IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2317 OF 2011

IN THE MATTER OF:

State of Punjab and Ors. **… Appellants**

v

Davinder singh and Ors. **…Respondents**

WRITTEN SUBMISSIONS ON BEHALF OF MR. SANJAY R HEGDE, SENIOR ADVOCATE FOR THE RESPONDENTS

Preliminary Submissions

1. The President, in consultation with the Governor specifies the castes which would be deemed to be Scheduled Castes in relation to a State. The question that arises in this case is whether the state legislature can give preference to certain castes mentioned under the presidential order in the matter of reservation. The Respondents submit that this cannot be done. It is parliament alone that has the power to exclude castes listed in the schedule. Further, it is parliament alone which has the power to deny any benefits (including reservation), that flow from to a caste that is listed as a scheduled caste.

2. If the state is allowed to deny reservation/ give preference in reservations to a scheduled caste, it will render the purpose of Article 341 redundant. The purpose of Articles 341 and 342 was stated by Dr. Ambedkar in the Constituent Assembly to be as follows:

> *"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 purpose of these 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."*** [cited in Milind v State of Maharashtra, (2001) 1 SCC 4 Paragraph 14]

Background Facts

3. The Punjab Government by a circular No. 1818-SW-75/10451 dated 05.05.1975 laid down that 50% of the vacancies reserved for Scheduled Castes would be offered to Balmikis and Mazhbi Sikhs as a first preference. The circular was struck down by a Division Bench of the Punjab and Haryana High Court vide a judgment dated 25.07.2006. [Annexure R2 Colly (i), Page 61-77, Counter Affidavit main paperbook]. The State of Punjab's SLP against the Division Bench judgment was dismissed on 10/03/2008 [Page 78, main paperbook].

4. The Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, 2006 was notified on 05.10.2006. Section 4 (5) of the Act is identical to the circular that was struck down. It stipulates that *"fifty per cent of the vacancies of the quota reserved for Scheduled Castes in direct recruitment, shall be offered to Balmikis and Mazhbi Sikhs, if available, as a first preference from amongst the Scheduled Castes."* [Act at Pages 19-25]

5. It is worthwhile to mention here that at the time of enactment there was no basis or data to support the preference being given to certain castes. The state has sought to justify the preference by relying on certain subsequent data which has been produced for the first time by way of a additional documents filed before this Court in July, 2020.

6. A Division Bench of the High Court struck down Section 4 (5) vide the impugned judgment dated 29.03.2010. The Court relied extensive on the Supreme Court judgment in *E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394.* The matter was referred to a larger bench (by a bench of three judges) on 20.08.2014. The bench noted:

> "*Having heard learned Additional Solicitor General and learned counsel for the parties, we are of the view that EV Chinniah needs to be revisited in light of Article 338 of the Constitution of India and, inter alia, exposition of law in Indra Sawhney. 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."*

7. On 04.02.2020, the Constitution Bench proposed 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 A. P. & Ors. reported in (2005) 1 SCC 394 is required to be revisited?

With due leave of the Court, the Respondents seek to address issue (iii) above as a preliminary issue:

A. Whether the decision in E.V. Chinnaiah Vs. State of A. P. & Ors. reported in (2005) 1 SCC 394 is required to be revisited?

1. A Bench of 7-judges of this Hon'ble Court in Keshav Mills Co. Ltd. v. CIT, (1965) 2 SCR 908 has held that this Hon'ble Court *"would be reluctant to entertain pleas for the reconsideration and revision of its earlier decisions, unless it is satisfied that there are compelling and substantial reasons to do so."* The Court held:

> *"23……..When it is urged that the view already taken by this Court should be reviewed and revised, it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier decision, this Court should ask itself whether in the interests of the public good or for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the*

interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be 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. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions.

It would always depend upon several relevant considerations: —What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law

or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

2. Subsequently, another Constitution Bench of this Hon'ble Court in *Union of India v. Raghubir Singh*, *(1989) 2 SCC 754* reaffirmed the doctrine of binding precedent holding that it has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. The bench relied on several criteria of judicial discipline that had been articulated by Lord Reid. The same are reproduced below:

(1) The freedom granted by the 1966 Practice Statement ought to be exercised sparingly (the "use sparingly" criterion) (Jones v. Secy. of State for Social Services [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)] , AC at p. 966).

(2) A decision ought not to be overruled if to do so would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision (the "legitimate expectations" criterion) (Ross Smith v. Ross Smith [1963 AC 280 : (1962) 1 All ER 344 : (1962) 2 WLR 388 (HL)] , AC at p. 303 and Indyka v. Indyka [(1969) 1 AC 33 : (1967) 2 All ER 689 : (1967) 3 WLR 510 (HL)] , AC at p. 69).

(3) A decision concerning questions of construction of statutes or other documents ought not to be overruled except in rare and exceptional cases (the "construction" criterion) (Jones case [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)]).

(4)(a) A decision ought not to be overruled if it would be impracticable for the Lords to foresee the consequences of departing from it (the "unforeseeable consequences" criterion) (Steadman v. Steadman [1976 AC 536 : (1974) 2 All ER 977 : (1974) 3 WLR 56 (HL)] , AC at p. 542 C). (b) A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done "by legislation following on a wide survey of the whole field" (the "need for comprehensive reform" criterion) (Myers v. DPP [1965 AC 1001 : (1964) 2 All ER 881 : (1964) 3 WLR 145 (HL)] , AC at p. 1022, Cassell &

Co. Ltd. v. Broome [1972 AC 1027 : (1972) 1 All ER 801 : (1972) 2 WLR 645 (HL)] , AC at p. 1086 and Haughton v. Smith [1975 AC 476 : (1973) 3 All ER 1109 : (1974) 2 WLR 1 (HL)] , AC at p. 500).

