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

IN THE MATTER OF:

The State of Punjab & Ors. …Petitioners

Versus

Davinder Singh & Ors. …Respondents

WRITTEN SUBMISSIONS OF MR. KAPIL SIBAL, SR. ADVOCATE ON BEHALF OF PETITIONER NO. 3

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INDEX

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I. INTRODUCTION

1. These Written Submissions are being filed on behalf of Petitioner No. 3, Gurbachan Singh (associated with Mazhabi Sikhs & Balmiki 12.5% Rakhvankaran Bachao Morcha), who was impleaded as a party by the Order of this Hon'ble Court dated 01.03.2011.
2. The present case arises out of the reference order authored by a 5-judge bench of this Hon'ble Court in *The State of Punjab v. Davinder Singh* [(2020) 8 SCC 1]. This order doubted the correctness of the judgment in *E.V. Chinnaiah v. State of A.P. and Ors.*, [(2005) 1 SCC 394], which had held that sub-classification within Scheduled Castes, for the purposes of reservations, is not permissible.
3. By way of context, while deciding the reference order, this Hon'ble Court was considering the validity of Section 4(5) of the Punjab Scheduled Caste and Backward Class Reservation in Service Act, 2006 (hereinafter, "*the Punjab Act")* which required 50% of the vacancies to be filled up by candidates of the Balmiki caste and Mazhabi caste. The reference order noted that the application of the provisions of Article 16(4) should be along similar lines to all backward classes – which includes Scheduled Castes and Scheduled Tribes – and if sub-classification is permissible for socially and educationally backward classes (*as upheld in*

Indra Sawhney and Ors. v. Union of India & Ors., 1992 Supp (3) SCC 217), it must also be applicable along the same lines to Scheduled Castes and Scheduled Tribes.

4. Consequently, the main issue referred to the seven-judge bench of this Hon'ble Court is whether sub-classification within Scheduled Castes is permissible within the scheme of the Constitution.

5. It is submitted that the decision in *E.V. Chinnaiah* is erroneous, and sub-classification within Scheduled Castes is permissible because, *first*, sub-classification does not amount to 'tinkering' with the list notified by the President under Article 341 (**I**); *secondly*, the constitutional scheme permits sub-classification (**II**); *thirdly*, the judgment of the nine-judge bench of this Hon'ble Court in *Indira Sawhney* sanctions sub-classifications (**III**); *fourthly*, a study of the constitutional design reveals that Article 341 is *in pari materia* with Article 342, which contemplates sub-classification in reservations for Other Backward Classes (**IV**); *fifthly*, the state State is competent to make policy decisions regarding affirmative action for any backward class, which may include any caste or part thereof, including any Scheduled Caste (**V**); *sixthly*, preferential treatment is a facet of substantive equality under the "equality code" (Articles 14-16) (**VI**); *seventhly*, the decision in *E.V. Chinnaiah* is contrary to other binding judgment (**VII**); and *finally*, the judgment will have empirically demonstrable baneful effects, which amount to defeating the constitutional mandate of equality, as Scheduled Castes and

Scheduled Tribes do not constitute homogenous classes. Thus, these effects will lead to substantive inequality *in effect*, which is contrary to the constitutional scheme (**VIII**).

II. THERE IS NO 'TINKERING' OF THE PRESIDENTIAL LIST NOTIFIED UNDER ARTICLE 341 AS SUB-CLASSIFICATION DOES NOT AMOUNT TO INCLUSION OR EXCLUSION.

6. Article 341 (2) prohibits variations (exclusions and inclusions) to the Presidential List of Scheduled Castes and Scheduled Tribes notified under Article 341 (1), except by way of law made by the Parliament. It is submitted that any affirmative action by the State, wherein it gives preference to certain Scheduled Castes under Article 16(4) on the basis of greater relative disadvantage, cannot be said to "tinker" with the Presidential List in any manner. The extent of prohibition on the State under Article 341 is limited only to "inclusion" or "exclusion" of castes by the State in the List. Consequently, when the states decide to accord preferential treatment to any castes already falling within the Scheduled Castes, there is no inclusion or exclusion or variance to the list. The other castes continue to remain in the list and avail of the constitutionally sanctioned entitlements that are due to them as members of the list of Scheduled Caste notified under Article 341. In the present case, the State of Punjab had decided to bring in preferential treatment of the Balmiki and Mazhabi castes. This did not entail any changes being made to the list notified under Article 341.

