practice of untouchability or to reinforce the historically entrenched ideas like the superiority of the "upper castes" over the "lower castes/untouchables", the notions of 'purity' and 'pollution', etc. that it could be said to be an insult or intimidation of the type envisaged by the Act, 1989.

62. We would like to refer to the observations of this Court in Ram Krishna Balothia (supra) to further elaborate upon the idea of "humiliation" as it has been used under the Act, 1989. It was observed in the said case that the offences enumerated under the Act, 1989 belong to a separate category as they arise from the practice of 'untouchability' and thus the Parliament was competent to enact special laws treating such offences and offenders as belonging to a separate category.

Referring to the Statements of Objects and Purposes of the Act, 1989 it was observed by this Court that the object behind the introduction of the Act, 1989 was to afford statutory protection to the Scheduled Castes and the Scheduled Tribes, who were terrorised and subjected to humiliation and indignations upon assertion of their civil rights and resistance to the practice of untouchability. For this reason, mere fact that the person subjected to insult or intimidation belongs to a Scheduled Caste or Scheduled Tribe would not attract the offence under Section 3(1)(r) unless it was the intention of the accused to subject the concerned person to caste-based humiliation.

63. V. Geetha in her paper titled Bereft of Being: The Humiliations of Untouchability1 describes humiliation as an experience that is "felt, held and savoured in the very gut of our existence." Humiliation, in her understanding, can either be suffered as a one-time occurrence which bruises the self-esteem or pride of an individual, or it can be "suffered as a condition that is degrading and wounding." In the words of Gopal Guru, humiliation is not so much a physical injury but is in the nature of a psychological injury that leaves a permanent scar on the heart.

64. Explaining the social structures that perpetuate humiliation, Gopal Guru, in an introduction to his book2 writes that "humiliation is almost endemic to social life that is active basically through asymmetries of intersecting sects of attitudes - arrogance and obeisance, self-respect and servility and reverence and repulsion.

Discussing on how the basis of humiliation varies in different societies, depending upon the social context, he observes that the idea and practice of

humiliation "continues to survive in different forms depending upon the specific nature of the social context. For example, in the West it is the attitude of race that is at the base of humiliation. In the East, it is the notion of untouchability that foregrounds the form and content of humiliation."

65. While Gopal Guru makes the aforesaid observation in the context of different societies in relation to one another, such as the East and the West, in our opinion the observations are equally applicable to specific individual societies as well wherein multiple varying grounds of humiliation like gender, caste, race, etc. can co-exist and apply to the same or different individuals and groups.

66. Bhikhu Parekh in his paper titled Logic of Humiliation3 attempts to differentiate humiliation from other concepts that it is generally confused with. He gives the example of the ticket inspector who threw Gandhi off the train in South Africa to argue that humiliation might, but need not, involve physical cruelty. On the contrary, he contends that a man who starves another to death and tortures him, shows cruelty but does not necessarily humiliate him. He argues the same regarding the difference between insult and humiliation and observes that although humiliation generally involves insult, yet insult alone is not sufficient to constitute humiliation.

67. On the social context of humiliation, Parekh writes that "organised or institutionalized humiliation exists when social institutions and practices embody disrespect for, and systematically violate the self-respect of, groups of individuals." Drawing a distinction between systemic and regimented humiliation on the one hand as distinguished from isolated incidents of humiliation on the other, he observes that while the latter is present in modern liberal societies, the former is found in societies structured on the basis of slavery, racial segregation, untouchability, caste system, hierarchical status, etc.

According to him, the reason for the same is that the modern liberal societies, though marked by deep economic, political and other inequalities, allow for vertical mobility owing to the fluid nature of the inequalities. Whereas, societies based on race, caste system, etc. are grounded in inequalities like colour, birth, ethnicity, etc. which are unalterable and deeply entrenched in the very foundational fabric of such a society.

The inflexible nature of the basis of inequalities leads to the existence of a more structural and systemic form of humiliation, as the perpetrator is assured of its place in the structure of the society owing to its immobility. Since no one can be assured of the same in a modern liberal society which is marked by vertical mobility in the social structure, there is no incentive for anyone to have a regimented system of humiliation.

68. Resistance is internal to humiliation, and some scholars have argued that humiliation is only defined on the basis of the claims made against it. Thus, those who are humiliated also inherently possess the capacity to protest against it. However, those who protest also run the risk of inciting opposition from those who want to push the traditionally humiliated groups to the margins. This apprehension of opposition and push back from the dominant against the marginalised is also evident from the Statements of Objects of the Act, 1989, as discussed by this Court in Ram Krishna Balothia (supra).

69. What appears from the aforesaid discussion is that the expression "intent to humiliate" as it appears in Section 3(1)(r) of the Act, 1989 must necessarily be construed in the larger context in which the concept of humiliation of the marginalised groups has been understood by various scholars. It is not ordinary insult or intimidation which would amount to 'humiliation' that is sought to be made punishable under the Act, 1989.

The Parliament, by way of different legislations, has over the years sought to target humiliation based on different grounds and identities which exist in the society. The Protection of Women from Domestic Violence Act, 2005 seeks to punish humiliation based on gender inequalities by specifically including the term 'humiliation' in the definition of "domestic violence". Similarly, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 includes treatment causing humiliation to a female employee and which may likely affect her health and safety within the definition of sexual harassment.

70. In our considered view, it is in a similar vein that the term 'humiliation' as it appears in Section 3(1)(r) of the Act, 1989 must be construed, that is, in a way that it deprecates the infliction of humiliation against members of the Scheduled Castes and Scheduled Tribes wherein such humiliation is intricately associated with the caste identity of such members.

71. We would also like to refer to Section 7(1)(d) of The Protection of Civil Rights Act, 1955 ("Civil Rights Act") at this juncture to give a more meaningful construction to Section 3(1)(r) of the Act, 1989. The provision reads as follows:

"7. Punishment for other offences arising out of "untouchability".-

(1) Whoever-

(d) insults or attempts to insult, on the ground of "untouchability", a member of a Scheduled Caste; shall be punishable with imprisonment for a term of not less than one month and not more than six months, and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees."

72. It is clear from a plain reading of the aforesaid provision that any insult against a member of a Scheduled Caste or Scheduled Tribe on the ground of "untouchability" was punishable with imprisonment for a maximum term of six months under the Civil Rights Act. With the passage of time, it was realised by the legislature that the Civil Rights Act was not adequately sufficient to tackle caste-based offences and the practice of "untouchability", leading to the enactment of the Act, 1989 introducing more stringent provisions for combating such practices. Section 3(1)(r) of the Act, 1989 should, thus, be seen in the context of Section 7(1)(d) of the Civil Rights Act. Seen thus, the words "with an intent to humiliate a member of a Scheduled Caste or Scheduled Tribe" become inseparable from the underlying idea of "untouchability" which is sought to be remedied and punished by the Act, 1989.

73. A two-Judge Bench of this Court in Ramesh Chandra Vaishya (supra) explained that for an act of intentional insult to attract the offence under erstwhile Section 3(1)(x) of the Act, 1989 (which is identical to Section 3(1)(r) of the Act, 1989) it was necessary that the insult is laced with casteist remarks. Relevant observations is extracted hereinbelow:

"18. The legislative intent seems to be clear that every insult or intimidation for humiliation to a person would not amount to an offence under section 3(1)(x) of the SC/ST Act unless, of course, such insult or intimidation is targeted at the victim because of he being a member of a particular Scheduled Caste or Tribe. If one calls another an idiot (bewaqoof) or a fool (murkh) or a thief (chor) in any place within public view, this would obviously constitute an act intended to insult or humiliate by user of abusive or offensive language. Even if the same be directed generally to a person, who happens to be a Scheduled Caste or Tribe, per se, it may not be sufficient to attract section 3(1)(x) unless such words are laced with casteist remarks."

74. Having regard to the reprehensible conduct and the nature of the derogatory statements made, the appellant, at best could be said to have prima facie committed the offence of defamation punishable under Section 500 of the IPC. If that be so, it is always open for the complainant to prosecute the appellant accordingly. However, the complainant could not have invoked the provisions of the Act, 1989 only on the premise that he is member of Scheduled Caste, more so, when a prima facie conjoint reading of the transcript of the video and the complaint fails to disclose that the actions of the appellant were impelled by the caste identity of the complainant.

v. Whether any offence under Section 3(1)(u) of the Act, 1989 is prima facie made out in the FIR/complaint in question?

75. Section 3(1)(u) of the Act, 1989 reads thus:

"Punishments for offences of atrocities.-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(u) by words either written or spoken or by signs or by visible representation or otherwise promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes; Shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine"

(Emphasis supplied)

76. The basic ingredients for constituting an offence under Section 3(1)(u) of the Act, 1989 are:

a. Accused should not be a member of the Schedule Caste or Scheduled Tribe;

b. Accused should by words, either written or spoken, or by signs or by visible representation or otherwise;

c. Promote or attempt to promote feelings of enmity, hatred or ill-will against members of the Scheduled Caste or the Scheduled Tribes.

77. In our opinion, there is nothing to even prima facie indicate that the appellant by publishing the video on YouTube promoted or attempted to promote feelings of enmity, hatred or ill-will against the members of Scheduled Castes or Scheduled Tribes. The video has nothing to do in general with the members of Scheduled Caste or the Scheduled Tribe. His target was just the complainant alone. The offence under Section 3(1)(u) will come into play only when any person is trying to promote ill feeling or enmity against the members of the scheduled castes or scheduled tribes as a group and not as individuals.

vi. Whether mere knowledge of the caste identity of the complainant is sufficient to attract the offence under Section 3(1)(r) of the Act, 1989?

78. It was also sought to be argued that the appellant knew very well that the complainant belongs to a Scheduled Caste and despite such knowledge if he went on to make derogatory utterances in the video then the offence under Sections 3(1)(r) and 3(1)(u) respectively of the Act, 1989 could be said to have been prima facie made out.

79. We find no merit in the aforesaid submission. Wherever the legislature intended that mere knowledge of the fact that the victim is a member of Scheduled Caste or Scheduled Tribe would be sufficient to constitute an offence under the Act, 1989, it has said so in so many words. We may reproduce some of the relevant provisions where knowledge that the complainant belongs to the Scheduled Castes or Scheduled Tribes is sufficient in itself to constitute the offence:

"3. Punishments for offences atrocities.- (1)

(w)(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

(ii) uses words, acts or gestures of a sexual nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe."

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine;

(va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine;]"

(Emphasis supplied)

80. At the cost of repetition, the words in Section 3(1)(r) of the Act, 1989 are altogether different. Mere knowledge of the fact that the victim is a member of the Scheduled Caste or Scheduled Tribe is not sufficient to attract Section 3(1)(r) of the Act, 1989.

As discussed earlier, the offence must have been committed against the person on the ground or for the reason that such person is a member of Scheduled Caste or Scheduled Tribe. When we are considering whether prima facie materials exist, warranting arrest of the appellant, there is nothing to indicate that the

allegations/statements alleged to have been made by the appellant were for the reason that the complainant is a member of a Scheduled Caste.

81. The High Court in its impugned order has observed "materials on record do indicate that the video is intended to insult and humiliate the second respondent." The High Court may be right in observing that the intention of the appellant could have been to insult and humiliate the complainant but the High Court failed to consider whether such insult or humiliation was on account of or for the reason that the complainant belongs to Scheduled Caste. Is it the case of the complainant that had he not belonged to a Scheduled Caste, the appellant would not have levelled the allegations? The answer lies in the question itself.

82. A penal statute must receive strict construction. A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislator intended to conform to this legal policy. A principle of statutory interpretation can, therefore, be described as a principle of legal policy formulated as a guide to the legislative intention.

83. Maxwell in The Interpretation of Statutes (12th Edn.) has observed that "the strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

84. William F. Craies in Statute Law (7th Edn. at p. 530) while referring to U.S. v. Wiltberger [5 L Ed 37 : 18 US (5 Wheat.) 76 (1820)] observes thus:

"The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law. This rule is said to be founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislature, and not in the judicial department, for it is the legislature, not the court, which is to define a crime and ordain its punishment."

(Emphasis supplied)

85. In Tuck & Sons v. Priester reported in (1887) 19 QBD 629 (CA), which was followed in London and Country Commercial Properties Investments Ltd. v.

Attorney General reported in (1953) 1 WLR 312 : (1953) 1 All ER 436, it was observed thus:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation, which will avoid the penalty in any particular case, we must adopt that construction. Unless penalties are imposed in clear terms, they are not enforceable. Also, where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive."

(Emphasis supplied)

86. Blackburn, J. in Willis v. Thorp reported in (1875) LR 10 QB 383 observed that "when the legislature imposes a penalty, the words imposing it must be clear and distinct."

87. We have construed Section 18 of the Act, 1989 keeping in mind the aforesaid principles of statutory construction. We are of the view that taking any other view than the one taken by us would be unreasonable, oppressive and not in tune with the consecrated principles of our Constitution.

H. CONCLUSION

88. For all the foregoing reasons, this appeal succeeds and is hereby allowed. The impugned order passed by the High Court is hereby set aside.

89. We direct that in the event of arrest of the appellant by police in connection with the First Information Report No. 899 of 2023 lodged at the Elamakkara Police Station, he shall be released on bail subject to terms and conditions, which the Investigating Officer may deem fit to impose.

90. Pending application(s), if any, shall stand disposed of.

.....J. (J.B. Pardiwala)

.....J. (Manoj Misra)

New Delhi

August 23, 2024

1 Humiliation: Claims and Context, Oxford University Press, First Edition (2009), pp. 95-107

2 Humiliation: Claims and Context (supra), pp. 1-22

3 Humiliation: Claims and Context (supra), pp. 23-40

IN THE SUPREME COURT OF INDIA

M/s. Karnataka Emta Coal Mines Ltd. and Anr.
Vs.
Central Bureau of Investigation

[Criminal Appeal No. 1659-1660 of 2024]

HEADNOTE – Under Section 227 Cr.P.C., a Judge is required to sift the evidence to find out whether there was sufficient ground for proceedings against the accused. The expression "not sufficient ground for proceeding against the accused" means that the "Judge is not a mere post office to frame the charge at the behest of the prosecution. The judge must exercise the judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution."

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CITATIONS

S. No.	Title	Citation
1.	'CBI vs. S.M. Jaamdar & Others'	
2.	M.L. Sharma v. The Principal Secretary and Others	(2014) 9 SCC 614
3.	Girish Kumar Suneja v. CBI	(2017) 14 SCC 809
4.	KPCL v. Aryan Energy Private Limited1 and Others	COMAP No. 12, 13, 14 and 15 and 2020 decided on 22nd July, 2021
5.	Centre for Public Interest Litigation v. Union of India	(2012) 3 SCC 1
6.	Arun Kumar Aggarwal v. Union of India	(2013) 7 SCC 1
7.	Pathan Mohammed Suleman Rehmat khan v. State of Gujarat	(2014) 4 SCC 156
8.	Radheshyam Kejriwal v. State of West Bengal and Another	(2011) 3 SCC 581
9.	Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI and Another	(2020) 9 SCC 636
10.	J Sekar alias Sekar Reddy v. Directorate of Enforcement	(2022) 7 SCC 370
11.	Prem Raj v. Poonamma Menon & Another	2024 SCC OnLine SC 483

12.	Neeraj Dutta v State (NCT of Delhi)	(2023) 4 SCC 731
13.	B. Jayaraj v State of Andhra Pradesh	(2014) 13 SCC 55
14.	P. Satyanarayana Murthy v District Inspector of Police, State of Andhra Pradesh and Another	(2015) 10 SCC 152
15.	K. Shanthamma v State of Telangana	(2022) 4 SCC 574
16.	State through Central Bureau of Investigation v Dr Anup Kumar Srivastava	(2017) 15 SCC 560
17.	Soundarajan v State Rep. by the Inspector of Police Vigilance Anticorruption Dindigu	(2023) SCC OnLine SC 424
18.	M.S Associates and others v. Union of India	(2005) SCC Online Gau 308; (2005) 275 ITR 502
19.	The King Emperor v. Khawaja Nazir Ahmand	AIR (1945) PC 18
20.	Manohar Lal Sharma vs. Principal Secretary and Another	(2014) 9 SCC 516

GLOSSARY

Abbreviations of Acts

Act of 1973	Coal Mines (Nationalization) Act, 1973
CAG Act	Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971
Cr.P.C	Code Criminal Procedure, 1973
CVC	Central Vigilance Commission IPC Indian Penal Code
MMDR Act,	Mines and Minerals (Development & Regulation) Act, 1957
P.C. Act	Prevention of Corruption Act

Abbreviations of Companies

AEPL	M/s Aryan Energy Private Limited
EMTA	M/s Eastern Mineral and Trading Agency
GCWL	M/s Gupta Coalfields and Washeries Limited
KECML	M/s Karnataka Emta Coal Mines Limited
KPCL	M/s Karnataka Power Corporation Limited
SAS	M/s. SAS India Private Limited

Abbreviations of Government Organizations

CAG	Comptroller and Auditor General
CBI	Central Bureau of Investigation
CIMFR	Central Institute of Mining and Fuel Research
CIPCO	M/s. Central India Power Company
DoPT	Department of Personnel and Training
MoC	Ministry of Coal
MoEF&CC	Ministry of Environment, Forest and Climate Change
MoPPP	Ministry of Personnel, Public Grievances and Punishment

Abbreviations of terms

BTPS	Bellary Thermal Power Station
CV	Calorific Value
FBC	Fluidized Bed Combustion
FSA	Fuel Supply Agreement
GCV	Gross Calorific Value
IBOCM	Integrated Baranj Open Cast Mines
JVA	Joint Venture Agreement
JVC	Joint Venture Company
MoU	Memorandum of Understanding
MT	Metric Tones
PE	Preliminary Enquiry
SIR	Source Information Report

JUDGMENT

Hima Kohli, J.

A. PREFACE

1. The present appeals challenge the Order on Charge dated 24th December, 2021 and Order framing Charges dated 03rd March, 2022 passed by the learned Special Judge (Prevention of Corruption Act[1]) Central Bureau of Investigation[2], Coal Block Case No. - 01, Rouse Avenue District Court, Delhi[3] in a case[4] registered under Section 120- B read with Sections 409/420 of the Indian Penal Code[5] and Sections 13(1)(d)/ 13(2) of the P.C. Act, 1988 titled 'CBI vs. S.M. Jaamdar & Others'. The appellants before this Court are M/s Karnataka Emta Coal Mines Limited[6] arrayed as accused No. 12 in the chargesheet and Shri Ujjal Kumar Upadhaya, Chairman and Managing Director of Emta Coal Limited

and former Managing Director of accused No. 12, arrayed as accused No. 6 in the chargesheet.

2. It may be noted at the outset that a challenge has been laid to the impugned orders passed by the learned Special Judge directly before this Court in the light of the directions issued in M.L. Sharma v. The Principal Secretary and Others[7] vide order dated 25th July, 2014 and upheld in Girish Kumar Suneja v. CBI[8] vide Judgement dated 13th July, 2017 wherein directions have been issued that this Court alone shall have the jurisdiction to entertain cases relating to coal block allocation across the country, in particular, cases where the parties seek a stay of the investigation/trial in a matter relating to coal.

B. FACTUAL BACKDROP

3. The contours of the case being intricately intertwined with several documents including Agreements, Memorandum of Understandings[9], correspondence etc. referred to by both sides, the factual narrative must be delineated chronologically at some length to appreciate the context of the case.

3.1. JOINT VENTURE AGREEMENT

3.1.1 A Joint Venture Agreement[10] was executed between Karnataka Power Corporation Limited[11] and M/s Eastern Mineral and Trading Agency[12] for a period of 25 years for the development of captive coal mines and supply of coal to the Thermal Power Plant operated by KPCL namely, Bellary Thermal Power Station[13] with the tentative date of commissioning scheduled in December, 2005. KPCL was allocated three coal blocks by the Government of India under the Western Coalfield Limited command area situated in the State of Maharashtra for the development/operation of coal mines dedicated to feeding BTPS.

3.1.2 The JVA was executed between KPCL and EMTA on 13th September, 2002 which gave birth to the Joint Venture Company[14] namely, M/s KECML. The shareholding of EMTA in the JVC was to the extent of 76 per cent and that of KPCL was 24 per cent. In the JVA, it was agreed that there would be five directors from each of the two companies and the nominee of KPCL would be the Chairman of KECML who would have the right to cast vote. The relevant clauses of the JVA referred to and relied upon by the parties are extracted hereinbelow:

"AGREEMENET ON CAPTIVE COAL MINING PROJECT THROUGH A JOINT VENTURE

"COAL" means washed coal with guaranteed values as per article-6 clause 3 C and satisfies quality parameter laid down in Annexure-1 attached to this agreement.

"KPCL Coal Mines" means the coal mine(s) to be allotted to KPCL by Ministry of Coal, Government of India in which mining rights shall be given to the Company and which shall be developed/operated through the Company for captive use of KPCL.

"GCV (ADB)" Gross Calorific value on 'Air dried basis' in kcal/kg determined through a Bomb Calorimeter as measured at BTPS as per IS 1350(part -I)

"D Grade Coal" means "Non-long flame coal" having Useful Heat Value(UHV) in the range of 4200 to 4940 Kcal/Kg as per GOI notification.

ARTICLE 2
THE COMPANY AND ITS OBJECTIVES

1. The Parties of this agreement shall form and incorporate the Company as a Public Limited Company under the Companies Act, 1956 having its registered office at Bangalore.

2. The Company shall be named KARNATAKA EMTA COAL MINES LIMITED; or in case such name is not available, any other name which may be mutually acceptable to the Parties.

3. The main object of the Company shall be to develop the captive coal mines of KPCL and produce coal from KPCL coal mines and to supply, transport and deliver such coal wholly and exclusively to KPCL.

4. For achieving the above main object, EMTA on behalf of the Company shall, inter-alia, take up the following activities with regard to the KPCL Coal Mines:

(a) survey and preparation of plans for mining;
(b) drilling and prospecting;
(c) mining either in open cast process or underground or both;
(e) raising coal and stacking the same on surface;

(g) Establishing coal washery of adequate capacity at the pit head and supply of coal of the required specification to the power plant of KPCL by Rail mode;

(m) preparation of plans, obtention of approval of Site Clearance from Ministry of Environment & Forest Govt. of India;

(n) preparation of Mining Plan and its approval from Ministry of Coal, Govt. of India;

(r) arrangement of approval for coal linkage from KPCL Coal Mines to the power stations of KPCL; (s) arrangement of railway siding nearest to the KPCL Coal Mines, and {u) undertake all other allied jobs for coal mining & washery operations.

ARTICLE 5
BUSINESS OF THE COMPANY

To achieve the main objects of the Company as mentioned in clause 3 of Article 2, EMTA shall be responsible for development, operation of KPCL coal mines and delivery of coal to BTPS or any other thermal power station under KPCL, the terms and conditions of which shall be governed by an agreement to be executed by and between Company and EMTA.

EMTA's Scope of work shall comprise as follows:

1. Development and Operation of KPCL coal mines

2. Establishing coal washery at Pit head

a) EMTA shall ensure establishment of coal washery at the pit head so that the coal to be supplied by the company should meet the required specification of KPCL and KPCL is not liable to pay any additional charges towards washing of coal.

b) EMTA shall take all the clearances required for the setting up the coal washery from the concerned authorities and to properly dispose off the coal rejects to the satisfaction of environmental regulation.

c) EMTA shall keep liaison with the concerned railway authorities and organise railway siding at nearest distance from mines/washery area for movement of coal to BTPS by rail.

3. Arranging transportation of coal to BTPS

xxxx

6. Quantity

a. The total quantity of coal required to be supplied to BTPS is approximately 2 Million Tonnes (+)/(-) 10% per annum.

7. Quality

a) The quality of coal shall be determined by drawing coal samples from railway wagons on receipt at KPCL power plants before unloading.

b) A third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end. The third party agency shall carry out the sampling and analysis of coal in the presence of the representative of the parties.....

xxxx

d) An independent inspection agency shall supervise and certify the quality of coal received at BTPS and the result of analysis certified by the independent inspection agency as per the procedure stated above shall be binding to all concerned for all commercial purposes.

xxxx

9. Delivery Period

a. The delivery of coal to BTPS shall commence one month prior to the scheduled date of synchronisation of first unit with coal at BTPS. The tentative date of commissioning maybe taken as Dec. 2005.

xxxx

13. The company shall provide an undertaking to the Ministry of Coal, Government of India that the coal produced from the KPCL Coal Mines shall be wholly and exclusively supplied, transported and delivered to KPCL.

ARTICLE - 6
COMMERCIAL TERMS

Fuel supply agreement shall be executed between KPCL and Company to record the terms and conditions of coal supply from KPCL coal mines to KPCL which shall be governed by the following commercial terms:

1. Price

a) KPCL shall purchase the entire quantity of specified coal supplied to BTPS at a price of Rs. 1650.47 per tonne, the detailed break up of which is as per Annexure - II attached to this agreement

xxxx

c) The price shall be firm at the agreed price i.e. Rs.1650.47 per MT for a quantity of one million tonnes in the first year of BTPS - operation subject to price variation as per clause 3.D(b)-l(a) but limited to 50% increase in base price only. And 100% variation in statuary charges as per clause 3.D(a).

xxxx

2. Basis of payment and price adjustment

KPCL shall pay the price of coal for the quantity and quality of coal on receipt at BTPS on rake to rake basis as detailed herein below:

A) QUANTITY ...
B) QUALITY ...
C) PRICE ADJUSTMENT

The size of coal, ash content, and GCV of coal would be checked and compared with the guaranteed values as indicated below:

a) GCV (ARB)	4500 in Kcal/KG
(b) Permissible variation	Max. 4500 Kcal/Kg & Min. 4000 Kcal/Kg.
(c) Ash content (ADB)	0 to 25 mm with fines (upto-2 mm) not exceeding 20%

xxxx

Suitable price adjustment would be carried out be KPCL for variation in properties compared to the guaranteed value as indicated in the following paragraphs.

i) ASH CONTENT(ADB)...

ii) GCV (ARB) a) No Pro rata price adjustment is allowed for the GCV over and above 4500 Kcal/Kg.

b) In case the GCV is between 4200 to 4500 Kcal/Kg the price adjustment will be on the Base Price on Pro rata basis.

c) In ease the GCV of the coal supplied falls between 4000- 4200 Kcal/Kg, the price payable is restricted to 50% of the Base Price.

d) In case the GCV is below 4000 Kcal/Kg KPCL shall not require to pay for such supplies including freight and other incidental charges.

xxxx

D) Price Variation

4. Penalty

a) The delivery period stipulated in Clause No 9 of Article 5 for the supply of coal shall be the essences of the contract. In the event of failure to commence the delivery of coal within the stipulated time specified in Clause 9 of Article 5 KPCL shall impose a penalty at a rate of l/2% of initial contract value of Rs.330.09 Crores i.e. Rs.l.65 crores for every week's delay subject to a maximum of 10% of the contract value of Rs.330.09 crores i.e. Rs.33.00 crores

b) In the event of delay in commencement of mining operation or washery or due to non-availability o(railway siding or for any other reason, Company shall arrange coal supply from any other source with the same specification as indicated under 3 c) of above.

xxxx

5. Fuel Supply Agreement shall be executed between KPCL and the company on the terms and conditions stipulated in the L.O.A. dated 8.7.2002 and relevant clauses as agreed upon between the parties under this agreement.

ARTICLE 9
OBLIGATIONS OF THE PARTIES

The parties shall at their own cost and expense observe, undertake, comply with and perform in addition to and not in derogation of their obligations elsewhere set out in this Agreement, the following:

Obligation of KPCL

1. It shall apply to the Central and the relevant state governments for the allotment of the KPCL coal mines.

2. It shall purchase the Coal supplied to it as per the terms agreed to in the Fuel Supply Agreement.

Obligation of EMTA

1. It shall arrange for the identification of mining block(s) for present and future requirement, the acquisition of private land and allotment of vested lands by the

State Government required for mining operation and KPCL will render assistance, if required.

2. It shall ensure supply of coal from KPCL coal mines to KPCL power plants as per the guaranteed values indicated in 3 c) of Article 6 and specification stated in Annexure - I attached to this agreement.

xxxx

6. It shall establish Washery at the pit head and get all clearances required for setting up the washery to effect washing of coal to meet the specification."

[emphasis added]

3.1.3 Annexure-I appended to the aforesaid JVA specifies the desired characteristics of the coal and contains a computed statement relating to the expected coal quality with the range for the maximum and minimum. The calorific value[15] in Gross Calorific Value[16] has been mentioned in the first column under the head 'Description' and in the column of "Expected Product Coal" that states as follows:

'DESIRED CHARACTERISTICS OF WCL COAL

EXPECTED COAL QUALITY WITH THE RANGE FOR MAXIMUM & MINIMUM				
DESCRIPTION	UNITS	EXPECTED PRODUCT COAL	RANGE	
			MINUMUM	MAXIMUM
Gross C.V.	Kcal/K.gm	4995		
xxxxx				
Size of Coal	mm		0-25 mm (0-2 mm fines not>20%	

3.1.4 Annexure-II that prescribes the price schedule for mining, washing and delivery of washed coal to BTPS, specifies amongst others, the total price of coal at the pit head as follows:

PRICE SCHEDULE FOR MINING, WASHING AND DELIVERY OF WASHED COAL TO BTPS

Sl. No.	**Particulars**	**Price Per Metric tonne**

1.	xxxxx	
	f) Total price of coal at pit head (Railway Siding) (a+b+c+d-e)	860.70
	xxxxx	
7.	Railway Freight from captive mines to BTPS	608.90
	xxxxx	
9.	Landed cost per MT of washed coal at BTPS including Sales Tax	1650.47

3.2. CORRESPONDENCE

3.2.1 Vide letter dated 10th November, 2003, the Ministry of Coal[17], Union of India allocated three coal blocks to KPCL for power generation for the proposed Thermal Power Station at Bellary, Karnataka[18]. As much emphasis has been laid on the contents of the said letter by the respondent-CBI, the same is reproduced hereinbelow for ready reference:

'No. 47011/1(1)/2002-CPAM/CA
GOVERNMENT OF INDIA
MINISTRY OF COAL
....

New Delhi, dated the 10th November, 2003

'To,

M/s. Karnataka Power Corporation Ltd.,
Shakti Bhavan No. 82,
Race Course Road,
Bangalore - 560 001,
KARNATAKA.

'Subjet: Allocation of Kiloni, Manoradeep and Baranj I-IV captive coal blocks for power generation to M/s KPCL for their proposed 1000 MW(2x500 MW) TPS at Bellary, Karnataka.

The Screening Committee has agreed to identify Baranj 1-IV. Manoradeep and Kiloni under the command area of WCL in the State of Maharashtra to meet the requirement of coal for the exclusive use in the proposed TPS at Bellary. Karnataka. The allocation of these blocks are subject to the following conditions:-

(i) The coal mined from the blocks shall exclusively be used by the company to meet the requirement of coal in their proposed TPS.

(ii) Synchronization/commissioning of the end use plant should be December, 2006.

(iii) The setting up of the proposed TPS should be completed by the Company before coal production starts from the captive mine. The bar chart for the coal production should be modified suitably.

(iv) The coal mining will be done in accordance with the provisions of Mines & Minerals (Development & Regulation) Act, 1957 and Mineral Concession Rules, 1960 and subject to the provisions of other relevant statutes.

(v) Allocation of coal block may be cancelled in case of unsatisfactory progress of implementation of their proposed end use plant, development of captive coal mine or any of them.

3. The allotment of the captive blocks will also be subject to the following conditions:

(i) The end use for which coal mined from the captive block should be utilized and all the conditions imposed by the Central Government mentioned in this letter conveying offer by the Screening Committee of captive block to M/s. Karnataka Power Corporation Ltd, may be clearly specified in the mining lease.

(ii) All the conditions imposed by the Central Government while conveying the previous approval to the State Government under Section 5(1) of the Mines and Minerals (Development & Regulation) Act, 1957 for grant of mining lease in favour of captive mining party should clearly form part of the lease deed to be executed between the concerned State Government and the party.

(iii) In case the captive block has been offered for washing-cum-end use, the deed must clearly specify that the beneficiated coal from the washery will exclusively be used for the end use (power generation) as approved by the Central Government and not for commerce or otherwise. Tailings, middlings or rejects, as the case may be, shall be used for captive consumption only by the applicant as approved by the Central Government.

(iv) The allocattee would furnish to this Ministry detailed plan for disposal of unusable containing carbon materials obtained during the process of mining or any process thereafter including washing etc. so as to avoid any need for disposal of the same through sale etc. at a later stage, within 30 days of receipt of this letter or submission of mining plan whichever is earlier.

(v) No coal shall be sold, delivered, transferred or disposed of except for the stated captive mining purpose (power generation) except with the previous approval of the Central Government in writing.

(vi) There should be complete synchronization between the captive coal mining operations and the development of end-use (power generation) plant so that no situation arises where the company is left with coal extracted from the captive block when the end-use plant is yet to be operational.

(vii) Approval of mining plan shall be considered only after financial closure for the end use project is achieved.

(viii) Existing coal linkage from CIL/SCCL, would not be disturbed in any way with the coal mined from the allocated blocks. The coal linkage of 2.5 mtpa provided for the TPS from MCL shall continue.

(ix) Further, detailed exploration of the block, if required, shall be carried out by CMPDIL or under its direct supervision, on payment basis by the applicant.

(x) Violation of any of the conditions will render the allocation of the block/ grant of the lease as the case may be liable for cancellation.