(5) In the interest of certainty, a decision ought not to be overruled merely because the Law Lords consider that it was wrongly decided. There must be some additional reasons to justify such a step (the "precedent merely wrong" criterion) (Knuller v. DPP [1973 AC 435 : (1972) 2 All ER 898 : (1972) 3 WLR 143 (HL)] , AC at p. 455).

(6) A decision ought to be overruled if it causes such great uncertainty in practice that the parties' advisers are unable to give any clear indication as to what the courts will hold the law to be (the "rectification of uncertainty" criterion) [Jones case [1972 AC 944 : (1972) 1 All ER 145 : (1972) 2 WLR 210 (HL)] and Oldendorff (E.L.) & Co. GmbH v. Tradax Export SA [1974 AC 479 : (1973) 3 All ER 148 : (1973) 3 WLR 382 (HL)] , AC at pp. 533, 535].

(7) A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy (the "unjust or outmoded" criterion) (Jones case [1972 AC 944 : (1972) 1 All ER 145 :

(1972) 2 WLR 210 (HL)] and Conway v. Rimmer [1968 AC 910 : (1968) 2 All ER 304 : (1968) 2 WLR 1535 (HL)] , AC at p. 938).

The decision in Raghubir Singh was cited with approval with a subsequent Constitution bench of this Court in *Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673.*

3. The Petitioners/Appellants have sought to contend that the decision in EV Chinnaiah (supra) does not follow the Judgment of a larger bench of this Hon'ble Court in *Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.* This is incorrect. The judgment in *Indra Sawhney (supra,)* permitting sub-classification was limited to the case of 'Other Backward Classes'. In fact, the Court therein specifically held that none of its observations would apply to Scheduled Castes and Scheduled Tribes. The relevant portions of the Judgment are reproduced below:

> ***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.*

788. *Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. 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 feed upon each other constituting a vicious circle. It is a well-known 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. In this sense Dr Rajeev Dhavan may be right when he says that the object of Article 16(4) was "empowerment" of the backward classes. The idea was to enable them to share the state power. 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.* ***The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness…..***

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).*

4. The fact that Indra Sawhney was limited in its application to Other backward classes has been noted by subsequent constitution benches of this Court. [Please ee EV Chinnaiah (supra) at Paragraph 38, *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 Opinon of Pasayat and Thakker JJ. at Paragraph 293 and Bhandari J. at Paragraphs 395 and 633 and *Jarnail Singh v Lachhmi Narain Gupta, (2018) 10 SCC 396;* Paragraphs 16, 24 and 34]

5. It is humbly submitted that the Judgment in *EV Chinnaiah* follows a long line of precedent that stresses on the special status granted to Scheduled Castes under the Constitution. This Hon'ble Court in *State of Kerala and Anr. v NM Thomas and Ors. (1976) 2 SCC 310* has held that Scheduled Castes do not form a 'caste', but a special class as a whole. In this regard, the separate but concurring opinion of Justice Fazal Ali is reproduced below:

> ***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.

6. Similar observations were made by a bench of three judges of this Hon'ble Court in *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India and Ors, (1981) 1 SCC 246.*

7. The Respondent submits that there is no conflict between the Judgments of this Hon'ble Court in *Indra Sawhney* and *EV Chinnaiah.* As will be submitted hereinafter, reconsideration of the decision in EV Chinnaiah, would require this Hon'ble Court to revisit judgments rendered by multiple Constitution benches and to set-aside precedent which has been established for over 50 years. In this light, the Respondents submit that the decision in EV Chinnaiah does not need consideration.

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

8. Section 4 (5) of the Act stipulates that *"fifty per cent of the vacancies of the quota reserved for Scheduled Castes in direct recruitment, shall be offered to Balmikis and Mazhbi Sikhs, if available, as a first preference from amongst the Scheduled Castes."* The Respondents submit that this amounts to an alteration/amendment of the list issued by the President under Article 341 of the

Constitution and is constitutionally impermissible. Any alteration/amendment to the list can be made only by Parliament. The state legislature is not competent to do so.

9. Article 341 of the Constitution of India reads as under:

"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 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."

10. A perusal of the above reveals that the notification issued under Article 341 can be altered only by a law made by Parliament. Any other method of altering the list or tinkering with its operation is not valid under the Constitution. A Constitution Bench in the case of *B. Basavalingappa v. D. Munichinnappa [(1965) 1 SCR 316]* examined the provisions of Article 341 Wanchoo, J. spoke for the Constitution Bench thus: (SCR pp. 318-20)

"Clause (1) provides that the President may with respect to any State, 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 the Constitution be deemed to be scheduled castes in relation to that State. The object of this provision obviously is 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 castes in a State. Clause (2) then provides that 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. ***The power was thus given to Parliament to modify the notification made by the President under clause (1). Further clause (2) goes on to provide that a notification issued under clause (1) shall 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). Clearly therefore Article 341 provides for a notification and for its finality except when altered by Parliament by law.***