7. It is submitted that the decision in *E.V. Chinnaiah* has proceeded on the wrong premise that such affirmative action of giving preference to certain Scheduled Castes under Article 16(4) tinkers with the Presidential List under Article 341. Affirmative action with respect to a caste already in the List does not interfere with the said List in any manner: there is no inclusion or exclusion of any caste in the list notified under Article 341. As the noted legal scholar, K. Balagoplal pointed out in his critique of the judgment, the text of Article 341 is clear and unambiguous, and admits of no judicial variance (**K. Balagopal, "Justice for Dalits among Dalits: All the Ghosts Resurface" (2005) 40(29) *Economic and Political Weekly* 3128)**. (A copy is annexed as **ANNEXURE A/1, Pg. 33 to 39.)**

8. Indeed, the error in *E.V. Chinnaiah* is evident on a facial reading of the judgment. In his concurring opinion, Hegde J reads the text of Article 341 to mean that "any executive action or legislative enactment which interferes, disturbs, re-arranges, re-groups or re- classifies the various castes found in the Presidential List will be violative of scheme of the Constitution and will be violative of Article 341 of the Constitution." (emphasis supplied) However, these words are not synonyms of each other, and are certainly not synonyms of the actual words used by Article 341: "include" and "exclude." Specifically, as a matter of plain English, "re-arrange", "re-group" and "re-classify" all have substantially different meanings from "include" and

"exclude." It is respectfully submitted, therefore, that Hedge J.'s reading of Article 341 is hoist on its own petard.

9. Furthermore, it is settled law that even if it is assumed that all castes are homogeneous by virtue of being in the Presidential List under Article 341, only addition or deletion of any caste in the list would be impermissible. In the Constitution Bench judgments in *State of Maharashtra v. Milind & Ors*., [(2001) 1 SCC 4, para 36] and *Bir Singh v. Delhi Jal Board & Ors.*, [(2018) 10 SCC 312, para 36, 100], this Hon'ble Court has held that inclusion, exclusion, alteration, amendment or modification in the Presidential Lists can be done only by the Parliament and by no other authority, not even the Courts. However, the present case is outside the purview of these judgments as the issue here is regarding providing preferential treatment to certain already ascertained Scheduled Castes. Section 4(5) of the Punjab Act does not change the constitution of the Lists, least of all tinkers with it. It only aims for proportional equality for the weakest sections of the Scheduled Castes. The State Government cannot include or exclude a caste from the list; however, there is no bar to preferential treatment *within* the List, in the interests of substantive equality.

10. In their written submissions, the Respondents have cited a number of judgments affirming that variations of the List can only be undertaken by Parliament (**Written Submissions of Mr. Sanjay R. Hegde)**. Petitioners do not disagree; but all of Respondents judgments are inapplicable to the present

case: none of them stand for the proposition that sub-classification is equivalent to modification, inclusion, or exclusion.

III. THE CONSTITUTIONAL SCHEME PERMITS SUB-CLASSIFICATION

11. It is submitted that sub-classification is not alien to the Constitutional scheme. *First*, the definition of 'Scheduled Caste' itself visualizes cases where only a part of a caste or group may be included (see **K. Balagopal, "Justice for Dalits among Dalits: All the Ghosts Resurface" (2005) 40(29) *Economic and Political Weekly* 3128 (A)**. *Secondly*, Article 16(4) covers "**any** backward class of citizens", which includes scheduled castes (**B**). And *thirdly*, this reading is sustained on a purposive interpretation of the Constitution (**C**).

A. Definition of Scheduled Caste under Article 366 (24) of the Constitution

12. Article 366 (24) defines Scheduled Castes as follows:

> *"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" (emphasis supplied)*

13. The definition of Scheduled Caste itself visualizes/ permits situations where just **parts of** castes, races or tribes, or groups within the same are deemed to

be Scheduled Castes under Article 341. Therefore, Scheduled Castes not being a homogenous group is an idea that is explicitly recognised in the Constitution.

B. Article 16(4) Covers "Any Backward Class of Citizens"

i. The meaning of "a part of"

14. Further, Article 16(4) covers all backward classes, including Scheduled Castes and Scheduled Tribes. It uses the expression "*any backward class of citizens*". Therefore, the expression "not adequately represented" covers all socially and educationally backward classes, who, on account of their backwardness, are inadequately represented in the State's services. It is obvious that this is a relative concept: "backwardness" – or, more accurately, disadvantage and marginalization – is intersectional and fine-grained, and consequently, legislative policy must be equally fine-grained to take the many layers and facets of disadvantage into account.

15. It is also important to note that the scope of Article 16(4) is wider in its ambit than Article 15(4). The expression "any backward class of citizens" used in Article 16(4) includes Scheduled Castes and Scheduled Tribes and other backward classes, including the socially and educationally backward classes, within its ambit.

ii. The Creamy Layer

16. Furthermore, it is a settled position of law that the concept of exclusion of creamy layer does not tinker with the Presidential List under Article 341 and

342. It is submitted that in the case of *M. Nagaraj & Ors. v. Union of India & Ors.,* [(2006) 8 SCC 212, para 121] a Constitution Bench of this Hon'ble Court has held that the creamy layer concept applies to Scheduled Castes and Scheduled Tribes.