4. The progress in the end use project and the development of the allocated blocks should be reported to this Ministry every 3 months from date of issuance of this letter.

5. The company may approach CIL for more detailed information, geological report etc. and contract the State Government authorities concerned for completing the necessary formalities for attaining mining lease rights and related matters. The company will be required to apply for mining lease within a period of six months. The arrangement of transport of coal, if any, etc. will have to be worked out by the company in consultation with the Ministry of Railways/Ministry of Surface Transport depending on the mode of transport.

Yours faithfully

(S. Gulati)
Director."

(emphasis added)

3.2.2. On 16th April, 2004, the Ministry of Coal and Mines issued a Gazette Notification under Section 3(3)(a)(III)(4) of the Coal Mines (Nationalization) Act, 1973[19] stating as below:

"MINISTRY OF COAL AND MINES
(Department of Coal)
NOTIFICATION

New Delhi, the 16th July, 2004

S.O. 824(E) - In exercise of the powers conferred by item(4) of subclause (Ill) of clause (a) of Sub-section (3) of Section 3 of the Coal Mines (Nationalisation) Act, 1973 (26 of 1973) the Central Government hereby specifies as an end use the supply of coal from the coal mines of Kiloni, Manoradeep and Baranj I-IV blocks by the Karnataka EMTA Coal Mines Limited on an exclusive basis to the Karnataka Power Corporation Limited for generation of thermal power in their proposed 1000 MW (2 x 500 MW) TPS at Ballary, Karnataka subject to condition that the Karnataka Power Corporation Limited holds at least 26 per cent of voting equity share capital of the Karnataka EMTA Coal Mines Limited at all times.

[F.No. 13016/33/2003-CA]
APVN Sarma, Jt. Secy."

3.2.3 On 08th December, 2004, the MoC, Government of India issued a letter to KECML approving the Mining Plan submitted by it for the Baranj Open Pit Project under Section 5(2)(b) of the Mines and Mineral (Development & Regulation) Act, 1957[20]. The appellants herein have taken a plea that the Mining Plan did not contain any provision contrary to the JVA with respect to the rejects and what KECML was required to do to dispose off the rejects, was stipulated under Clause 5(2)(b) of the JVA which required it to dispose off the rejects in an environment friendly manner. It was submitted that there was no clause in the Mining Plan that ran contrary to the JVA. The said plea has however been disputed by the respondent-CBI.

3.3 FUEL SUPPLY AGREEMENT

3.3.1 Article 6 of the JVA stipulated execution of an Agreement between KPCL and EMTA for supply of washed coal, described as the 'Fuel Supply Agreement[21]. The FSA was executed on 09th May, 2007 and its relevant clauses are as below:

FUEL SUPPLY AGREEMENT

'THIS AGREEMENT made this ninth day of May two thousand seven between KARNATAKA EMTA COAL MINES LIMITED, ... called the "Supplier".....of the First Part and

KARNATAKA POWER CORPORATION LIMITED, ... called the "Purchaser'....of the Second Part.

WITNESSETH AS FOLLOWS

a) WHEREAS Purchaser inter alia is engaged in the business of generating power through its various thermal, hydel, wind power stations and is taking up a new thermal power plant named as Bellary Thermal Power Station (hereinafter referred to as BTPS), with an initial capacity of 500 MW likely date of commissioning is July, 2007.

b) AND WHEREAS the annual requirement of coal at BTPS will be approximately 2 million tonnes.

c) AND WHEREAS pursuant to the policy of Govt. of India of leasing out coal mines to power generating agencies for use as captive coalmine(s) for their own consumption, the Purchaser has been allocated mining block(s) identified as Baranj I-IV, Manoradeep & Kiloni vide allotment Letter No.47011/1(1)12002-CPAM/CA dated 10.11.2003 . The Purchaser has assigned and entrusted the responsibility to develop and operate the said coal mines to the Supplier.

For this purpose, the Purchaser has entered into a Joint Venture Agreement dated 13.9.2002 with, M/s. Eastern Minerals & Trading Agency (in short EMTA hereinafter), to form a joint venture company (hereinafter' called the "Supplier") for development and operation of such coal) mines. The entire amount of coal produced from such coal mines shall be sold, transported and delivered by the Supplier exclusively to the Purchaser for use at BTPS in accordance with the provisions of this Agreement.

ARTICLE 1
DEFINITIONS

"Coal" means washed coal with guaranteed values as per Article-6 and satisfies quality parameter laid down in Annexure -I attached to this agreement.

"GCV (ADB)" means Gross Calorific value on air dried basis in Kcal/Kg determined through a Bomb Calorimeter as measured at BTPS as per IS 1350 (Part- II).

"Joint Venture Agreement" means the agreement dated 13.09.2002 entered into between the Purchaser and M/s. Eastern Minerals & Trading Agency to form a joint venture company.

"Specified Coal" means washed coal as defined in the Schedule of Specification (Annexure I) of this Agreement.

ARTICLE 4
CONDITIONS PRECEDENT

4.1 The respective obligations of the Parties under this Agreement shall be subject to the satisfaction in full of each of the following conditions precedent prior to Commencement Date:

i) The Purchaser has assigned the mining rights in favour of the Supplier

ii) The Supplier has obtained all the necessary clearances and approvals required from the concerned authorities regarding operation of the Designated Coal Mines and submitted a copy of same to the Purchaser.

iii) The Supplier has registered this Agreement with the relevant authority at the time and in the manner stipulated in the Monopolies and Restrictive Trade Practices Act, 1969 as amended from time to time, to the extent the provisions are required to be registered.

ARTICLE 5
QUANTITY AND QUALITY

5.1 QUANTITY

The Supplier shall supply and the Purchaser shall take coal in quantities of 2 Million Tonnes (+)/(-) 10% per annum. The quantity may increase depending on requirement of the Purchaser.

5.2 QUANTITY

5.2.1 The Supplier shall ensure that it shall supply the Washed Coal with guaranteed value as per Article - 6 and satisfies quality parameter laid down in Annexure-I attached to this agreement to the Delivery Points without any interruption and shall maintain quality of supply as required. The following procedure is indicated in respect of Joint Sampling.

a) third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end.

b) The third party agency shall be required to undertake sampling and analysis of coal as per the provision of ISI/ BIS or mutually agreed procedure.

c) The payment to the third party agency shall be borne by the supplier.

d) In the absence of certification by the independent Inspection agency for any rake, KPCL is not liable for payment for such rake.

5.2.2 The Supplier shall take all reasonable steps to ensure that shalesIstones are removed from the coal and no lumpy and/ or oversized coal is supplied and the quality of coal shall fall within the parameters indicated in the Annexure - I. The methodology for verifying the incidence of stonesIshales shall be mutually agreed to between the Purchaser and the Supplier. The size of coal shall be less than 25 mm (0-2 mm fine not >20%).

ARTICLE 6
CONTRACT PRICE OF COAL

6.1 The Purchaser shall purchase the entire quantity of Specified Coal supplied to it at the commercial terms and conditions stated herein below:

6.1.1 Price

a) Purchaser shall purchase the entire quantity of specified coal supplied to BTPS at a price of Rs. 1 650.47 per tonne, the detailed break up of which is as per Annexure - II attached to this agreement.

6.1.3 Basis of payment and price adjustment

C) PRICE ADJUSTMENT
The size of coal, ash content and GCV of coal would be checked and compared with the guaranteed values as indicated below:

(a) GCV (ARB)	4500 in Kcal/KG
(b) Permissible variation	max. 4500 Kcal/Kg.&
(c) Ash content	32% maximum
(d) Size of coal	0 to 25 mm with fines (upto-2mm) not exceeding 20%
(e) Total moisture	6% minimum; 15 maximum

Suitable price adjustment would be carried out by Purchaser for variation in properties compared to the guaranteed value as indicated in the following paragraphs.

ii) GCV (ARB)

a) No Pro rata price adjustment is allowed for the OCV over and above 4500 Kcal/kg.

b) In case the GCV is between 4200 to 4500 Kcal/Kg the price adjustment will be on the Base Price on Pro rata basis.

c) In case the GCV of the coal supplied falls between 4000-4200 Kcal/Kg, the price payable is restricted to 50% of the Base Price.

d) In case the GCV is below 4000 Kcal/Kg Purchaser shall not be required to pay for such supplies including freight and other incidental charges. The coal supplied having GCV of below 4000 Kcal/Kg will be consumed. Adjusted rate per Mt. is calculated as per formula defined in Annexure-III

iii) The size of coal shall not exceed 0 to 25 mm with fines (0-2 mm) not exceeding 20%.....

ARTICLE 8
SAMPLING OF COAL AND ANALYSIS OF QUALITY

8.1 The quality of coal shall be determined by drawing coal samples from railway wagons on receipt at KPCL power plants before unloading.

8.2 A third party agency shall be appointed jointly by the parties of the agreement for sampling and analysis of coal received at BTPS end. The third party agency shall carry out the sampling and analysis of coal in the presence of the representative of the parties.

8.3 The third party agency shall be required to undertake sampling and analysis of coal as per the provision of ISIIBIS or mutually agreed procedure.

8.4 The payment to the third party agency shall be borne by the Supplier.

ARTICLE 10
PENALTY

10.1. The Supplier has agreed to commence supply of coal to BTPS on commissioning which has been rescheduled July 2007.

10.2 The delivery period stipulated in 10.1 above for the supply of coal as envisaged in Article 5 shall be the essence of the contract. In the event of failure to commence the delivery of coal within the stipulated time specified above, Purchaser shall impose a penalty at a rate of l/2% of initial contract value of

Rs.330.09 crores i.e. Rs 1.65 crores for every week's delay subject to a maximum of 10% of the contract value of Rs.330.09 crores i.e. Rs.33.00 crores.

(emphasis added)

3.3.2 In terms of Articles 2 and 5 of the FSA, a Tripartite Agreement was executed between KECML, KPCL and M/s SGS India Private Limited[22] on 20th June, 2008. M/s SGS was appointed as a third-party agency for purposes of sampling and analysis of the coal to be received at BTPS.

3.3.3 For the sake of completion of narration, it may be noted here that although the MoC had approved the Mining Plan submitted by KECML on 08th December, 2004 and the FSA referred to above was executed on 09th May, 2007, the actual mining and coal production could be commenced by KECML only in September, 2008 on account of the litigation initiated by M/s Central India Power Company[23] against the MoC in relation to the coal block allocated to KPCL.

In July, 2003 CIPCO filed a writ petition[24] before the Nagpur Bench of the Bombay High Court seeking reallocation of coal blocks allocated to KPCL. On 21st May, 2006, a status quo order was passed by the High Court in the said petition and KECML and KPCL were also made parties. The said petition was finally dismissed by the High Court on 10th August, 2006 which dismissal order was upheld by this Court on 05th January, 2007. Due to the status quo order operating in all this duration, the coal production could commence at site only in September, 2008 and washed coal was supplied by KECML to the BTPS w.e.f. December, 2008. Due to nonsupply of washed coal by KPCL as stipulated in Article 6(4) of the JVA and Article 10 of the FSA, KPCL imposed penalties on KECML for the delay.

3.4 MEMORANDUM OF UNDERSTANDING

3.4.1 Since Article 5(2) of the JVA required the appellants to establish a coal washery at the pithead to supply coal of the required specification for the consumption of BTPS and there were several layers of clearances required from the authorities to establish the washery at the pithead, it is the stand of the appellants that KECML entered into a Memorandum of Understanding[25] with M/s Gupta Coalfields and Washeries Limited[26] for washing of the mined coal, transportation of raw coal, transportation of washed coal from the washery to Majri Railway siding of KECML and loading into the railway wagons for onward despatch to BTPS. For the said purpose, GCWL agreed to dedicate its Majri washery to KECML. Following are the relevant terms of the aforesaid MoU:

"MEMORANDUM OF UNDERSTANDING'

"This MEMORANDUM OF UNDERSTANDING is made and executed on this 20th May of December, 2008

BETWEEN

KARNATKA EMTA COAL MNINES LIMITED, ... through its Director,

Shri Bikash Mukherjee herein after referred as 'KECML', ... assigns of the FIRST PART. AND

GUPTA COALFILEDS & WASHERIES LTD., ... through its Managing Director, Shri Padmesh Gupta ..... assigns of the SECOND PART

NOW BOTH THE PARTIES HAVE AGREED TO SIGN AN MOU TO UNDERTAKE THE ABOVE ACTIVITIES WITHNESSETH AS UNDER -

1. KECML has entered into a Coal Purchase Agreement with KPCL dated 9th May, 2007, whereby KECML shall require to supply coal from the above designated coal mines with the following parameters

a) GCV (ARB)	4500 Kcal/Kg
b) Permissible variation	Max 4500 Kcal/Kg & Min 4000 Kcal/Kg
c) Size	0-50 mm with fines (upto -2 mm) not exceeding 20%
d) Total moisture	6% minimum, 15% maximum

Suitable price adjustment (CIFD BTPS basis) would be earned out for variation in properties compared to the guaranteed values as follows

It has been agreed by the parties hereto that the above parameters shall be maintained by GCWL for onward supply of coal to BTPS of KPCL by KECML

2. KECML has agreed to provide minimum 2 mtpa (Min 8000 tonnes on daily average basis) raw coal to Majri washery of GCWL from their Raw Coal Dump Yard. It shall be GCWL's responsibility to arrange/transport Raw Coal from the mines to MAJRI washery process the coal to achieve agreed specifications of the washed coal, transportation of washed coal to Majri railway siding to load minimum two rakes daily, supervise the loading of washed coal, onward delivery at BTPS power plant and co-ordination.

4. GCWL has agreed to deliver washed coal of following specifications -

Ash (ABD)	Less than 32 %

GCV (ARB)	4500 Kcal/Kg
Size	0-5 mm

5. Yield Parameters GCWL shall ensure, broadly, of 90% if the ash content of the raw coal is 35% to 36% and in the event ash content of the raw coal is found to be 40%, the yield shall be 80%. However, after analysis of the full seam of coal available from the mine the yield percentage will be settled on suitable terms.

7. KECML shall pay Rs. 90/- Per MT (excluding all taxes as applicable) of raw coal towards washing charges including charges for loading washed coal to dumpers for transportation to railway siding. All taxes and duties are applicable shall be reimbursed by KECML at actual. The above charges will remain firm for 3 years.

8. It will be the responsibility of GCWL to transport raw coal from mines to washery and washed coal from washery to KECML siding and supervise the loading onto railway wagons. The transportation rates shall be decided mutually by both the parties which shall be reimbursed by KECML at actual KECML shall place indents with railways and make rail freight payments etc, as per RR on actual

12 That the rejects shall be the joint property of KECML and GCWL and it shall be disposed off/sold jointly at mutually agreed terms, subject to compliance of rules/ regulations/guidelines of Ministry of Coal, Government of India, if applicable."

3.4.2 The appellants have stated that the draft MoU was sent to KPCL for its approval by Mr. Murlidhar Rao, the then Director (Technical) of KPCL and Director of KECML and after deliberations between 18th December, 2008 and 12th January, 2009, the same was finally approved and ratified by the Board of KECML on 13th January, 2009.

In the meeting of the Board of Directors of KECML held on 13th January, 2009, those who had participated included Mr. S.M Jaamdar, the then Managing Director of KPCL and Chairman of KECML, Mr. R. Balasubramanian, the then Executive Director and Company Secretary of KPCL and Director of KECML, Mr. D.C. Sreedhar, the then Director (Finance) of KPCL and Director of KECML, Mr. U.K. Upadhyaya, Chairman and Managing Director of EMTA and former MD of KECML (appellant No. 2 in the appeals).

In the Meeting held on 23rd February, 2010, the Board of Directors of KECML subsequently concluded that washing of raw coal was necessary since a specific grade of coal was required by the BTPS for generation of power and therefore,

washed coal should continue to be supplied on the same basis. The appellants have also pointed out that GCWL was known to KPCL that had earlier entered into an agreement with GCWL along with two other washery operators for washing of coal mined by Western Coalfields Limited. However, the respondent-CBI has questioned the execution of the MoU between KECML and GCWL, in particular, Clause 12 thereof.

3.5 WASHABILITY REPORT OF THE CENTRAL INSTITUTE OF MINING AND FUEL RESEARCH, NAGPUR

3.5.1 In the year 2009, to check the statistics of the coal mine, the appellants approached a Government Laboratory, namely, Central Institute of Mining and Fuel Research[27] for testing of the Integrated Baranj Open Cast Mines[28]. The team of officers from CIMFR visited the site, collected 100 MT of coal for testing and furnished a Detailed Washability Report. The report states that the rejects did not contain any useful c.v. as the GCV of the rejects was 1094 Kcal/Kg and the useful heat value was negative.

3.6 REVISED MINING PLAN

3.6.1 After the mining continued for about two years in terms of the original Mining Plan submitted in the year 2004, KPCL decided to increase the capacity of BTPS from 2.5 Mty to 5 Mty. As a result, the appellants were required to prepare a revised Mining Plan for supplying the increased mining demands. On 20th December, 2010, the appellants addressed a letter to the MoC for seeking approval of the revised Mining Plan. At that stage, a new technology for utilization of the rejects for its carbon value was introduced, described as the Fluidised Bed Combustion[29]. The letter issued by the appellants to the MoC mentioned that the rejects generated could be gainfully utilized for its carbon content by generating power through FBC/CFBC power plants of appropriate capacity.

It is not in dispute that the new technology of FBC could have been put to use only when a plant in respect of the same was set up for which several approvals would be required from various departments besides the process of acquiring land for setting up the plant spreading over four to five years, as a power plant could not be installed within the mining lease area. The appellants have pleaded that KPCL could not have started using the rejects immediately upon receiving approval of the revised Mining Plan and that the rejects having optimum useful heat value/GCV i.e. 2500 Kcal/kg, could have been used only by applying the FBC technology after such a facility was set up.

3.6.2 Vide letter dated 24th August, 2011, the MoC approved the revised Mining Plan submitted by KECML whereafter the process of obtaining preliminary approvals including environmental clearance from the Ministry of Environment, Forest and Climate Change, Government of India[30] for the enhanced capacity of 5 MTPA coal from 2.5 MTPA was initiated. While the Terms of Reference was granted by the MoEF&CC, the mandatory public hearing required to obtain environment clearance could not be conducted since this Court passed an order in the year 2014 deallocating all captive coal blocks. Before that, due to disputes that had arisen between KECML and GCWL, washing of coal was stopped at the washery of GCWL w.e.f. 22nd May, 2012.

3.7 INFORMATION SUBMITTED BY KECML TO THE COAL CONTROLLER

3.7.1 On 14th December, 2012, the Office of the Coal Controller that falls under the MoC called upon the KECML to furnish details in terms of the prescribed formats in respect of the production, stock, despatch of coal to the washery etc. Vide letter dated 16th January, 2013, KECML furnished the detailed data as per the prescribed format.

The said letter stated that from December, 2008 to December, 2012, approximately 3,61,000 MT of rejects was generated at the washery; that the ash content of the raw coal varied from 35 per cent to 37 per cent and the content of the washed coal varied from 32 per cent to 34 per cent; that the yield of the washery was about 95 per cent to 96 per cent and the residual 4 per cent of the raw coal were rejects whose ash content was over 90 per cent and was therefore not marketable. It was further stated that the quality of the rejects was so poor that no records were maintained regarding its utilization. However, the rejects were used to fill up low land area of siding and road between coal blocks to the washery and for pit dumping near the washery.

3.7.2 To substantiate the statement made that the yield of the washery was 95 to 96 per cent, the appellants relied on the Washability Report prepared by CIMFR, Nagpur unit dated 01st August, 2009 which records that IBOCM coal is amenable to wash with yield varying from 90 to 98 per cent at the desired ash level of 32 per cent. The Report has recorded that the GCV of the mined coal fit for transporting to BPTS is 4464 Kcal/kg and that of the rejects is 1094 Kcal/kg. The data prepared in a format and submitted in a tabulated format by KECML to the Coal Controller for the period between the year 2008-09 and 2012-13 is extracted below:

Sl. N	Year	Production	QTY OF COAL	QTY OF COAL	WASHED COAL	REJECTS	REJECTS

o.			DIRECTLY DESPTACHED TO SIDING	DESPATCHED TO WASHERY	PRODUCED	PRODUCED	CONSUMED (APPROX.)
1	2	3	4	5	6	7	8
1	2008-09	990839	7744	90436	860367	40069	30000
2	2009-10	2252358	0	2216334	21177107	98627	70000
3	2010-11	2274995	0	2368455	2263059	105396	70000
4	2011-12	2189869	0	2205395	2108000	97395	50000
5	2012-13	1832770	1606343	225056	205200	19856	20000
Total		9539831	1614087	7915676	7554333	361343	240000

Ash % of Raw coal varies from 35% to 37%
Ash % of wash coal varies from 32% to 34%
% age of yield of washed coal varies from 95-96%

7915676 X (35+37)/2 = 7554333 X (32+34)/2 + 361343 X (A)
where A= Ash% of Rejects,
Hence A = (284964336 - 249292989)/ 361343 = 98.7%
The quality of rejects is as good as stone and not saleable

Pertinently, the data regarding despatch of coal for washing has been furnished only upto May, 2012 since a dispute had arisen between KECML and GCWL thereafter. The second last column mentions the total rejects produced at IBOCM as 3,61,343 MT[31] and the rejects consumed as 2,40,000 MT.

3.8 AUDIT OBJECTIONS RAISED BY THE COMPTROLLER AND AUDITOR GENERAL[32]

3.8.1 On 31st October, 2013, the Office of the Principal Accountant General (E&RSA), Karnataka raised an audit inquiry on KPCL on the subject of non-utilization of the washery rejects and the resultant undue benefit of ₹ 53.37 crores to a private company. The audit inquiry noted that KECML had engaged a third party agency namely, GCWL through a MoU for washing of coal and Clause 12 of the MoU stipulated that rejects should be the joint property of KECML and GCWL which ought to be disposed of/sold jointly at mutually agreed terms subject to compliance of the relevant rules, regulations/guidelines issued by the MoC, if applicable.

It was stated that KECML had executed the MoU with GCWL to dispose off the rejects without the concurrence of KPCL and KPCL did not demand the washery rejects from KECML either for its captive consumption or for its disposal. Further, it was stated that no coal could be sold/delivered/disposed of except for captive mining purpose, i.e., power generation and with the previous written approval of the Central Government.

3.8.2 The observations made by the CAG in Audit Inquiry No. 18 are extracted below:

"We observed that

➢ Depending on the type of coal being washed and the requirement of the captive user, the rejects and middlings are generated from washery. A study report indicates that washing of D-grade coal generates rejects and middling of F and G-grade, and such low quality coal was also being used in power generation.

➢ The purpose of allocation of coal blocks for captive use under section 3(3) of the Coal Mines (Nationalisation) Act, 1973 is not to enable free trading of coal by private companies. The basic concept of captive mining permitted under the aforesaid Act is that the coal obtained from a captive block shall be used entirely and exclusively for the specified and approved end use by the allocatee Company and, therefore, the production of surplus coal should not result in any undue advantage to the captive block allocatee as the coal block is allotted to them for use in their end-use plant only and any additional production from the block should be made available to the Government for utilization.

➢ While allocating the coal block in November 2003, the Government directed the Company to use the rejects for its own captive consumption.

➢ In reply to the clarification sought (October 2003) by the Ministry of Coal regarding detailed plan about the use of middling, tailings and rejects etc, the Company informed (October 2003) that the same was proposed to be used for

power generation with fluidized-bed boilers. Thus, the inaction on the part of the Company resulted in the KECML/EMTA disposing the coal rejects without transferring the revenue to KPCL. Considering the coal rejects as G-grade based on GCV undue benefit afforded to the KECML/EMTA worked out to Rs. 52.37 crore, as detailed below:

Year	**Coal produced at Baranj OCP (in Tonnes)**	**Minimum quantity of rejects as per MOU (10%)**	**Average CIL rate of G grade coal (Rs.)**	**Loss (₹)**
2008-09	990839.026	99083.903	590	58459502.53
2009-10	2252358.28	225235.83	620	139646213.05
2010-11	2274994.46	227499.45	650	147874639.58
2011-12	2188869	218886.9	650	142276485.00
2012-13 (up to June 2012)	570869.3	57086.93	620	35393896.60
				52,36,50,736.76

Facts and Figures may be confirmed"

3.8.3 Vide letter dated 17th December, 2013, KPCL submitted the following reply to Audit Inquiry No. 18:

"Sl. No.	**Question**	**KPCL Reply**
1.	**Audit Inquiry No. 18** **Sub: Non-utilisation of washery rejects by the company and resultant undue benefit of Rs 52.37crores to private company.** In November 2003, Government of India allocated captive coal blocks in Wardha Valley region to the	The Audit objection is raised as if the entire rejects have been appropriated by KECML and that the rejects have a market value of Rs. 52.37 crores. These are factually incorrect in view of the following:- a) The assessment of washery rejects does not have any direct co-relation with

Company to develop it as source of supply to its thermal power plant al Bellary. In accordance with the requirement of the Company, the JV Company (KECML) engaged (December 2008) a third party agency, M/s Gupta Coalfields and Washeries Limited (GCWL), Nagpur through a Memorandum of Understanding for washing of coal. Clause 12 of the MOU stipulated that the rejects should be the joint property of KECML and GCWL and it should be disposed off/ sold jointly at mutually agreed terms, subject to compliance of rules/regulations/guidelines of Ministry of Coal, Government of India, if applicable. The washing of coal was carried out till the end of June 2012 before it was discontinued due to dispute between the parties to the MOU.

KECML entered into MOU with GCWL to dispose of the rejects without the concurrence of the Company. Despite the fact that the Company holds the right on the captive coal blocks, no provision was made in the FSA made by the Company with KECML for supply of rejects/middling. It did not demand the washery rejects from KECML either for its captive consumption or for its disposal by its own means with the approval of Central Government.

The conditions of allocation inter-alia included that if the coal was being washed, tailings, middling or the quantity of coal produced at Integrated Baranj OCP, rather, the quantity sent to washery and the quantity actually dispatched to the thermal power stations of KPCL after the processing in the washery are the two important quantities giving idea of reject generation at the washery. We are furnishing below the year-wise quantity of coal sent to washery from Integrated Baranj OCP, the quantity of rejects generation and the quantity of coal finally dispatched to KPCL.

Year	**Coal produced at Baranj OCP (in Tonnes)**	**Minimum quantity of rejects as per MOU (10%)**	**Average CIL rate of G grade coal (Rs.)**	**Loss (Rs.)**
2008-09	990839.026	99083.903	590	58459502.53
2009-10	2252358.28	225235.83	620	139646213.05
2010-11	2274994.46	227499.45	650	147874639.58
2011-12	2188869	218886.9	650	142276485.00
2012-13 (up to	570869.3	57086.93	620	35393896.60

May 2012)				
				52,36,50,736.76

rejects, as the case may be, from washery should be used for captive consumption only by the Company as approved by the Central Government. Further, no coal shall be sold, delivered, transferred or disposed of except for the stated captive mining purpose (power generation) and with the previous approval of the Central Government in writing.

We observed that:
> Depending on the type of coal being washed and the requirement of the captive user, the rejects and middling are generated from washery. A study report indicates that washing of D-grade coal generates rejects and middling of F and G-grade, and such low quality coal was also being used in power generation.

> The purpose of allocation of coal blocks for captive use under section 3(3) of the Coal Mines' (Nationalization) Act, 1973 is not to enable free trading of coal by private companies. The basic concept of captive mining permitted under the aforesaid Act is that the coal obtained from a captive block shall be used entirely and exclusively for the specified and approved end use by the allocatee Company and, therefore, the production, of surplus coal should not result in any undue advantage to the captive block allocatee as the coal block is allotted to them for use in their

b) It may be noted that the said rejects are only Stones / Boulders not consistent with the size of coal :(- 25 mm) for which the boiler is designed, hardly have any calorific value. Therefore the said rejects have been used for leveling, piling etc. towards facilitating Integrated Baranj OCP.

c) The Audit comment is a generalized observation without any factual support and as such cannot be concluded that the washery rejects irrespective of the geological location of the source of coal would have Useful Heat Value (UHV) to cater to the generation requirement. In fact, the rejects generated in the present case are only shale and non- coal matter. Hence the conclusion drawn by Audit that the rejects are G- grade is not only arbitrary but also not based on the ground geological realties.

Thus, the abandonment of rejects at the collieries end has been resorted to based on its utility, as otherwise its transportation would have imposed additional burden on the Company.

The abandonment of rejects is, therefore, in order.

enduse plant only and any additional production from the block should be made available to the Government for utilization.

While allocating the coal block in November 2003, the Government directed the Company to use the rejects for its own captive consumption.

> In reply to the clarification sought (October 2003) by the Ministry of Coal regarding detailed plan about the use of middling, tailings and rejects, etc, the Company informed (October 2003) that the same was proposed to be used for power generation with fluidized-bed boilers.

Thus, the inaction on the part of the Company resulted in the KECML / EMTA disposing the coal rejects without transferring the revenue to KPCL Considering the coal rejects as G-grade base on GCV undue benefit afforded to the KECML / EMTA worked out to Rs.52.37 crore, as detailed below.

Year	**Quantity sent to Washery from integrated Baranj OCP**	**Quantity of rejects generation**	**Quantity of coal finally dispatched to KPCL**
2008-	9,31,195.026	98,940.003	8,08,871.000

09			
2009-10	22,16,334.815	71,891.838	21,68,827.000
2010-11	23,68,121.815	1,24,137.309	22,12,460.790
2011-12	23,68,121.995	33,081.099	21,63,569.650
2012-13 (upto June 2012)	2,25,035.600	34,978.967	2,11,206.350
	79,46,082.736	3,63,023.216	75,63,934.800

Though KPCL requested the CAG to drop the audit objection in view of its clarification, it is a matter of record that the CAG did not accept the explanation offered by KPCL. Instead, CAG observed in its Audit Report for the year ending March, 2013 that coal rejects worth ₹ 52.37 crore had been misappropriated by KECML and GCWL on account of the inaction on the part of the KPCL.

3.9 PRELIMINARY INQUIRY REGISTRED BY RESPONDENT-CBI

3.9.1 On receiving the Report from the Office of the CAG, KPCL dashed off a letter dated 31st July, 2014 to KECML seeking an account of the rejects generated by washing of coal and demanded reimbursement of the cost of the rejects. KECML responded vide letter dated 14th August, 2014 reiterating therein that the percentage of rejects generated at the washery were only 4.39 per cent of the total coal produced at the IBOCM and the said rejects did not possess any c.v. having no carbon and only being stones/boulders. Therefore, the same had been used at the site for levelling, piling etc. for facilitation of smooth mining operations at the IBOCM.

3.9.2 In the meantime, based on a Source Information Report[33] pertaining to some irregularities committed in the allocation of coal blocks under the 'Government Dispensation' category, failure to follow the due procedure resulting in large private companies having connived with public servants and gaining undue benefit a Preliminary Inquiry[34] was registered by the Superintendent of Police, CBI on 28th September, 2012.

In all, three Preliminary Inquiries were registered namely, PE 2, PE 4 and PE 5. The FIR[35] subject matter of the present appeal was registered by the respondent-CBI on 13th March, 2013[36] under Section 120-B read with Sections 409 and 420, IPC and under Section 13(2) read with 13(1)(d) of the PC Act alleging substantive offences against the appellants and other co-accused. Following are the fourteen persons/entities who have been arrayed as accused by the respondent-CBI:

FUNCTIONARIES OF KPCL	
A-1	SM Jaamdar, (Rtd IAS and the then Managing Director Karnataka Power Corporation Limited "(KPCL") and Chairman of Karnataka EMTA Coal Mines Ltd ("KECML")
A-2	Balasubramanium, then Executive Director and Company Secretary, KPCL and Director KECML
A-3	Muralidhar Rao, Director (Technical) KPCL, Director - KECML
A-4	DC Sreedharan, Director (Technical) KPCL and Director KECML
A-5	H.N. Narayana Prasad, the then Director (Technical) KPCL, and Former Director KECML
FUNCTIONIARIES OF KECML	
A-6	Ujjal Kumar Upadhyay, Chairman and MD EMTA Coal Ltd and Managing Director of KECML
A-7	Bikash Mukherjee, Director EMTA and Former Director of KECML
A-8	Bishwanath Dutta, Director EMTA and Director KECML
A-9	Purajit Roy, Executive Director and CFO M/s EMTA Coal Ltd
A-10	Ashok Tooley, Director KECML FUNCTIONARIES OF GCWL

A-11	Padmesh Gupta , CMD Gupta Coal Washeries Limited
CORPORATE ENTITIES & FUNCTIONARIES	
A-12	Karnataka EMTA Coal Mines Ltd. (KECML)
A-13	M/s Eastern Minerals and Trading Agency (EMTA)
A-14	Gupta Coal Washeries Limited

Though the appellants have asserted that the respondent-CBI has registered the complaint on coming across the Report of the CAG, the said submission has been refuted by the respondent-CBI who has pleaded that it had conducted an independent investigation after registering the PE which was followed by registering of the FIR.

3.10 LITIGATION BETWEEN KPCL AND KECML

3.10.1 Aggrieved by the letter dated 31st July, 2014 addressed by KPCL to KECML, KECML filed two writ petitions[37] before the High Court of Karnataka praying inter alia for quashing of the letters dated 31st July, 2014 and 24th December, 2014 issued by KPCL. In the writ petitions[38] EMTA and KECML assailed a demand of ₹ 52,37,00,000/- (Rupees Fifty two crore thirty seven lakh only) raised by KPCL towards the value of the coal rejects, as arbitrary.