11. A subsequent Constitution Bench of this Hon'ble Court in *Bhaiya Lal v. Harikishan Singh, (1965) 2 SCR 877* [Paragraph 10] has held :

"*The object of Article 341(1) plainly is to* ***provide additional protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer****. It is obvious that in specifying castes, races or tribes, the President has been expressly authorised to limit the notification to parts of or groups within the castes, races or tribes, and that must mean that after examining the educational and social backwardness of a caste, race or tribe, the President may well come to the conclusion that not the whole caste, race or tribe but parts of or groups within them should be specified. Similarly, the President can specify castes, races or tribes or parts thereof in relation not only to the entire State, but in relation to parts of the State where he is satisfied that the examination of the social and educational are backwardness of the race, caste or tribe justifies such specification. In fact, it is well known that before a notification is issued under Article 341(1), an elaborate enquiry is made and it is as a result of this enquiry that social justice is sought to be done to the castes, races or tribes as may appear to be necessary, and in doing justice, it would obviously be expedient not only to specify parts or groups of castes, races or tribes, but to make the said specification by reference to different areas in the State. Educational and social backwardness in regard to these castes, races or tribes may not be uniform or of the same intensity in the whole of the State; it may vary in degree or in kind in different areas and that may*

justify the division of the State into convenient and suitable areas for the purpose of issuing the public notification in question."

12. In *Srish Kumar Chodhury v. State of Tripura, 1990 Supp SCC 220,* a bench of three-judges of this Court relied on the aforesaid Judgments and held :

16. These authorities clearly indicate, therefore, that the entries in the Presidential Order have to be taken as final and the scope of enquiry and admissibility of evidence is confined within the limitations indicated. It is, however, not open to the court to make any addition or subtraction from the Presidential Order.

It went on to hold:

21. Reservation has become important in view of the increasing competition in society and that probably had led to the anxiety of the appellant and the people in his community to claim reservation. As pointed out by the Constitution Bench judgments which we have referred to above, the basis on which inclusion into or exclusion from the enumerated list made under Article 342 is contemplated is the changing economic, educational and other situations of the members of any particular tribe. ***Keeping that in view the State Government may initiate appropriate proposals for modification in case it is satisfied and after appropriate enquiry if the authorities are***

satisfied that the claim is genuine and tenable, amendment may be undertaken as provided by the Constitution.

13. In *Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala, (1994) 1 SCC 359*, a bench of three judges was called upon to decide on the validity of the State of Kerala's decision not to treat members of the Thandan community as members of the Scheduled Castes. The decision was struck down by the Court which held:

> *"18. These judgments leave no doubt that the Scheduled Castes Order has to be applied as it stands and no enquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it.* ***No action to modify the plain effect of the Scheduled Castes Order, except as contemplated by Article 341, is valid.***

The Court went on to hold:

> *21. The enquiry that was ordered by the High Court in the order under appeal to "find out whether there was a community called Thandan distinct from Ezhavas in Palghat District in areas other than in the erstwhile Chittur Taluk and also in any other place in erstwhile Malabar District" has proceeded to a conclusion on the basis of an interim order passed by this Court on January 16, 1989. It is not for the State Government or for this*

Court to enquire into the correctness of what is stated in the report that has been made thereon or to utilise the report to, in effect, modify the Scheduled Castes Order. ***It is open to the State Government, if it so deems proper, to forward the report to the appropriate authority to consider whether the Scheduled Castes Order needs amendment by appropriate legislation. Until the Scheduled Castes Order is amended, it must be obeyed as it reads and the State Government must treat Thandans throughout Kerala as members of the Scheduled Castes and issue community certificates accordingly.***

14. The issue of whether the State legislature/ executive has the power to amend the Presidential notification was conclusively answered by a bench of 5-judges of this Hon'ble Court in *State of Maharashtra v. Milind, (2001) 1 SCC 4*. The Court therein held:

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.***

The Court went on to hold:

> ***14.*** *In the debates of Constituent Assembly (Official Report, Vol. 9) while moving to add new Articles 300-A and 300-B after Article 300 (corresponding to Articles 341 and 342 of the Constitution), Dr B.R. Ambedkar explained as follows:*
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> > *"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 purpose of these 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."*

15. Thus it is clear that States have no power to amend Presidential Orders. Consequently, a party in power or the Government of the day in a State is relieved from the pressure or burden of tinkering with the Presidential Orders either to gain popularity or secure votes. *Number of persons in order to gain advantage in securing admissions in educational institutions and employment in State services have been claiming as belonging to either Scheduled Castes or Scheduled Tribes depriving genuine and needy persons belonging to Scheduled Castes and Scheduled Tribes covered by the Presidential Orders, defeating and frustrating to a large extent the very object of protective discrimination given to such people based on their educational and social backwardness. Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said article, it is expressly stated that the said Orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with Parliament and that too by making a law in that regard. The President had the benefit of consulting the States through Governors of States which had the means and machinery to find out and recommend as to whether a particular caste or*

tribe was to be included in the Presidential Order. If the said Orders are to be amended, it is Parliament that is in a better position to know having the means and machinery unlike courts as to why a particular caste or tribe is to be included or excluded by law to be made by Parliament. Allowing the State Governments or courts or other authorities or Tribunals to hold inquiry as to whether a particular caste or tribe should be considered as one included in the schedule of the Presidential Order, when it is not so specifically included, may lead to problems. In order to gain advantage of reservations for the purpose of Article 15(4) or 16(4) several persons have been coming forward claiming to be covered by Presidential Orders issued under Articles 341 and 342. This apart, when no other authority other than Parliament, that too by law alone can amend the Presidential Orders, neither the State Governments nor the courts nor Tribunals nor any authority can assume jurisdiction to hold inquiry and take evidence to declare that a caste or a tribe or part of or a group within a caste or tribe is included in Presidential Orders in one entry or the other although they are not expressly and specifically included. A court cannot alter or amend the said Presidential Orders for the very good reason that it has no power to do so within the meaning, content and scope of Articles 341 and 342. It is not possible to hold that either any inquiry is permissible or any evidence can be let in, in

relation to a particular caste or tribe to say whether it is included within Presidential Orders when it is not so expressly included."