17. Later, while considering whether *Nagaraj* needs to be revisited on the aforesaid point, a Constitution Bench of this Hon'ble Court, in *Jarnail Singh & Ors. v. Lachhmi Narain Gupta & Ors.,* (2018) 10 SCC 396, held as follows:

> *"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. <u>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 and 342 of the Constitution of India</u>…"*

18. Therefore, it is a settled position of law that the concept of exclusion of creamy layer while giving reservation to Scheduled Castes and Scheduled Tribes is necessary to ensure that backwardness does not persist in perpetuity. If the concept of creamy layer is not applied to them, those who comprise the top portion of the Scheduled Castes and Scheduled Tribes would have an edge

over the weakest of the weak, and would also become a hurdle in the advantages of reservation being trickled down to them.

19. In the instant case, the preference given to Balmikis and Mazhabi Sikhs, i.e., the most backward amongst the Scheduled Castes, is nothing but the application of the principle of creamy layer taken to its logical conclusion, and is thus, permissible under the Constitutional scheme.

20. It may be noted that a full bench of Punjab and Haryana High Court in *Kanwaljit Singh Sidhu and others v. State of Punjab and others* [(1980) 3 SLR 34 (2), Para 17, 18 & 19] upheld the constitutional validity of 50% reservation for Balmiki and Mazhibi Sikhs from the quota reserved for Scheduled Castes, based on the fact that they deserved preferential treatment as their representation was that inadequate in the services. The Court also held that the scheme of reservation, in order to fall within the requirement of Article 16(4) of the constitution of India, has to satisfy twin condition; (i) that the given backward class is so, because of social and educational backwardness and (ii) that the share of this particular class in the services is so meagre that it required weightage. As long as these conditions are fulfilled, there is nothing unconstitutional about sub-classification.

iii. The basis of identifying Scheduled Castes

21. That sub-classification is consistent with - and indeed - advances the constitutional scheme is evident from the way the Constitution understands -

and identifies - the category of Scheduled Castes. As Anuna Tiwai - drawing upon the seminal work of Marc Galanter - notes:

> *The first census tests for identification revolved around incidence of disability such as debarment from using temples, polluting touch, occupational disability etc. The 1950 Scheduled Order took educational and economic criteria as indicators of inclusion into the list. Presently, "social, educational and economic backwardness" arising out of traditional untouchability is used as the primary indicator of inclusion in the presidential list. Since the criteria of distinguishing SCs (as a whole) is untouchability and relative impurity- based on occupation, residence, ritual status, eating habits etc., relative impurity among the Dalits assumes importance. If the same ritual untouchability persists within the SCs, it should adequately justify sub-classification- not as an exception but as an extension of the entitlement.*
>
> **(Anuna Tiwari, "Sub-Classification in Reservations - I, *The Indian Constitutional Law and Philosophy Blog* (3 September 2020), available at <https://indconlawphil.wordpress.com/2020/09/03/guest-post-sub-classification-in-reservations/>)**

22. Consequently, the very basis of identifying the beneficiaries of reservations assumes both heterogeneity and inter-se graded inequality within those beneficiaries (as noted by B.R. Ambedkar), and therefore requires - by the very same logic - the existence of sub-classification in order to mitigate those inequalities.

23. In this context, it is important to note that the finding in *E.V. Chinnaiah* that Scheduled Castes are homogenous for the purposes of the Constitution rests on a misreading of Justice Krishna Iyer's opinion in **State of Kerala & Anr. v. N.M. Thomas & Ors., [(1976) 2 SCC 310].** In **N.M. Thomas**, while referring to Scheduled Castes and Scheduled Tribes, Krishna Iyer J noted that "they 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." (para 135) In his gloss on the judgment, Hegde J in *E.V. Chinnaiah* notes that "there are no castes, races, groups, tribes, communities or parts thereof in Hinduism … the sequitor [sic] thereof is that Scheduled Castes are one class for the purposes of the Constitution."

24. The replacement of "they" with "there", however, completely inverts the meaning of Krishna Iyer J.'s observation, which was that Scheduled Castes and Scheduled Tribes are conglomeration of groups placed outside of the caste hierarchy, and not that SCs/STs form one homogenous legislatively recognised mass, because caste does not exist in Hinduism. Hegde J.'s sequitur, therefore, that "proves" homogeneity, is no sequitur at all (see also **Balagopal, supra**).