Challenge was also laid to the decision taken by KPCL to deduct ₹ 90 (Rupees Ninety) per MT towards non-washing of coal, in terms of its communications dated 23rd November, 2013 and 29th January, 2014. Vide Judgment dated 24th March, 2016 the Division Bench of the High Court allowed both the writ petitions[39] and quashed the communications issued by KPCL to KECML. Further, KPCL was restrained from initiating any demand against KECML on the basis of the report of the CAG and called upon to reimburse the amounts already deducted by KPCL towards non-washing of coal.

3.10.2 For the sake of completion of the narrative pertaining to the aforesaid litigation, it is pertinent to note that the aforesaid judgement dated 24th March, 2016, was challenged by KPCL before this Court by preferring Petitions for Special Leave to Appeal[40]. Vide Judgment dated 20th May, 2022, both the Civil Appeals[41] were dismissed.

3.10.3 On 31st July 2017, the respondent-CBI submitted a request to the Ministry of Personnel Public Grievances and Pension[42], Government of India for grant of sanction to prosecute Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML under Section 19 of the PC Act. However, the Board of KPCL, which was the Sanctioning Authority, refused sanction for prosecution of Mr. R. Nagaraja by passing a detailed order.

3.10.4 After examining the order passed by the Board of KPCL refusing to grant sanction to prosecute Mr. R. Nagaraja, the Department of Personnel & Training[43], Government of India addressed a letter dated 16th September, 2018 to the respondent- CBI stating that the Competent Authority i.e., the Central Government had denied sanction for prosecution of Mr. Yogendra Tripathi, the then Managing Director of KPCL. It is a matter of record that the respondent-CBI did not take any steps to challenge the decision taken by the Sanctioning Authority and the Competent Authority refusing permission to grant sanction for the prosecution of Mr. R. Nagaraja and Mr. Yogendra Tripathi.

3.10.5 The Charge-sheet was finally filed by the respondent-CBI against 14 persons/entities alleging that they had illegally disposed of the coal rejects in IBOCM. A Supplementary Chargesheet was filed on 4th November, 2019. Out of the two charges, one charge relating to allegations of recovery of payment for washing charges was dropped by the respondent-CBI.

3.10.6 On 1st September, 2021, the appellants filed an application before the learned Single Judge under Section 227 read with Section 239 of the Criminal Procedure Code[44] for discharging them in the case. By the common impugned order dated 24th December, 2021, the said application was dismissed and charges were framed against them on 3rd March, 2022, under Section 409 IPC and 120 (B) r/w Section 13(1)(c), 13(1)(d) r/w Section 13(2) PC Act i.e. resulting in filing of the present appeals.

C. SUBMISSIONS

4. ARGUMENTS BY COUNSEL FOR THE APPELLANTS

Following are the arguments advanced by Mr. Ranjit Kumar, learned Senior Advocate appearing for the appellant No.1 and Mr. Abhimanyu Bhandari, learned counsel appearing for the appellant No.2:-

4.1 That KPCL did not have any right over the rejects produced from the mine and therefore, cannot claim any entitlement thereto. The terms and conditions stipulated in the JVA dated 13th September, 2002, in particular Articles 5(1)(b), 5(2)(b), 5(13) and 6(3)(c) and Annexure I, when read together, would

demonstrate that the obligation cast on the KECML was limited to providing KPCL specified quality of "washing coal" containing a guaranteed value and having a specified heat value and KECML was only required to dispose off the rejects to avoid any environmental hazards.

4.2 That the original Mining Plan which was submitted by KECML and was approved by the MoC in the year 2004, did not contain any specific provision relating to how the rejects were to be disposed off and nor did the allocation letter issued by the MoC to KPCL state anything in this regard. For this, reliance has been placed on the reply furnished by the Minister of State, MoC, in the Lok Sabha in response to an unstarred question seeking an answer from the Government of India as to whether it had framed any National Policy for exploitation of coal rejects. The reply furnished by the Minister was in the negative along with a clarification given that formulation of a policy of disposal of surplus coal, by-products and middling stock rejects from coal blocks was under the consideration of the Government.

4.3 Citing Clauses 5.2 and 5.2.2 of the FSA dated 09th May, 2007 and the definition clauses in respect of the expressions, "Purchaser" and "specified coal", it has been urged that none of the clauses in the FSA have stated that KPCL would purchase or claim rights over the rejects and that KECML was to ensure that "shales/stones" are removed from the coal and the quality of coal meets the parameters indicated in Annexure I.

4.4. To fortify the submission that KECML was only required to dispose off the coal rejects in an environment friendly manner and that KPCL would have no right over the rejects or claim any entitlement over them, reference has been made to the decision of the Division Bench of the Karnataka High Court in the case of KPCL v. Aryan Energy Private Limited[45] and Others[46] and the clause in the Agreement governing KPCL and AEPL to contend that it was similar to the present case inasmuch as like KECML, AEPL was also required to dispose off the rejects in a manner that would satisfy environmental regulations.

In the above case the Karnataka High Court has held that the clauses of the Agreement between the parties appearing before it showed that coal rejects were the property of AEPL and KPCL had no claim over it and that the term regarding disposal of coal rejects was imposed by KPCL only to ensure compliance of the environmental regulations.

4.4.1. Notably, the aforesaid judgement of the High Court was challenged by KPCL before this Court by way of petition for special leave to appeal[47]. The said petition was disposed of by this Court on 26th April, 2024, noting that during the pendency of the petitions, the parties had settled their disputes amongst

themselves and part of the decretal amount deposited by KPCL to discharge its liability towards supply of washed coal by AEPL along with interest etc. was directed to be released in favour of AEPL in terms of the Compromise Deed.

4.5 That the Washability Report of CIMFR, Nagpur for the year 2009 had stated that the rejects had a GCV of 1094 Kcal/kg and less and therefore, the same could not have been utilized in the BTPS. For the said reason, KECML had used the rejects for captive consumption of the mine i.e. for levelling, piling etc. The very same Report was also referred to by KPCL in its reply to the audit objections raised by CAG to state that no loss has been caused to KPCL since the rejects were in the nature of stones and boulders and did not have useful heat value.

4.6. To substantiate their submission that the rejects did not have the requisite GCV for being utilized in the BTPS, learned counsel have quoted a Circular issued by the NITI Aayog in the year 2020 which states that coal rejects having GCV of 1500 Kcal/kg are to be used in back filling of mines and can be used in construction of highways, roads etc. whereas rejects having GCV in the range of 1500 Kcal/kg to 2200 Kcal/Kg, can be used in FPC Boilers.

4.7 That at the time of filing the chargesheet on 04th January, 2018, the respondent- CBI completely ignored the judgement dated 24th March, 2016 passed by the Karnataka High Court in the writ petition filed by the appellants against KPCL wherein it has been clearly held that KPCL does not have any right over the rejects generated during the process of mining and resultantly, the demand letter dated 31th July, 2014, issued by KPCL was set aside. The said judgement has also been upheld by this Court vide judgement dated 20th May, 2022.

4.8 That KPCL has been blowing hot and cold. First, it had filed objections to the quantification of coal rejects as recorded by the CAG in its Report but when its objections were rejected by the CAG, it changed its stand and proceeded to raise an illegal demand on the appellants on the basis of the very same CAG Report, which has been quashed by the High Court.

4.9 That both, the Karnataka High Court and this Court having quashed the demands made by KPCL in respect of the value of rejects to the tune of ₹ 52 Crore, no case has been made out by the respondent-CBI to prosecute the appellants particularly when on the advice of the Central Vigilance Commission[48], the Central Government refused to grant sanction for the prosecution of Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML. A different treatment cannot be meted out to the appellants.

4.10. That the respondent-CBI has solely relied on the Report of the CAG of 2013 to launch its prosecution in the year 2015. However, the Report of the CAG has not been approved by the Parliament in accordance with the procedure prescribed under Section 19(A) and other provisions of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971[49] read with Articles 148 to 151 of the Constitution of India.

4.11. That the analysis of the rejects and the manner in which loss was allegedly caused to KPCL, has primarily been arrived at by the respondent - CBI from the Report of the CAG and once this Court has held that the Report of CAG cannot be the basis for launching prosecution against the appellants, the entire basis of launching the prosecution is eroded.

4.12. Stating that contrary to the prescribed procedure that contemplates that the Report of the CAG in relation to the accounts of a Government Company shall be submitted to the Government and the Central Government/State Government, as the case may be, shall place the said Report before each House of the Parliament/State Legislature and the Public Accounts Committee/the Joint Parliamentary Committee is required to scrutinize the said Report. In the instant case, the Report of the CAG has not been accepted either by the Public Accounts Committee or by the Committee of Public Undertakings or by the Joint Parliamentary Committee nor has it been tabled before each House of the Parliament.

It is only when the Report is tabled in the Parliament and duly scrutinized and the Government offers its view on the Report, can it form the basis for initiating any action. Decisions in Centre for Public Interest Litigation v. Union of India[50], Arun Kumar Aggarwal v. Union of India[51] and Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat[52] have been cited to bring home the argument that when the Report of the CAG is subject to scrutiny by the Public Accounts Committee/Joint Parliamentary Committee, it would not be proper to refer to its findings or the conclusions drawn therein.

4.13. That the learned Special Judge, CBI has blindly accepted the charge levelled by the respondent-CBI quantifying the loss purportedly caused to KPCL on account of illegal sale of rejects at ₹49,03,54,159/- (Rupees Forty nine crore three lakh fifty four thousand one hundred and fifty nine only). The observations made in para 104 of the impugned judgement to the effect that the respondent-CBI has quantified the rejects on the basis of the documents of KECML and has calculated the loss on the basis of the rate of the lowest grade of coal prevailing at the relevant point of time is therefore, devoid of merits. Reliance has been placed on the information in the Coal Directory of India published by the MoC for the year 2010-2011 that has categorized coal and coke and clarified that w.e.f.

January, 2011, by virtue of a notification issued by the MoC, there has been a switchover from the existing Useful Heat Value[53] based system of grading and pricing of non-coking coal produced in India to fully variable GCV system.

4.13.1. Under the JVA/FSA, KECML was required to supply Grade 'D' coal to KPCL. As per the Coal Directory of India, 2010-2011, Grade 'D' coal in terms of the old grades of non-coking coal would be equivalent to Grade 'G-7' and 'G-8' under the new grades of non-coking coal. The GCV range in respect of Grade 'G-7' coal has been fixed between 5201 Kcal/kg and 5500 Kcal/kg and in respect of Grade 'G-8' coal, between 4901 Kcal/kg and 5200 Kcal/kg.

In the instant case, even as per the Report of the CIFMR, Nagpur, the coal rejects were found to be below either of the aforesaid grades of non-coking coal, having been pegged at a GCV of 1094 Kcal/kg. Therefore, it is contended that the chargesheet filed by the respondent-CBI quantifying the loss suffered by KPCL at ₹49,03,54,159/- (Rupees Forty nine crore three lakh fifty four thousand one hundred and fifty nine only), is without any basis and contrary to the records.

4.14. That the Coal Controller did not raise any issue with regard to the disposal of the rejects and the respondent-CBI has neither made the Coal Controller a witness or an accused in the present case.

4.15. The judgements in Radheshyam Kejriwal v. State of West Bengal and Another54; Ashoo Surendranath Tewari v. Deputy Superintendent of Police, EOW, CBI and Another[55]; J Sekar alias Sekar Reddy v. Directorate of Enforcement[56]; and Prem Raj v. Poonamma Menon & Another[57] have been cited to argue that it is settled law that where a party has been exonerated on merits in civil adjudication, criminal prosecution cannot be permitted to continue on the same set of facts and circumstances.

4.16. That the respondent - CBI has failed to produce any document to demonstrate that the accused Nos.1 to 5 had made any demand for illegal gratification or there was acceptance of any such demand made. In the absence of proof of demand and acceptance of illegal gratification by the public servant, no offence is made out under Section 13(1)(d) of the PC Act.

For this proposition, reliance has been placed on B. Jayaraj v State of Andhra Pradesh[58]; P. Satyanarayana Murthy v District Inspector of Police, State of Andhra Pradesh and Another[59]; State through Central Bureau of Investigation v Dr Anup Kumar Srivastava[60]; K. Shanthamma v State of Telangana[61]; Neeraj Dutta v State (NCT of Delhi)[62]; Soundarajan v State Rep. by the Inspector of Police Vigilance Anticorruption Dindigul[63].

4.17. Lastly, it has been strenuously argued that sanction to prosecute Mr. Yogendra Tripathi and Mr. R. Nagaraja[64] having been denied by the Sanctioning Authority i.e. the Board of Directors of KPCL and the CVC and the said orders having been upheld by the DoPT and no steps having been taken by the respondent - CBI to challenge the said decision, a different yardstick cannot be adopted in respect of the appellants. The matter having attained finality, the appellants deserve to be discharged.

5. ARGUMENTS BY COUNSEL FOR THE RESPONDENT-CBI

5.1 Mr. Cheema, learned Senior Advocate appearing for the respondent - CBI has refuted each and every argument advanced by learned counsel for the appellants. He submitted that the appellants have unduly placed heavy reliance on the fact that the original Mining Plan was approved by the MoC on 08th December, 2004 and the said Mining Plan did not contain any specific clause for disposal of rejects.

Similarly, unnecessary reference has been made by the appellants to Rule 22(5) of the Mineral Concession Rules, 1960 to demonstrate what information is required to be disclosed in a Mining Plan. It is submitted that the argument advanced by the appellants that in the absence of any stipulation in the Mining Plan regarding disposal of the rejects, there could be no inference of commission of any offence or a shadow cast on the conduct of the appellants, is flawed.

5.2 Learned counsel for the respondent-CBI has canvassed that there was a latent error in the assumption of the appellants that it was for the MoC to incorporate a clause regarding disposal of the rejects in the Mining Plan and in the absence of any such clause, KPCL or KECML could not be held responsible for the disposal of the rejects, which was done in an illegal manner or that when the Mining Plan was silent regarding the manner in which the rejects were to be disposed of, it was for KPCL and KECML to deal with the rejects in an appropriate manner. The aforesaid presumptions are stated to be without any basis and opposed to the letter dated 10th November, 2003, addressed by the MoC to KPCL that lays down the conditions of allotment of the captive coal blocks in para 3 that specifically states in sub-para (iv) as follows:

"3 The allotment of the captive blocks will also be subject to the following conditions:

(iv) The allocattee would furnish to this Ministry detailed plan for disposal of unusable containing carbon material obtained during the process of a mining or any process thereafter including washing etc. so as to avoid any need for disposal

of the same through sale etc. at a later stage, within 30 days of receipt of this letter or submission of mining plan whichever is earlier."

5.3 As per the respondent-CBI, it was the duty of KPCL to furnish the detailed plan for the disposal of the rejects to the Ministry within 30 days of the receipt of the letter dated 10th November, 2003 or submission of the Mining Plan, whichever is earlier and this requirement was independent of the Mining Plan. Therefore, absence of any plans mentioned in the Mining Plan to deal with the rejects would not exonerate the appellants who remained under an obligation to furnish a detailed plan for the disposal of the rejects in terms of the Allocation letter dated 10th November, 2003 issued by the MoC.

5.4 Referring to the letter dated 31st January, 2006 addressed by the MoC to the Secretary, Industries, Energy and Labour Department, State of Maharashtra, learned counsel for the respondent-CBI submitted that the appellants were aware of the fact that the rejects could not have been disposed of by KECML since the said letter had conveyed the approval of the Central Government to grant mining lease for coal in three coal blocks in favour of KECML with certain stipulations, one of which was as follows:

"ii) No coal mined from the allocated blocs shall be sold, delivered, transferred of disposed of except for the aforestated captive mining purposes except with the previous approval of the Central Government"

5.5 To reinforce the above plea, reliance has also been placed on the statement of Dr. Manmohan Seam, cited as witness No. 12 who had prepared the Mining Plan in question and stated that in case of washing of coal the allocatees are required to obtain an approval from the MoC in terms of the letter of allotment and since the MoC has not allocated any coal block for washing of coal alone, the expression used in para 3 (iii) of the letter dated 10th November, 2003 written by the MoC has to be read and understood to mean 'washing-cum-end use'. Therefore, emphasis on non-incorporation of a detailed plan for the disposal of the rejects in the original Mining Plan has no relevance and cannot offer any defence to the appellants.

5.6 It has next been submitted that the order refusing grant of sanction to prosecute Mr. Yogendra Tripathi (IAS), Managing Director, KPCL and Mr. R. Nagaraja, Director (Finance) of KPCL and nominee Director on the Board of KECML by the Sanctioning Authority and the Competent Authority is not a relevant circumstance at the stage of consideration and framing of charge and no benefit can be given to the appellants on that basis. The orders passed by the Competent Authority refusing to grant sanction are sought to be described as mere administrative orders. Learned counsel argued that in any event, the two

officers mentioned above were public servants and the factum of the Competent Authority having refused to grant sanction to prosecute them cannot enure to the benefit of the appellants herein who are not public servants and cannot seek any parity with public servants.

5.7 Learned counsel for the respondent-CBI points out that the Order on Charge impugned by the appellants herein was also challenged by the accused No. 1 to 5 (functionaries of KPCL who had since retired), by filing a Petition for Special Leave to Appeal[65] in this Court which was dismissed as withdrawn vide order dated 09th February, 2024.

5.8 It is submitted that at the stage of framing of charges, the trial Court must confine itself to the material brought on record by way of the chargesheet filed under Section 173 Cr.P.C and merely because some other Authority has taken a different view with regard to the complicity of some co-accused who are public servants and denied the request made by the respondent-CBI for sanctioning their prosecution, is irrelevant.

5.9 As for case law cited by learned counsel for the appellants to substantiate their submission that sanction under Section 197 Cr.P.C is mandatory for prosecuting public servants (A-1 to A-5 in the instant case), the submission made is that for the said purpose, facts and circumstances of each case have to be examined and there cannot be any universal findings in this regard.

5.10 Learned counsel for the respondent - CBI has strenuously disputed as incorrect, the argument advanced on behalf of the appellants that the respondent - CBI has filed the Chargesheet solely on the basis of the CAG Report and submitted that a reading of the FIR dated 31st March, 2015 would demonstrate that this case was not triggered by the Report of the CAG. In fact, PE 5/2012 was registered on 28th September, 2012 in connection with the irregularities noticed in the allocation of coal blocks under the Government Dispensation route for the period between 1993 and 2006.

Asserting that PE 5 did not emanate from the CAG Report and originated independently thereof, learned counsel submitted that during the course of the preliminary enquiry, several documents including the CAG Report were examined by the respondent - CBI. In fact, the respondent - CBI had conducted its own independent enquiry into the allegations for arriving at a conclusion relating to the commission of the offence or quantification of the extent of misappropriation.

In view of the aforesaid submission, the contentions of the appellants based on a reading of the provisions of the CAG Act and the Constitution of India are stated

to be extraneous to the controversy raised before this Court just as the case law cited by them regarding the nature of the CAG Report. Learned counsel has cited the judgment of the Gauhati High Court in M.S Associates and others v. Union of India[66] to urge that even if the CAG Report has not been placed before the Parliament/State Legislature, contents thereof can serve as information for starting an investigation into a criminal offence.

5.11 Coming next to the judgement passed by the Karnataka High Court in the case of Aryan Energy (supra) and cited by the other side, it is submitted on behalf of the respondent-CBI that the said judgment was passed on 22nd July, 2021, much after institution of the chargesheet by the respondent-CBI in the present case. Learned counsel submits that the said judgement addresses a situation where no criminal case has been registered against any of the parties appearing before the High Court.

The main dispute in that matter was relating to the entitlement of KPCL to the value of the coal rejects. The Commercial Court had decreed the suits in favour of AEPL by holding that as per the contractual stipulations between the parties, AEPL was only required to dispose off the coal rejects in a manner that would satisfy environmental regulations and KPCL was not entitled to the value of the coal rejects. Learned counsel submits that the terminology used in the contract governing the parties was different and therefore the said judgement does not have any relevance to the facts of the instant case.

5.12 Learned counsel for the respondent-CBI goes on to argue that even the judgement dated 24th March, 2016, passed by the Karnataka High Court in a writ petition filed by KECML against KPCL cannot be of any assistance to the appellants for the reason that the respondent - CBI had not been impleaded as a party in the said proceedings and the said judgement has confined itself to the demands made by KPCL for recovery of amounts from KECML towards the value of the coal rejects.

Further, the FIR in the present case was registered on 13th March, 2015 whereas the judgement was delivered by the Karnataka High Court one year later, on 24th March, 2016. By the time the appeal preferred by KPCL against the judgment of the High Court was dismissed by this Court on 20th May, 2022, Charges had already been framed by the learned Special Judge, CBI against the appellants on 24th December, 2021.

5.13 Learned counsel for the respondent-CBI has emphatically argued that Clause 12 of the MoU dated 20th December, 2008 executed between KECML and GCWL states that the rejects shall be the joint property of KECML and GCWL and it shall be disposed of/sold jointly at mutually agreed terms. It is

contended that the above clause clearly demonstrates the underlying intent of the appellants to conspire with GCWL to sell the rejects in the market and cause monetary loss to KPCL by depriving it of the value of the rejects.

5.14 The attention of this Court has also been drawn to the letter dated 10th September, 2009, issued by KECML to GCWL enclosing therewith a Debit Note of even date for a sum of ₹ 4,30,38,500/- (Rupees Four crore thirty lakh thirty eight thousand five hundred only) towards "disposal of foreign material during washing" and it has been argued that the said Debit Note was raised on the instructions of Mr. Purujit Roy (accused No. 9), as stated by Mr. N.K. Ganorkar (PW 26) who was one of the two signatories of the said Debit Note and Mr. S.K. Gupta, an employee of GCWL (PW 16).

5.15 Learned counsel for the respondent-CBI also referred to a Certificate dated 12th July, 2010 issued by Mr. Avijit Sarkar who was working in the Finance and Accounts Department of KECML. The said Certificate refers to the MoU dated 20th December, 2008 and states that the rejects generated in the process of washing of coal undertaken by GCWL at their washery at Majiri during 2009-10, is owned by GCWL.

5.16. Lastly, learned counsel for the respondent-CBI has canvassed that the findings returned in a civil proceeding are not binding in a prosecution founded on similar allegations and it is for the criminal Court to arrive at any decision on its own and not to reach any conclusion by reference to any previous decisions relating to the parties which cannot be treated as binding upon it. In support of the said submission, he has cited The King Emperor v. Khawaja Nazir Ahmed[67]. It has thus been argued by the respondent-CBI that the present appeals are devoid of merits and deserve to be dismissed.

5.17. On the scope of Section 227, Cr.P.C. and the power of the Special Judge to pass an order of discharge, learned counsel for the respondent-CBI has cited the decisions in Union of India v. Prafulla Kumar Samal and Another[68] and Niranjan Singh Karam Singh v. Jitendra Bhimraj Bijjaya And Others[69].

The decisions in State of Maharashtra v. Som Nath Thapa[70], State of Tamil Nadu v. N. Suresh Rajan and Others[71] have been relied on to make a point that at the stage of framing of charges, the Court cannot appraise the evidence as is done at the time of trial and the Court must proceed on an assumption that the materials brought on record by the prosecution are true. Alluding to the judgment in State of Bihar v. Ramesh Singh[72], learned counsel submitted that at the initial stage of the trial, if there is a strong suspicion that gives an impression to the Court for drawing a presumption that the accused has committed an offence, it is not open

for the Court to state that there is insufficient ground for proceeding against the accused.

5.18 Both sides have also relied on K.G. Premshanker v. Inspector of Police and Another[73] which discusses the effect of a decision of a civil Court on criminal proceedings against the same person pertaining to the same cause in the context of Sections 40 to 43 of the Indian Evidence Act, 1872 as to which judgments of the courts are relevant and the extent of the relevance.

6. REJOINDER ARGUMENTS BY COUNSEL FOR THE APPELLANTS

In their rejoinder arguments, learned counsel for the appellants have disputed the submissions made on behalf of the respondent-CBI and reiterated the pleas taken by them. We do not propose to repeat the said submissions except for touching on the aspects which were not addressed earlier.

6.1 It has been stated that the MoU dated 20th December, 2008 was executed to meet the urgent requirement of coal for BTPS. The purpose of incorporating Clause 12 was to keep a check on the rejects generated by GCWL during the washing of coal. The said clause specifically mentions that any disposal/sale of the rejects would be subject to compliances of the relevant rules and regulations. Learned counsel submitted that it is the case of the respondent-CBI itself that GCWL sold the rejects by mixing it with good coal at their washery. There is no document produced by the respondent-CBI to connect the rejects sold by GCWL to the appellants. The appellants cannot be roped in on the bald statements made by the functionaries of GCWL connecting them with the coal purchased in e-auction from WCL and sold off.

6.2 As for the Debit Note dated 21st March, 2009, it is submitted that the same was recovered from GCWL and not KECML. The said Debit Note was neither acted upon nor approved by the Board of Directors of KECML and there is no supporting correspondence relating to the Debit Note to demonstrate any complicity on the part of the appellants.

6.3 The appellants have disputed the Certificate dated 12th July, 2010, purportedly issued by Mr. Avijit Sarkar to GCWL stating that the email was despatched by the said employee from his personal email id and not from the official email id of KECML and he was not authorized by the Board of Directors of KECML to issue any such email. Even otherwise, the Certificate runs contrary to Clause 12 of the MoU, as it purports to give 100% entitlement of the rejects to GCWL.

6.4 During the course of rejoining, arguments have also been advanced on the quantum of the rejects which as per the appellants, has been wrongly quantified

by the respondent-CBI at 8,03,859.277 MT. Learned counsel contended that the said figure has been pulled out by the respondent-CBI from the CAG Report though it claims it has not relied on it to register the PE, followed by registration of the FIR. The attention of this Court has been drawn to the mismatch between the quantity of rejects for a period of two months (April and May of the year, 2012-13) claimed to be 207,837.117 MT by referring to a Certificate dated 07th June, 2016 issued by Mr. S.N. Roy, Statutory Auditor of KECML vis-à-vis the quantity of rejects generated for a period of twelve months for the previous year (2011-2012) that came to only 74,511.709 MT.

Learned counsel submitted that in reply to the Audit query raised by the CAG, KECML had specifically stated that the total production of coal upto May, 2012 was 79,46,082.736 MT which included coal and rejects. This figure has not been disputed by the respondent - CBI. The quantity of the rejects upto May, 2012 was 75,63,934.800 MT of the washed coal which figure has also not been disputed by the respondent-CBI. An inference would therefore have to be drawn that, at best, the difference between both the aforesaid figures would be the extent of the rejects of coal.

It has been urged that once the extent of production and the quantum of coal sent to KPCL has not been disputed, there is no question of inflating the quantum of rejects, as alleged. The respondent-CBI has therefore blindly accepted the version put forth by GCWL that it had supplied good coal to KPCL from its own pocket, which suits its purpose because when the washing activity was stopped at Majri on 22nd May, 2012, disputes had arisen between KECML and GCWL, that are pending adjudication before the Arbitration Tribunal and GCWL has inflated its claims to raise exorbitant demands on KECML.

D. DISCUSSION AND ANALYSIS

7.1 We have given our anxious consideration to the arguments advanced by learned counsel for the parties, gone through the records and perused the impugned orders. The grievance of the appellants arises from the decision taken by the learned Special Judge, CBI to reject the application moved by them for seeking discharge in the matter and proceeding to frame charges against them alongwith the other co-accused for having entered into a criminal conspiracy with an object to facilitate illegal sale of coal rejects by GCWL that were generated during washing of coal and to have gained undue pecuniary advantage therefrom.

7.2 The genesis of the investigation conducted by the respondent-CBI in respect of the coal block allocation lies in the judgement of this Court dated 25th August 2014 rendered in Manohar Lal Sharma vs. Principal Secretary and Another[74].

The petitioner therein filed a petition under Article 32 of the Constitution of India and challenged the allocation of coal blocks to Private Companies for the period between 1993 and 2011 on the ground that they violated the principles of trusteeship of natural resources by giving away precious resources as largesse without complying with the mandatory provisions of the MMDR Act and 1973 Coal Act. After a detailed scrutiny, this Court declared that the entire allocation of coal blocks as per the recommendations made by the Screening Committee from the year 1993 onwards through the Government dispensation route suffered from arbitrariness, and that no fair and transparent procedure had been adopted.

7.3 In the course of the proceedings in the aforesaid matter, the respondent-CBI registered a Preliminary inquiry to investigate the irregularities in allocation of coal blocks under the Government Dispensation Route and to State PSUs, who were allowed to form JVA by joining hands with Private Companies for purposes of development and operation of coal mines. PE 5 was registered on 28th September, 2012.

It related to all the coal block allocations made during the year 1993 to 2006. It is not in dispute that the coal allocation in favour of KPCL was also a subject matter of investigation, but nothing untoward was noticed in that. The JVA between KPCL and KECML also withstood the test of scrutiny. As a result, allocation of coal blocks made in favour of KPCL were not interfered with.

8. DID CBI PRIMARILY RELY ON THE AUDIT REPORT OF THE CAG?

8.1 We shall first examine the submission made by the appellants that the respondent-CBI solely relied on the Audit report of the CAG of 2013 to launch its prosecution in the year 2015. This contention has been strongly refuted by the respondent-CBI that has asserted that the Department had on its own initiative, come across several documents including the CAG Report which exposed commission of the offence and the extent of misappropriation of money by the appellants and the other coaccused and it had not solely relied on the CAG Report to commence the investigation.

8.2 In the course of hearing, this Court had directed learned counsel for the respondent-CBI to produce the files of the Department on the basis whereof, three Preliminary Inquiries were registered - PE-2/2012/EO-I[75], PE-4/2012/EO-I[76] and PE- 5/2012/EO-I[77].

It transpires from the said records that PE-2 was registered on 02nd June, 2012 on the directions issued by the CVC that had forwarded a complaint received by it alleging irregularities in the allotment of coal blocks to Private Companies

during the period 2006 to 2009 and in awarding a contract by State owned PSUs for the development of coal blocks allocated to them under the Government dispensation. Subsequently, two more references were received by the respondent-CBI from the CVC and vide OM dated 19th September, 2012, the CVC forwarded a third complaint received from seven Members of Parliament (Lok Sabha) and directed the respondent - CBI to conduct a preliminary inquiry.

8.3 The file produced by the respondent-CBI reveals that premised on the Source Information Report[78] submitted by an Inspector from the Department pertaining to some irregularities in the allocation of coal blocks under the Government Dispensation Category allegedly in connivance with public servants, the matter was taken up by CBI for verification. The notings in the file states that it was not possible to verify the allegations discretely. Therefore, the SIR was directed to be registered as a PE.

These records falsifies the suggestion made by the respondent-CBI that there was a SIR that disclosed irregularities in the JVA executed between KPCL and KECML. The stand of the respondent - CBI that PE-5 was registered well before the Audit Report of the CAG and originated independently thereof, is also factually misleading because CBI's own record shows that the scope of enquiry in respect of PE-5 registered on 28th September, 2012, was entirely different and had no relationship with the JVA and other agreements executed by KPCL and KECML.

No other documents have been filed by the respondent - CBI to demonstrate that it had initiated an independent inquiry into the mining operations of KPCL or that it was during the course of its inquiry into the affairs of KPCL and KECML that it had stumbled upon some irregularities in the MoU executed between KECML with GCWL. Quite clearly, the respondent-CBI made the Audit Report of the CAG submitted in 2013, a launching pad for initiating the prosecution of the appellants in respect of the allegations levelled in the present case and subsequently sought to substantiate them by delving into the records maintained by KPCL, KECML and GCWL.

In other words, there was no move within the Department to investigate KPCL or KECML before 2015. The PE's registered in the year 2012 did not inculpate the appellants in any manner. The entire focus of the said PE's was on the larger issue of irregularities in the allocation of coal blocks through the Government dispensation route. In this background, the respondent-CBI cannot be heard to state that CBI was independently investigating the matter at hand well before 2015 or the Audit Report of the CAG of 2013 was not the trigger point for commencing the investigation.

9. COULD THE AUDIT REPORT OF THE CAG FASTEN ANY LIABILITY ON KECML?

9.1 Coming next to the CAG Report, as much hinges on the said Report, we may note that the same was considered by the Division Bench of the High Court of Karnataka in its judgement dated 24th March, 2016, wherein, it was noticed that there was no dispute between KPCL and KECML regarding the obligations cast on them under the contracts for the development of captive coal blocks and for supply of coal for consumption at the Thermal Power Station (BPCL) located in the State of Karnataka until the CAG submitted an Audit Report for the year ending March, 2013.

The High Court took note of the Report of the CAG which stated that the total production of coal from one of the open cast mines between 2008-09 and June 2012 was 80.78 lacs MT and a minimum quantity of coal rejects ought to be 10% of the total production which would come to 8.28 lacs MT which financially translated into ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lacs only). Based on the above analysis, the CAG raised an audit objection and called upon KPCL to explain the loss of ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lacs only) allegedly caused to the public exchequer, on account of the rejects being disposed of in terms of a MoU executed between KECML and GCWL.

The stand taken by KPCL was also noted by the court. KPCL submitted its Audit Objections to the said Report stating inter alia that the valuation of the rejects was erroneous; that assessment of washery rejects did not have any co-relation with the quantity of coal produced at the open coal mines; that the rejects generated in the mining operation were only stones and boulders and could not be used for generation of electricity at BPCL and lastly, that all the rejects were used for levelling and piling work within the mines for better mining operations. However, all the said objections were rejected by the CAG that maintained its stand in the final Report.