15. It is humbly submitted that the same view has been taken by a bench of two judges in *Heikham Surchandra Singh v. Representative of "Lois" Kakching, (1997) 2 SCC 523*. The Court therein held:

11…the Presidential notification issued under Article 341(1) is final and conclusive and it cannot be added to any caste or subtracted by any action either by the State Government or by a court on adduction of evidence.

In *Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India, (2007) 5 SCC 360,* another two Judge bench of the Court held that:

"6. *..... List prepared by the President under Article 341(1) of the Constitution of India forms one class of homogeneous group. Only one list is to be prepared by the President and if any amendment thereto is to be made, the same is to be done by Parliament.* ***Even the State does not have any legislative competence to alter the same."***

16. The object of clause (1) of Article 341 is to provide preferential right by way of protection to the members of the Scheduled Castes having regard to the economic and educational backwardness from which they suffer. It is in relation thereto the President has been authorised to limit the notification to parts or

groups within the castes. The notification issued in terms of the said provision is exhaustive. By reason of Article 341 of the Constitution, a legal fiction is created which is to be given its full effect. [vide ***Punit Rai v. Dinesh Chaudhary*****, (2003) 8 SCC 204 – Separate, concurring opinion of Sinha J.]**

17. Recently, a Constitution Bench of this Hon'ble Court in *Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312* was called upon to answer the "question as to whether a policy in furtherance of the enabling provision contained in Article 16(4) of the Constitution of India could extend to giving of benefits beyond the Scheduled Castes and Scheduled Tribes of a State/Union Territory enumerated in the Presidential Orders framed/issued under Articles 341 and 342 of the Constitution of India.". The Court formulated the issue before it thus:

> "A very important question of law as to interpretation of Articles 16(4), 341 and 342 arises for consideration in this appeal. Whether the Presidential Order issued under Article 341(1) or Article 342(1) of the Constitution has any bearing on the State's action in making 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? The extent and nature of interplay and interaction among Articles 16(4), 341(1) and 342(1) of the Constitution is required to be resolved."

It held:

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.***

C. Whether the provisions contained under Section 4(5) of The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 are constitutionally valid?

18. Section 4 (5) of the Act has the effect of altering the operation of the list notified under Article 341 of the Constitution. In *E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394,* a Constitution Bench of this Hon'ble Court was called upon to examine the validity of an Ordinance by which the State had divided the 57 castes enumerated in the Presidential List into 4 groups based on inter se backwardness and fixed separate quotas in reservation for each of these groups. The Court unanimously held that this was not permissible under the

constitutional scheme. The relevant portions of the Judgment are reproduced below:

> *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.

19. *This part of the Constituent Assembly Debate coupled with the fact that Article 341 makes it clear that the State Legislature or its executive has no power of "disturbing" (term used by Dr. Ambedkar) the Presidential List of Scheduled Castes for the State. It is also clear from the articles in Part XVI of the Constitution that the power of the State to deal with the Scheduled Castes List is totally absent except to bear in mind the required maintenance of efficiency of administration in making of appointments which is found in Article 335. Therefore any executive action or legislative enactment which interferes, disturbs, rearranges, regroups or reclassifies 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.*

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.*

41. *The conglomeration of castes given in the Presidential Order, in our opinion, should be considered as representing a class as a whole. The contrary approach of the High Court, in our opinion, was not correct. The very fact that a legal fiction has been created is itself suggestive of the fact that the legislature of a State cannot take any action which would be contrary to or inconsistent therewith. The very idea of placing different castes or tribes or group or part thereof in a State as a conglomeration by way of a deeming definition clearly suggests that they are not to be subdivided or subclassified further. If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the list. Such subclassification would be violative of Article 14 of the Constitution. It may be true, as has been observed by the High Court, that the caste system has got stuck up in the society but with a view to do away with the evil effect thereof, a legislation which does not answer the constitutional scheme cannot be upheld. It is also difficult to agree with the*

High Court that for the purpose of identifying backwardness, a further inquiry can be made by appointing a commission as to who amongst the members of the Scheduled Castes is more backward. If benefits of reservation are not percolating to them equitably, measures should be taken to see that they are given such adequate or additional training so as to enable them to compete with the others but the same would not mean that in the process of rationalising the reservation to the Scheduled Castes the constitutional mandate of Articles 14, 15 and 16 could be violated." **[from the majority opinion of Hegde J.]**

19. In *Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458*, a bench of two judges of this Hon'ble Court was faced with the question of whether migrants, not listed in the presidential notification with respect to Delhi, could claim the benefit of reservation in the State. The State sough to argue that the power under to provide reservation under Article 16 (4) was distinct from the power to amend the presidential list under Article 341.