C. Purposive Interpretation to be adopted

25. It is submitted that while interpreting the provisions of the Constitution, this Hon'ble Court should adopt a purposive approach which gives effect to the

true purpose of the legislature. If sub-classification is denied then it would defeat the right to equality guaranteed under Article 14 by treating unequal as equal. Therefore, while interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted.

26. In the case of *M. Nagaraj v. Union of India*, [(2006) 8 SCC 212, para 19, 29], this Hon'ble Court held that a purposive, rather than a strict interpretation must be adopted for the Constitution which is to endure for ages to come and which embodies aspiration to social justice, brotherhood and human dignity. The relevant paragraphs are quoted below:

> *19. The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.*
>
> *…*
>
> *29. Lastly, constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his*

article titled "Challenge to the Living Constitution" by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision-making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution. To conclude, as observed by Chandrachud, C.J., in Minerva Mills Ltd. [(1980) 3 SCC 625 : (1981) 1 SCR 206] "the Constitution is a precious heritage and, therefore, you cannot destroy its identity".

27. It is submitted that the doctrine of generous and purposive construction should apply in particular to that part of the Constitution which protects and entrenches fundamental rights to which all persons are to be entitled. It has been held that the intention of a Constitution is to outline principles, rather than to engrave details. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance of the line of their growth. (Ref: *R. C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, Para 124; *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)*, (2002) 8 SCC 237, Para 139).

28. Further, it is trite law that provisions of a beneficial legislation also have to be construed with a purpose-oriented approach. (Ref: *KH Nazar v. Mathew K Jacob* 2020 14 SCC 126, para 11, 12; *Badshah v. Urmila Badshah Godse,* 2014 1 SCC 188, para 13-16). The Government of Punjab had enacted the Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act,

2006 in an attempt to uplift the most backward castes, and created a sub-classification within the SC community.

29. The Respondents have purported to rely upon Dr. Ambedkar's speech in the Constituent Assembly – cited in **Milind vs State of Maharashtra, (2001) 1 SCC 4 –** to argue that the scheme of Article 341 is designed to "eliminate any kind of political factors" playing a role in "disturbing" the Presidential List (**Written Submissions filed on behalf of Mr. Sanjay R. Hegde, para 2**). However, the very speech cited by the Respondents makes it clear that Dr. Ambedkar was categorically referring to the inclusion of exclusion of specific castes *from* the List: Dr. Ambedkar's exact words are "specifying all the castes and tribes or groups thereof deemed to be Scheduled Castes and Scheduled Tribes for the purpose of these privileges which have been defined for them in the Constitution." It is evident that sub-classification *within* the List does not have any bearing upon the determination of which groups *are deemed to be* SCs/STs for the purpose of the constitutional *entitlement* to reservation.

30. In any event, it is respectfully submitted that the *potential* of politically-motivated tinkering cannot obviate the *present* constitutional need for legislative policy that takes into account graded and *inter-se* inequalities within Scheduled Castes. As the final section of these written submissions demonstrate, the impugned Act is based on rational and empirically demonstrated conditions. Where reservations have been granted on the basis

of purely political considerations, this Hon'ble Court has not hesitated to strike them down, as it did in the case of reservations for Jats. A similar standard of rational classification can, therefore, be applied to a case of sub-classification. Judicial review, thus, is the surest check against political abuse.

IV. THE MAJORITY RATIO IN *INDRA SAWHNEY* PERMITS SUB-CLASSIFICATION OF BACKWARD CLASSES, WHICH INCLUDES SCHEDULED CASTES

31. A 9-judge bench has held in *Indra Sawhney's* case as follows [Paras 746-779, 780-785, 859 (3)]: a caste can be and is often a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Although there is no procedure of method for identification of backward classes, the process can be started with applying the criteria which have been evolved for identifying backwardness to castes; upon satisfaction of the criteria, what emerges is a backward class of citizens.

32. Therefore, the law laid down in *Indra Sawney* states that "backward classes" include Scheduled Castes and Scheduled Tribes and all considerations which apply *mutatis mutandis* while dealing with backward classes will also apply to Scheduled Castes and Scheduled Tribes. *Indra Sawhney* held that amongst the "backward" (i.e., disadvantaged) there may be some who are more "backward" and if the State chooses to make such classification, it would be permissible in law.

33. Since Scheduled Castes and Scheduled Tribes fall under "backward classes" as contemplated by Article 16(4), and since *Indra Sawhney* enables sub-classification within socially and educationally backward classes, therefore sub-classification is permissible within the Scheduled Castes and Scheduled Tribes as well.