9.2 The High Court observed that at that stage, KPCL did a sudden summersault. Faced with the Audit Report of the CAG, KPCL proceeded to raise a demand on the appellants seeking reimbursement to the tune of ₹52,37,00,000/- (Rupees Fifty two crores thirty seven lacs only) as cost of the rejects and threatened KECML that in case of default of payment, recovery would commence from their running bills. This made KECML file two writ petitions, which were allowed by the High Court with the following observations:

"36. We find that the report of CAG cannot be the sole basis for any liability being caused or for that matter the sole basis for the prosecution to be launched.

However, mere drawing up of FIR by the CBI against unknown officials of KPCL, EMTA and KEMTA cannot provide legal basis or impetus for unilateral demand by KPCL for recovery of ₹52,37,00,000/- (Rupees Fifty Two Crores Thirty Seven Lakh) only. We hold that such action is arbitrary and unsustainable in law."

9.3. The aforesaid judgement was assailed by KPCL by approaching this Court. The said appeals were dismissed by a three Judges Bench of this Court of which one of us (Hon'ble Ms. Hima Kohli, J) was a member with the observations that the Audit Report of the CAG appeared to have been the starting point for the entire dispute between the parties. When the CAG Report was first submitted, KPCL had itself raised objections to the quantification of the coal rejects by the CAG but on its objections being turned down, KPCL raised a demand on KECML seeking reimbursement on the basis of very same CAG Report to which it had not so long ago, filed objections.

9.4. The observations made by this Court in the captioned decision are germane and are extracted below:

"13. The present matter pertains to a tender that was awarded by the appellant to EMTA nearly twenty years ago, in the year 2002. The CAG report that appears to have been the starting point for the entire dispute between the parties is dated March, 2013, close to a decade back. In such circumstances, to even advert to arguments on the maintainability of the writ petitions would be unjust to the parties involved.

14 Coming to the merits of the appeal, from the facts, it appears that in the first instance, when the CAG report was first submitted, the appellant itself had raised objections to the quantification of coal rejects arrived at by the CAG. However, when the audit objections were rejected by the CAG, and the final report was made available, the appellant demanded reimbursement from KEMTA based on the same CAG report to which it had filed objections. Such a change of stand by the appellant has not been sufficiently explained.

15 Additionally, a bare perusal of the clauses contained in the various agreements entered into between the parties does not indicate that such deductions could be made for the purposes of washing charges. There does not appear to be any specification laid down as to the method required to be adopted for washing of coal.

16 No material has been placed on record by the appellant to suggest that there was ever any problem with respect to the quality of coal being supplied by KEMTA to the appellant. Rather, the impugned order suggests that coal supplied

by KEMTA was utilized by the appellant in its thermal power plants in order to generate electricity.

17 Taking into consideration the above facts and circumstances, we are of the opinion that no material has been brought to the notice of this Court that would compel us to interfere with the impugned common judgment passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution.

18 Accordingly, the Civil Appeals filed by the appellant are dismissed."

9.5. We are therefore of the opinion that this Court having already dismissed the appeal filed by KPCL against the judgment of the Karnataka High Court, having held in clear terms that the CAG Report could not form the basis for launching proceedings against the appellants and further, having upheld the findings returned by the Karnataka High Court that the CAG Report appears to have been the starting point for the entire disputes between the parties who till then, were smoothly discharging their obligations under various agreements, there is no reason to take a different view only on the ground that the respondent-CBI was not a party in the aforesaid proceedings. The chronology of the events speak for themselves and need no further elaboration.

10 IMPORT OF THE JUDGMENT DATED 24TH MARCH, 2016 OF THE KARNATAKA HIGH COURT

10.1. Coming next to the submission made by learned counsel for the respondent that the judgement dated 24th March, 2016 passed by the Karnataka High Court in a writ petition filed by KECML against KPCL is of no consequence, as the said judgment was confined to examining the demands made by KPCL on KECML for reimbursement towards the value of the coal rejects, the same is found to be erroneous. It is wellsettled that in a case of exoneration on merits in relation to adjudication proceedings in a civil matter where the allegations are found to be unsustainable and the party is held as innocent, criminal prosecution on the same set of facts and circumstances cannot be permitted to continue.

In Radheshyam Kejriwal(supra), a three judges Bench of this Court reconciled the conflict between the view taken in Standard Chartered Bank(1) v. Directorate of Enforcement[79] and Collector of Customs v. L.R. Melwani[80] on the one hand where it was held that adjudication proceedings and criminal proceedings are two independent proceedings and both can go on simultaneously and findings in the adjudication proceedings is not binding on the criminal proceedings and the judgments in Uttam Chand v. ITO[81], G.L. Didwania v. ITO[82], K.C. Builders v. CIT[83] where the view taken was that when there is a categorical finding in the adjudication proceedings exonerating a person which is binding and conclusive,

the prosecution cannot be allowed to stand, this Court summarized the ratio of the decisions in the following words:

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court."

[emphasis added]

The aforesaid view also finds resonance in Ashoo Surendranath Tewari (supra) and J Sekar alias Sekar Reddy(supra).

10.2. We are of the view that if there was any breach of contract or default on the part of KECML, KPCL was well empowered to determine the lease. However, KPCL did not do so. Instead, on being confronted with the Audit Objections taken by CAG, it raised a demand on KECML for the value of the coal rejects. This demand was quashed and set aside by the Karnataka High Court and this Court.

10.3. On applying the decisions cited above to the facts of the instant case, this Court cannot turn a blind eye to the view taken in the judgement dated 24th March, 2016 passed by the Division Bench of the High Court of Karnataka in a dispute directly arising between KPCL and KECML pertaining to the very same cause of action based on the obligations cast on both the parties under various agreements executed for the development of captive coal blocks and for supply of coal, which was finally upheld by this Court vide judgement dated 20th May, 2022. The said judgments have cleared KECML of any blame. On the same set of facts and logic, we are of the opinion that no criminality can be attributed to the appellants.

11. SANCTITY OF AN AUDIT REPORT IN LAW

11.1. As the sanctity of the Audit Report of the CAG of 2013 has been questioned by the appellants, we propose to examine this aspect. Before the year 1971, the CAG used to function under the Government of India (Audit and Accounts Order), 1936 as adopted by the Government of India (Provisional Constitution) Order, 1947. This was followed by the promulgation of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971[84].

By virtue of Section 26 of the CAG Act, the earlier Order of 1936 was repealed. Section 10 of the CAG Act requires the CAG to compile the accounts of the Union and the States and on the basis of the said accounts, to prepare an annual account for being submitted to the President of India or the Governor of the State/Administrator of the Union Territory, as the case may be. The scope of the audit of the Union and the States has been stated in Section 13 of the CAG Act.

11.2. Article 149 of the Constitution of India defines the duties and powers of the CAG and provides thus:

"149. Duties and powers of the Comptroller and Auditor-General The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the "accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such

duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively."

11.3 The duties of the CAG have been described and discussed at some length in the Arun Kumar Aggarwal(supra) in the following words:

"60. The audit of the Union and the States is under Section 13 of the Act. The scope of the audit extends to the audit of all expenditure so as to ascertain whether the monies shown in the accounts as having been disbursed were legally available for such disbursement and whether the expenditure conforms to the authority which governs it. The CAG has to satisfy himself that the rules and procedures designed to secure an effective check on the assessment, collection and proper allocation of revenue are being duly observed under Section 16. The CAG also has to examine decisions which have financial implications including the propriety of the decision making.

61. The reports of the CAG are required to be submitted to the President, who shall cause them to be laid before each House of Parliament, as provided under Article 151(1). In relation to the States, reports are submitted to the Governor, who shall cause them to be laid before the legislature of the State, as per Article 151(2) of the Constitution. When reports are received in Parliament, they are scrutinised by the Public Accounts Committee (PAC).

62. The PAC is established in accordance with Rule 308 of the Rules of Procedure and Conduct of Business in Lok Sabha. The function of the PAC is to examine the accounts of the Union and the report of the CAG. The PAC shall be principally concerned whether the policy is carried out efficiently, effectively and economically, rather than with the merits of government policy. Its main functions are to see that public monies are applied for the purposes prescribed by Parliament, that extravagance and waste are minimised and that sound financial practices are encouraged in estimating and contracting, and in administration generally. The PAC also has the power to receive evidence, the power to send for persons, papers and record and can receive oral evidence on solemn affirmation. Once the report is prepared, the report of the PAC is presented to the House.

68. We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective Ministries have to offer on the CAG's Report. The Ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the

various issues. For instance, we cannot as such accept the CAG report in the instant case."

[emphasis added]

A similar view has been expressed in Pathan Mohammed Suleman Rehmatkhan(supra) and Centre for Public Interest Litigation(supra).

11.4. It is, therefore, evident that the recommendations of the PAC are premised on the response that is received from the concerned Ministries and the Action Taken Reports which includes the replies furnished by the Government and the comments of the PAC to the said replies. Finally, it is for the Parliament to comment on the CAG's Report after it receives the report of the PAC.

11.5. In the instant case, admittedly the aforesaid procedure has not been followed. As noticed above, the CAG Report is subject to scrutiny by the Parliament and the Government can always offer its views on the said report. Merely because the CAG is an independent constitutional functionary does not mean that after receiving a report from it and on the PAC scrutinizing the same and submitting its report, the Parliament will automatically accept the said report. The Parliament may agree or disagree with the Report. It may accept it as it is or in part.

It is not in dispute that the Audit Report of the CAG has not been tabled before the Parliament for soliciting any comments from the PAC or the respective Ministries. Therefore, the views taken by the CAG to the effect that tremendous loss had been caused to the public exchequer on account of the coal rejects being disposed of by the KPCL and KECML remains a view point but cannot be accepted as decisive. The respondent-CBI has largely relied on the findings and the conclusions drawn in the Audit Report of the CAG to launch the prosecution against the appellants on an assumption that the said Report has the seal of approval of the Parliament and has attained finality, which is not the case.

12. DENIAL OF SANCTIONS BY THE SANCTIONING AUTHORITIES AND THE EFFECT ON THE APPELLANTS

12.1. It is relevant to note that the very same Audit objections taken by the CAG and relied upon by the respondent-CBI to allege conspiracy and loss to the public exchequer were thoroughly examined and found to be meritless by two separate set of Sanctioning Authorities. When it came to Mr. R. Nagaraja, the then Director (Finance) of KPCL and the nominee Director on the Board of KECML, the Sanctioning Authority, i.e., the Board of KPCL went through several documents during its deliberations including the MoU between the KECML and GCWL forwarded by the respondent-CBI for seeking sanction to prosecute him.

The reasons for holding that the CAG Report was without any factual basis, were elaborately dealt with as below:

"DETAILED REPORT OF THE BOARD OF KPCL IN RELATION TO THE CBI REPORT DATED 28.07.2017 AS REGARDS SHRI R. NAGARAJA

1.8 There is an Memorandum of Understanding dated 20.12.2008 between Gupta Coal Fields and Washeries Ltd ('GCWL') and KECML under which GCWL was required to wash and supply the coal of required specification to the Power Plant of KPCL in respect of coal mined by KECML. Clause 12 of the said MoU stipulates that "the rejects generated shall be the joint property of KECML and GCWL and can be disposed off / sold at mutually agreed terms subject to compliance of rules / regulations / guidelines of Ministry of Coal, Government of India, if applicable".

KPCL allowed KECML to sign an MoU with Gupta under which rejects belonging to KPCL was put under the joint ownership of Gupta and KECML by virtue of Clause 12. Gupta has sold those rejects resulting in an illegal gain of Rs.52.37 crores to Gupta (as per CAG) and loss to KPCL. The Board of KECML which conspired to insert Clause 12 of the MoU did not take any protective / mitigative measures to prevent the loss despite it being raised at a lower level. The facts in relation to the above offence are elaborated in detail herein below.

B. Consideration of the report of CBI dated 27.07.2017 (along with annexures) by the Board of KPCL and their Report thereon

2. The entire matter including the 344 documents produced along with the Report and the witness statements of 67 witnesses have been perused by the members of the Board. The Board has also considered the applicable law on the point.

3. The offence is complained of by Shri R. Nagaraja in his capacity as a nominee of KPCL in the Board of KECML. It is the matter of fact that the nominees of KPCL who have been appointed to the Board of KECML are not persons well versed in mining matters. As KPCL was not capable of handling mining operations, a joint Venture Company was formed. The Board of KECML and the nominees of KPCL on the Board entirely depended on the inputs provided by the Managing Director, Statutory Auditor and other personnel for making their decisions.

4. The Mining Plan for the operationalization of the mine was prepared by Dr. Seam who was a Ministry of Coal official and not an employee of KECML or KPCL. The Mining Plan was approved by the Ministry of Coal when it did not contain any provisions for disposal of the rejects. In such a situation, the Board of

Directors of KECML and especially the KPCL nominees (A-1 to A-7) could not be blamed for the non-compliance of the Allotment Letter and there is no act of omission or commission on the part of KPCL's employees including Shri R. Nagaraja.

5. A perusal of the KPCL Office Notes (Document No.199 to 202) for the period indicates that by way of letter dated 12.01.2009, the Managing Director of KPCL had specifically raised the issue of whether washing of coal is required or not. If washing was not necessary, then the question of generation of rejects would not arise at all. Therefore, after taking into account the office note generated by Shri Purushottam, Shri R. Nagaraja had sought to examine whether washing is required at all. Hence, Shri R. Nagaraja has acted with great prudence to ensure that no loss is caused to KPCL under the directions of Dr. S.M. Jaamdar, MD, KPCL.

6. If washing of coal was not required, then the MoU with Gupta was not required to be approved inasmuch as the main purpose of the agreement was to start the washing process. Although the MoU was ratified, it could not be operationalized specifically Clause 12 of the MoU was not ratified by the Board of KECML. Conditional ratification of MoU does not mean that the Board has dishonestly refrained from protecting the interest of KPCL. (See Board minutes of KECML at Document No.232)

7. From the reading of the Clause 12, it appears that the fact that there was no concluded contract vis-à-vis of rejects inasmuch it was understood that it was to be sold on 'mutually agreed terms' and 'subject to legal clearances'. This implies that GCWL and KECML had to mutually agree for the terms of the sale and same had to be approved by Ministry of Coal. Given the fact that the MoU was only conditionally ratified, it was incumbent upon the officials of KECML that before they agree to any terms for the sale of the rejects that they had to bring the matter up to the Board of KECML. The subsequent events indicate that even the officials of KECML were of the same understanding.

8. Even assuming that the Clause 12 of the MoU was approved, another aspect of the matter which has to be noted is that Clause 12 of the MoU does not violate the terms of the Allotment Letter inasmuch as it specifically required that the approval of the Ministry of Coal be obtained before such a disposal. A bare reading of the Clause 12 does not indicate any illegality a sought to be alleged by the CBI. Therefore, the approval of the MoU in the Board Meeting on 13.01.2009 cannot be said to be an act of negligence or error in judgment and no imputation of any wrongdoing can be imposed any KPCL nominee present in the Board Meeting on 13.01.2009.

10. Additionally, KECML wrote a letter wherein it sought for a waiver from meeting the specification if raw coal was supplied. The difficulty for the Management of KPCL was that if the raw coal did not match the specification, it would not be utilization for the generation of power. This would result in stoppage of generation resulting in power crisis in the State of Karnataka. The better alternative would have been to wait for the certificate of the Coal Controller regarding whether the raw coal met the requirements of KPCL of not. Hence, no confirmation was given. This was a managerial decision taken in the best interest of the State of Karnataka as the power generation could not be compromised to save washing cost.

The cost of procurement of power would be tremendous and outweighed any temporary disadvantage caused by not abiding by the Board Minutes of 13.06.2009. This decision was vindicated by the letter issued by the Coal Controller's Office on 09.12.2009 wherein it concluded that to obtain the agreed parameter of coal quality, washing would be required. Therefore, it cannot be said that there was an act of omission or negligence or error in judgment on part of the KPCL nominees on the Board of KECML. The decision was taken keeping the best interests of KPCL in mind and cannot be faulted.

16. The contention of CBI that there is a violation of the allotment order that tailings and rejects are the property of KPCL and should be utilized only for its end use of power generation appears to be based on a strict interpretation of the allotment conditions. Technically, Bellary Thermal Plant of 500 MW capacity is designed to use pulverized coal for firing and coal of reasonable quality.

As such the condition that middlings, tailings & rejects should be used for power generation by KPCL is neither feasible nor appropriate. On the other hand, since disposal of rejects is an environmental issue, KPCL has insisted that the same should be subject to compliance of environmental norms. When KPCL was not in a position to use the reject for power generation, the onus is on the mining operator to dispose of the same as permitted under law. Given the facts as stated above, there cannot be any act of negligence on part of the nominees of KPCL in this regard as well.

17. The CAG report is without factual basis for the following reasons:

i) The quantum of rejects is assumed as 10% of the coal based on MoU whereas as per actuals it was 4.39% as evident from the Coal Controller's certificate, Statements of inward and outward movements of Coal as submitted by GCWL.

ii) Without even knowing the calorific value of the rejects, it has been assumed to be G Grade coal. Even going by the statement of Shri Padmesh Gupta of GCWL,

the rejects were of such a low calorific value that it could not be sold without blending. Hence, it could not have been of G grade. Hence, the basis of the calculation is wrong.

20. The assumption of the CBI that the exact quantity of rejects that have been sold off cannot be ascertained is a self-serving statement inasmuch as for the purpose of blending of coal, Gupta has to purchase the raw coal / washed coal and pay royalty / sales tax on the same whereas there is no sales tax / royalty paid on the rejects. With this number, it is easily possible to arrive at the exact quantity of reject coal.

As the quantity of reject coal generated / available at Majri Washery as per the Stock statement far exceeds the reject coal quantity claimed to be generated by the washing of KECML's coal, in order to divert other rejects as KECML's rejects, the absurdly high amount has been claimed. Hence, there is absolutely no evidence to show that any reject has been sold and if so, what is the quantity of rejects sold. In such a situation, there is no basis for assuming that KPCL has suffered any unlawful loss or that GCWL has gained unlawfully during this process.

21. CBI has produced a Debit Note No.KECML/DN/08-09/09 dated 31.03.2009 for Rs.4,30,38,500/- which was recovered at GCWL (and not at KECML) and there is a statement from GCWL that this Debit Note was not honoured. An examination of the Debit Note, Annual Accounts of KECML for 2008-09 and other documents produced along with the Report would indicate that this Debit Note is a fabricated document for the following reasons:

a. The Note is generated as on the last date of the financial year 2008-2009 but is forwarded only in the next financial year in September 2009 indicating that it is an afterthought.

b. This Debit Note does not find a mention in the Annual Accounts of 2008- 2009 i.e. it should have created an income stream for KECML.

c. If the Debit Note was a genuine document, then KECML had to classify the sales of washer rejects of 86,077 MT as "other income" in the Annual Accounts. However, it is shown as washing loss.

d. There are no corresponding Debit Notes of this nature (viz. For foreign material) amongst the several admitted Debit Notes and no mention of this Debit Note or such an arrangement for subsequent years.

e. KECML officials have written emails asking for accounts of the stock and Gupta has stated that the rejects are still lying with them.

22. There are two types of rejects as reflected in the Annual accounts. One is the rejects lost due to stones, boulders etc. for which no royalty was paid. These rejects were not even transported to Gupta and are not classified as 'washery loss'. The washery loss is evident from the Coal Controller's certificates.

38. To say the least, there is no evidence whatsoever that is collected by the investigator that would indicate that there was either any request or a demand by the public servant concerned for a valuable thing or a pecuniary advantage at any point of time upon the beneficiary for any reason whatsoever. A mere omission on the part of the public servant or a negligent act on his part which has enured to the beneficiary cannot be said to act of misconduct on the part of the public servant to bring him within the ambit of Section 13(1) (d) of the Prevention of Corruption Act, 1988.

48. Shri R. Nagaraja has an impeccable and unblemished service record in his 27 years of service as an officer and he has held many important and sensitive posts during his service span in KPCL. Any action against him on the basis of a charge devoid of any merit and substance would not only tarnish his otherwise impeccable reputation but will also have a bearing on the morale of the public services.

49. For the reasons enumerated in para 3 to 48 above, we, the Board of KPCL, hereby exercising our powers under Section 19 of the Prevention of Corruption Act, 1988 refuse to grant sanction to prosecute Shri R. Nagaraja for the offences alleged to have been committed under Sections 120B r/w 409 and 420 of the Indian Penal Code, 1860 and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988."

12.2. It is apparent from the above that after Sanctioning Authority had scrutinized all the relevant documents and the depositions as many as of 67 witnesses submitted by the respondent-CBI, it observed that there was no evidence to show that any rejects generated by washing of coal had been sold or that KPCL had suffered an unlawful loss during the process. As a result, the Board of KPCL refused to grant sanction to the respondent-CBI to prosecute Mr. R. Nagaraja for offences alleged to have been committed by him. It is noteworthy that no appeal has been filed by the respondent - CBI against denial of sanction.

12.3. Similarly, the request made by the respondent-CBI for seeking sanction to prosecute Mr. Yogendra Tripathi, the then Managing Director, KPCL was denied by the Competent Authority in the Central Government in terms of the letter dated 16th April, 2018, issued by the DoPT. The order passed by the DoPT shows that it took note of the Report of the respondent-CBI, the records submitted by it along with the Report, the advice received from the CVC and

then summarized the allegations levelled by the respondent-CBI that formed the basis of its proposal to seek sanction for prosecution of the aforesaid officer. The said request was finally rejected by the Competent Authority in the Central Government with the following observations:

"12. AND WHEREAS the debit note recovered at GCWL and the certificate are contradictory to each other in as much as debit note imposes a realizable value on the rejects and the certificate claims that it has been written off. Neither document is supported by the annual accounts. Hence, they are extraneous and fabricated as an afterthought.

13. AND WHEREAS washery loss and loss due to stone bounders etc. are different. The certificate combines the two losses and claims them as washing loss. The rejects quantified as 8.03. MT only reproduces what is disclosed in the accounts as processed wastage.

14. AND WHEREAS on examination of records, statement of witnesses etc, it was seen that there is no evidence of any purported conspiracy between the accused officer and GCWL or any quid pro quo in this regard. The reason for deferring the agenda in 41st Board Meeting have been explained in the detailed note of M/s KPCL and appear to be reasonable. It has been mentioned that the revised mining plan was approved in the Board Meeting of the Joint Venture KECML by which a new technology was to be implemented which could have been issued of rejection irrelevant.

15. AND WHEREAS the comments of the Govt. of Karnataka have been obtained. They have stated that there is no material to support the allegation that he conspired to illegally dispose off the rejects and therefore deferred the agenda. Hence, no criminal intent can be attributed to Shri Yogendra Tripathi and have recommended declining of sanction for prosecution U/s 120B r/w 409 and 420 of IPC and Section 13 of the Prevention of Corruption Act, 1988.

16. AND WHEREAS the proposal was sent to the CVC for their advice. The CVC advised declining of sanction for prosecution against Shri Yogendra Tripathi, IAS(KN:1985), the then Managing Director Karnataka Power Corporation Ltd. (KPCL), Bangalore, in case RC:2202015 E0002 dated 13.03.2015.

17. AND WHEREAS all case records sent by the investigating agency were sent to the Hon'ble Prime Minister, who is the Competent Authority in the Central Government, to decide sanction for prosecution in respect of the IAS officers.

18. AND THEREFORE The Competent Authority, in view of the above position and after carefully considering the facts and circumstances of the case and

considering all other relevant material/documents, including evidence submitted by the Investigating Agency with the proposal, has approved the proposal to decline sanction for prosecution against Shri Yogendra Tripathi, IAS (KN:85) in the instant case, under Section 19 of the Prevention of Corruption Act, 1988."

12.4. The aforesaid order reveals that before applying its mind, the Competent Authority in the Central Government had sought comments from the Government of Karnataka who had stated that there was no material produced by the respondent-CBI in support of the allegation that Mr. Yogendra Tripathi had conspired to illegally dispose off the coal rejects or with malafide intention deferred the agenda in the 41st Board Meeting of the KPCL.

The Competent Authority separately sent the said proposal submitted by the respondent-CBI to the CVC for seeking advice. After examining all the records sent by the investigation agency including the evidence submitted by it, the Office of the Prime Minister who is the Competent Authority in the Central Government, approved the proposal to decline the sanction for prosecuting Mr. Yogendra Tripathi. Yet again, no appeal has been filed by the respondent - CBI before the court questioning the said decision.

12.5. The respondent-CBI having accepted the decision taken by the Sanctioning Authority in respect of Mr. R. Nagaraja and the decision of the Competent Authority in the Central Government in respect of Mr. Yogendra Tripathi, both senior most serving officers of KPCL and were also on the Board of KECML, cannot be permitted to argue that these were merely administrative decisions and even if permission to prosecute the aforesaid officers has been denied, the Department can still proceed against the appellants based on the very same set of material/documents/evidence etc. that have been minutely scrutinized by different authorities at the highest level and they have independently arrived at an identical conclusion of refusing to grant sanction to prosecute senior functionaries of KPCL.

Simply because the said senior functionaries of KPCL were public servants, does not detract from the fact that the respondent-CBI has described them as co-accused in a criminal conspiracy and attributed similar motives to them as the appellants herein. If they have been let off the hook and the respondent-CBI has not challenged the said decisions, there is no reason to proceed against the appellants herein on the basis of the very same set of facts and material gathered during the course of investigation.

13. EFFECT OF THE ABSENCE OF ANY STRATEGY IN THE MINING PLAN TO DISPOSE OFF THE COAL REJECTS

13.1. Coming next to the stand taken by the respondent-CBI that absence of any plan mentioned in the Mining Plan to deal with the rejects could not exonerate the appellants who were bound by the terms and conditions of the letter dated 10th November, 2003 issued by the MoC, we may note the assertion of the respondent-CBI that the Mining Plan of the coal blocks in question did not contain any plan for disposal of rejects, usable, tailings, middlings, etc., that would be generated on account of mining/ washing of coal, is contrary to the records. Article 5(2)(b) of the JVA required EMTA to take all clearances for setting up the coal washery from the concerned authorities and properly dispose off the coal rejects to the satisfaction of environmental regulations.

13.2. The explanation offered by the appellants that at that point in time, the Central Government had not come out with any specific plan to dispose off the coal rejects is validated by the reply furnished by the Minister of State, MoC, in the Lok Sabha in response to an unstarred question seeking an answer from the Government of India as to whether it had framed any National Policy for exploitation of the coal rejects.

The reply given was that the Government had not framed any National Policy for exploitation of coal rejects and the same was still under consideration. That being the position, it was left to KPCL and KECML to devise a satisfactory and safe method to dispose off the coal rejects. This was done in terms of Article 5(2)(b) of the JVA that required KECML to dispose off the rejects in a manner that would ensure that there was no threat to the environment. We do not find any irregularity in the route adopted to dispose off the coal rejects.

14. WAS KECML REQUIRED TO ACCOUNT FOR THE COAL REJECTS?

14.1. Much emphasis has been laid by the respondent-CBI on the contents of the allocation letter dated 10th November, 2003 issued by the MoC, Government of India to KPCL to canvass that the coal mined from the allocated blocks was to be exclusively used to meet the requirements of coal in the proposed thermal power station namely, BTPS and on the condition that no coal was to be sold /delivered/transferred/disposed of except for the purpose of power generation and with the previous approval of the Central Government. We are afraid, the said letter cannot be read in isolation and out of context for the very same reasons as have been noted above.

14.2 When the Central Government did not formulate any National Policy for exploitation of coal rejects, it is fallacious on the part of the respondent-CBI to argue that the conditions imposed by the Central Government while conveying its approval to the State Government for grant of mining lease in favour of KPCL

ought to have formed a part of the lease deed to be executed. Fact of the matter is that there was no such condition imposed in the Notification dated 16th July, 2004, issued by the MoC.

The said notification simply specified the end use of the coal from the allocated coal blocks for supply to KPCL to generate thermal power in the proposed BPCL. The original Mining Plan of September, 2004 submitted by KECML to the MoC for its approval also did not elucidate the manner in which the coal rejects were to be disposed of. The said Mining Plan had the approval of the MoC which did not raise any objection relating to the absence of any condition for dealing with the coal rejects. The inevitable conclusion is that disposal of the coal rejects was to be undertaken by KECML strictly in terms of Article 5(2)(b) of the JVA and no more.

14.3 Moreover, a closer look at the clauses of the JVA and FSA clearly indicate that KECML was only obliged to provide a specified grade of washed coal (Grade - D) having a specific GCV in the range of 4200-4940 Kcal/kg[85]. When coal has been defined in the JVA and FSA as "washed coal with guaranteed value" and one that satisfied the parameters laid down in Annex-1 attached to the JVA and FSA[86] and further, KECML was required to ensure that all "shales/stones" are removed from the coal before making the supply[87], there was no occasion for KECML to account for the rejects. All that KPCL was required to do was to buy from KECML, the washed coal with a particular guaranteed value and one that would satisfy the specified quality parameters, at a predetermined price[88].

The agreement governing the parties required KECML to dispose off the rejects safely. KECML was not required to account for the coal rejects to KPCL. KPCL itself understood the clauses in the JVA and the FSA to mean the same and it was satisfied with the manner in which KECML was discharging its obligations under the agreements till Audit Objections were raised by the CAG in October, 2013. That's when KPCL did a complete flip flop and for the first time, raised a demand on KECML seeking reimbursement towards the value of the coal rejects, a decision that was successfully assailed by the appellants in the High Court and the challenge laid by KPCL to the said judgement was repelled by this Court.

15. CAN KECML BE BLAMED FOR NOT SETTING UP THE COAL WASHERY AT THE PITHEAD?

15.1. As for the allegation levelled by the respondent-CBI that KECML violated the terms of Articles 2(4)(g) and 5(2)(b) of the JVA having failed to setup the coal washery at the pithead, the sequence of events narrated above, shows that the fault does not lie at the door of the appellants. It was on account of some

litigation between CIPCO and MoC in relation to the coal blocks allocated to KPCL wherein interim orders were granted by the High Court in favour of CIPCO, that the project got delayed.

Production of coal could commence only in September, 2008 after the aforesaid litigation came to an end. By then, much time was lost. The conditions stipulated in the agreements governing KPCL and KECML placed an obligation on KECML to supply washed coal with a definite GCV and specified parameters for the consumption of the Thermal Power Station at Bellary and failure to deliver coal within the stipulated time, attracted penalties.

15.2. It was in this background that KECML executed the MoU with GCWL for washing of the mined coal at its washery at Majri, transportation of the raw coal from the mines and washed coal to the Railway Siding for delivery to BTPS. Records reveal that the draft of MoU was duly deliberated upon by the Board of Directors of KECML and finally approved and ratified on 13th January, 2009.

Subsequently, in the meeting held on 23rd February, 2010, the Board of Directors of KECML concluded that washing of raw coal was a prerequisite to meet the specified grade of coal with a defined GCV for generation of power at BTPS. The necessity of supplying washed coal to obtain the agreed parameter of coal quality was also recognized by the office of the Coal Controller in its letter dated 9th December, 2009. This fact finds mention in the detailed Report of the Board of KPCL that refused permission to the respondent-CBI to prosecute Mr. R. Nagaraja.

15.3 It is clear from the above that the decision of KECML to enter into a MoU with GCWL for washing of coal was actuated by compelling circumstance faced by it and KPCL had taken a calibrated decision in its commercial wisdom to duly concur with the said decision knowing very well that non-supply of a specified grade of washed coal by KECML would have serious consequences of stoppage of generation of power at BTPS and a cascading effect of resulting in a power crisis in the State of Karnataka.

15.4. We do not propose to Labour much on the contention of the respondent-CBI that allocation of the coal block was in favour of KPCL and not in favour of KECML as stands adequately explained on a perusal of the Notification dated 16th July, 2024 which shows that the Central Government did recognize the fact that it was KECML who was required to supply coal from the coal mines allocated to KPCL and end use of the said coal was specified for generation of Thermal Power Station at Bellary, Karnataka. In our view, having regard to the aforesaid notification, nothing much turns on the submission made by the

respondent-CBI that the coal block allocation was only in favour of KPCL and it ought to have a right over the rejects to the exclusion of KECML and others.

16. DID THE COAL REJECTS HAVE ANY USEFLUL CALORIFIC VALUE MAKING IT A SALEABLE COMMODITY?

16.1. We find that the Detailed Washability Report of the Government Laboratory namely, CIMFR, Nagpur has been ignored by the respondent-CBI. It was the said Report that formed the basis of the information furnished by KECML with respect to production, stock, despatch of coal to the washery etc., as was demanded by the office of the Coal Controller, a department that falls under the MoC.

The said Report stated in so many words that the rejects did not contain any useful c.v. Reliance placed by the respondent-CBI on the revised Mining Plan submitted by the appellants to the MoC in 2010, that mentions a new technology for utilization of rejects for its carbon value, namely FBC is of no consequence as the said technology had not even been introduced when MoC approved the original Mining Plan, submitted by KECML in the year 2004. Even otherwise, it is not in dispute that for applying the said technology, a plant was required to be established after obtaining necessary approvals from several agencies.

The plant could not be established by KECML for the reason that the revised Mining Plan submitted by it was approved by the MoC only on 24th August, 2011. Consequent steps that were required to be taken by KECML for obtaining necessary approvals from the MoEF&CC and other govt. agencies came to a grinding halt when an order was passed by this Court in the year 2014, deallocating all captive coal blocks, including those allocated to KPCL. Therefore, any reference by the respondent-CBI to the revised Mining Plan is of no consequence.