20. While answering the question in the negative, the Court held:

64… Article 341 leads to grant of constitutional rights upon a person whose affinity to a caste/tribe would attract the Constitution (Scheduled Castes) Order or the Constitution (Scheduled Tribes) Order. ***Once a person comes within the purview of presidential promulgation, he would be entitled to***

constitutional and other statutory or administrative benefits attached thereto. In our opinion, such socio-political rights created in our Constitution cannot be segregated keeping in view the administrative exigencies.

The Court further held:

66. *Clause (4) of Article 16 of the Constitution, as noticed hereinbefore, cannot be made applicable for the purpose of grant of benefit of reservation for Scheduled Castes or Scheduled Tribes in a State or Union Territory, who have migrated to another State or Union Territory and they are not members of the Scheduled Castes and Scheduled Tribes. By virtue of Article 341, the Presidential Orders made under clause (1) thereof acquire an overriding status. But for Articles 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis-à-vis inclusion of castes/tribes. The presence of Articles 338, 338-A, 341, 342 in the Constitution clearly precludes that.*

69. *Both the Central Government and the State Government indisputably may lay down a policy decision in regard to reservation having regard to Articles 15 and 16 of the Constitution of India but such a policy cannot violate other constitutional provisions. A policy cannot have primacy over*

the constitutional scheme. If for the purposes of Articles 341 and 342 of the Constitution of India, State and the Union Territory are on a par on the ground of administrative exigibility (sic) or in exercise of the administrative power, the constitutional interdict contained in clause (2) of Article 341 or clause (2) of Article 342 of the Constitution of India cannot be got rid of.

70. *It is well known that what cannot be done directly cannot be done indirectly. [See Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel [(2006) 8 SCC 726] , SCC para 73.] When an amendment or alteration is to be brought about by a parliamentary legislation, the same purpose cannot be achieved by taking recourse to circular letters.*

78. *There is another aspect of the matter. When reservation for the Scheduled Castes or the Scheduled Tribes had been earmarked, persons answering the description thereto only can be appointed. No recruitment is permissible for a Backward Class against a Scheduled Caste or Scheduled Tribe quota. That itself would be violative of clauses (1) and (4) of Article 16 of the Constitution of India.* ***Furthermore, if a person is to be treated as Scheduled Caste or Scheduled Tribe in terms of Article 341 of the Constitution of India, the benefit attached thereto in all other areas must be conferred on him. A person cannot be treated to be a member of the Scheduled Castes for one purpose and not for another purpose.***

21. The Judgment in *Subhash Chandra (supra)* was cited with approval by the Constitution Bench in *Bir Singh (supra)*, where the Court held that **even the operation** of the list of Scheduled Tribes and Scheduled Castes has to be carried out in accordance with Articles 341 and 342. The relevant portion of the Judgment is reproduced below:

> ***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.

22. It is clear from the above, that a State Government cannot give the benefit of reservation to a Scheduled Caste/Tribe which is not listed in the presidential notification for that particular state. It is equally true that a state government cannot deny the benefit of reservation to a Scheduled Caste listed in the presidential list. The Respondent humbly submits that once a caste is listed as a Scheduled Caste under the presidential notification, it is to be treated as such for all benefits under the Constitution. If the State Government is of the opinion that such benefits are no longer required for the upliftment of the caste, it is free to make an appropriate recommendation in this regard. The said caste can then be

denotified from the list under the procedure prescribed under Article 341 (2). However, it is not open to the State to adopt the mechanism it has observed herein.

23. In a recent judgment, this Hon'ble Court was called upon to adjudicate the validity of 100% reservations given to Scheduled Caste candidates in Andhra Pradesh. This Hon'ble Court in *Chebrolu Leela Prasad Rao and Others v State of Andhra Pradesh and Ors. (2020) SCC Online 383* held:

> ***"139.*** *In the instant case, it is not in dispute that the district is a local area and a unit for the appointment of teachers and reservation is provided at the district level and as per the Presidential Order under Article 371D of the Constitution, incumbent of one district cannot stake claim outside the district for an appointment. The reservations for scheduled tribes are covered within the ken of Article 16(4). Thus, no further preference or classification could have been made under Article 16(1) of the Constitution of India in favour of scheduled tribes as Article 16(4) is exhaustive of the special provisions that can be made in favour of scheduled castes, scheduled tribes, and other backward classes. Reservation for the other classes can be provided under Article 16(1) and not to scheduled tribes to whom the reservation has been provided under Article 16(4). Thus, as argued on behalf of respondents, it cannot be said to be a case of classification made under Article 16(1) of the*

Constitution of India. It is a case of tinkering with the percentage of reservation permissible as per the dictum of Indra Sawhney (supra).

24. In view of the above, the Respondent submits that Section 4(5) of The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 is ultra-vires the Constitution.

COUNTER AFFIDAVIT ON BEHALF OF UNION OF INDIA

25. That the Union of India in the present Civil Appeal by filing a short counter affidavit has taken the stand that any modification can be by an Act of Parliament. And this Hon'ble Court has held that in catena of case have held that State is not competent (a reference be made to para 6 at page no. 2 of U.O.I Counter affidavit dated 03.03.2020).

26. In the said Counter Affidavit at Page no. 16 minutes of the meeting of National Commission for Schedule Caste are annexed whereby the Commission has rejected the sub classification and instead recommended that State should devise a proper mechanism to empower.