34. In *E.V. Chinnaiah*, the Hon'ble Court has erroneously held that by virtue of the Notification of the President the Scheduled Castes come into being as one class of persons which forms a homogeneous group, and any protection can be granted to this homogenous group as a whole.

35. The Respondents attempt to get around this by arguing that *Indira Sawhney* was limited to the question of "Other Backward Classes" (**Written Submissions of Sanjay R. Hegde, pg 13**). This, however, ignores the specific observations in *Indira Sawhney* that disadvantage is not to be understood in absolute terms, but is relative and intersectional.

V. ARTICLE 342A IS PARI MATERIA WITH ARTICLE 341

36. Articles 341, 342 and Article 342-A are *pari materia* provisions that deal with Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes respectively. Article 342-A, which was inserted by the Constitution (One Hundred and Second Amendment) Act, 2018 empowers the President to notify socially and educationally backward classes, and

clause 2 of the Article 342-A states that any inclusion or exclusion to the list notified under clause 1 can be only done by the Parliament by way of a law.

37. As discussed above, since Scheduled Castes and Scheduled Tribes fall under backward classes as contemplated by Article 16(4), and since *Indra Sawhney* enables sub-classification within socially and educationally backward classes, sub-classification is permissible within the Scheduled Castes and Scheduled Tribes as well.

38. It is submitted that there cannot be a difference in application of sub-classification between Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes in view of the *pari materia* provisions, Article 16(4), and settled law on sub-classification.

VI. SUCH SUB-CLASSIFICATIONS ARE WITHIN THE LEGISLATIVE COMPETENCE OF THE STATE

39. It is submitted that the State is competent to enact laws giving preferential treatment to certain classes of people. The State's legislative competence in various fields for making reservation flows from Article 246(2) and 246(3) read with Entry 41 in List II (*State public services; State Public Service Commission*) and Entry 25 in List III (*Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour*). The Punjab Act has been enacted under Articles 16(1) and 16(4)

read with Articles 245 and 246. The provisions of Section 4(5) of the Punjab Act granting preferential reservation to Balmiki and Mazhabi castes are within the legislative competence of the State.

40. Nothing in Article 341 takes away from the legislative power of a State to enact a law providing for reservation in employment in the State Public Services or State Public Service Commission or reservation in admission to educational institutions.

41. It is submitted that the State is empowered to make policy decisions to discharge its obligation of eradicating inequalities in status and wealth. The State is the best judge of the needs of its citizens, of the ground realities, the qualitative and quantitative differences that exist between the various classes in it, and the State logically becomes the appropriate authority which should take ameliorative measures for their emancipation. The State plays a vital role in the process of reservation and therefore, it would be in violation of the scheme of the Constitution if the State is not given its due when it comes to ascertaining preferential treatment to the Scheduled Castes which, in the State's opinion, form the most backward classes even inter-se among the Scheduled Castes.

42. It is submitted that the reference order rightly held that caste, occupation, and poverty are interwoven and that the State cannot be deprived of the power to take care of the qualitative and quantitative difference between different classes to take ameliorative measures.

43. The Constitution only prohibits inclusion or exclusion in the Presidential notification, unless the Parliament makes a law to that effect. There is no constitutional bar for the State to take affirmative action in addition to the Presidential lists to achieve the objective. The State Government has the right to provide reservation in the fields of employment and education, and therefore, grouping, classification or sub-classification of castes and tribes for effectuating the rights under Article 16(1) and 16(4) is permissible as none of the castes and tribes enlisted in the Presidential List is denied the benefit of reservation, or excluded from the list.

VII. PREFERENTIAL TREATMENT IS A FACET OF EQUALITY UNDER ARTICLE 14

44. It is submitted that preferential treatment is a facet of equality under Article 14. Classification for the purposes of Article 16(4) is to provide proportional equality. This classification is based on intelligible differentia which bears a reasonable nexus with the object which is sought to be achieved, i.e. equitable representation of all Scheduled Castes in Government service.

45. It is submitted that Scheduled Castes/Scheduled Tribes do not constitute a homogenous group; there are undeniably classes within a class. The differences between the castes mean that they cannot be judged by the same yardstick, especially in matters concerning public employment. Though 'equal protection' clause prohibits the State from making unreasonable discrimination in providing preferences and facilities for any section of its

people, it also requires the State to afford substantially equal opportunities to those placed unequally. Equality contemplated by Article 14 is secured not only when equals are treated equally, but also when unequals are treated unequally. The empirical data clearly shows that inter-se inequality persists. The States are empowered to deal with backward classes based on each group's needs or sub-class and handle the pervading imbalances.