17. PERSUASIVE VALUE OF THE ARYAN ENERGY CASE

17.1 KPCL's entitlement over the coal rejects has been separately tested by the High Court of Karnataka in the case of Aryan Energy(supra). Pertinently, in that case the clauses forming a part of the Agreement between KPCL and Aryan Energy particularly with respect to the disposal of the coal rejects is the same as in the instant case. Aryan Energy was also required to dispose off the coal rejects by making compliance of the environmental regulations. In the said case, the High Court of Karnataka returned a finding that KPCL did not have any claim over the coal rejects generated during washing of coal.

The view taken was that as long as disposal of the coal rejects was in line with the environmental regulations, KPCL did not have any role to play in the disposal

of the coal rejects. It was specifically observed by the High Court that the agreement between KPCL and Aryan Energy included a condition that KPCL would only buy washed coal at a predetermined price and that it was not entitled to lay a claim on the coal rejects generated during the processing of raw coal. In view of the terms and conditions of the agreement between the parties, the High Court concluded that KPCL could not have raised any demand on Aryan Energy claiming reimbursement for the value of the coal rejects.

It is a matter of record that although KPCL had challenged the judgement and order dated 22nd July, 2021 passed by the High Court of Karnataka44 before this court, the said petitions were disposed of on 26th April, 2014 noting that the parties had settled their inter se disputes amongst themselves in terms of a Compromise Deed and as a result, part of the decretal amount deposited by KPCL before the Commercial Court was agreed to be released in favour of Aryan Energy.

17.2 We do not see why the aforesaid decision would not have any persuasive value when the clauses in the agreement between KPCL and KECML for disposing off the coal rejects are identical. On going through the agreements executed between KPCL and Aryan Energy, the High Court had shot down the plea of KPCL that it was entitled to the coal rejects. Though KPCL assailed the said decision before this Court, it settled its dispute with Aryan Energy and the appeals preferred by it were disposed of as compromised.

The contention of the respondent-CBI that the order of the High Court of Karnataka is not relevant for the present case since there was no criminal case registered therein, cannot be a distinguishing feature when the terms and conditions of the contract between KPCL and Aryan Energy on the aspect of disposal of the coal rejects is pari materia. We are of the opinion that the judgment in the case of Aryan Energy does have persuasive value.

18. INHERENT JURISDICTION OF THE HIGH COURT UNDER SECTION 482, Cr.P.C

18.1. For seeking quashing of the chargesheet and the order framing charges, learned counsel for the appellants has cited decisions of this court that lay down the proposition of law relating to quashing of criminal proceedings by a High Court under Section 482, Cr.P.C. In Rajiv Thapar and Others v. Madan Lal Kapoor[89], this court held as under:

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of

committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection.

To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence.

For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice."

[emphasis added]

18.2 In the captioned case, this court had further observed that the discretion vested in the High Court under Section 482 Cr.P.C can be exercised suo moto to prevent abuse of the process of a Court, and/or to secure the ends of justice. After listing the factors that ought to weigh with the High Court to make a just and rightful choice, it was observed thus:

"30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

[emphasis added]

18.3 In State of Orissa v. Debendra Nath Padhi[90], the powers of the High Court under Section 482, Cr.P.C and Article 226 of the Constitution of India were highlighted and the court observed that:

"29. Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal case[91] [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426]."

[emphasis added]

18.4 In Rukmini Narvekar v. Vijaya Satardekar and Others[92], this Court has observed that the width of the powers of the High Court under Section 482, Cr.P.C and under Article 226 of the Constitution of India are unlimited, that the High Court could make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. In a concurring order passed in the very same case, it was observed in addition that in exercising

jurisdiction under Section 482, Cr.P.C, the High Court is free to consider even material that may be produced on behalf of the accused to arrive at a decision whether charge as framed could be maintained.

18.5 In Anand Kumar Mohatta and Another v. State (NCT of Delhi), Department of Home and Another[93], referring to the provisions of Section 482, Cr.P.C, this Court held as follows:

16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636, para 7 : 2000 SCC (Cri) 513. Umesh Kumar v. State of A.P., (2013) 10 SCC 591, para 20 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237].

Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court.

28. In State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , this Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised. Para 102 of the judgment reads as follows : (SCC pp. 378-79)

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

18.6. In State of Karnataka vs. L. Munniswamy[94], Y.V. Chandrachud, J. as he then was (speaking for a three Judge Bench) observed thus:

"7. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice."

[emphasis added]

18.7 As can be gathered from the above, Section 482 Cr.P.C recognizes the inherent powers of the High Court to quash initiation of prosecution against the accused to pass such orders as may be considered necessary to give effect to any order under the Cr.P.C or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is a statutory power vested in the High Court to quash such criminal proceedings that would dislodge the charges levelled against the accused and based on the material produced, lead to a firm opinion that the assertions contained in the charges levelled by the prosecution deserve to be overruled.

18.8 While exercising the powers vested in the High Court under Section 482, Cr.P.C, whether at the stage of issuing process or at the stage of committal or even at the stage of framing of charges, which are all stages that are prior to commencement of the actual trial, the test to be applied is that the Court must be fully satisfied that the material produced by the accused would lead to a conclusion that their defence is based on sound, reasonable and indubitable facts. The material relied on by the accused should also be such that would persuade a reasonable person to dismiss the accusations levelled against them as false.

19. EXTRAORDINARY POWERS OF THIS COURT UNDER ARTICLE 13 OF THE CONSTITUTION OF INDIA

19.1. When it comes to invocation of the powers vested in this Court under Article 136 of the Constitution of India, unlike Section 438 Cr.P.C that has a statutory flavour, Article 136 confers plenary powers on this Court to interfere in suitable cases. In Arunachalam v. P.S.R. Sadhanantham and Another[95], this court has expounded on the amplitude of its powers under Article 136 in the following words:

"4. Article 136 of the Constitution of India invests the Supreme Court with a plentitude of plenary, appellate power over all Courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court to set limits to itself within which to exercise such power. It is now the well established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court.

But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly". (See State of Madras v. A. Vaidyanatha Iyer [AIR 1958 SC 61 : 1958 SCR 580 : 1958 Cri LJ 232] and

Himachal Pradesh Administration v. Om Prakash [(1972) 1 SCC 249 : (1972) 2 SCR 765])."

5. A doubt has been raised about the competence of a private party, as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution against a judgment of acquittal by the High Court. We do not see any substance in the doubt. Appellate power vested in the Supreme Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and Appellate Tribunals under specific statutes. As we said earlier, it is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (vide Durga Shankar Mehta v. Thakur Raghuraj Singh [AIR 1954 SC 520 : (1955) 1 SCR 267 : 1954 SCJ 723]).

Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of the Supreme Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in the Supreme Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of the Supreme Court is not circumscribed by any limitation as to who may invoke it. Appeals under Article 136 of the Constitution are entertained by special leave granted by this Court, whether it is the State or a private party that invokes the jurisdiction of this Court, special leave is not granted as a matter of course but only for good and sufficient reasons, as well established by the practice of this Court."

[emphasis added]

19.2. In P.S.R. Sadhanantham v. Arunachalam[96], a Constitution Bench of five judges elaborated the content and character of Article 136 vis-à-vis Article 21 and made the following observations:

"7. Specificity being essential to legality, let us see if the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the court. The question is whether it spells by implication, fair a procedure as contemplated by Article 21. In our view, it does. Article 136 is a special jurisdiction.

It is residuary power; it is extraordinary in its amplitude, its limit, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is if merely a power in the court to be exercised in any

manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal?

We have hardly any doubt that here is a procedure necessarily implicit in the power vested in the summit court. It must be remembered that Article 136 confers jurisdiction on the highest court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the highest judges of the land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity.

10. Once we hold that Article 136 is a composite provision which vests a wide jurisdiction and, by the very fact of entrusting this unique jurisdiction in the Supreme Court, postulates, inarticulately though, the methodology of exercising that power, nothing more remains in the objection of the petitioner. It is open to the court to grant special leave and the subsequent process of hearing are (sic is) wellestablished. Thus, there is an integral provision of power-cum-procedure which answers with the desideratum of Article 21 justifying deprivation of life and liberty.

[emphasis added]

In a concurring judgement in the captioned case, it was further observed that:

21. Plainly, the jurisdiction conferred by Article 136 seeks to confer on this Court the widest conceivable range of judicial power, making it perhaps among the most powerful courts in the world. The judicial power reaches out to every judgment, decree, determination, sentence or order affecting the rights and obligations of persons in civil matters, of life and liberty in criminal matters as well as matters touching the Revenues of the State.

It is an attempt to ensure that the foundations of the Indian Republic, which have been laid on the bedrock of justice, are not undermined by injustice anywhere in the land, Bharat Bank Ltd.v. Employees of these Bharat Bank Ltd [1950 SCC 470 : AIR 1950 SC 188 : (1950) SCR 459, 474 : 1950 LLJ 21 : (1950-51) 2 FJR 1] . As the court observed in Durga Shankar Mehta v. Thakur Raghuraj Singh [AIR 1954 SC 520 : (1955) 1 SCR 267, 272 : 9 ELR 494] Article 136 "vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals by grant of special leave".

22. Nonetheless, there is a limitation which, in our opinion, is of immediate relevance. It is a limitation in-built in to the jurisdiction of the court and flows

from the nature and character of the case intended to be brought before the court. It is a limitation which requires compliance despite the apparent plenitude of power vested in the court. When a petition is presented to the court under Article 136, the court will have due regard to the nature and character of the case sought to be brought before it when entertaining and disposing of the petition.

[emphasis added]

19.3 In Khoday Distilleries Limited and Others v. Mahadeshwara S.S.K. Limited[97], this Court observed that Article 136 commences with a non-obstante clause, the words are of overriding effect and clearly indicate the intention of the framers of the Constitution that it is a special jurisdiction and a repository of residuary powers unfettered by any Statute or any provisions of Chapter IV of Part V of the Constitution of India. It was also observed that the jurisdiction under Article 136 of the Constitution cannot be barred by the Statute since it is an extraordinary power.

19.4 In State of Punjab and others v. Rafiq Masih (White Washer) others[98], in the same strain, this Court has held that Article 136 is a special jurisdiction and can be described as a 'residuary power, extraordinary in its amplitude, its limits when it chases injustice, is the sky itself'. It is a corrective jurisdiction that vests a discretion in this Court to settle the law clearly and makes the law operational thereby making it a binding precedent for the future instead of keeping it vague.

19.5 In Mekala Sivaiah v. State of Andhra Pradesh[99], this Court commented on the circumstances in which the power under Article 136 is exercised and held thus:

"14. Before adverting to the merits of the contention raised, it is important to reiterate that Article 136 of the Constitution of India is an extraordinary jurisdiction which this Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when this Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice.

15. It is well settled by judicial pronouncement that Article 136 is worded in wide terms and powers conferred under the said Article are not hedged by any technical hurdles. This overriding and exceptional power is, however, to be exercised sparingly and only in furtherance of cause of justice. Thus, when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or misreading of evidence or by ignoring material evidence then this Court is not only empowered but is well expected to interfere to promote the cause of justice."

[emphasis added]

19.6 From the aforesaid discussion, it is apparent that Article 136 can be invoked by a party in a petition for special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by a Court or Tribunal within the territory of India. The reach of the extraordinary powers vested in this Court under Article 136 of the Constitution of India is boundless.

Such unbridled powers have been vested in Court, not just to prevent the abuse of the process of any court or to secure the ends of justice as contemplated in Section 482, Cr.P.C, but to ensure dispensation of justice, correct errors of law, safeguard fundamental rights, exercise judicial review, resolve conflicting decisions, inject consistency in the legal system by settling precedents and for myriad other to undo injustice, wherever noticed and promote the cause of justice at every level. The fetters on this power are self imposed and carefully tampered with sound judicial discretion.

19.7 Coming back to the case in hand, ordinarily, a party aggrieved by the filing of a chargesheet or framing of charges ought to first approach the High Court in a petition under Section 482, Cr.P.C. Though such a route would have been available to the appellants herein as well, but in view of the categorical directions issued by this court in M.L. Sharma (supra) that this Court alone shall have the jurisdiction to entertain cases relating to allocation of coal blocks including cases for staying the investigation or trial in a matter relating to coal, one rung of an appeal before the High Court for quashing the chargesheet or interfering in the order on charge by invoking the inherent jurisdiction under Section 482 Cr.P.C. stands fore closed. The appellants were left with only one chance of directly invoking Article 136 of the Constitution of India and filing a petition for special leave before this court to challenge the impugned orders passed by the learned Special Judge, CBI framing charges against them and dismissing their application for seeking discharge.

19.9 Given the broad amplitude of the extraordinary powers of this Court under Article 136 of the Constitution of India, the respondent-CBI cannot be heard to urge that since a Chargesheet has already been filed against the appellants and charges framed, the appellants should be left to take all the pleas available to them before the learned Special Judge, CBI during the course of the trial and that no interference is called for by this Court at this stage. Such an approach does not commend itself to this Court in the facts and circumstances of this case.

20. APPLICATION OF MIND AT THE STAGE OF SECTION 227, Cr.P.C

20.1 We may note that there is no quarrel with the broad proposition canvassed by learned counsel for the respondent- CBI that at the stage of Section 227, Cr.P.C., the Special Judge, CBI had to sift the evidence to find out whether there was sufficient ground for proceedings against the appellants. That exercise would include taking a prima facie view on the nature of the evidence recorded by the CBI and the documents placed before the court so as to frame any charge. At the same time, one must be mindful of the language used in Section 227 of the Cr.P.C, which is extracted below:

"227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

20.2. As observed in Prafulla Kumar Samal (supra) the expression "not sufficient ground for proceeding against the accused" clearly shows that the Judge is not a mere post office to frame the charge at the behest of the prosecution. The Judge must exercise the judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. The principles governing the scope of Section 227, Cr.P.C. have been succinctly summarized in the caption case as below:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely

as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

[emphasis added]

20.3. To the same effect is the view expressed in Niranjan Singh KS Punjabi (supra) where this court has observed as follows:

"5. Section 227, introduced for the first time in the new Code, confers a special power on the Judge to discharge an accused at the threshold if 'upon consideration' of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure.

6. The next question is what is the scope and ambit of the 'consideration' by the trial court at that stage. It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution."

[emphasis Added]

20.4. In N. Suresh Rajan(supra), the following view was expressed as to the role of the trial Court at the time of considering an application for discharge.

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in

order to find out whether or not the allegations made are groundless so as to pass an order of discharge.

It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has not to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction.

In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

[emphasis added]

20.5 The aforesaid parameters had to be kept in mind by the learned Special Judge, CBI at the time of considering the records/documents submitted by the respondent-CBI and the material produced by the appellants. In our view, the said consideration is lacking in the impugned orders for the reasons noticed above.

21. CONCLUSION

21.1 Though multiple arguments have been advanced by learned counsel for the appellants to assail the impugned orders passed by the learned Special Judge, CBI, including a plea that no offence is made out under Section 13(1)(d) of the P.C. Act for various reasons, this Court has consciously elected to confine itself only to those aspects that in our opinion, would be sufficient to arrive at a prima facie view that the allegations levelled against the appellants have pre-dominant contours of a dispute of a civil nature, does not have the makings of a criminal offence and on an overall conspectus of the case, would persuade any reasonable person to dismiss the accusations levelled. Therefore, this court declines to go into the nitty gritties of the documents/evidence, or the contrasting data produced by the parties to test their probative value.

21.2 The prima facie findings of this Court, based on the documents and material placed before us are as follows:

(a) The plea of the respondent-CBI that it conducted an investigation in the present case during the course of the inquiry in respect of PE-5 registered by it in the year 2012 is belied as the SIR was on a completely different aspect. CBI only got activated only on stumbling upon the Audit Report of the CAG submitted in 2013. There is nothing brought on record to show to the contrary.

(b) The CAG Report had not attained finality inasmuch as its recommendations have not been tabled before the Parliament or accepted so far. The said report at best, has a persuasive value but no more.

(c) The Sanctioning Authority namely, the Board of Directors of KPCL in respect of Mr. R Nagarajan, the then Finance Director of KPCL and nominee Director of the Board of KECML had the occasion to thoroughly scrutinize all the relevant documents including the MoU dated 20th December, 2008 executed between KECML and GCWL as also the depositions of 67 witnesses submitted by the respondent-CBI. Only thereafter, did it arrive at a conclusion that there was nothing to demonstrate that any rejects generated by washing of the coal had been sold by the appellants or that KPCL had suffered an unlawful loss due to the same.

(d) The Competent Authority in the Central Government who was approached by the respondent-CBI for sanction to prosecute Mr. Yogendra Tripathi, the then Managing Director of KPCL sought comments from two separate sources. The Government of Karnataka opined that no criminal intent could be attributed to the said officer. A proposal was also sent to the CVC for their advice. The CVC too recommended that the sanction for prosecuting the officer ought to be declined. The Competent Authority in the Central Government after going through the entire documents and material including the evidence submitted by the respondent-CBI and the opinions solicited, declined sanction for the prosecution of the aforesaid officer.

(e) The respondent-CBI did not approach the Court to challenge the aforesaid decisions. Having accepted the decision taken by the Sanctioning Authority/Competent Authority in the Central Government and dropping the charges against the seniormost functionaries in KPCL, who were also holding positions in the Board of KECML, there is no justification to press charges against the appellants herein whose role is similar to them.

(f) The decision dated 24th March, 2016 of the Karnataka High Court in a writ petition filed by KECML against KPCL has been wrongly overlooked. The High Court had an occasion to scrutinize the very same agreements and the CAG report that formed the basis of the investigation conducted by the respondent-CBI to return positive findings in favour of the appellants. The view taken by the

Karnataka High Court has been upheld by this Court in a judgment rendered on 20th May, 2022 which was just a few days after Charges were framed by the learned Special Judge, CBI on 3rd March, 2022.

(g) Yet again, an interpretation of the very same clauses in the agreement relating to the manner of disposal off the coal rejects came up for consideration before the Karnataka High Court in a writ petition filed by Aryan Energy against KPCL. Having scrutinized the clauses forming a part of the agreement executed between the parties vide judgment dated 22nd July, 2021, the Karnataka High Court clearly observed that KPCL did not have any claim over the coal rejects generated during washing of the coal.

The submissions made by the respondent - CBI that the aforesaid judgment came much after institution of the chargesheet by the, respondent-CBI is of no consequence. Even if that was so, nothing prevented the learned Special Judge, CBI from taking into consideration the view expressed in the said judgement at the time of framing charges, particularly, when the clause relating to disposal of the coal rejects in an environment friendly manner incorporated in the agreement between KPCL and Aryan Energy was identical to the one contained in the agreement between KPCL and KECML.

(h) Perusal of the relevant clauses of the JVA read in conjunction with the terms and conditions stipulated in the FSA leave no manner of doubt that all that KPCL required KECML to do was to provide it a specified grade of washed coal having a specific GCV to be purchased at a predetermined price for being supplied to BPCL for generation of power. The agreement between the parties did not contemplate that KPCL would be entitled to claim the 'shales/stones' that were required to be removed from the coal before supplies were made by KECML. Under the agreements governing the parties KECML was required to dispose off the coal rejects properly, to the satisfaction of environmental regulation, as prescribed in Article 5(2)(b) of the JVA.

(i) The MoC did not impose any condition in the Notification dated 16th July, 2004 which required KECML to hand over the coal rejects to KPCL; nor did the MoC issue any Guidelines as to the manner in which the coal rejects were to be disposed of. Once the Mining Plan of September, 2004 submitted by KECML was approved by the MoC, nothing further was required to be done by KECML except for following the conditions imposed on it.

(j) The Central Government had not come up with any specific plan to dispose off the coal rejects, as is apparent from a perusal of the reply submitted by the Minister of State, MoC in the Lok Sabha, stating that the Government had not framed any National Policy for exploitation of coal rejects and the same was still

under consideration. In the absence of a policy to dispose off the coal rejects, the appellants cannot be blamed for complying with the terms and conditions stipulated in the JVA.

(k) KECML could not be faulted for failing to set up the coal washery at the pithead, in terms of the JVA as that was for reasons beyond its control which included a prolonged litigation between the MoC and CIPCO in relation to the very same coal blocks allocated to KPCL which in turn delayed the project considerably. Production of coal could only commence in September, 2008 when the curtains were drawn on the aforesaid litigation. The Board of KPCL consciously acceded to the proposal made by KECML that a MoU be executed with GCWL for washing of mined coal at its washery. Pertinently, GCWL was not an unknown entity to KPCL as the latter had prior dealings with the said Company for washing of mined coal in another project. This decision taken by the parties in their commercial wisdom has been sought to be selectively tainted with criminal intention attributed to the appellants, without any basis.

(l) There was no getting around the process of washing of raw coal which was the predominant prerequisite to meet the specified grade of coal with the defined GCV for generation of power at BTPS. Failure to supply washed coal to KPCL not only invited heavy penalties on KECML in terms of the JVA, it would have had serious consequences of stoppage of generation of power at BTPS, resulting in power outages in the State of Karnataka.

(m) The Washability Report submitted by CIMFR, Nagpur, a Government Laboratory stated in so many words that the coal rejects did not contain any useful c.v. Therefore, the entire edifice of criminality and conspiracy built by the respondent-CBI on the premise that the coal rejects had a commercial c.v. with an assertion that the appellants had profited from the sale thereof in the open market and pocketed the sale proceeds, flies in the face of the Washability Report.

(n) The Revised Mining Plan submitted by the appellants to the MoC in the year 2010 and approved in 2011, could not have been relied on by the respondent-CBI for pressing charges against the appellants on a plea that had the new technology for utilizing the coal rejects been put to use, the losses could have been mitigated. It is not in dispute that the new technology namely, FBC was not even in vogue when the MoC had approved the original Mining Plan submitted by KECML in the year 2004. Besides that, before putting the new technology to use, there were several steps required to be undertaken, which included obtaining approvals from different government agencies and establishment of a plant. None of that could take place as an order was passed by this court in the year 2014, deallocating all captive coal mines.

21.3 In the light of the aforesaid discussion, we are of the opinion that the respondent-CBI embarked on a roving and fishing inquiry on the strength of the Audit Report of the CAG and then started working backwards to sniff out criminal intent against the appellants. The underpinnings of what was a civil dispute premised on a contract between the parties, breach whereof could at best lead to determination of the contract or even the underlying lease deed, has been painted with the brush of criminality without any justification.

This criminal intent has been threaded into the dispute by the respondent-CBI by misinterpreting the clauses of the agreements governing the parties and by heavily banking on the observations made in the Audit Report of the CAG that has not attained finality till date. In view of the glaring infirmities mentioned hereinabove, the impugned orders deserve interference in exercise of the powers vested in this court under Article 136 of the Constitution of India.

21.4 For all the reasons enumerated above, the present appeals succeed. The order on charge dated 24th December, 2021 and the order framing charges dated 3rd March, 2022 passed by the learned Special Judge, CBI qua the appellants before this Court are unsustainable and accordingly quashed and set aside.

.....J. [Hima Kohli]

.....J. [Ahsanuddin Amanullah]

New Delhi

August 23, 2024

1 In short 'P.C. Act'
2 In short CBI
3 Hereinafter referred to as 'learned Special Judge, CBI'
4 Case No. CBI/317 /2019; CNR No. DLCT11-001312-2019 in RC No. 220-2015- E-0002; Branch: CBI/EOU-IV, EO-II/New Delhi
5 In short 'IPC'
6 In short "KECML"
7 (2014) 9 SCC 614
8 (2017) 14 SCC 809
9 In short 'MoU'
10 In short 'JVA'
11 In short 'KPCL'
12 In short 'EMTA'
13 In short 'BTPS'
14 In short 'JVC'
15 In short 'C.V.'

16 In short 'G.C.V.'
17 In short 'MoC'
18 at Kiloni, Manoradeep and Beranj I to IV blocks
19 For short '1973 Coal Act
20 For short 'MMDR Act'
21 For short 'FSA'
22 In short 'SGS'
23 Hereinafter referred to as 'CIPCO'
24 Writ Petition No. 2923 of 2003
25 For short 'MoU'
26 Hereinafter referred to as 'GCWL'
27 In short 'CIMFR'
28 In short 'IBOCM'
29 For short FBC.
30 In short 'MoEF&CC'
31 Metric Tonnes
32 For short "CAG"
33 'SIR-03/12
34 PE 5/2012-BS&FC, Delhi Coal Block Cases
35 FIR No. RC: 220 2015 E 0002
37 Writ Petition 2995 to 2996 of 2016 (GM-MMS) c/w Writ Petition Nos. 2997 to 2998 of 2016 (GM-MMS)
38 Ibid
39 ibid
40 Petition for Special Leave to Appeal (C) No. 26367-26370/2016
41 Civil Appeal Nos. 5401-5404/2017
42 For short 'MoPP&P'
43 For short 'DoPT'
44 In short 'Cr.P.C'
45 In short 'AEPL'
46 COMAP No. 12, 13, 14 and 15 and 2020 decided on 22nd July, 2021
47 Petition for Special Leave to Appeal (Civil) No. 395-398 of 2022
48 In short 'CVC'
49 In short 'CAG Act'
50 (2012) 3 SCC 1
51 (2013) 7 SCC 1
52 (2014) 4 SCC 156
53 In short UHV
54 (2011) 3 SCC 581
55 (2020) 9 SCC 636
56 (2022) 7 SCC 370
57 2024 SCC OnLine SC 483
58 (2014) 13 SCC 55

59 (2015) 10 SCC 152
60 (2017) 15 SCC 560
61 (2022) 4 SCC 574
62 (2023) 4 SCC 731
63 (2023) SCC OnLine SC 424
64 (both of who were serving officers in KPCL at the relevant point of time)
65 SLP (Crl.) Dy No. 20094/2023 titled S.M. Jaamdar & Others v. CBI
66 (2005) SCC Online Gau 308; (2005) 275 ITR 502
67 AIR (1945) PC 18
68 (1979) 3 SCC 4
69 (1990) 4 SCC 76
70 (1996) 4 SCC 659
71 (2014) 11 SCC 709
72 (1977) 4 SCC 39
73 (2002) 8 SCC 87
74 (2014) 9 SCC 516
75 In short PE-2
76 In short PE-3
77 In short PE-4
78 For short 'SIR'
79 (2006) 4 SCC 278
80 AIR 1970 SC 962
81 (1982) 2 SCC 543
82 (1995) Supp(2) 724
83 (2004) 2 SCC 731
84 For short 'the CAG Act'
85 'Grade D Coal' as defined under 'Definition and Interpretation' clause of the JVA dt 13th September, 2002.
86 'Coal' as defined under 'Definition and Interpretation' clause of the JVA dt. 13th September, 2002 and Article 1 of FSA dt. 09th May, 2007
87 Article 5.2.2 of the FSA
88 Annexure-II of the JVA and Article 6.1.1 of the FSA
89 (2013) 3 SCC 330
90 (2005) 1 SCC 568
91 (1992) Supp (1) SCC 335
92 (2008) 14 SCC 1
93 (2019) 11 SCC 706
94 (1977) 2 SCC 699
95 (1979) 2 SCC 297
96 (1980) 3 SCC 141
97 (2012) 12 SCC 291
98 AIR (2015) 1267
99 (2022) 8 SCC 253

IN THE SUPREME COURT OF INDIA

Prem Prakash
Vs.
Union of India through the Directorate of Enforcement

[Criminal Appeal No._____ of 2024
@ SLP (Crl.) No. 5416/2024]

HEADNOTE – Even in the Prevention of Money Laundering Act (PMLA), bail is the rule and jail is the exception.

JUDGMENT

K.V. Viswanathan, J.

1. Leave granted.

2. The present appeal challenges the judgment dated 22.03.2024 of the High Court of Jharkhand at Ranchi in B.A. No. 9863 of 2023. By the said judgment, the High Court dismissed the bail application of the appellant. The appellant sought for regular bail in connection with ECIR Case No. 5 of 2023 in ECIR-RNZO/10/2023 (hereinafter referred to as ECIR Case No. 5 of 2023) registered for the offence under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA') and pending before the Court of Special Judge, PMLA, Ranchi.

Brief Facts

3. The predicate offence on the basis of which ECIR No. 5 of 2023 was recorded on 07.03.2023 is an FIR bearing Sadar P.S. Case No. 399 of 2022 registered on 08.09.2022 for offences punishable under Sections 406, 420, 467, 468, 447, 504, 506, 341, 323 and 34 of the Indian Penal Code, 1860 (for short 'IPC'). The appellant was not named as an accused there.

4. In view of Section 420 and 467 of IPC, being Scheduled Offences, ECIR No. 5 of 2023 was registered and investigation under the PMLA was initiated. Even here the appellant was not named though the ECIR did mention certain unknown persons being involved. It is alleged that the investigation revealed falsification of the original records in the Circle Office, Bargain, Ranchi and the Office of Registrar of Assurances, Kolkata respectively and as such custody of the original registers were taken in accordance with law.

5. The substratum of the allegation leading to the complaint lodged under PMLA are as follows:- Umesh Kumar Gope complained that Rajesh Rai, Imtiaz Ahmad, Bharat Prasad, Lakhan Singh, Punit Bhargava and Bishnu Kumar Agarwal fraudulently acquired one acre of land situated at Plot No. 28, Khata No. 37 Village Gari, Cheshire Home Road P.S. Sadar, Ranchi.

The allegation was that accused Rajesh Rai S/o Jagdish Rai illegally and fraudulently made a Power of Attorney in the name of Imtiaz Ahmad and accused Bharat Prasad and on the basis of said Power of Attorney prepared a forged sale deed and sold the above-mentioned parcel of land to accused Punit Bhargava, an accomplice of the appellant for an amount of Rs. 1,78,55,800/-. It is further alleged that the said land was transferred by accused Punit Bhargava to accused Bishnu Kumar Agarwal vide two sale deeds dated 01.04.2021 for a total amount of Rs. 1,80,00,000/- (Rs.1,02,60,000/- and Rs.77,40,000).

According to the Enforcement Directorate, accused Bishnu Kumar Agarwal paid Rs. 1,78,20,000/- to accused Punit Bhargava in the account of his firm Shiva Fabcons (Proprietorship firm of accused Punit Bhargava) and out of which Rs. 1,01,57,400/- was transferred to M/s Jamini Enterprises, which according to the respondent-Investigating Agency, was a firm whose beneficial owner is the appellant. The appellant was arrayed as Accused No.8 in the Prosecution Complaint of the Investigating Agency.

6. According to the Investigating Agency, it was confirmed by the Directorate of Forensic Science that Deed No. 184 of 1948, a purported sale deed, by which the property was transferred by the predecessors of Umesh Gope to Jagdish Rai, father of Rajesh Rai was forged. A separate FIR bearing No. 137 of 2023 dated 10.05.2023 for offences under Sections 120-B, 465, 467, 468 and 471 of IPC came to be registered at Hare Street Police Station Kolkata on the basis of the report of the Fact Finding Committee of the Registrar of Assurances, Kolkata. It is stated that the said FIR was also merged into ECIR No. 5 of 2023.

7. It is alleged that it was on the directions of the appellant that the sale deed was executed in favor of Punit Bhargava by Rajesh Rai for an amount of Rs. 1,78,55,800/-; that only Rs. 25 lakhs were transferred from Shiva Fabcons (Proprietorship firm of Punit Bhargava) to Rajesh Rai although the consideration amount was Rs. 1,78,55,800/- and it was shown to have been paid in the sale deed; that out of the aforesaid sum of Rs. 25 lakhs, an amount of Rs. 18 lakhs were transferred from the Bank account of Rajesh Rai to the Bank account of Green Traders (Partnership firm under the control of Md. Saddam Hussain); that Rs. 7 lakh cash was withdrawn through cheques by Rajesh Rai; that on the directions of the appellant, mutation of the property was done in the name of Punit Bhargava, who was an accomplice of the appellant; that Punit Bhargava

sold the property to the Bishnu Kumar Agarwal within a span of two months for Rs. 1.80 crore; that an amount of Rs.56,62,600/- was paid from the account of M/s Chalice Real Estate (Company of Bishnu Kumar Agarwal) on 05.04.2021 to Punit Bhargava's bank account and on 24.06.2021 an amount of Rs. 1,01,57,400/- was transferred from the account of Adarsh Heights Pvt Ltd (Company of Bishnu Agarwal) to Punit Bhargav's bank account; that the entire payment was made in the month of April and June, 2021 but the registration was done on 1st April, 2021 before the receipt of consideration. Finally, it is alleged that an amount of Rs.1,01,57,400/- was transferred to the Bank account of M/s Jamini Enterprises, which is alleged to be a firm controlled and beneficially owned by appellant - Prem Prakash.

8. It is alleged that the appellant conspired with the other accused persons, namely, Afshar Ali @ Afsu Khan, Rajesh Rai, Lakhan Singh, Imtiaz Ahmad, Bharat Prasad, Saddam Hussain, Punit Bhargava, Chhavi Ranjan and Bishnu Kumar Agarwal in the acquisition of proceeds of crime in the form of landed property. It is specifically alleged that the appellant being an accomplice of Bishnu Kumar Agarwal used his connections to assist Bishnu Kumar Agarwal in acquiring the land and that Bishnu Kumar Agarwal transferred the money to Punit Bhargava and the amount was further transferred to Jamini Enterprises.

9. The appellant was taken into custody on 11.08.2023. He was already in custody from 25.08.2022 in ECIR No. 4 of 2022. His application for bail was rejected by the Special Judge on 20.09.2023. He preferred a bail application before the High Court. The High Court has declined bail to the appellant. Aggrieved, the appellant is before us.