Conclusion

27. This Hon'ble Court in its judgment in *Punit Rai v. Dinesh Chaudhary*, (2003) 8 SCC 204 has recognized that Article 341 creates a legal fiction that has to be given full effect to. In fact, such a concept was recognized by some members of the Constituent Assembly. In the Constituent Assembly Debates, Mr. Mahavir Tyagi had argued,

> *"The term "Scheduled Castes" is a fiction. Factually there is no such thing as `Scheduled Castes'. There are some castes who are depressed, some castes who are poor, some who are untouchables, some who are down-trodden. All their names were collected from the various provinces and put into one category "Scheduled Castes"."* **[Constituent Assembly Debate Proceedings (Vol. VIII), Date: May 26, 1949]**

28. In interpreting a legal provision creating a legal fiction, the court is to ascertain the purpose for which the fiction is created. The Court is then required to assume all facts and consequences which are incidental or inevitable corollaries of giving effect to the fiction. This Court in a number of judgments has held that the deeming fiction that is created by the Legislature ought to be carried to its logical end. In *G. Viswanathan v. T.N. Legislative Assembly* (1996) 2 SCC 353, the Court held,

"10. ...The law laid down in this regard in East End Dwellings Co. Ltd. case (1952 AC 109) has been followed by this Court in a number of cases, beginning from State of Bombay v. Pandurang (AIR 1953 SC 244) and ending with a recent decision of a three Judge Bench in M. Venugopal v. Divisional Manager (1994 (2) SCC 323). N.P. Singh, J., speaking for the Bench, stated the law thus at page 329:

> *"The effect of a deeming clause is well- known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date. In this connection, one is often reminded of what was said by Lord Asquith in the case of East End Dwellings Co. Ltd. V. Finsbury Borough Council that when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which inevitably have flowed from it - one must not permit his "imagination to boggle" when it comes to the inevitably corollaries of that state of affairs.""*

29. Dr. Ambedkar while discussing Draft Article 300A (Article 341) in the Constituent Assembly had argued that its object 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." The Petitioner submits that a fiction was created by putting certain castes in the presidential list. The purpose of this fiction was to ensure the upliftment of these castes by way of affirmative action and to eliminate any political interference from the process. This fiction has to be carried to its logical end.

30. It is humbly submitted that if Section 4 (5) of the Act is upheld, it will go against the very object and spirit of Article 341 and permit political interference with the rights of scheduled castes and scheduled tribes. The same is both non-permissible and indesirable. In a recent Judgment, a bench of three Judges of this Court in *Union of India v State of Maharashtra 2019 SCC OnLine SC 1279*, has observed that members of Scheduled Caste continue to live in abject backwardness. The observations of the Court are reproduced below:

> *42. Though, Article 17 of the Constitution prohibits untouchability, whether untouchability has vanished? We have to find the answer to all these pertinent questions in the present prevailing social scenario in different parts of the country. The clear answer is that untouchability though intended to be abolished, has not vanished in the last 70 years. We are still experimenting with 'tryst with destiny.' The plight of untouchables is that they are still denied various civil rights; the condition is worse in the villages, remote areas where fruits of development have not percolated*

down. They cannot enjoy equal civil rights. So far, we have not been able to provide the modern methods of scavenging to Harijans due to lack of resources and proper planning and apathy. Whether he can shake hand with a person of higher class on equal footing? Whether we have been able to reach that level of psyche and human dignity and able to remove discrimination based upon caste? Whether false guise of cleanliness can rescue the situation, how such condition prevails and have not vanished, are we not responsible? The answer can only be found by soul searching. However, one thing is sure that we have not been able to eradicate untouchability in a real sense as envisaged and we have not been able to provide downtrodden class the fundamental civil rights and amenities, frugal comforts of life which make life worth living. More so, for Tribals who are at some places still kept in isolation as we have not been able to provide them even basic amenities, education and frugal comforts of life in spite of spending a considerable amount for the protection, how long this would continue. Whether they have to remain in the status quo and to entertain civilized society? Whether under the guise of protection of the culture, they are deprived of fruits of development, and they face a violation of traditional rights?

31. In this light, the Respondent submits that Scheduled Castes as a class continue to suffer and be deprived of basic human dignities. Any attempt by the State to

water down the special protections offered to the class by means of Article 341 must be struck down as unconstitutional.

Drawn by: Mr. Tushar Bakshi and Mr. Pranjal Kishore, Advocates	Filed by: [redacted]

THE STATE OF PUNJAB AND ORS. V DAVINDER SINGH AND ORS.

CIVIL APPEAL NOS. 2317 OF 2011

List of Judgments Relied upon by the Respondent

A. **Whether Chinnaiah should be reconsidered?**

S.No.	Judgment	Quorum	Relevant Portion	Link
1.	E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394	Five Judges	Facts – Paragraphs 1 and 2 Law- Paragraphs 12, 13, 19, 26 and 41	Click here
2.	Keshav Mills Co. Ltd. v. CIT, (1965) 2 SCR 908	Seven judges	Paragraphs 1-13 Law – Paragraph 23	Click here
3.	Union of India v. Raghubir Singh, (1989) 2 SCC 754	Five Judges	Facts – Paragraph 1 to 5 Question framed – Paragraph 1 Law – Discussion at Paragraphs 6 to 24. See Paragraph 16	Click here
4.	Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673.	Five Judges	Facts – Paragraphs 1 to 3 Law – Paragraphs 8 to 12	Click here
5.	*Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.*	Five Judges	Opinion of Balakrishnan C.J. at Paragraphs 184 and 186, Opinon of Pasayat and Thakker JJ. at Paragraph 293 and Bhandari J. at Paragraphs 395 and 633.]	Click here
6.	*Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217*	Nine Judges	Paragraphs 781, 788, 796-797	Click here