46. It is respectfully submitted that it has long been held that the Equality Code under Articles 14-16 sets out the principles of substantive equality (***State of Kerala vs N.M. Thomas, supra)***. The evolution of constitutional jurisprudence in recent years has also flagged the importance of intersectional concerns when considering the equality guarantee. Sub-classification is an inherent facet of substantive and intersectional equality, as it is based on differences *inter se* between castes that have been subjected to structural and institutional disadvantage. It is therefore entirely in compliance with - and pursuant to - the constitutional scheme.

VIII. THE DECISION IN *EV CHINNAIAH* IS CONTRARY TO OTHER BINDING JUDGMENTS

47. The decision in *E.V. Chinnaiah* is contrary to other binding judgments, such as *K.C. Vasanth Kumar & Anr. v. State of Karnataka,* [1985 Supp. SCC 714] and *State of Kerala & Anr. v. N.M. Thomas & Ors.*, [(1976) 2 SCC 310]. The five-judge bench of the Supreme Court in *K.C. Vasanth* discussed about the characteristics of backward classes and held that:

> *55. The propriety of such a course may be open to question on the facts of each case, but we do not see why on principle there cannot be a classification into backward classes and more backward classes, if both classes are not merely a little behind, but far far behind the most advanced classes. 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 might 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 backward classes, the most advanced classes would walk away with all the seats available for the general category leaving none for the backward classes. All that we can say is that sub-classification may be permissible if there are classes of people who are definitely far behind the advanced classes but ahead of the very backward classes.*

48. Further, this Hon'ble Court in *Indra Sawhney*, relying on Justice Chinnappa Reddy's judgment in *K.C. Vasanth Kumar*, held that sub-classification was permissible among the OBCs. (Justice B.P. Jeevan Reddy @ paragraphs 802, 843; Justice P.B. Sawant @ Paragraph 524).

49. *E.V. Chinnaiah* also did not correctly appreciate the decision of seven-judge bench of the Supreme Court in the *State of Kerala & Anr. v. N.M. Thomas & Ors.*, (1976) 2 SCC 310. The case of *N.M. Thomas* dealt with the constitutionality of the reservation policy in state employment, wherein this Hon'ble Court observed that there could be no objection to further classification within a class as men are born different, and some sort of

differential treatment is required to achieve proportional equality. The relevant portions of the Judgement are reproduced below:

> *"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).*
>
> *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; S.G. Jaisinghani v. Union of India and State of J&K. v. Triloki Nath Khosa, (1974) 1 SCR 771, has no application here.*
>
> *…*
>
> *167. A combined reading of Article 46 and clauses (24) and (25) of Article 366 clearly shows that the members of the scheduled castes and the scheduled tribes must be presumed to be backward classes of*

citizens, particularly when the Constitution gives the example of the scheduled castes and the scheduled tribes as being the weaker sections of the society.

…

169. Thus in view of these provisions the members of the scheduled castes and the scheduled tribes have been given a special status in the Constitution and they constitute a class by themselves. That being the position it follows that they do not fall within the purview of Article 16(2) of the Constitution which prohibits discrimination between the members of the same caste. 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 able to be properly represented in the services under the State. This can undoubtedly be done under Article 16(1) of the Constitution."

IX. THE DECISION IN *EV CHINNAIAH* WILL HAVE EMPIRICALLY DEMONSTRABLE BANEFUL EFFECTS AS SCs AND STs DO NOT CONSTITUTE A HOMOGENOUS CLASS

50. Holding that all SCs and STs form a homogenous class is removed from social and economic reality. *EV Chinnaiah* miserably fails in appreciating the ground realities of the Caste system in India. It is not based on the empirical/statistical data collected by the State which demonstrated the variations in the development of different Scheduled Castes and Scheduled Tribes.

51. According to Justice B.P. Jeevan Reddy in Indra Sawhney:

"*Para 795….neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated."*

52. It is submitted that the various castes forming part of the list of Scheduled Castes are not similarly situated and the umbrella term ‘scheduled castes’ does not contain a homogeneous group of people. Caste is nothing but social class or a socially homogeneous class; and Scheduled Castes are a group of castes, races, tribes, communities or parts thereof, notified by the President. As per Justice Reddy in *Indra Sawhney*, several castes or tribes within the Scheduled Castes and Scheduled Tribes are not similarly situated. Lacking homogeneity amongst themselves, some Scheduled Castes would find themselves at a weaker footing as compared to the more developed Scheduled Castes unless preferential treatment is not given to them while doling out the benefit of reservation to them.

53. If some castes usurp all the benefit of reservation to the disadvantage of the weakest of the weak, the object of real equality of all would be defeated and inequality would be perpetuated. It would defeat the substantive and intersectional commitments of the equality code.