10. We have heard Mr. Ranjit Kumar, Learned Senior counsel for the appellant, ably assisted by Mr. Indrajit Sinha and Mr. Siddharth Naidu, learned advocates. We have also heard Mr. S.V. Raju, Learned Additional Solicitor General, ably assisted by Mr. Zoheb Hussain and Mr. Kanu Agarwal for the respondents. Learned Senior Counsels on both sides have placed their respective contentions and also filed detailed written submissions.

SECTION 45 PMLA-CONTOURS

11. Considering that the present is a bail application for the offence under Section 45 of PMLA, the twin conditions mentioned thereof become relevant. Section 45(1) of PMLA reads as under:-

"45. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by-

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government."

In Vijay Madanlal Choudhary and Ors. Vs Union of India and Ors. reported in (2022) SCC OnLine SC 929, this Court categorically held that while Section 45 of PMLA restricts the right of the accused to grant of bail, it could not be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. Para 131 is extracted hereinbelow:-

"131. It is important to note that the twin conditions provided under Section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the court, which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act."

These observations are significant and if read in the context of the recent pronouncement of this Court dated 09.08.2024 in Criminal Appeal No. 3295 of 2024 [Manish Sisodia (II) Vs. Directorate of Enforcement], it will be amply clear that even under PMLA the governing principle is that "Bail is the Rule and Jail is the Exception". In para 53 of [Manish Sisodia (II), this Court observed as under:-

"53. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception."

All that Section 45 of PMLA mentions is that certain conditions are to be satisfied. The principle that, "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception.

Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure. Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.

12. Independently and as has been emphatically reiterated in Manish Sisodia (II) (supra) relying on Ramkripal Meena Vs Directorate of Enforcement (SLP (Crl.) No. 3205 of 2024 dated 30.07.2024) and Javed Gulam Nabi Shaikh Vs. State of Maharashtra and Another, 2024 SCC online 1693, where the accused has already been in custody for a considerable number of months and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty.

Further, Manish Sisodia (II) (supra) reiterated the holding in Javed Gulam Nabi Sheikh (Supra), that keeping persons behind the bars for unlimited periods of time in the hope of speedy completion of trial would deprive the fundamental right of persons under Article 21 of the Constitution of India and that prolonged incarceration before being pronounced guilty ought not to be permitted to become the punishment without trial. In fact, Manish Sisodia (II) (Supra) reiterated the holding in Manish Sisodia (I) Vs. Directorate of Enforcement (judgment dated 30.10.2023 in Criminal Appeal No. 3352 of 2023) where it was held as under:-

"28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable

time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded.

The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years."

It is in this background that Section 45 of PMLA needs to be understood and applied. Article 21 being a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict.

Scope of Inquiry under Section 45 of PMLA

13. Coming back to the scope of inquiry under Section 45, Vijay Madanlal Choudhary (Supra), while reiterating and agreeing with the holding in Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Another reported in (2005) 5 SCC 294, held that the Court while dealing with the application for grant of bail in PMLA need not delve deep into the merits of the case and only a view of the Court based on the available material available on record is required.

It held that the Court is only required to place its view based on probability on the basis of reasonable material collected during investigation. The words used in Section 45 are "reasonable grounds for believing" which means that the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt. We deem it fit to extract the relevant portion (Para 131) from Vijay Madanlal Choudhary (supra):

"131. It is important to note that the twin conditions provided under section 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under section 45 impose absolute restraint on the grant of bail. The discretion vests in the court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under section 45 of the 2002 Act. While dealing with a similar provision prescribing twin

conditions in MCOCA, this court in Ranjitsing Brahmajeetsing Sharma (supra), held as under:

"44. The wording of section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of the MCOCA, therefore, must be construed reasonably.

It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction.

The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby". We are in agreement with the observation made by the court in Ranjitsing Brahmajeetsing Sharma (supra). The court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the court based on available material on record is required. The court will not

weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court.

The court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this court in Nimmagadda Prasad (supra), the words used in section 45 of the 2002 Act are "reasonable grounds for believing" which means the court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."

(emphasis supplied)

Importance of the foundational facts-under Section 24 PMLA

14. In Vijay Madanlal Choudhary (supra) dealing with Section 24 of the PMLA, the three-Judge Bench held as under:-

"97. Be that as it may, we may now proceed to decipher the purport of section 24 of the 2002 Act. In the first place, it must be noticed that the legal presumption in either case is about the involvement of proceeds of crime in money-laundering. This fact becomes relevant, only if, the prosecution or the authorities have succeeded in establishing at least three basic or foundational facts.

First, that the criminal activity relating to a scheduled offence has been committed. Second, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity. Third, the person concerned is, directly or indirectly, involved in any process or activity connected with the said property being proceeds of crime. On establishing the fact that there existed proceeds of crime and the person concerned was involved in any process or activity connected therewith, itself, constitutes offence of money-laundering.

The nature of process or activity has now been elaborated in the form of Explanation inserted vide Finance (No. 2) Act, 2019. On establishing these foundational facts in terms of section 24 of the 2002 Act, a legal presumption would arise that such proceeds of crime are involved in money-laundering. The fact that the person concerned had no causal connection with such proceeds of crime and he is able to disprove the fact about his involvement in any process or activity connected therewith, by producing evidence in that regard, the legal presumption would stand rebutted.

99. Be it noted that the legal presumption under section 24(a) of the 2002 Act, would apply when the person is charged with the offence of money-laundering and his direct or indirect involvement in any process or activity connected with the proceeds of crime, is established. The existence of proceeds of crime is, therefore, a foundational fact, to be established by the prosecution, including the involvement of the person in any process or activity connected therewith.

Once these foundational facts are established by the prosecution, the onus must then shift on the person facing charge of offence of money-laundering-to rebut the legal presumption that the proceeds of crime are not involved in money-laundering, by producing evidence which is within his personal knowledge. In other words, the expression "presume" is not conclusive. It also does not follow that the legal presumption that the proceeds of crime are involved in money-laundering is to be invoked by the Authority or the court, without providing an opportunity to the person to rebut the same by leading evidence within his personal knowledge.

100. Such onus also flows from the purport of section 106 of the Evidence Act. Whereby, he must rebut the legal presumption in the manner he chooses to do and as is permissible in law, including by replying under section 313 of the 1973 Code or even by cross-examining prosecution witnesses. The person would get enough opportunity in the proceeding before the Authority or the court, as the case may be.

He may be able to discharge his burden by showing that he is not involved in any process or activity connected with the proceeds of crime. In any case, in terms of section 114 of the Evidence Act, it is open to the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Considering the above, the provision under consideration [section 24(a)] by no standards can be said to be unreasonable much less manifestly arbitrary and unconstitutional."

(Emphasis supplied)

Importance of the counter to the bail application - filed in the original Court

15. In view of the importance of the three basic foundational facts that the prosecution needs to establish, the counter/response to the bail application in the original Court is very significant in PMLA bail matters. In cases where the Public Prosecutor takes a considered decision to oppose the bail application, the counter affidavit of the Investigating Agency should make out a cogent case as to how the three foundational facts set out hereinabove are prima facie established in the

given case to help the Court at the bail application stage to arrive at a conclusion within the framework laid down in Vijay Madanlal Choudhary (supra).

It is only thereafter the presumption under Section 24 would arise and the burden would shift on the accused. The counter to the bail application should specifically crystallize albeit briefly the material sought to be relied upon to establish prima facie the three foundational facts. It is after the foundational facts are set out that the accused will assume the burden to convince the court within the parameters of the enquiry at the Section 45 stage that for the reasons adduced by him there are reasonable grounds to believing that he is not guilty of such offence.

Analysis and Reasons

16. The contention of the prosecution is that

(i) the appellant connived with accused persons, namely, Afshar Ali, Saddam Hussain and others who created a forged Sale Deed No. 184 of 1948, and on the strength of the sale deed the property was sold by Rajesh Rai (associate of Afshar Ali) to Punit Bhargava a close associate of the appellant;

(ii) that Rs. 25 lakhs were transferred to the bank account of Rajesh Rai and later Rs. 18 lakh (out of the 25 lakhs) was transferred to the bank account of M/s Green Traders, a firm controlled by Md. Saddam Hussain even though the sale consideration was Rs. 1,78,55,800/-;

(iii) that the appellant is aware of the forgery committed by Afshar Ali & others and intentionally acquired the property in the name of Punit Bhargava, who later sold the property within 2 months to Bishnu Agarwal for Rs. 1.80 crore and out of the said amount, Rs. 1,01,57,400/- was transferred by Punit Bhargava to M/s Jamini Enterprises, a firm controlled and beneficially owned by the appellant;

(iv) that the accused persons had full knowledge of the transaction, inasmuch as though the sale deed was executed in favor of Punit Bhargava through accused Rajesh Rai on 06.02.2021, payment was made on 12.02.2021 and that only 25 lakh was paid to Rajesh Rai and mutation was done and thereafter sold to Bishnu Agarwal and all payments were received by Punit Bhargava;

(v) that no subsequent payments were to be made further, as according to the prosecution, all concerned knew that the deeds were fake, and

(vi) that Bishnu Agarwal made the payment in the month of April and June 2021, but the registration was done on 1st April, 2021 and as such the registration was done before consideration.

(Emphasis supplied)

17. The prosecution relies on the statements under Section 50 of the PMLA of Afshar Ali, Rajdeep Kumar, Md. Saddam Hussain, Punit Bhargava and of the appellant himself. They also rely on the call detail records of the other accused, namely, Afshar Ali and Rajdeep Kumar. They also alleged that the appellant, with the help of another accused person Chhavi Ranjan, by influencing the circle officials got the land mutated and hence, according to the prosecution, the role of the appellant is pivotal.

18. Learned ASG for the respondent has taken us through summary of the statements of the persons mentioned hereinabove, as adverted to in the complaint, filed by the Enforcement Directorate.

Admissibility of the Statement of the Appellant

19. In the oral submissions and also as elaborated in the detailed written submissions by the respondent-Enforcement Directorate, reliance is sought to be placed on the statements of the appellant. This is stoutly resisted on the side of the appellant by contending that the appellant was in custody from 25th August 2022 in ECIR No. 4/2022; that his arrest was shown in the present case on 11th August 2023 and it is submitted that statements recorded while in custody (although in ECIR No.4/2022) will not be admissible and will be hit by Section 25. The statement of the appellant-Prem Prakash, the summary of which, as given in the complaint, reads as under:-

"8.23 Prem Prakash - In his statement dated 04.08.2023 (RUD No.41) recorded in judicial custody at Birsa Munda Central Jail, Hotwar, Ranchi, he stated that he knows Bishnu Kumar Agarwal as a businessman and sometimes, he has met him during marriage events. He further stated that Punit Bhargava is like his younger brother and he is from his native place, so he knows him since childhood.

From his statement dated 03.08.2023, (RUD No.40) it reveals those three persons including Afshar Ali used to visit him for the Cheshire Home Road property. He introduced them with Rajdeep Kumar and got the property verified. After some time, with the consent of Punit Bhargava, he got the property registered in the name of Punit Bhargava and later this property was sold to Bishnu Kumar Agarwal at a consideration price of Rs. 1.78 crores. His statement also reveals that Rajdeep used to visit Chhavi Ranjan on his instructions for the landed properties. However, in his statement dated 15.08.2023, he started concealing facts regarding meeting between Afshar Ali, Md. Saddam Hussain and others with Chhavi Ranjan.

It may be mentioned that Rajdeep is a person who worked under Prem Prakash as his employee and had visited the office of the accused Chhavi Ranjan on directions of Prem Prakash with the accused persons Afshar All and Md. Saddam Hussain. This fact has also been admitted by Rajdeep Kumar in his statement under section 50 of PMLA, 2002 recorded on 24.04.2023. (RUD No. 76) Further, several calls have also been identified to have taken place during the scrutiny of the CDR which have also been mentioned below in the relevant para."

(Emphasis supplied)

20. In his statement of 04.08.2023, he stated that he knew Bishnu Kumar Agarwal and has met him during Marriage Events; that Punit Bhargava was like his younger brother who hailed from his native place, and he had known him since childhood. That in his statement of 03.08.2023, he stated that persons including Afshar Ali used to visit him for the Cheshire Home property and that he introduced him to Rajdeep Kumar and got the property verified.

That with the consent of Punit Bhargava, he got the property registered in the name of Punit Bhargava and later the property was sold to Bishnu Kumar Agarwal at a consideration of Rs. 1.78 crore. The statement, as summarized, taken as it is does not prima facie make out a case of money laundering against the appellant. It also does not point to the involvement of the appellant prima facie in the forgery.

21. Independent of the above, there is one important issue which arises in this case. It has to be pointed out that the appellant has been in judicial custody from 25.08.2022 in connection with another ECIR, namely, ECIR No. 4 of 2022 and while in judicial custody his arrest was shown in the current ECIR, namely, ECIR No. 5 on 11.08.2023. The statements of the appellant were recorded on 03.08.2023, 04.08.2023, 11.08.2023, 12.08.2023, 14.08.2023, 15.08.2023 and 30.08.2023.

22. The question that arises is when a person is in judicial custody/custody in another case investigated by the same Investigating Agency, whether the statements recorded (in this case the statements dated 03.08.2023, 04.08.2023, 11.08.2023) for a new case in which his arrest is not yet shown, and which are claimed to contain incriminating material against the maker, would be admissible under Section 50?

23. In Vijay Madanlal Choudhary (supra), addressing the scope of Section 50, following has been held:-

"159. However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may

come into play to urge that the same being in the nature of confession, shall not be proved against him.'

(Emphasis supplied)

The three-judge Bench in Vijay Madanlal Choudhary (supra) has apart from Article 20(3) also adverted to Section 25 of the Evidence Act. Section 25 of the Evidence Act reads as under:-

"25. Confession to police officer not to be proved.- No confession made to a police officer shall be proved as against a person accused of any offence.

24. Vijay Madanlal Choudhary (supra) though held that the authorities under the PMLA are not police officers, did anticipate a scenario where in a given case, the protection of Section 25 of the Evidence Act may have to be made available to the accused. The Court observed that such situations will have to be examined on a case-to-case basis. We deem it appropriate to extract Para 172 of Vijay Madanlal Choudhary (supra).

"172. In other words, there is stark distinction between the scheme of the NDPS Act dealt with by this court in Tofan Singh (supra) and that in the provisions of the 2002 Act under consideration. Thus, it must follow that the authorities under the 2002 Act are not police officers. Ex-consequenti, the statements recorded by the authorities under the 2002 Act, of persons involved in the commission of the offence of money-laundering or the witnesses for the purposes of inquiry/investigation, cannot be hit by the vice of article 20(3) of the Constitution or for that matter, article 21 being procedure established by law. In a given case, whether the protection given to the accused who is being prosecuted for the offence of money-laundering, of section 25 of the Evidence Act is available or not, may have to be considered on case-to-case basis being rule of evidence."

(Emphasis supplied)

25. This Court in Vijay Madanlal Choudhary (supra) anticipated the myriad situations that may arise in the recording of the Section 50 statement and discussed the parameters for dealing with them. In Rajaram Jaiswal vs. State of Bihar, AIR 1964 SC 828, a judgment quoted in extenso in Vijay Madanlal Choudhary (supra), this Court observed that the expression "police officer " in Section 25 of the Evidence Act is not confined to persons who are members of the regularly constituted police force. Further, setting out the test for determining whether an officer is a "police officer " for the purpose of Section 25 of the Evidence Act, this Court in Rajaram Jaiswal (supra) held (quoted from para 165 of Vijay Madanlal Choudhary (supra)

"165(ii) It may well be that a statute confers powers and imposes duties on a public servant, some of which are analogous to those of a police officer. But by reason of the nature of other duties which he is required to perform he may be exercising various other powers also. It is argued on behalf of the State that where such is the case the mere conferral of some only of the powers of a police officer on such a person would not make him a police officer and, therefore, what must be borne in mind is the sum total of the powers which he enjoys by virtue of his office as also the dominant purpose for which he is appointed.

The contention thus is that when an officer has to perform a wide range of duties and exercise correspondingly a wide range of powers, the mere fact that some of the powers which the statute confers upon him are analogous to or even identical with those of a police officer would not make him a police officer and, therefore, if such an officer records a confession it would not be hit by S. 25 of the Evidence Act. In our judgment what is pertinent to bear in mind for the purpose of determining as to who can be regarded a 'police officer' for the purpose of this provision is not the totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise.

The test for determining whether such a person is a "police officer" for the purpose of S. 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of police station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession.

In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys. These questions may perhaps be relevant for consideration where the powers of the police officer conferred upon him are of a very limited character and are not by themselves sufficient to facilitate the obtaining by him of a confession."

(Emphasis supplied)

26. Four decades ago, V.R. Krishna Iyer, J. in his inimitable style, speaking for this Court in Nandini Satpathy Vs P.L. Dani and Another, (1978) 2 SCC 424 observed as under:-

"50. We, however, underscore the importance of the specific setting of a given case for judging the tendency towards guilt. Equally emphatically, we stress the need for regard to the impact of the plurality of other investigations in the offing

or prosecutions pending on the amplitude of the immunity. "To be witness against oneself" is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from "tendency to be exposed to a criminal charge". "A criminal charge" covers any criminal charge then under investigation or trial or which imminently threatens the accused."

(Emphasis supplied)

"57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation- not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter.

We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion tiring interrogative prolixity, overbearing and intimidatory methods and the like - not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3).

The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3)."

(Emphasis supplied)

27. In the facts of the present case, we hold that the statement of the appellant if to be considered as incriminating against the maker, will be hit by Section 25 of the Evidence Act since he has given the statement whilst in judicial custody, pursuant to another proceeding instituted by the same Investigating Agency. Taken as he was from the judicial custody to record the statement, it will be a travesty of justice to render the statement admissible against the appellant.

28. The appellant accused cannot be told that after all while giving this statement:-

"you were wearing a hat captioned 'ECIR 5/2023' and not the hat captioned 'ECIR 4/2022' ".

29. A complete reading of Vijay Madanlal Chaudhary (supra), particularly, paragraphs 159, 165 and 172 mandate us to ask ourselves the query: Is a reasonable inference legitimately possible that, due to the vulnerable position in which the appellant was placed and the dominating position in which the Investigating Agency was situated, in view of the arrest in the other proceeding that, there obtained a conducive atmosphere to obtain a confession? We certainly think so. The question is not whether it actually happened. The question is could it have been possible.

30. We are supported in this view by two old judgments of the Madras High Court. In Re Elukuri Seshapani Chetti (ILR 1937 Mad 358) Justice Mockett following the judgment of Justice Jackson In Kodangi V. Emperor, (AIR 1932 Mad 24.) held as under:-

"In my judgment this is clearly a confession, as I have already said, and, as has been pointed out by Jackson J. In Kodangi V. Emperor, (AIR 1932 Mad 24.) a confession made to the Police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible. The whole spirit of section 25 of the Indian Evidence Act is to exclude confessions to the police and, the moment a statement is found to amount to a confession, I do not think it matters in the slightest of what crime it is said to be a confession."

(Emphasis supplied)

31. We feel that the principle laid down there on is applicable. In fact, the three-Judge Bench in Vijay Madanlal Chaudhary (supra), in the para extracted hereinabove, expressly refers to Section 25 of the Evidence Act while dealing with statements recorded when the person is in custody.

32. We have no hesitation in holding that when an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under Section 50 PMLA to the same Investigating Agency is inadmissible against the maker. The reason being that the person in custody pursuant to the proceeding investigated by the same Investigating Agency is not a person who can be considered as one operating with a free mind. It will be extremely unsafe to render such statements admissible against the maker, as such a course of action would be contrary to all canons of fair play and justice.

33. We also draw support from the way Section 50 is structured. Section 50 reads as under:-

"Section 50. Powers of authorities regarding summons, production of documents and to give evidence, etc.

(1) The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

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

(f) any other matter which may be prescribed.

(2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.

(3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

(4) Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

(5) Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, any records produced before him in any proceedings under this Act:

Provided that an Assistant Director or a Deputy Director shall not-

(a) impound any records without recording his reasons for so doing; or

(b) retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director."

Section 50 (1)(b) speaks of enforcing the attendance of any person, Section 50 (2) speaks of the authorized officials having the power to summon any person whose attendance they consider necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under the Act.

Section 50 (3) states that all persons so summoned shall be bound to attend in person or through authorized agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents and Section 50(4) states that every proceeding under sub-Sections (2) and (3) shall be deemed to be in judicial proceeding. A person in judicial custody being not a free person cannot be summoned and any statement to be recorded will be after obtaining the permission of the Court which has remanded him to the judicial custody in the other case.

34. In view of the above and keeping the salutary principle of Article 21 in mind, we hold that since the words 'procedure established by law' occurring in Article 21 has to be a reasonable and valid procedure, the statement of the appellant under Section 50 cannot be read upon in ECIR No. 5 of 2023 even though the appellant was at that point in custody in ECIR No. 4 of 2022.

Statement of Afshar Ali - Co-accused

35. The appellant was not named in FIR No. 399 of 2023. It appears from the complaint of the respondent-Enforcement Directorate at para 6 that Afshar Ali, Saddam Hussain, Imtiaz Ahmad were arrested on 14.04.2023 in ECIR/RNZO/18/2022 though in the summary of the statements at para 8.12 it is mentioned that Afshar Ali was arrested on 14.04.2023 read with prayer (c) of the complaint it appears that the arrest that is referred to in para 8.12 is the arrest in ECIR/RNZO/18/2022.

36. Accused Afshar Ali was arrested on 14.04.2023 in ECIR/RNZO/18/2022 (a different ECIR) and his statement was recorded on 17.04.2023 in the present ECIR. Afshar Ali is supposed to have stated that since he came to know that the land was under vigilance by the Police and the land had certain disputes. He met with the appellant and the appellant was informed about the disputes and the vigilance of the Police. According to the statement of Afshar Ali, the appellant took stock of the status of the land and called the then Deputy Commissioner - Chhavi Ranjan and told him that the registry of the Cheshire Home property was to be done after removing the vigilance observed by the Police.

Thereafter, the appellant fixed the consideration of Rs. 1.5 crores and after accepting the consideration as fixed, he requested the appellant to arrange for unblocking the two plots of land, which were blocked by the Deputy Commissioner Office. That the appellant demanded Rs. 1 crore for the above work and the amount was adjusted in the said consideration and that it was appellant who asked to do the registration in the name of Punit Bhargava. He also stated that it was the appellant who fixed the deal with Bishnu Kumar Agarwal.

37. Being a co-accused with the appellant, his statement against the appellant assuming there is anything incriminating against the present appellant will not have the character of substantive evidence. The prosecution cannot start with such a statement to establish its case. We hold that, in such a situation, the law laid down under Section 30 of the Evidence Act by this Court while dealing with the confession of the co-accused will continue to apply. In Kashmira Singh vs. State of Madhya Pradesh, [1952] SCR 526, this Court neatly summarized the principle as under:-

"The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

Hence, insofar as Afshar Ali's statement is concerned, the Investigating Agency will have to first marshal the other evidence and can at best look at the statement for lending assurance. Independently, the statement of Afshar Ali does not prima facie indicate anything about the role of the appellant in the forgery of sale deed and other documents or being involved in the offence of money laundering.

Statement of Rajdeep Kumar

38. We have perused the statement, as summarized in the complaint, of Rajdeep Kumar. Rajdeep Kumar merely states that he worked for the appellant and has met Afshar Ali after the appellant introduced him at the house of the appellant regarding dealing of a land situated at Cheshire Home. He further states that he has met Saddam Hussain at the house of the appellant on the above stated land. He further adds that he has also seen Imtiaz Ahmed and Bharat Prasad, close associates of Afshar Ali and Saddam Hussain. Prima facie, we conclude that

there is hardly any evidence to implicate the appellant for the offence under Section 3 and 4 of PMLA. Statement of Md.

Saddam Hussain - Co-accused

39. Md. Saddam Hussain was arrested on 14.04.2023 also in ECIR/RNZO/18/2022 (a different ECIR), in his statement of 26.04.2023, in the present ECIR he only speaks of knowing Rajdeep Kumar and meeting him for the purpose of unblocking a piece of land measuring 3.81 acres and about Rajdeep Kumar arranging a meeting with the then Deputy Commissioner - Chhavi Ranjan. His statement like that of Afshar Ali will not have the status of being a substantive evidence and will be of the same character as Afshar's insofar as the co-accused are concerned.

In the complaint, the prosecution infers that it was Rajdeep Kumar who was the link between the Deputy Commissioner, Chhavi Ranjan and Prem Prakash and who acted on the instructions of the appellant - Prem Prakash and helped Saddam Hussain for unblocking the land. Prima facie, in our opinion, this statement carries the case of the prosecution no further. The corroboration drawn from his further statement of 29.08.2023 recorded in judicial custody of the above statement adds nothing further to support the prosecution apart from the fact that the statement of 29.08.2023 lacked the character of substantive evidence.

Statement of Punit Bhargava

40. Insofar as the statement of Punit Bhargava is concerned, it was recorded on 09.12.2022. He is supposed to have stated that he knew Bishnu Agarwal since March, 2021 when on the directions of appellant, he sold 1 acre of land to Bishnu Agarwal. He is supposed to have further stated that he had bought the piece of land under the supervision of Prem Prakash and that under the instructions of Prem Prakash, he acquired a land in his name and accordingly on the instructions of the appellant, he sold it to Bishnu Kumar Agarwal.

He stated that on the directions of the appellant, he gave Rs. 25 lakhs to Rajesh Rai through cheque after which the registration and mutation of the property was done but, further added that six post-dated cheques were given for encashing the balance amount later. He is supposed to have stated further that he was not aware as to why rest of the payment was not made even after the registration and mutation and that appellant could perhaps, give a reply. On being asked as to why the property was purchased in his name when it was sold within two months to Bishnu Agarwal, he stated that it was only done on the instructions of Prem Prakash.

41. The statement mentions that apart from 25 lakhs, six post-dated cheques were also given. Thereafter, it only speaks of the appellant advising the purchase and sale of the land. Prima facie, they do not detract from the reasonable grounds of belief that we entertain to the effect that the appellant is not guilty of the offence under Section 3 and 4.

Bishnu Kumar Agarwal (A9) on bail - Order has attained finality

42. We, prima facie, find that from the statements of the appellant and also from the other statements and other material relied upon by the investigating agency, there is nothing to indicate that the petitioner was involved in the creation of the forged deed nor had any knowledge of the forged sale deed of 1948. In the order enlarging Bishnu Kumar Agarwal on bail it was observed that-it was a plausible view to hold that Bishnu Kumar Agarwal was a bonafide purchaser of the property concerned in the present matter.

It has also been held therein that no criminality could have been found against Bishnu Kumar Agarwal in the making of the sale consideration later and registration of the sale earlier. Support has been drawn from Section 54 of the Transfer of Property Act. The same order also makes a reference to para 10.6.6 of the complaint filed by the ED where it has been mentioned that the investigation of the Enforcement Directorate has revealed that complainant in FIR No. 399 of 2022, Umesh Kumar Gope was himself frivolously exerting his claim over the said property. Be that as it may, the order of bail granted to Bishnu Kumar Agarwal has attained finality.

43. Moreover, there is no material placed on record to show as to on what basis it is claimed that the beneficial interest in M/s Jamini Enterprises lies with the appellant. Hence, the statements relied upon do not prima facie make out a case of money laundering against the appellant.

44. The complaint also adverts to two other transactions with which Bishnu Kumar Agarwal is being investigated. Nothing can be elicited from the record about the involvement of the appellant and as to the initiation of any proceeding against him with regard to the other transactions with which Bishnu Kumar Agarwal is involved.

45. In this scenario, we hold that the appellant has satisfied the twin conditions under Section 45. Inasmuch as from the material on record, this Court is satisfied that there are reasonable grounds for believing that the appellant is not guilty of the offence of Money Laundering as alleged under Sections 3 and 4 of the PMLA and the Court is further satisfied that the appellant is not likely to commit any offence, if enlarged on bail.

Arguments about criminal antecedents.

46. The Investigating Agency have also referred to ECIR No. 4 as a criminal antecedent. A reference was made to ECIR No. 4 of 2022 pertaining to illegal Stone Mining and related activities in Saheb Ganj, Jharkhand, where the petitioner was arrested on 25.08.2022 and the prosecution complaint was filed on 16.09.2022. Insofar as the bail pertaining to ECIR No. 4 of 2022, which is pending in this Court in SLP (Criminal) No. 691 of 2023, at the after notice stage, the merits of the bail in that case will be independently examined.

Having examined the facts of the present case arising out of ECIR No. 5 of 2023 and in view of the findings recorded hereinabove, we do not think that the appellant can be denied bail based on the pendency of the other matter. We say so in the facts and circumstances of the present case as we do not find any justification for his continued detention. The appellant has already been in custody for over one year. The Trial is yet to commence. There is a reference to one more ECIR which the Investigating Agency refers to in their counter, namely, ECIR/RNZO/18/2022 but nothing is available from the record as to whether any proceedings have been taken against the appellant.

Allegation of misuse of Jail facilities by the Appellant

47. Elaborate contentions have been made on the conduct of the appellant about certain facilities having been extended to him in jail. We do not comment on them and if at all there is any violation of the prison Rules, the Investigating Agency ought to take up with the higher officials of the Jail. On the facts of the present case, they are not reasons enough to deny the appellant his liberty.

48. For the reasons stated above, while allowing the appeal, we set aside the judgment dated 22.03.2024 of the High Court of Jharkhand at Ranchi in B.A. No. 9863 of 2023. We clarify that the observations made in this judgment are only for the purpose of disposing of the bail application and they shall not influence the Trial Court, which would proceed in accordance with law and on the basis of the evidence on record.

Conclusion

49. In the result, we pass the following order:-

(i) The appeal is allowed and impugned order dated 22.03.2024 is quashed and set aside.

(ii) The Trial Court is directed to release the appellant on bail in connection with ED Case No. ECIR No. 5 of 2023 on furnishing bail bonds for a sum of Rs. 5 lakh with 2 sureties of the like amount.

(iii) The appellant shall surrender his passport with the Trial Court and the appellant shall report to the Investigating Officer on every Monday and Thursday between 10 and 11 A.M.

(iv) The appellant shall not make any attempt to influence the witnesses and tamper with the evidence. Pending applications shall stand disposed of.

.....J. [B.R. Gavai]

.....J. [K. V. Viswanathan]

New Delhi;

August 28, 2024.

Item No. 1501

Prem Prakash Vs. Union of India through the Directorate of Enforcement

[Petition for Special Leave to Appeal (Crl.) No. 5416/2024 arising out of impugned final judgment and order dated 22-03-2024 in BA No. 9863/2023 passed by the High Court of Jharkhand at Ranchi]

Date: 28-08-2024

This matter was called on for pronouncement of today.

For Petitioner(s)

Mr. Ranjit Kumar, Sr. Adv.
Mr. Siddharth Agarwal, Sr. Adv.
Mr. Indrajit Sinha, Adv.
Ms. Sneh Singh, Adv.
Ms. Anusuya Sadhu Sinha, Adv.
Mr. Sowjhanya Shankar, Adv.
Mr. Harsh Yadav, Adv.
Mr. Siddharth Naidu, Adv.
M/S. KSN & Co., AOR

For Respondent(s)

Mr. Suryaprakash V. Raju, A.S.G.
Mr. Zoheb Hussain, Adv.
Mr. Annam Venkatesh, Adv.
Mr. Kanu Agrawal, Adv.
Mr. Mrigank Pathak, Adv.
Mr. Vivek Gurnani, Adv.
Mr. Samrat Goswami, Adv.
Mr. Hitarth Raja, Adv.
Mr. Harsh Paul Singh, Adv.
Mr. Gaurav Sarkar, Adv.
Mr. Animesh Upadhyay, Adv.
Mr. Sathvik Reddy, Adv.
Ms. Abhipriya, Adv.
Mr. Kartik Sabarwal, Adv.
Mr. Vivek Gaurav, Adv.
Mr. Kshitiz Agarwal, Adv.
Mr. Arvind Kumar Sharma, AOR

1. Hon'ble Mr. Justice K.V. Viswanathan pronounced the judgment comprising the Bench of Hon'ble Mr. Justice B.R. Gavai and His Lordship.

2. Leave granted.

3. The appeal is allowed; the impugned order is quashed and set aside and; the Trial Court is directed to release the appellant on bail in terms of the signed reportable judgment.

4. The operative portion of the judgment, inter alia, held as under:-

"49. In the result, we pass the following order:-

(i) The appeal is allowed and impugned order dated 22.03.2024 is quashed and set aside.

(ii) The Trial Court is directed to release the appellant on bail in connection with ED Case No. ECIR No. 5 of 2023 on furnishing bail bonds for a sum of Rs. 5 lakh with 2 sureties of the like amount.

(iii) The appellant shall surrender his passport with the Trial Court and the appellant shall report to the Investigating Officer on every Monday and Thursday between 10 and 11 A.M.

(iv) The appellant shall not make any attempt to influence the witnesses and tamper with the evidence."

Pending application(s), if any, shall stand disposed of.

(SNEHA DAS) SENIOR PERSONAL ASSISTANT	(ANJU KAPOOR) COURT MASTER (NSH)

(Signed reportable judgment is placed on the file)

IN THE SUPREME COURT OF INDIA

Mulakala Malleshwara Rao & Anr.
Vs.
State of Telangana & Anr.