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

S.No.	Judgment	Quorum	Relevant Portion	Link
1.	B. Basavalingappa v. D. Munichinnappa [(1965) 1 SCR 316]	Constitution Bench	Pages 318-320	Click here
2.	Bhaiya Lal v. Harikishan Singh, (1965) 2 SCR 877	Constitution Bench	Paragraph 10	Click here
3.	Srish Kumar Chodhury v. State of Tripura, 1990 Supp SCC 220	Three Judges	Facts – Paragraphs 1 and 2 Law - Paragraphs 16 and 21	Click here
4.	Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala, (1994) 1 SCC 359,	Three Judges	Facts – Paragraphs 1 to 9 Law - Paragraphs 18, 19 and 21	Click here
5.	**State of Maharashtra v. Milind, (2001) 1 SCC 4**	**Constitution Bench**	**Facts – Paragraph 4** **Questions framed – Paragraph 1** **Law- Paragraphs 12-15**	Click here
6.	Heikham Surchandra Singh v. Representative of "Lois" Kakching,	Two Judges	Facts – Paragraphs 4-6	Click here

	(1997) 2 SCC 523		Law –Paragraphs 9 to 11	
7.	Shree Surat Valsad Jilla K.M.G. Parishad v. Union of India, (2007) 5 SCC 360	Two Judges	Facts – Paragraphs 2 and 5 Law – Paragraphs 3,4, 6 to 9	Click here
8.	Punit Rai v. Dinesh Chaudhary, (2003) 8 SCC 204	Three Judges [reliance placed on separate opinion of Sinha J.]	Facts – Paragraphs 2 to 6 Law – Paragraphs 23 and 25	Click here
9.	Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312	Five Judges	Facts – Paragraphs 1 to 6 Question framed – Paragraph 3 Paragraphs 36 and 38	Click here
10.	State of Kerala and Anr. v NM Thomas and Ors. (1976) 2 SCC 310	Seven Judges	Facts – Paragraphs 2 to 13 Law – Paragraphs 167 and 169	Click here
11.	Union of India v State of Maharashtra, 2019 SCCOnline SC 1279	Three Judges	Facts – Paragraph 2 Portion to rely upon – Paragraphs 50 – 60	Click here

C. **Whether Section 4 (5) of the Act is constitutionally valid?**

S.No.	Judgment	Quorum	Relevant Portions	Link

1.	Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458	Two Judges	Facts – Paragraphs 5 to 14 Law - Paragraphs 64, 66, 69 and 78	Click here

D. **Judgments that may be cited by Petitioners**

S.No.	Judgment	Quorum	Relevant Portions	Link
1.	Jarnail Singh and Ors. v Lacchmi Narayan Gupta and Others, (2018) 10 SCC 396	Five Judges	Paragraphs 11 to 28 See specific reference to Chinnaiah at 13-18. The bench took note of the issue of Chinnaiah being referred to a larger bench. We rely on Para 27 where Court holds that Parliament and Constitutional Courts will be within their rights to apply the creamy layer principle. There is no finding that the state legislature can do so.	Click here
2.	BK Pavitra and Others v Union of India and Others, 2019 SCC Online SC 694	Two Judges	167 to 179	Click here
3.	Chebrolu Leela Prasad	Five Judges	See findings with	Click here

	Rao and Others, 2020 SCC Online SC 383		regard to revision of lists at Paragraphs 149-154	

ITEM NO.501 **COURT NO.3** **SECTION IV**

(PART HEARD)

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

Civil Appeal No(s). 2317/2011

THE STATE OF PUNJAB & ORS. **Appellant(s)**

VERSUS

DAVINDER SINGH & ORS. **Respondent(s)**

WITH

C.A. No. 5586/2010 (IV)

C.A. No. 5597/2010 (IV)

C.A. No. 5589/2010 (IV)

C.A. No. 5593/2010 (IV)

C.A. No. 5600/2010 (IV)

C.A. No. 5598/2010 (IV)

C.A. No. 5587/2010 (IV)

C.A. No. 5595-5596/2010 (IV)

C.A. No. 2324/2011 (IV)

(FOR INTERVENTION APPLICATION ON IA /2010 (UNREGISTERED))

C.A. No. 6936/2015 (IV)

1SLP(C) No. 30766/2010 (IV-B)

C.A. No. 2318/2011 (IV)

SLP(C) No. 5454-5459/2011 (IV-B)

SLP(C) No. 8701/2011 (IV-B)

SLP(C) No. 36500-36501/2011 (IV-B)

T.C.(C) No. 37/2011 (XVI-A)

T.C.(C) No. 38/2011 (XVI-A)

C.A. No. 289/2014 (IV)

T.P.(C) No. 464/2015 (XVI-A)

W.P.(C) No. 1477/2019 (X) (IA No. 193565/2019 - EX-PARTE STAY)

Date : 16-07-2020 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARUN MISHRA

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE VINEET SARAN

HON'BLE MR. JUSTICE M.R. SHAH

HON'BLE MR. JUSTICE ANIRUDDHA BOSE

For Appellant(s) Mr. Ranjit Kumar,Sr.Adv.
Ms. Uttara Babbar, AOR
Ms. Bhavana Duhoon,Adv.
Mr. Manan Bansal,Adv.
Mr. Anshuman Singh,Adv.