54. To understand the objective of the relevant provisions of the Constitution, the following empirical data on the Balmiki/ Mazhabi castes may be considered by this Hon’ble Court:

    a. A study of Punjab Castes done in 1883 found that Mazhabis belonged to the ‘chuhra’ caste and were primarily scavengers and sweepers.

    b. As per the report of the Evaluation Committee on Welfare regarding the welfare of SCs, Backward Classes and Denotified Tribes in Punjab

from the period commencing from 15th August 1947, dated Dec. 1965 to Aug. 1966, Mazhabis had a total population of 664,161, while Balmikis had a total population of 688,588. The said report also found that the social conditions of scavengers (Balmikis) were "awfully deplorable". They did not even have proper access to utensils, let alone housing. They had meagre income, and were forced to do scavenging despite working from dawn to dusk. The report also noted that educationally, they were extremely backward; even more so than other communities of SCs. Because of their educational backwardness, the scavengers could not derive full benefits of the reservations in services. (Extract of report annexed as **ANNEXURE A/2, Pg. 40 to 71**).

c. As per the 1971 census, Punjab (excluding Chandigarh) had a total schedule caste population of 3,347,217 of which 2,808,514 (83.9%) were illiterate. Out of the total population, 962,546 were from the Mazhabi caste of which 882,519 (91.6%) were illiterate and 401,960 were from the Balmiki caste of which 346,338 were illiterate (86.2%). (Relevant pages of the 1971 census annexed as **ANNEXURE A/3, Pg. 72 to 76).**

d. As per the Census of 2001, Balmikis and Mazhabis are still very backward in socio economic as well as educational and political spheres. Comparative data of education levels is as follows:

i. At matric level – Ad-dharmis and the Chamars are 36.2% where as Balmikis and Mazhabis are 31.2% (of all the educated persons of scheduled castes)

ii. At Higher Secondary level – 48.9% were Ad-Dharmis and the Chamars and 31.3% are Balmikis and Mazhabis.

iii. In technical diplomas and other diplomas Ad-Dharmis and the Chamars were 1.5% where as Balmikis and Mazhabis are only 0.5%.

iv. At the graduation level Ad-Dharmis and the Chamars were 5.6% and Balmikis-Mazhabis were 2%.

e. In 2011, Mazhabi Sikhs were found be the most dominant Dalit caste, making up 29.7% of the total SC population in Punjab, while Balmikis comprised of 9.78% of the total SC population. It was also found that only 54.5% Mazhabis were literate. They were also among the least urbanized communities with 81.71% living in rural areas and mostly working agricultural labourers. The Balmikis had a literacy rate of 65.9% and were among the low urbanized SC in the State – with 60.90% living in rural areas.

f. In contrast, as of 2011, Adharmis had a total literacy rate of 81.5% and Chamars had a literacy rate of 72.8%.

g. It was also found 40% of Mazhabis-Balmikis earned less than Rs. 1,00,000 per annum. In comparison, only 13.8% of Chamars earned

less than Rs. 1,00,000 per annum. (Ref: Thesis titled 'Dalit Mobilization, Identity and Political Assertion in Punjab: A Comparative Study of Balmikis-Mazhabis and the Chamars' by Ms. Parminderjit Kaur Hans, the Panjab University, Chandigarh, relevant pages annexed as **ANNEXURE A/4, Pg. 77 to 127).**

h. As noted by the 1965 report, the Mazhabis-Balmikis are still so backward, that because of their educational backwardness, they are unable to even derive full benefits of the reservations in services. This is evident from the recruitments processes where only a fraction of the seats reserved for these castes are filled up. Some examples are:

   i. On 09.03.2019, the Department of Animal Hisbandry, Fisheries and Dairy Development advertised 117 seats for veterinary officers, out of which 18 posts were reserved for Mazhabis-Balmikis. Only 7 of these posts could be filled, leaving 11 seats vacant. In contrast, 31 persons from other Scheduled Castes (12 posts advertised) and 35 persons from backward classes (14 posts were advertised), made it to the merit list, leaving 0 seats vacant in these categories.

   ii. On 29.04.2021, the PPSC advertised 1123 posts for Junior Engineers vide Advertisement No. 35, 36. Out of these, 140 posts (12.5%) were reserved for Mazhabis-Balmikis. However, only 19 were filled, leaving 121 seats vacant.

iii. In 2021, 866 posts for Veterinary Inspector were advertised vide Advertisement No. 14/202. Out of which 108 seats were reserved for Mazhabis-Balmikis, however only 26 such posts were filled.

iv. In 2021, 585 posts for Junior Draftsman were advertised vode Advertisement No. 12 of 2021, dated 07.07.2021. Out of these, 76 were reserved for Mazhabis-Balmikis but only 27 such posts could be filled, leaving 49 seats vacant. In contrast, 107 persons from other Scheduled Castes (71 posts were advertised) and 113 persons from backward classes (70 posts were advertised), made it to the merit list, leaving 0 seats vacant in these categories.