[Criminal Appeal No._____ of 2024
arising out of SLP (Crl.) No. 3981/2023]

HEADNOTE – It cannot be assumed that dowry and traditional presents given at the time of marriage are entrusted to the parents-in-law of the bride and would attract the ingredients of Section 6 of the Dowry Prohibition Act, 1961. Stridhan is the exclusive property of the woman, and her father cannot claim recovery of Stridhan from in-laws without explicit authorisation from her.

JUDGMENT

Sanjay Karol, J.

1. Leave Granted.

2. The present appeal is directed against an order of the High Court for the State of Telangana at Hyderabad dated 22nd December, 2022 passed in Criminal Petition No.11528 of 2022, whereby the High Court refused to quash proceedings arising out of C.C.No.1369 of 2022 on the file of XXVIth Metropolitan Magistrate, Cyberabad at Hayathnagar, under Section 406 of the Indian Penal Code, 1860[1] and Section 6 of the Dowry Prohibition Act, 1961.

3. Brief facts giving rise to the present appeal are as follows:

3.1 The complaint, which set in motion the Criminal Law, was at the instance of one Padala Veerabhadra Rao (Respondent No.2 referred to as the complainant herein), who filed the same against the former in-laws of his elder daughter, namely, Padala Sujana Sheela Kumar (referred to as the daughter) for not returning the ornaments (gold) which he had given at the time of her marriage with their son. The marriage was solemnized on 22nd December, 1999.

3.2 Undisputably, the marriage was unsuccessful and after a period of approximately 16 years, the complainant's daughter on 14th August, 2015 filed for divorce in the United States of America. The decree of divorce was granted by mutual consent by the Circuit Court of St. Louis County, Missouri, on 3rd February, 2016. At that time, all possessions, material and financial, were settled between the parties by way of the Separation Agreement. Hence, all issues

arising out of matrimony stood closed as the daughter got remarried in the U.S.A. in May, 2018.

3.3 Much thereafter, the complainant lodged FIR No.32 of 2021 dated 15th January, 2021, under Section 406 IPC pertaining to the return of the jewellery which he had given to his daughter at the time of her marriage as 'stridhan', but entrusted it to her-in laws (present-appellants)

3.4 It is necessary to record the complainant's version of events. At the time of getting his daughter married in the year 1999, he had given 40 Kasula gold and other articles. Thereafter, the newly married couple migrated to the U.S.A where the complainant's daughter was continually tortured, due to which the complainant's wife was severely disturbed and eventually passed away on 6th June, 2008. His daughter and son-in-law got their divorce in the year 2016, after 16 years of marriage. Such articles given to his daughter during the marriage were entrusted at that time to the in-laws i.e., the appellant Nos.1 and 2.

3.5 Whereafter, the complainant's daughter got remarried in the year 2018 for which purpose the complainant had travelled to the U.S.A. Upon returning therefrom, allegedly he made requests to the former in-laws of his daughter (appellants herein) to return the articles entrusted to them. Such requests remained unheeded with the articles yet to be recovered.

3.6 In the course of investigation, notice dated 16th June, 2022, under Section 41(a) of the Code of Criminal Procedure, 1973[2] was sent to Mulakala Malleshwara Rao (Appellant No.1, the father-inlaw of the complainant's daughter). He denied all allegations and contended that the complaint has been filed with an intent to cause harassment.

3.7 Upon completion of the investigation, the final report under Section 173 Cr.P.C. was filed under the Sections noted above.

3.8 The appellant No.1, aggrieved thereby filed a petition for quashing of the charges, under Section 482 Cr.P.C.

4. The High Court found the allegations made in the charge-sheet, prima facie to be triable. As such, the prayer to exercise such powers was rejected.

5. In the above context, the short point for consideration is whether the father i.e., the complainant herein, had any locus to file the First Information Report which has led to the present proceedings keeping in view that the same was affected by delay and laches, thereby expressly being non-maintainable? Contingent to the answer to this question would be, whether the High Court was correct in refusing to exercise its inherent power in quashing the proceedings under the Cr.P.C.

6. The sum and substance of the present dispute lie in the father's right over the gifts, i.e.,'stridhan' given by him to his daughter at the time of marriage. The generally accepted rule, which has been judicially recognized, is that the woman exercises an absolute right over the property. We may refer to Pratibha Rani v. Suraj Kumar,[3] wherein a Bench of three Judges observed:

"6. To the same effect is Maine's Treatise on Hindu Law at p.728. The characteristics of Saudayika have also been spelt out by Mulla's Hindu Law at p. 168 (Section 113) which gives a complete list of the stridhan property of a woman both before and during coverture, which may be extracted thus:

"113. Manu enumerates six kinds of stridhana:

1. Gifs made before the nuptial fire, explained by Katyayana to mean gifts made at the time of marriage before the fire which is the witness of the nuptial (adhyagni).

2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband (adhyavanhanika).

3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law (pritidatta), and those made at the time of her making obeisance at the feet of elders (pada-vandanika).

4. Gifts made by father.

5. Gifts made by mother.

6. Gifts made by a brother.

7. It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes - she may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

(Emphasis supplied)

The position of the wife or woman being the sole authority in respect of 'stridhan' stands emphatically stated in Rashmi Kumar v. Mahesh Kumar Bhada[4] in the following terms:

"9. A woman's power of disposal, independent of her husband's control, is not confined to saudayika but extends to other properties as well. Devala says:

'A woman's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress.' In N.R. Raghavachariar's Hindu Law - Principles and Precedents (8th Edn.), edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu Law, at para 468 deals with 'Definition of Stridhana'.

In para 469 dealing with 'Sources of acquisition' it is stated that the sources of acquisition of property in a woman's possession are: gifts before marriage, wedding gifts, gifts subsequent to marriage, etc. Para 470 deals with 'Gifts to a maiden'. Para 471 deals with 'Wedding gifts' and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana.

In para 481 at p. 426, it is stated that ornaments presented to the bride by her husband or father constitute her stridhana property. In para 487 dealing with 'powers during coverture' it is stated that saudayika meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

10. It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof."

(Emphasis supplied)

Pratibha Rani (supra) stands followed recently in Maya Gopinathan v. Anoop S.B.[5]. Noticeably, the position of law has remained consistent throughout since 1985, till date, regarding the sole authority of the woman in respect of her 'stridhan' as has also been held recently in Mala Kar v. State of Uttarakhand[6],

wherein a decree of divorce stood passed inter se the parties on 18th October 2014, and FIR was filed on 6th April 2015, the appellant's request for the respondent to pay a sum of Rs.10 Lakhs in full and final settlement of all claims, including 'stridhan' was accepted, and the former husband was directed to pay such amount.

7. As evidenced from the above, the jurisprudence as has been developed by this Court is unequivocal with respect to the singular right of the female (wife or former wife) as the case may be, being the sole owner of 'stridhan'. It has been held that a husband has no right, and it has to then be necessarily concluded that a father too, has no right when the daughter is alive, well, and entirely capable of making decisions such as pursuing the cause of the recovery of her 'stridhan'.

8. We also notice Section 14 of the Hindu Succession Act, 1956 which talks about a Hindu female being the absolute owner of property. It reads:

"14. Property of a female Hindu to be her absolute property.-

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

(Emphasis Supplied)

9. It is undisputed that action was initiated for securing possession of the articles and ornaments after a passage of more than 20 years since the date of marriage and five years after the settlement of all marital issues at the time of divorce and that too, not by the former wife, i.e., the complainant's daughter, but by the complainant himself. This coupled with the fact that there is no authorization on the part of the complainant's daughter in his favour to initiate proceedings for recovery of 'stridhan' exclusively belonging to her, beckons the question on the basis of which the complainant has initiated the present proceedings.

10. We find that the law provides for a situation where a woman may, in law, grant a person of her choosing the authority to do any act which she may herself execute. Section 5 of the Power of Attorney Act, 1882, provides as under:-

"5. Power-of-attorney of married women.-

A married woman, of full age, shall, by virtue of this Act, have power, as if she were unmarried, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act, relating to instruments creating powers-of-attorney shall apply thereto. This section applies only to instruments executed after this Act comes into force."

It cannot be disputed that no such power of attorney, within the meaning of this Act, stood executed by the complainant's daughter, in favour of her father, respondent No.2.

11. At this stage, it would be apposite to refer to the grounds under which the exercise of the power under Section 482 Cr.P.C. has been held to be justified. The locus classicus on this issue is State of Haryana v. Bhajan Lal[7] which considers Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre,[8] and has been subsequently referred to and relied upon in Neeharika Infrastructure v. State of Maharashtra[9]; and Peethambaran v. State of Kerala[10]. The factors to be considered are well enumerated requiring no reiteration here.

12. In particular, the second factor enumerated in Bhajan Lal (supra) is that the FIR or any other document enclosed therewith does not disclose a cognizable offence; and the seventh factor, which stipulates that where a criminal proceeding is initiated with manifest mala fides, ulterior motives or with a view to spite, are important in the present facts.

13. As noted above, the FIR was registered under Section 406 IPC which prescribes a punishment for a criminal breach of trust. Section 405 defines the said offence and provides for the ingredients that are required to be fulfilled for the offence to be made out. This Court in Prof. R.K. Vijayasarathy & Anr. v. Sudha Seetharam & Anr.[11] identified the ingredients required for a charge under Section 406 to be justified:

"13. A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows:

13.1. A person should have been entrusted with property, or entrusted with dominion over property;

13.2. That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; and

13.3. That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

14. In view of the facts of this case, the very first ingredient itself is not made out, for there is no iota of proof on record to show that the complainant had entrusted the 'stridhan' of his daughter to the appellants which allegedly was illegally kept by them. That apart, the second ingredient, i.e., the dishonest misappropriation or conversion for own use, also stands unfulfilled, for there is nothing on record to substantiate that the complainant's daughter's former in-laws converted the 'stridhan' allegedly kept in their custody, for their own use, more so, when the parties in matrimony had never ever raised 'stridhan' as an issue either in the subsistence of the marriage or thereafter, especially during the time of settlement of all issues.

15. Another ground on which the charge fails is that, apart from a statement of the complainant that the 'stridhan' is with the former in-laws of his daughter, there is nothing on record to substantiate the factum of possession actually being with the appellants. In Bobbili Ramakrishna Raja Yadad & Ors. v. State of Andhra Pradesh[12], this Court has held that giving dowry and traditional presents at the time of the wedding does not raise a presumption that such articles are thereby entrusted to the parentsin- law so as to attract the ingredients of Section 6 of the Dowry Prohibition Act, 1961.

16. As such, insofar as Section 406 IPC is concerned, the instant case would fall under the second factor enumerated in Bhajan Lal (supra), where no cognizable offence is visible on the face of the record. Furthermore, the action being initiated more than 5 years after the divorce of the complainant's daughter and also 3 years after her second marriage had taken place, demonstrates the same to be hopelessly belated in time.

17. We may further observe that the object of criminal proceedings is to bring a wrongdoer to justice, and it is not a means to get revenge or seek a vendetta against persons with whom the complainant may have a grudge. The principle in law that delay in filing the FIR has to be satisfactorily explained and does not need any reiteration. In the present case, the record is entirely silent on that aspect.

It is also to be noted, in the FIR the authorities are requested to take action against the appellant for not returning the gifts given by the complainant to his daughter at the time of the marriage, however, in the charge-sheet such a complaint turns into a demand of dowry and being pressured into incurring

expenses for marriage related functions. The question that is to be answered is that when the point of genesis is separate and distinct, how does the end result turn into something that is entirely foreign to the point of genesis?

18. An additional aspect is to be taken note of. The FIR, which culminated in the present proceedings, was lodged in 2021, whereas the matrimonial relations between the complainant's daughter and her former husband ended in 2015. She subsequently got remarried in 2018. Then, on what grounds does the complaint file the subject FIR in the year 2021, is entirely unexplained. It has been observed in Kishan Singh (Dead) through LRs. v. Gurpal Singh & Ors.[13] that:

"Chagrined and frustrated litigants should not be permitted to give vent by cheaply invoking the jurisdiction of the criminal Court. The Court proceedings ought not to be permitted to degenerate into a weapon of harassment or prosecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of that case". Kishan Singh (supra) was recently referred to and followed in Rohtash & Anr. v. State of Haryana.[14]

19. That apart, these proceedings have been initiated in the face of the Separation Agreement entered into by the parties to the marriage at the time of dissolution, that too, as already recorded supra without any express authorization by the daughter of the complainant. It categorically records as under:

"3. ...

e. Personal Belongings, Furniture & Household Goods:

The parties have agreed upon a division of their furniture, furnishings, household goods, appliances, equipment, silverware, china, glassware, books, works of art and other household and personal property items presently held by one or both of the parties. Each party hereby relinquishes all right, title and interest in and to all household goods, furniture and personal properties awarded to the other party." Clause 6 of the Separation Agreement is of import in the present controversy:

"6. RELEASES

Each of the parties hereto does hereby release and discharge the other from any and all other claims, causes of action whether at law or in equity, dower, both in real and personal property, both under the statutes and common law, and all other charges of every kind, character or nature which either of the parties does now or might have against the other arising in any manner whatsoever, except as are

herein specifically reserved to the parties, or as may be derived by either party to effectuate and maintain the terms of this Agreement."

Further, clause 8 of the Separation Agreement records the full division of the property between the parties in the following terms:

"8. FULL DIVISION OF PROPERTY

The parties represent to the Court that this Agreement fully disposes and divides all the marital property of the parties and that there is no further property which this Court must divide. Further, the parties represent and warrant that they have each disclosed to the other all of their respective property interests in their respective Statement of Property filed in this cause."

20. In view of the above, we also hold that the charge under Section 6 of the Dowry Prohibition Act, is not made out and therefore, fails. Consequently, the only conclusion that can be drawn is that the proceedings initiated by the complainant (CC No.1369/2022) against the present appellants have to be quashed and set aside. Any action commenced as a result thereof is bad in law. The questions raised in this appeal are answered accordingly.

21. The appeal is allowed in the above terms. The impugned judgment dated 22nd December 2022 in Criminal Petition No. 11528 of 2022 between the self-same parties, the complaint stands quashed and set aside. Pending applications, if any, are also disposed of.

.....J. (J. K. Maheshwari)

.....J. (Sanjay Karol)

New Delhi

August 29, 2024;

1 'IPC' for brevity

2 'Cr.P.C.' for brevity

3 (1985) 2 SCC 370

4 (1997) 2 SCC 397

5 2024 SCC OnLine SC 609

6 2024 SCC OnLine SC 1049

7 (1992) Supp. 1 335

8 (1988) 1 SCC 692

9 (2021) 19 SCC 401

10 2023 SCC OnLine SC 553

11 (2019) 16 SCC 739

12 (2016) 3 SCC 309

13 (2010) 8 SCC 775

14 (2019) 10 SCC 554

IN THE SUPREME COURT OF INDIA

A. B. Govardhan
Vs.
P. Ragothaman

[Civil Appeal Nos. 9975-9976 of 2024
@ SLP (Civil) Nos. 5034-5035 of 2019]

HEADNOTE – The production of title deeds of the property as a security towards the debt amounts to the creation of a 'mortgage by deposit of title deeds' under Sec. 58 (f) of the Transfer of Property Act, 1882.

JUDGMENT

Ahsanuddin Amanullah, J.

1. Heard Mr. Narendra Kumar, learned counsel for the appellant and Mr. V. Prabhakar, learned Senior counsel for the respondent.

2. Leave granted. The pending applications shall be dealt with in the final pages of this judgment.

3. The present appeals germinate from the:

3.1. Final Judgment and Order dated 22.02.2017 (hereinafter referred to as the "First Impugned Order")[1] passed by a Division Bench of the High Court of Judicature at Madras (hereinafter referred to as the "High Court") in Original Side Appeal[2] No.189 of 2011, whereby the appeal filed by the respondent was allowed and Judgment dated 01.04.2010 passed by a Single Judge of the High Court in Civil Suit No.701 of 2005 (hereinafter referred to as the "suit") was set aside.

3.2. Order dated 12.07.2018 (hereinafter referred to as the "Second Impugned Order") passed by the same Division Bench, whereby Civil Miscellaneous Petition[3] No.10107 of 2017 in OSA No.189 of 2011 filed by the appellant seeking to "set aside" the First Impugned Order and restore the main appeal for fresh hearing, was dismissed.

BRIEF FACTS:

4. The respondent (defendant in the suit) and his wife are engaged in business of building materials. As per the appellant (plaintiff in the suit), the respondent approached him in February, 1995 seeking a loan for his business. The appellant

advanced a loan of Rs.10,00,000/- (Rupees Ten Lakhs) to the respondent on the security of his properties.

5. Since the respondent could not pay Stamp Duty on the Mortgage Deed, it was agreed between the parties that the said sum be split into two registered mortgages and the balance in four promissory notes. Accordingly, the respondent executed the following:

i) Mortgage Deed dated 16.03.1995 for Rs.1,00,000/- (Rupees One Lakh) agreeing to repay the same together with interest at 36% per annum[4];

ii) Mortgage Deed dated 17.04.1995 for Rs.50,000/- (Rupees Fifty Thousand) agreeing to repay the same together with interest at 36% p.a., and;

iii) Four promissory notes for the balance amount of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand).

6. Besides the two mortgages supra, the respondent borrowed the remaining Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand) in four promissory notes on different dates. Since there was default in payment of interest, the appellant demanded repayment of the amount due under the four promissory notes. The respondent thereupon, in various panchayats, promised to repay the amounts. Ultimately, in the panchayat dated 24.06.2000, the respondent produced title document of his property as security towards debt under the four promissory notes, which has been noted in the Agreement dated 24.06.2000 (hereinafter referred to as the "Agreement"). This Agreement, in essence, is the root of the instant lis.

7. The Agreement notes that the respondent owed a total amount of Rs.11,00,000/- (Rupees Eleven Lakhs) to the appellant and in settlement thereof, the respondent handed over the title deeds pertaining to the property situated at No.33, Avvai Thirunagar, Chennai - 600111, admeasuring 1300 square feet of land together with 700 square feet building (hereinafter referred to as the "schedule property"), which was valued at Rs.9,00,000/- (Rupees Nine Lakhs). Per the Agreement, the respondent agreed to register the Sale Deed as and when demanded. Further, for re-paying the balance sum of Rs.2,00,000/- (Rupees Two Lakhs), it was agreed that the respondent will redeem the mortgaged property from the appellant and re-mortgage it elsewhere.

8. After the Agreement was entered into between the parties, the promissory notes were returned which were torn-out in the panchayat. Thereafter, the respondent neither executed a Sale Deed nor paid the balance sum of Rs.2,00,000/- (Rupees Two Lakhs). As a result, the appellant-plaintiff, filed the suit before the High Court, praying for:

"(I) granting a usual preliminary mortgage decree of the Schedule mentioned property against the defendant for the recovery of Rs.23,96,000/- together with interest at 36% p.a. on Rs.11,00,000/- till the date of realization; And pass a final decree thereafter for sale of the Mortgaged property;

(II) for costs of this suit; and for such other equitable reliefs as may deem fit and proper in the circumstances of the case and render justice." (sic)

9. The Single Judge, after perusing the evidence on record and hearing the parties, passed judgment dated 01.04.2010 holding that the respondent-defendant had agreed to "create equitable mortgage by depositing the title deeds". Finding thus, the Single Judge decreed the suit.

Aggrieved, the respondent filed an intra-court appeal being OSA No.189 of 2011 along with Miscellaneous Petition[5] No.1 of 2011, which was an application seeking condonation of delay of 176 days. The appellant through his advocate, Mr. V. Manohar received notice and filed a counter-affidavit opposing the said condonation of delay application. On 18.04.2011, the Division Bench was pleased to condone the delay, subject to payment of cost of Rs.1,000/- (Rupees One Thousand) to the appellant.

10. The Division Bench vide the First Impugned Order allowed the appeal, holding that the appellant had failed to prove that there was a mortgage executed by the respondent. It is to be noted that none appeared for the appellant in the appeal. Subsequently, the appellant filed CMP No.10107 of 2017 in OSA No.189 of 2011, praying therein to "set aside" the First Impugned Order and for restoration of the main appeal for fresh hearing. The appellant contended that his erstwhile counsel (Mr. V. Manohar) was authorized only to appear in the MP filed to condone the delay [MP No.1 of 2011] and that there was no notice issued to him after registering of the appeal. The Division Bench vide the Second Impugned Order dismissed the CMP.

SUBMISSIONS BY THE APPELLANT-PLAINTIFF:

11. At the outset, the learned counsel for the appellant submitted that the Division Bench of the High Court gravely erred in holding that the plaint averments were not sufficient to conclude that there was a valid mortgage entitling him to sue for a mortgage decree.

It was submitted that the plaint, read as a whole, alongwith the Agreement, the Proof Affidavits and evidence of PW-1/appellant and DW1/respondent clearly evince the fact that a loan was secured by the respondent by mortgaging the schedule property. The amount in the Agreement pertains to loan transactions for

which the mortgage was created by the Respondent. It was submitted that in such circumstances, the findings in the First Impugned Order are highly erroneous.

12. It was submitted by learned counsel that the Single Judge has rightly arrived at the conclusion that the present case is one where the respondent agreed to create a mortgage by depositing the title deed. There was an actionable debt and the respondent had fully intended that the deed ought to be the security for the debt. The Single Judge had also noted that the respondent in his evidence as DW1, had agreed to deposit the title deed to create an "equitable mortgage" for the loan amount obtained by him from the appellant. Thus, the Single Judge had rightly decreed the appellant's suit and passed preliminary decree of mortgage.

13. It was further submitted that the Division Bench in the First Impugned Order had erred in holding that there was no stipulation to pay interest in the Agreement and that therefore the rate of interest as granted by the Single Judge could not have been so granted. It was submitted that various loans were advanced by the appellant to the respondent categorically stipulating interest at the rate of 36% p.a. on repayment.

Once this contractual rate of interest was agreed upon by the parties, there was no scope for the Division Bench to state that there was no stipulation to pay interest in the Agreement. The Agreement had to be read in conjunction with various promissory notes and documents evidencing the mortgage and repayment of the loan with interest. Learned counsel contended that the Division Bench erred in holding that there was no prayer for grant of a personal decree against the respondent. It was submitted that the prayer clause of the plaint would show to the contrary.

14. On the Second Impugned Order, learned counsel for the appellant submitted that the Division Bench went wrong in not appreciating that the appellant had never authorized his counsel to represent him in the OSA and his vakalatnama was confined to the MP filed by the respondent seeking condonation of delay of 176 days. The MP was allowed by the Division Bench vide order dated 18.04.2011. Thereafter, the appellant, claims learned counsel, was not served with any notice in the OSA. The appellant submits that he was neither informed by his counsel, Mr. V. Manohar or by the Registry of the High Court about the status of the appeal.

15. It was further submitted that the Division Bench gravely erred in holding that the vakalatnama was given to Mr. V. Manohar for appearing in the MP for condonation of delay, the main appeal as also this Court. It was submitted that Mr. V. Manohar, counsel, was practicing only in the High Court. There was no question of the appellant authorizing any counsel for taking up the case in this

Court as and when a case would come up. It was urged that a blanket printed statement on a vakalatnama can never constitute the intention of a litigant authorizing his/her/their counsel to represent the litigant in question in all courts and all proceedings.

16. Learned counsel contended that the appellant's advocate Mr. Sukumar, who was appearing for the appellant in the Court at Tiruvannamalai, called the appellant and informed him that a judgment showing the appellant's name was published in one of the law reports under the citation 2017 (3) MLJ 521 and it also showed that he went unrepresented therein. The appellant categorically submits that it was only then that the appellant came to know that the OSA arising from the suit had been decided against him ex-parte. Prayer was made to allow the appeals.

SUBMISSIONS BY THE RESPONDENT-DEFENDANT:

17. Per contra, learned senior counsel for the respondent submitted that there is no merit in the present appeals and the impugned orders do not call for any interference by this Court under Article 136 of the Constitution of India (hereinafter referred to as the "Constitution"). It was submitted that the Agreement does not refer to any mortgage having been created, since the recitals therein make it clear that the Agreement was to sell the schedule property to the appellant, and for the said purpose alone, the title deed of the property was handed over to the appellant.

It was submitted that when the very genesis of the suit is the Agreement and the Agreement per se does not disclose the creation of any mortgage, a suit for foreclosure cannot be maintained and the Division Bench had rightly held so. The findings in the First Impugned Order that no mortgage has been created, stands justified in view of the contents of the Agreement.

18. Next, it was advanced that the plaint claims that Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was due as per the Agreement by including interest @ 36% p.a. till the date of institution of the suit. It was submitted that no particulars have been set forth in the plaint as to how this amount of Rs.23,96,000/- (Rupees Twenty Three Lakhs Ninety Six Thousand) was arrived at. While the cause of action pleaded in the suit makes reference only to the Agreement, the appellant makes a claim in respect of the mortgages dated 16.03.1995 and 17.04.1995, while also reserving the right to take separate action.

Thus, it was submitted that the appellant has not put forth any specific case but has attempted to intermingle the mortgages and/or promissory notes with the Agreement. It was submitted that the mortgages dated 16.03.1995 and

17.04.1995 as also the promissory notes have been merged to arrive at the figure of Rs.11,00,000/- (Rupees Eleven Lakhs), which is being claimed as due from the respondent. It was further submitted that the promissory notes have not been exhibited in the suit.

19. Learned Senior counsel also pointed out that in respect of the two mortgages dated 16.03.1995 and 17.04.1995, the High Court in Second Appeal[6] No.1235 of 2014 (which emanated from a suit for redemption filed by the respondent) passed an interim order dated 25.08.2022, directing the respondent to pay the appellant a sum of Rs.10,00,000/- (Rupees Ten Lakhs), being the principal and interest on both the mortgages.

Subsequently, the High Court, by way of its final order dated 24.01.2023 in the said SA, noted the payments made by the respondent to the appellant, the return of the original Mortgage Deeds and also the cancellation of the mortgages. Thus, as the decree in the redemption suit had been complied with, it dismissed the second appeal as having become infructuous. Payment had been made and, after receiving the same, the appellant had returned the original title deeds to the respondent in respect of the property which was the subject-matter of the two mortgages dated 16.03.1995 and 17.04.1995.

20. It was further submitted that in the criminal case filed by the appellant against the respondent under Section 138 of the Negotiable Instruments Act, 1881, this Court dismissed Special Leave Petition (Criminal) No.994 of 2019[7], confirming the acquittal of the respondent. As regards the Second Impugned Order, it was submitted that the facts recorded therein speak for themselves and the appellant did not deserve any indulgence. Based on the above pleas, the respondent has sought dismissal of the instant appeals.

ANALYSIS, REASONING & CONCLUSION:

21. Having given our anxious thought to the lis, we find that the Orders impugned need interference.

22. In our view, the Single Judge had appreciated the bundle of facts in the correct perspective, that is, the respondent had, by way of the Agreement, created a mortgage by deposit of title deeds. There was no redemption of this mortgage. The Division Bench fell in error in concluding that "The plaint averments are self-contradictory, vague and does not make out a clear case of mortgage." (sic).

Moreover, the plea of the respondent that the mortgage was redeemed is factually incorrect. Another point not noted by the Division Bench is that the mortgage which took care of the return of Rs.8,50,000/- (Rupees Eight Lakhs Fifty Thousand), was never redeemed and initially, only re the two previous

mortgages, the principal amount of Rs.1,50,000/- (Rupees One Lakh Fifty Thousand) was returned, without the agreed interest.

As noted above, subsequent to the passing of the Impugned Orders, in SA No.1235 of 2014, interim Order dated 25.08.2022 had directed the respondent to pay the appellant a sum of Rs.10,00,000/- (Rupees Ten Lakhs), being the principal and interest on both the mortgages. This stood complied with and the SA was dismissed as having become infructuous on 24.01.2023.

23. However, the Agreement envisaged property worth Rs.9,00,000/- (Rupees Nine Lakhs) out of the total claimed due of Rs. 11,00,000/- (Rupees Eleven Lakhs), being registered in favour of the appellant or his nominee. The Agreement also stipulated that after redeeming the earlier/previous mortgages, the respondent would re-mortgage for the purpose of raising Rs.2,00,000/- (Rupees Two Lakhs).

Thereafter, the said sum of Rs.2,00,000/- (Rupees Two Lakhs) would be paid to the appellant. The said condition was not followed through i.e., no Sale Deed was executed and registered, nor was the sum of Rs.2,00,000/- (Rupees Two Lakhs) paid. We are of the view that in such a case, it was well-within the competence of the appellant to move the Court, which he did by instituting the suit.

24. Another factor is that the appellant was not heard in the appeal, as recorded in the First Impugned Order itself. Undoubtedly, in the face of non-appearance by the appellant before it, the Division Bench was free to proceed with final hearing of the appeal, as it did. However, what seems to have transpired is that in the absence of the appellant, what was averred by the respondent in the appeal was accepted as correct by the Division Bench.

Fact remained that the respondent admitted to having executed Exhibit P-1 (the Agreement) and that the signature(s) thereon were his, in the Proof Affidavit dated 01.03.2010 as also cross examination dated 08.03.2010. No doubt, he (respondent) has denied its voluntary execution and contended that it was under coercion and threat, but no evidence was brought or led by him to support this plea. The Division Bench opined, correctly, that "It is true that there was no supporting evidence adduced by him to show as to how he was threatened and forced to execute Ex.P1."

Pausing here, we may emphasise that for every fact which is pleaded, there has to be evidence, either oral or documentary, to substantiate the same. A bald averment or mere statement by a defendant bereft of evidentiary material to back up such averment/statement takes such defendant's case nowhere. While deciding a statutory appeal under Section 116A of the Representation of the People Act,

1951 against an order of the Gauhati High Court rejecting an Election Petition, this Court in Kalyan Kumar Gogoi v Ashutosh Agnihotri, (2011) 2 SCC 532 commented that the term 'evidence' is used colloquially in different senses:

"33. The word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc."

(emphasis supplied)

25. However, we see in the facts at hand that there is no dispute qua execution of the Agreement. The respondent claims/pleads coercion etc. Arguendo, such was the case, what would assume relevance would be the steps taken immediately thereafter by the respondent. Admittedly, no steps whatsoever were taken, in law, by the respondent to resile from the Agreement or to revoke it for at least half a decade i.e., from the date of the Agreement till the suit came to be instituted.

The respondent did not even lodge appropriate legal proceedings and hence, it does not lie in his mouth to take the plea that the Agreement was not signed voluntarily. If such coercion etc. had actually occurred, the respondent has no explanation to offer as to why he did not avail of any civil law remedy (to have the Agreement nullified or voided) or take recourse to criminal law (filing a complaint or registering a First Information Report). What seems clear to us is that the panchayat tried to resolve the dispute and that led to the Agreement between the parties.

26. It would be profitable to refer to some decisions, after looking at the relevant provisions of the Transfer of Property Act, 1882 (hereinafter referred to as the "Act"). Chapter IV of the Act is entitled "Of Mortgages Of Immovable Property And Charges" and the relevant Section is quoted below:

"58. "'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed'" defined.-

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement

which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any), by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.-Where the mortgagor ostensibly sells the mortgaged property- on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage.-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgagemoney, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) English mortgage.-Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds .-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Officia l Gazette , specify in this behalf, delivers to a creditor or his agent documents of

title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.-A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

(emphasis supplied)

27. In Syndicate Bank v Estate Officer & Manager, APIIC Ltd., (2007) 8 SCC 361, this Court held:

"28. The requisites of an equitable mortgage are: (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt. The existence of the first and third ingredients of the said requisites is not in dispute. The territorial restrictions contained in the said provision also does not stand as a bar in creating such a mortgage.

The principal question, which, therefore, requires consideration is as to whether for satisfying the requirements of Section 58(f) of the Transfer of Property Act, it was necessary to deposit documents showing complete title or good title and whether all the documents of title to the property were required to be deposited. A fortiori the question which would arise for consideration is as to whether in all such cases, the property should have been acquired by reason of a registered document.

38. In K.J. Nathan v . S.V. Maruty Reddy [AIR 1965 SC 430: (1964) 6 SCR 727] this Court held: (AIR pp. 435- 36, para 10)

"10. The foregoing discussion may be summarised thus: Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (i) debt, (ii) deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt.

Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act

or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage.

But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed. The decisions of English Courts making a distinction between the debt preceding the deposit and that following it can at best be only a guide; but the said distinction itself cannot be considered to be a rule of law for application under all circumstances. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit.

There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of title deeds by the debtor to the creditor. If the creditor was already in possession of the title deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor and the debtor redelivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction." The question which arose therein was that what would be the extent of subject-matter of mortgage; the entire property forming the subject-matter of mortgage or a part thereof."

(emphasis supplied)

28. In the interest of completeness, we may note that the Bench of 2 learned Judges in Syndicate Bank (supra) had referred to a larger Bench, the question as to whether a property could be equitably mortgaged by deposit of documents other than the title deeds or registered title document.

However, the 3-Judges Bench in Syndicate Bank v Estate Officer and Manager (Recoveries), Andhra Pradesh Industrial Infrastructure Corporation Limited, (2021) 3 SCC 736 was "of the opinion that the reference need not be answered in the peculiar facts and circumstances of the case since in our opinion the State of Andhra Pradesh and its successor viz. APIIC and Telangana Industrial Infrastructure Ltd., are estopped from challenging the validity of the mortgage."

In State of Haryana v Narvir Singh, (2014) 1 SCC 105, this Court observed:

"11. A mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a nontestamentary instrument

which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. A mortgage by deposit of title deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory.

However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title deeds of the property for the purpose of security, it becomes a mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent.

After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.