55. In 2022, 418 posts for veterinary officers were notified, out of which 52 were reserved for Mazhabis-Balmikis, but only 11 seats could be filled. In contrast, out of 52 seats reserved for rest of the Scheduled Castes, 44 seats could be filled.It may be also be noted that even the Brish Bham Committee (the Evaluation Committee on Welfare appointed to evaluate the work done in the State regarding the welfare of Scheduled Castes and Backward Classes from 1947) which presented its report on 31.08.1966 recommended that 5% reservation out of 21% should be exclusively earmarked for those engaged in scavenging, as the facts prove that scavengers are the main losers in availing the concessions given by the Government.

56. Further, the Government of India appointed a one-member commission headed by Justice Usha Mishra after the *EV Chainnaiah* judgment to examine

the issue of Sub-Categorization of Scheduled Caste in Andhra Pradesh. The commission submitted its Report in May 2008 which recommended that a new clause (3) be inserted in Article 341 of the Constitution:

> *"341(3) Parliament may by law provide for sub-categorization or de-sub-categorization of caste, race, or tribe or part of or group within any caste, race, or tribe specified in a notification issued under clause (1) or by law made by Parliament under clause (2), upon receiving a resolution from the legislature of a State/ U.T. passed unanimously."*

57. It is submitted that the Ministry of Social Justice & Empowerment has also prepared a Note for the Cabinet seeking approval for introducing a Constitution Amendment Bill in Parliament for insertion of following two new clauses, (3) (4) to Article 341 of the Constitution.

> *"341. Scheduled Castes –*
>
> *...*
>
> *(3) Parliament may, by law provide for sub-categorization or de-sub-categorization of the castes, races or tribes, or part of or group within any castes, races or tribes specified in a notification issued under clause (1), or by law made by Parliament under clause (2), in respect of a State or Union Territory, upon receiving a resolution from the legislature or that State or, as the case may be, Union Territory passed unanimously, recommending such sub-categorization or, as the case may be, desub-categorization*
>
> *(4) Upon the Scheduled Castes of a State/ Union Territory being sub-categorized as per clause (3) above, it shall, notwithstanding anything contained in clauses (1) and (2) above, be lawful for such sub-categories to be treated as a distinct entity for the purpose of reservation in the services in connection with the affairs of that State or, as the case may*

be, Union Territory, in pursuance of clause (4) of Article 16, and in admission to educational institutions run or substantially aided by the Government of that State or, as the case may be, Union Territory, in pursuance of clause (5) of Article 15."

58. It may be noted that the Punjab Government is no stranger to the ground reality of the conditions of the Balmiki and Mazhibi castes. This is why even prior to the enactment of the Punjab Act, several actions were initiated by the Punjab Government for the betterment of these classes. Some of these are:

    a. The Secretary to the Govt. of Punjab, Scheduled Castes and Backward Classes Department issued a Letter No. 1818-SW-75/10451 dated 05.05.1975 to all Heads of Departments, Commissioners of the Divisions, Deputy Commissioners, District and Session Judges, Registrar, Punjab and Haryana High Court and Sub Divisional Officers (Civil) in the State, etc., stating that it was decided by the Govt. that henceforth 50% vacancies of quota reserved for SC should be offered to the Balmiki and the Mazhvi Sikh, if available, as a first preference from amongst the SC candidates.

    b. Subsequently, Letter No. 1786-3SI-75/23005 dated 19.09.1975 was also issued by the Secretary to the Govt. of Punjab Scheduled Castes and Backward Classes Department, stating that henceforth, 50% vacancies of the quota reserved for Scheduled Castes should be offered to Balmiki and Mazhibi Sikhs, if available, as first preference from

amongst the SC candidates (in direct recruitment only and not in promotion cases).

c. Thereafter, vide another letter dated 08.04.1980 issued by the Welfare Department, Punjab Government, it was communicated that while appointing Balmiki and Mazhibi Sikh candidates in place of other Scheduled Caste candidates, the Joint merit list can be disturbed. They can be given the first reserved vacancy on the basis of 50% reservation, even if his name is below in the merit list.

X. Conclusion

59. In conclusion, therefore, Petitioner No. 3 submits that that Article 341 does not take away the power of the State under Article 16(4) to make provisions for giving preference to certain castes, and the State is competent to create sub-groups within the Scheduled Castes declared under Article 341. *E.V. Chinnaiah* has incorrectly found such sub-classification to be prohibited and therefore deserves to be set aside.

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