12. This Court had the occasion to consider this question in Rachpal Mahra j v . Bhagwandas Daruka [1950 SCC 195: AIR 1950 SC 272] and the statement of law made therein supports the view we have taken, which would be evident from the following passage of the judgment: (AIR p. 273, para 4)

"4. A mortgage by deposit of title deeds is a form of mortgage recognised by Section 58(f) of the TP Act, which provides that it may be effected in certain towns (including Calcutta) by a person 'delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon'.

That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the

document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage.

As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable."

13. This Court while relying on the aforesaid judgment in United Bank of India Ltd. v . Lekharam Sonaram & Co. [AIR 1965 SC 1591] reiterated as follows: (AIR p. 1593, para 7)

"7. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms.

In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

14.2. But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor documents of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit of the title deeds. In such a case also registration is not required. But in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration.

14.3. In our opinion, the letter of the Finance Commissioner would apply in cases where the instrument of deposit of title deeds incorporates the terms and conditions in addition to what flows from the mortgage by deposit of title deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration.

14.4. Nothing has been brought on record to show existence of any instrument which has created or extinguished any right or liability. In the case in hand, the original deeds have just been deposited with the Bank. In the face of it, we are of the opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of the title deeds and for that, an instrument of mortgage is not necessary. A mortgage by deposit of the title deeds further does not require registration. Hence, the question of payment of registration fee and stamp duty does not arise.

14.5. By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract into writing and if such a document is the sole evidence of the terms between them, the document shall form an integral part of the transaction and the same shall require registration under Section 17 of the Registration Act."

(emphasis supplied)

29. We are of the opinion that the Single Judge has appreciated the law correctly as far as the Agreement is concerned to hold it to be a mortgage in view of Section 58(f) of the Act. We have read and re-read the Agreement. We have also minutely considered the exposition of law made in Narvir Singh (supra). We are of the opinion that the Agreement only records what has happened and does not create/extinguish rights/liabilities. It would, therefore, be covered by para 14.3 of Narvir Singh (supra), as highlighted hereinbefore. The reasoning of the Division Bench proceeds as under:

"10. The recitals of the document marked as Ex.P1 and duly extracted in the judgment does not contain any, clear admission that a mortgage was created on the property. The document proceeds as if the appellant agreed to pay a sum of Rs.11 lakhs in full and final settlement. There is nothing to show that a mortgage was created. Even in the evidence given by the respondent as P.W.1, it was his case that the parent document was handed over only as a security.

Such being the evidence on record, the learned single Judge was not correct in giving a finding that mortgage was created and the title deed was given in

furtherance of the mortgage. We are therefore of the view that there is no evidence adduced by the respondent to show that a mortgage deed was executed by the appellant and as such, he is entitled to a mortgage decree." (sic)

30. Quite evidently, the Division Bench did not account for Section 58(f) of the Act. Indubitably, the respondent pleaded threat and coercion whilst executing/signing the Agreement, yet having accepted that he did sign the same in his own hand, the burden was on him to prove such threat/coercion. Looked at from any angle, the First Impugned Order suffers from legal errors, and cannot withstand the scrutiny of law. At the cost of repetition, it is to be stated that the Single Judge has rightly considered the factual prism and focused on the core issue without reference to facts which were irrelevant and not germane to the issue(s) before her.

31. The Second Impugned Order raises serious questions about how and why the appellant went into slumber. If we may say so, a 'fantastic' plea was taken that the appellant had engaged a counsel only for the delay condonation MP and not to argue the main appeal. Such a contention is noted only for the purpose of outright rejection. This 'fantastic' plea has been dealt with correctly by the Division Bench and no legal infirmity can be found therein.

32. Alas, only if things were as simple as they seemed! We have already indicated that the First Impugned Order has to be set aside. In order to do justice, quashing of the First Impugned Order would necessarily mean that the effect of the Second Impugned Order would get nullified, for all practical purposes, despite this Court being of the view that on its own merits, the Second Impugned Order cannot be faulted.

However, for such legal misadventure resulting in wastage of precious judicial time of the High Court, which could have been better spent answering the call of justice raised by the teeming millions, we impose costs of Rs.1,20,000/- (Rupees One Lakh Twenty Thousand) on the appellant. Such cost shall be deposited within 6 weeks with the Registry of the High Court, to be utilised as follows:

i. Rs.40,000 for juvenile welfare in a manner to be decided by the Juvenile Justice Monitoring Committee;

ii. Rs.40,000 for welfare of the Advocate-Clerks in a manner to be decided by Hon'ble the Acting Chief Justice, and;

iii. Rs.40,000 for legal aid in a manner to be decided by the High Court Legal Services Committee. Receipt of deposit be filed in the Registry of this Court soon thereafter. In case of non-compliance, the matter will be placed before us with appropriate Office Report.

33. Accordingly, both Impugned Orders stand set aside. The Judgment dated 01.04.2010 passed by the Single Judge stands restored with a slight modification i.e., reduction in the rate of interest which has been claimed by and allowed to the appellant. Interest at the rate of 36% p.a. is on the excessive side and we pare down the same to 12% p.a. in the interest of justice. Hence, simple interest will run only @ 12% p.a. from 24.06.2000 till the date of realisation.

34. The appeals are allowed in the above terms. 35. I.A. No.16204/2019 for exemption from filing Certified Copy of the Impugned Judgment(s) is allowed. I.A. No.180367/2019 for permission to file Additional Documents is allowed.

36. I.A. No.16203/2019 seeks condonation of delay in filing the petitions. There is a delay of 589 days in filing the petition against the First Impugned Order. The petition against the Second Impugned Order is also delayed by approximately 84 days. We are cognizant that the appellant had moved the Division Bench seeking a fresh hearing of the main appeal, which led to passing of the Second Impugned Order.

In Collector, Land Acquisition, Anantnag v Mst Katiji, (1987) 2 SCC 107, the Court noted that it had been adopting a justifiably liberal approach in condoning delay and that "justice on merits" is to be preferred as against what "scuttles a decision on merits". Albeit, while reversing an order of the High Court therein condoning delay, principles to guide the consideration of an application for condonation of delay were culled out in Esha Bhattacharjee v Managing Committee of Raghunathpur Nafar Academy, (2013) 12 SCC 649. One of the factors taken note of therein was that substantial justice is paramount[8].

37. In N L Abhyankar v Union of India, (1995) 1 MhLJ 503, a Division Bench of the Bombay High Court at Nagpur considered, though in the context of delay vis-à-vis Article 226 of the Constitution, the decision in M/s Dehri Rohtas Light Railway Company Limited v District Board, Bhojpur, (1992) 2 SCC 598, and held that "The real test for sound exercise of discretion by the High Court in this regard is not the physical running of time as such, but the test is whether by reason of delay there is such negligence on the part of the petitioner, so as to infer that he has given up his claim or whether before the petitioner has moved the Writ Court, the rights of the third parties have come into being which should not be allowed to be disturbed unless there is reasonable explanation for the delay."[9]

The Bombay High Court's eloquent statement of the correct position in law found approval in Municipal Council, Ahmednagar v Shah Hyder Beig, (2000) 2 SCC 48 and Mool Chandra v Union of India, 2024 SCC OnLine SC 1878.

38. In the wake of the authorities above-mentioned, taking a liberal approach subserving the cause of justice, we condone the delay and allow I.A. No.16203/2019, subject to payment of costs of Rs.20,000/- (Rupees Twenty Thousand) by the appellant to the respondent.

.....J. [Hima Kohli]

.....J. [Ahsanuddin Amanullah]

New Delhi

August 29, 2024

1 2017 SCC OnLine Mad 11918 | (2017) 3 CTC 777 | (2017) 3 Mad LJ 522 | (2017) 4 LW 421.

2 Hereinafter abbreviated to "OSA".

3 Hereinafter abbreviated to "CMP".

4 Hereinafter abbreviated to "p.a.".

5 Hereinafter abbreviated to "MP".

6 Hereinafter abbreviated to "SA".

7 Order dated 28.08.2023 reads as below:

"Heard learned counsel for the petitioner. After having perused the evidence of the petitioner- complainant, we are satisfied that the acquittal of the respondent is a possible conclusion, which could have been recorded by the High Court.

Though, something can be said about the manner in which the findings have been recorded by the High Court, we are recording our findings after having perused the evidence of the complainant. Hence, we concur with the ultimate order of the High Court and accordingly, the special leave petition stands dismissed.

Pending application(s), if any, shall stand disposed of."

8 Para 21.3 of Esha Bhattacharjee (supra).

9 Emphasis supplied.

2. Study Material-G.K.

Battle	Year	Location	Fought Between	Conclusion/Result
Battle of Hydaspes (Jhelum)	327-26 BC		Alexander invades India. Defeats Porus.	
Conquest of the Nanda Empire	321-320 BC		Dhana nanda vs Chandragupta Maurya	Conquest of the Nanda Empire under Dhana Nanda by a force under Chandragupta Maurya
The Seleucid–Mauryan War	303 BC		Chandragupta Maurya defeats the Greek King Seleucus.	
The Kalinga War	262 BC		Ashoka vs. Kalinga empire	Conquest of Kalinga by Ashoka. The Kalinga War prompted Ashoka to devote the rest of his life to ahimsa (non-violence) and to dharma-Vijaya (victory through dharma). After the conquest of Kalinga, Ashoka ended the military expansion of the empire and began an era peace, harmony, and prosperity.
First Battle of Tarain	1191		Muhammad Ghori and Prithviraj Chauhan	Prithviraj won
Second Battle of Tarain	1192		Muhammad Ghori and Prithviraj Chauhan	Ghori won, Prithviraj Chauhan killed. Ghori established first Muslim kingdom in India
1st Battle of Panipat	1526		Ibrahim Lodi vs. Babur	Babur won, end of Delhi Sultanate
Battle of Chausa	1539		Humayun and Sher Shah Sur	Sher shah sur won

Battle of Baligram	1540			
2nd Battle of Panipat	1556		Akbar vs Hemu	Akbar won
Battle of Tailkota or Battle of Rakasa-Thangadi or Battle of Bannihati	1565		Vijaynagara (Ram raya) vs combined forces of Bijapur, Ahmadnagar, Bidar, and Golkonda	Defeat of Ram Raya. Considered as the end of Vijayanagar Empire (though kingdom existed another century under Aravidu dynasty)
Battle of Haldighati	1576		Rana Pratap vs Mughal led by Man Singh	Rana Pratap severely defeated (during Akbar's reign)
Battle of Dharmat	1658		Aurangzeb and Dara Shikoh	Part of succession war of Shah Jahan's sons
Treaty of Purandar	1665		Shivaji Maharaj vs. Jaya singh	Jaya singh defeated Shivaji Maharaj. Treaty of Purandar - major setback for Maratha kingdom. 23 Forts handed over to Mughals.
Battle of Karnal	1739	Near Delhi	Nader Shah of Persia and Muhammad Shah (Mughal)	Nader won in 3 hrs. Captured Delhi --> Already declining Mughal dynasty was critically weakened to such an extent as to hasten its demise. Kohinoor diamond taken away by Nader
First Carnatic War	1746-48			Ended with Treaty of Aix-La Chapelle - ending the Austrian War of Succession.
Second Carnatic War	1749-54			Inconclusive
Third Carnatic War or the Battle of Wandiwash	1758-63			Ended with the Treaty of Peace of Paris (1763). English became the supreme

				European power in the Indian subcontinent.
Battle of Plassey	1757		East India Company (EIC) headed by Robert Clive vs. the Nawab of Bengal (Siraj-Ud-Daulah)	EIC won. Historic turning point for British in India; it established political and military supremacy of British in Bengal.
3rd Battle of Panipat	1761		Maratha vs. Ahmed Shah Abdali	Marathas defeated by Abdali.
Battle of Buxar	1764		British East India Company (led by Hector Munro) vs the combined armies of Mir Qasim (Nawab of Bengal); Shuja-ud-Daulah (Nawab of Awadh); and Mughal Emperor Shah Alam II	English won. Treaty of Allahabad, 1765 - Established British supremacy in North India. British defeated Mughal empire - landmark event!
1st Anglo-Maratha War	1780s			Inconclusive. 20 years peace. Treaty of Salbai.
2nd Anglo-Maratha				
3rd Anglo-Maratha				
Battle of Kangla Tongbi (Battle of Lion Box)	1944	Imphal, Manipur	Ordnance personnel of 221 Advance Ordnance Depot (AOD) against Japanese forces	It is considered one of the fiercest battles of World War II. Japanese to withdraw

Antonyms

Words	Antonyms
Adorable	Hateful
Adequate	Insufficient
Affordable	Costly
Attractive	Boring
Awesome	Bad
Abundance	Elementary
Accidental	Unfriendly
Advanced	Professional
Affable	Grumpy
Amateur	Descendant
Amiable	Hateful
Ancestor	Insufficient
Beauty	Grotesqueness
Believe	Disbelieve
Beloved	Unbeloved
Benefit	Drawback
Balk	Impetus
Beneficial	Detrimental
Care	Carelessness
Carry	Exclude
Cavalier	Humble
Clumsy	Adroit
Creative	Uninventive
Cut	Restore
Close	Far
Darling	Unbeloved
Dear	Unbeloved
Deep	Shallow
Demand	Disclaim
Destroy	Raise
Effective	Ineffective
Efficient	Inefficient
Effort	Ease
Enjoy	Abhor
Enough	Inadequate
Emigrate	Immigrate
Enslave	Emancipate
Ephemeral	Long-lived
Excitable	Tranquil
Fabulous	Ordinary
Fair	Foul
Fast	Slow

Few	Many
Flaccid	Taut
Forgive	Resent
Gentle	Abrasive
Great	Little
Genius	Stupidity
Glad	Dismayed
Gorgeous	Uninteresting
Habit	Disinclination
Happy	Sad
Help	Hinder
Humanity	Inhumanity
Hurt	Heal
Illegal	Legal
Ignominy	Glory
Impress	Disappoint
Intrepid	Cowardly
Independent	Dependent
Inception	Conclusion
Innocent	Guilty
Inspire	Depress
Install	Remove
Joke	Humourless
Jolly	Miserable
Joy	Misery
Justice	Injustice
Justify	Disprove
Keen	Reluctant
Keep	Spend
Kickoff	End
Kind	Unkind
Knowledge	Ignorance
Little	Plenty
Lively	Listless
Lost	Regain
Love	Hatred
Luck	Misfortune
Magic	Awful
Make	Destroy
Master	Servant
Mature	Immature
Morality	Immorality
Neat	Disorderly
Need	Optional
Next	Previous
Nice	Unpleasant
Normal	Abnormal
Objective	Biassed

Odium	Affection
Offer	Withdraw
Omnipotent	Impotent
Optimistic	Pessimistic
Outstanding	Mediocre
Pause	Continue
Peace	Noise
Potential	Impotence
Power	Inability
Pretty	Plain
Qualify	Disqualify
Quality	Inadequacy
Quick	Slow
Quiet	Loud
Quit	Stay
Real	Unreal
Recall	Forget
Relax	Tense
Report	Silence
Rough	Gentle
Simple	Difficult
Sincere	Perfunctory
Small	Big
Soft	Hard
Sure	Unsure
Talent	Inability
Talkative	Taciturn
Target	Deselect
Task	Inactivity
Tenderhearted	Fiendish
Triumph	Defeat
Unique	Common
Upturn	Slump
Unite	Divide
Unlimited	Finite
Uplift	Lower
Useful	Useless
Valid	Invalid
Valuable	Worthless
Variety	Uniformity
Vast	Tiny
Victory	Defeat
Warning	Neglect
Wealth	Poverty
Winner	Loser
Wise	Stupid
Worthy	Unimportant
Xenial	Inhospitable

Xenophobic	Impartial
Xeroxes	Original
Young	Old
Yield	Resist
Yearning	Disinclination
Youthful	Old
Yummy	Unappetizing
Zappy	Melancholy
Zany	Sane
Zeal	Apathy
Zenith	Nadir, Bottom
Zen	Disturbed
Zingy	Sullen

5. Current Affairs

AUGUST 2024

S.N.	News and Events
1.	Which medal did Swapnil Kusale win in the men's 50m rifle 3P event at Paris Olympics 2024 - **Bronze**
2.	Who has been appointed as Director General of Medical Services recently- **Sadhana Saxena Nair**
3.	Who has taken charge as the new Director General of Assam Rifles- **Vikas Lakhera**
4.	Rohan Bopanna announced his retirement from Indian tennis after representing India in which tournament- **Paris Olympics**
5.	Which country is hosting the multinational air exercise, 'Taranga Shakti 2024'- **India**
6.	What is India's rank in the Global Agriculture Export Index- **8th**
7.	What is the rank of India according to the Tourism Development Index 2024 report- **39th**
8.	Recently a set of four commemorative postage stamps was released on the occasion of which games- **Paris Olympics 2024**
9.	Which player won the gold in men's singles tennis at Paris Olympics 2024- **Novak Djokovic**
10.	How many National High-Speed Road Corridor projects have been approved by the Central Government- **8**
11.	Noah Lyles, who won the gold medal in the men's 100m sprint at the Paris Olympics, is a runner from which country- **United States**
12.	Which player won the silver medal in men's singles tennis at Paris Olympics 2024- **Carlos Alcaraz**
13.	President Draupadi Murmu was recently awarded the highest civilian honor of which country- **Fiji (Honor - Companion of the Order of Fiji)**
14.	How many meters did India's Neeraj Chopra throw for the final of the javelin throw event at the Paris Olympics - **89.34 meters**
15.	Who launched e-Evidence, Nyaya Setu, Nyaya Shruti and e-Summons App- **Amit Shah**
16.	Which country hosts the BIMSTEC Business Summit - **India**
17.	Who has been sworn in as the Lieutenant Governor of Puducherry- **K Kailashnathan**
18.	Who has been appointed the head of the interim government of Bangladesh- **Muhammad Yunus**
19.	When is National Javelin Day celebrated every year- **07 August**
20.	Who is the Indian player who has scored the most 50+ scores in

	international cricket as an opener- **Rohit Sharma**
21.	Budhadev Bhattacharya passed away recently, he was the former Chief Minister of which state- **West Bengal**
22.	Which exercise was recently organized by the Indian Army in Ladakh- **'Parvat Prahar'**
23.	How many villages were recognized as 'Best Tourist Village' in the year 2023 - **35**
24.	Which medal did the Indian men's hockey team win in the Paris Olympics- **Bronze**
25.	When was the 'Har Ghar Tiranga' initiative launched by the Government of India- **09 August**
26.	Indian men's hockey team won bronze medal in Paris Olympics, who is the captain of this team- **Harmanpreet Singh**
27.	Who has been chosen by the IOA for the case related to the disqualification of Vinesh Phogat before the Court of Arbitration for Sport (CAS)- **Harish Salve**
28.	Which Indian wrestler won the bronze medal in men's 57 kg freestyle in Paris Olympics - **Aman Sehrawat**
29.	Which medal did Neeraj Chopra win in Paris Olympics 2024- **Silver**
30.	Recently which state government has launched 'Attendance' portal- **Chhattisgarh**
31.	Who will be the second Indian flag bearer along with Manu Bhaker in the closing ceremony of the Olympic Games- **PR Sreejesh**
32.	Reserve Bank of India has increased the UPI payment limit from Rs 1 lakh to how much- **Rs 5 lakh**
33.	In which two states has the Central Government recently established new peacock sanctuaries- **Karnataka and Kerala**
34.	Who was recently appointed as the Cabinet Secretary of India- **TV Somanathan**
35.	What was the position of India in the medal tally in Paris Olympics 2024- **71st**
36.	Which country won the most medals in Paris Olympics 2024- **USA**
37.	India has recently signed an agreement with which country to start UPI service- **Maldives**
38.	Who has been elected as the second vice president of the Athletes Commission of the International Olympic Committee- **Abhinav Bindra**
39.	When is World Elephant Day celebrated every year- **12 August**
40.	Paul Kagame was recently sworn in as the President of which country- **Rwanda**
41.	The joint military exercise 'Mitra Shakti' is being conducted between India and which country- **Sri Lanka**
42.	With whom has Amazon India tied up to expand EV delivery fleet-

	Gentari (Gentari Green Mobility India)
43.	Indian Railways has partnered with which organization to promote 'One India-One Ticket' initiative- **National Capital Region Transport Corporation**
44.	DRDO successfully tested long range glide bomb, what is it named- **'Gaurav'**
45.	Who has been appointed the new head coach of the Indian junior men's hockey team- **PR Sreejesh**
46.	Recently which Indian para shuttler was suspended by the Badminton World Federation- **Pramod Bhagat**
47.	Recently Vinay Mohan Kwatra took charge as India's ambassador to which country- **USA**
48.	In which state will the first Global Overseas Women's Kabaddi League be organized- **Haryana**
49.	Recently, which state government declared the ancient monument of the Mesolithic era located in Ratnagiri as a 'protected monument' - **Maharashtra**
50.	Recently how many new Ramsar sites were announced in India- **3** Nanjarayan Bird Sanctuary and Kazhuveli Bird Sanctuary in Tamil Nadu Tawa Reservoir in Madhya Pradesh
51.	Who has become the youngest Prime Minister of Thailand- **Patongtarn Shinawatra**
52.	Which actor got the Best Actor Award under the 70th National Film Awards- **Rishab Shetty**
53.	Who has been appointed as the new Ambassador of India to the United Nations- **P Harish**
54.	Who has been appointed as the new Enforcement Director of Enforcement Directorate- **Rahul Naveen**
55.	Who has been appointed as the new bowling coach of the Indian men's cricket team- **Morne Morkel**
56.	Which country will host the third Voice of Global South Summit- **India**
57.	Who has been selected as India's flag bearer for the opening ceremony of Paris Paralympics 2024- **Sumit Antil**
58.	National Geoscience Award has been instituted by which ministry- **Ministry of Mines** National Geoscience Award for Lifetime Achievement 2023 was bestowed upon **Prof. Dhiraj Mohan Banerjee,** Emeritus Scientist at the Indian National Science Academy (INSA), **for his outstanding contributions to the field of geosciences.**
59.	When is World Humanitarian Day celebrated every year – **19 August** It recognizes, and aims to raise awareness of, the work of humanitarians around the world.

60.	Prime Minister Narendra Modi held a bilateral meeting with the Malaysian PM, who is the Prime Minister in Malaysia- **Anwar Ibrahim**
61.	Every year Sadbhavna Diwas is celebrated on whose birth anniversary- **Rajiv Gandhi**
62.	Joint military training exercise 'Mitra Shakti' is being organized between India and which country- **Sri Lanka**
63.	With which country has India recently signed a Green Ammonia Export Agreement- **Japan** This is the first time India will export green ammonia to Japan
64.	In which country will the upcoming Women's T20 World Cup be organized instead of Bangladesh- **UAE**
65.	Who has been named as the Chef de Mission of the Indian contingent for Paris Paralympics 2024- **Satya Prakash Sangwan**
66.	Who won the women's singles title of Cincinnati Open 2024- **Aryna Sabalenka**
67.	Who won the men's singles title of Cincinnati Open 2024- **Jannik Sinner**
68.	When is National Space Day celebrated- **23 August** National Space Day commemorates the **successful landing of Chandrayaan-3 on the Moon.**
69.	What is the theme of National Space Day 2024- **Touching Lives while Touching the Moon: India's Space Saga**
70.	Who has been appointed as the nominated President of NASSCOM- **Rajesh Nambiar**
71.	Who has been appointed as the interim chairman of Airports Authority of India- **M Suresh**
72.	Who has recently taken charge as the new Union Home Secretary- **Govind Mohan**
73.	Where was India's first reusable hybrid rocket successfully tested- **Chennai**
74.	How many new districts have been announced to be created in the Union Territory of Ladakh - **5** **New districts are Zanskar, Drass, Sham, Nubra, and Changthang**
75.	Which medal did the Indian team win in the Asian Surfing Championship 2024- **Silver**
76.	Who was recently elected as the new President of Bangladesh Cricket Board- **Farooq Ahmed**
77.	Which state has become the first one to implement the Unified Pension Scheme**- Maharashtra**
78.	Who has built India's first reusable hybrid rocket- **Space Zone India and Martin Group**
79.	Where was the Asian Surfing Championship 2024 organized- **Maldives**

80.	Who has resigned from the post of President of Association of Malayalam Movie Artists (AMMA)- **Mohanlal**
81.	Which bank has launched a new savings bank account scheme named 'Avani' for women- **Bandhan Bank**
82.	The Union Finance Minister recently inaugurated the GST Bhawan in which city- **Udaipur**
83.	Where was the International Mother Teresa Award ceremony organized- **Dubai**
84.	When is World Water Week 2024 being organized- **25-29 August**
85.	Who has been appointed as the new Director General of National Security Guard (NSG)- **B. Srinivasan**
86.	Who has become the new chairman of International Cricket Council- **Jay Shah**
87.	Who are the flag bearers of the Indian contingent at the Paris 2024 Paralympics opening ceremony- **Sumit Antil and Bhagyashree Jadhav**
88.	Bharti Airtel has recently partnered with whom for music and other services- **Apple**
89.	Union Minister George Kurien has been elected unopposed to the Rajya Sabha from which state- **Madhya Pradesh**
90.	How many new Greenfield Industrial Smart Cities have been approved by the Union Cabinet- **12** These industrial areas will be located in Khurpia in Uttrakhand, Rajpura-Patiala in Punjab, Dighi in, Maharashtra, Palakkad in Kerela, Agra and Prayagraj in UP, Gaya in Bihar, Zaheerabad in Telangana, Orvakal and Kopparthy in AP and Jodhpur-Pali in Rajasthan.
91.	Who has been appointed as the Director General of Border Security Force (BSF)- **Daljit Singh Chaudhary**
92.	Who won the Under-20 SAFF Football Championship title- **Bangladesh**
93.	When is National Sports Day celebrated every year- **29 August** National Sports Day is celebrated annually in India on August 29 to commemorate the birth anniversary of **legendary hockey player Major Dhyan Chand.** The National Sports Day was included in the list of celebratory days in India for the first time in 2012
94.	David Malan has recently announced his retirement from international cricket, he is a player of which country- **England**
95.	Who won the title of Indian National Chess Championship- **Karthik Venkataraman**
96.	Which ministry recently launched the SHe-Box portal- **Ministry of Women and Child Development** It is a Centralized platform for registering and monitoring complaints of sexual harassment of women in the workplace.
97.	In which sport did Avni Lekhara win the gold medal in Paris

	Paralympics 2024- **Shooting**
98.	Where was the Global Fintech Fest 2024 organized- **Mumbai**
99.	Assam Legislative Assembly passed a new law - **called the Assam Compulsory Registration of Muslim Marriages and Divorces Bill, 2024.** This law is designed to address serious issues like child marriage, marriages without mutual consent, and polygamy. It replaces an old law known as the Assam Muslim Marriage and Divorce Registration Act of 1935, bringing in new rules to protect vulnerable individuals, especially women and children.
100.	How many new Vande Bharat trains were PM Modi flag off on August 31- **Three Vande Bharat trains** These three new Vande Bharat trains connecting **Meerut with Lucknow**, **Madurai with Bengaluru** and **Chennai with Nagercoil**. With the introduction of these three new train services, the number of Vande Bharat Express trains opearing in various parts of India have gone upto **54.**

5. Prelims and Mains Notes Preparation Scheme

V.S. DREAM COACHING
FOR
HJS, PCS (J.) AND CLAT

Prelims and Mains Notes Preparation Scheme is going on. Prepare your own excellent study notes to crack HJS, PCS (J) and CLAT on the subjects mentioned below under the able guidance of Hon'ble Mr. Justice Vedpal (Former Judge), High Court of Judicature at Allahabad, Ex-Director of Judicial Training and Research Institute, U.P., Lucknow and resource person of various legal academies and institutions. Seek prior appointment to avoid despair.

1.General Knowledge

1. Current Affairs
2. G.K.MCQs
3. History of India and Indian Culture
4. Geography of India
5. Indian Polity
6. Current National Issues
7. Topic of Social Relevance with special reference to newly added 9 Social Acts
8. India and the World
9. Indian Economy
10. International Affairs and Institutions
11. Development in the field of:
    - (a) Science and Technology
    - (b) Communications and Space

2.Law

1. Constitutional Law
2. Law of Evidence
3. Criminal Procedure Code
4. Code of Civil Procedure,
5. Indian Panel Code
6. Law of Contract
7. Partnership Act
8. Easements Act
9. Law of Torts
10. Transfer of Property Act
11. Principles of Equity ,
12. Law of Trust
13. Specific Relief Act
14. Hindu Law
15. Muslim Law
16. U.P. Revenue Code.
17. U.P. Municipalities Act 1916
18. U.P. Panchayat Raj Act 1947
19. U.P. Consolidation of Holdings Act, 1953
20. U.P. Urban (Planning and Development) Act, 1973

3.CLAT

1. General Knowledge
2. A Guide for CLAT

6. About Coaching

V.S. Dream coaching is one of the Premiere Law Institute that offers coaching for Judicial Services Examinations at all the three levels – Preliminary Test, Main Examination and Personality Test.

We started our journey the month of Sept. 2022 with a vision driven by the socialist ideology. Since its inception, the coaching is successfully conducting courses for Judicial Services Exams and has always worked by aligning itself to the best interest of its students. The coaching Institute is focused on providing comprehensive and reliable training and support to all its students, who plan to appear for the Judicial Services Exam and are in the search of highly qualified targeted and dedicated faculty to crack examinations successfully.

The teaching faculty of the Institute has been drawn from highly qualified persons having experience. We also guide the aspirant in preparing his own notes and quality study Material

Teaching pedagogy

Our faculty uses a teaching pedagogy which is easily understandable and is aspirant friendly. Our patron Hon'ble Mr. Justice Vedpal former Judge High Court Allahabad had been a Trainer of Trainers. Director of Judicial Training and Research institute U.P., Resource person of several Judicial Institutes and member of Law commission U.P. The faculty of the coaching Institutes consists of those who have several decade experience in teaching in the field of law.

7. About Director and faculty

Ms. Anshu Singh B.A., LL.B is the Director of the Coaching who remained associated with the law for more than two decades. The director of the coaching possess self-awareness, garner credibility, focus on relationship-building, exhibit humility, empower others, stay authentic, present themselves as constant and consistent, become role models and are fully present

The director aims to improve performance and focuses on the 'here and now' rather than on the distant past or future. The director is subject expert. And focuse on helping the individual to unlock their own potential

Regular Faculty

1. Ms. Anshu Singh, B.A. (English Literature) LL.B. The Director, herself
2. Shri Shantanu Baliyan, B.A. LL.B who is a Law graduate from C.C.S. University Campus. He has also received Certificate of Excellency from the

University. He has started teaching at a very young age and now with his teaching experience, he has developed innovative ways of teaching Law and general knowledge, which suites to the need of a law student, as well as an Judicial service aspirant. He has conducted many online and offline Courses. His notes on Law subjects as well as on general knowledge are masterly work

8. Resource persons/Guest Speakers

1. Hon'ble Mr. Justice Vedpal, Former Judge, High Court Allahabad – Mentor
2. Shri Soraj Singh, Ex-Director (Ag.), U.P. Government – Guest Speakers
3. Mrs. Kalpana Malik, B.Sc., LL.B., LL.M. (P) – Guest Speakers
4. Dr. Venu Agarwal M.A.(English), M.Com. M.Ed., PhD – Guest Speakers

9. Library with Research wing

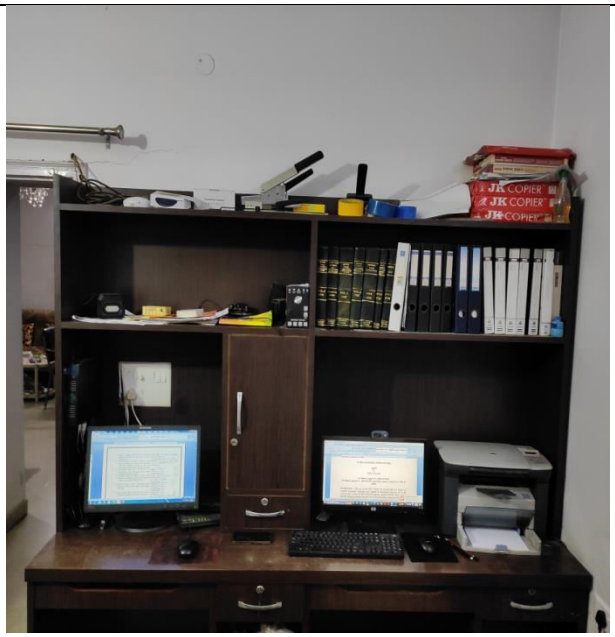
V.S. Dream Coaching has an excellent Library containing **about five thousand Books, Journals, Brochures, Notes and Guides**. The library in a coaching institute plays an important role in the life of students by serving as the store house of knowledge. It facilitates the work of the resource person and faculty also. The students have also access to library, after coaching hours. Our library changes as technology changes and remains updated in Course subjects. The coaching itself prepares study excellent and qualitative reading material.

Preparing a study material on a subject on Law and General Knowledge, is a herculean task. There is always a debatable question to be asked regarding what, and what not to include and how to differentiate the books and brochures from the ones already available in the market.

There should be a system for the verification of facts, data, etc. While preparing study material, we always keep in the mind the quality, so we hope that the book, brochures prove beneficial to all the aspirants taking examinations with law and General Knowledge.

A coaching should provide students with the fundamental knowledge base or foundation needed in order to be successful in their exam. Aspirants were surveyed to determine how they should be taught. The survey was developed based on course content. We encourage accredited programs to regularly evaluate current curricula for and develop new curricula that reflect changing construction technologies and management trends.

Library



Research wing