For Respondent(s) Mr. Vikramjit Banerjee,ASG
Mr. Anmol Chandan,Adv.
Mr. Saurabh Mishra,Adv.

UPON hearing the counsel the Court made the following

O R D E R

Heard learned counsel for the parties at length.

Hearing concluded.

Judgment reserved.

Written submission, if any, be filed by 21.07.2020.

(NARENDRA PRASAD)
ASTT. REGISTRAR-cum-PS

(JAGDISH CHANDER)
ASSISTANT REGISTRAR

TYPED COPY

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2317 OF 2011

IN THE MATTER OF:

State of Punjab and Ors. ... **Appellants**

v

Davinder Singh and Ors. ...**Respondents**

SUPPLEMENTARY SUBMISSIONS BY MR. SANJAY R HEGDE, SENIOR ADVOCATE ON BEHALF OF THE RESPONDENTS

1. These submissions are in addition to those submitted by the Respondents on 15.07.2020. The submissions are limited to certain queries that were raised by the Hon'ble Court during the course of arguments on 15.07.2020 and 16.07.2020.

2. During the hearing on 16.07.2020, the Hon'ble Court had enquired as to why Other Backward Classes could be further sub-classified, while Scheduled Castes were to be taken as a homogenous group. The bench had also queried as to why the State Legislature could not take steps to reduce/ deny the benefit of reservation when several members of a particular Scheduled Caste had entered into high paying jobs, government service etc.

3. The Respondents submit that the Constitution itself treats gives 'special' treatment to Scheduled Castes. This is in view of them having endured/ continuing to endure the disability of untouchability for many years. It is further submitted that while benefits of reservation can be denied to certain castes, the same can only be done if the caste or a part of the caste is removed from the Presidential list by way of an amendment carried out by Parliament. These submissions are detailed out below.

A. Special Status of Scheduled Castes under the Constitution

4. A study of various provisions of the Constitution makes it clear that the drafters of the Constitution intended to give a special position to Scheduled Castes. Scheduled Castes are defined under Article 366 (24) of the Constitution to *"mean 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."* No other caste or group of castes is defined by the Constitution.

5. Article 46 makes it incumbent upon 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."* Further, Article 335 provided for claims of Scheduled Castes and Scheduled Tribes to services and posts. There is no corresponding provision for other castes or groups of castes.

6. The Respondents submit that reservations in public employment are provided under Article 16 (4) of the Constitution. However, even in the context of public employment, scheduled castes are treated as distinct from other backward classes. Article 320 (3) inter alia, states that the Public Service Commission *"shall be consulted on all matters relating to methods of recruitment to civil services and for civil posts"*. Article 320 (4) is pertinent in this regard and is reproduced below:

> *(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.*

7. Article 320 (4) lists reservations for backward classes under Article 16 (4) and claims of scheduled castes to services and posts under Article 335 separately. The Respondents rely on the above to submit that though reservations to both scheduled castes and other backward classes are provided under Article 16 (4), the Constitution envisages the claims of Scheduled Castes to such posts as separate and distinct from those of other backward classes.

Difference between Scheduled Castes and Other Backward Classes

8. The key feature which distinguishes Scheduled Castes from Other Backward Classes is untouchability. A Constitution Bench of this Court in *Jarnail Singh v Lachhmi Narain Gupta and Ors., (2018) 10 SCC 396* has held that *"the Presidential List contains only those castes or groups or parts thereof, which have been regarded as untouchables."* **[Paragraph 24]**

9. Other Backward Classes, though admittedly socially backward do not suffer from untouchability. During the hearing, it was sought to be argued that not all members of Scheduled Castes are untouchables. It is humbly submitted that this position is incorrect. In order to appreciate the position of the castes listed in the 1950

Presidential Order (as amended by Parliament from time to time), it is imperative to understand the history of the order.

10. The Census of 1911 was one of the first official documents to have a separate list of 'depressed classes'. However, the criteria for being considered a depressed class was not made public. The Southborough Franchisee Committee of 1919 adopted the test of untouchability as the criterion for identifying the depressed classes. This was largely on account of Dr. Ambedkar's deposition before the Commission. Dr. Ambedkar argued that *"the Hindus, in spite of castes, divide themselves into two significant groups—the touchables and the untouchables."* A similar definition was adopted by the Indian Statutory Commission (Simon Commission) which observed that the "essential characteristic" of the depressed classes was untouchability.

11. The term "Depressed Classes" was replaced by "Scheduled Caste", after the promulgation of the Government of India Act, 1935. Section 26 (1) of the Act defined Scheduled Caste to be 'castes races or tribes which appear to correspondent to the classes formerly known as the depressed classes.' Subsequently, an Order of 1936 issued under the Act enumerated several castes, races or tribes in an attached Schedule. These castes were deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 is substantially modeled on the Order of 1936. **[vide Soosai v. Union of India, 1985 Supp SCC 590 at Paragraph 7]**

12. The aforesaid makes it clear that Scheduled Castes under the Constitution are nothing but the erstwhile Depressed Classes, and are defined by the common disability of untouchability. During the framing of the Constitution, the Constituent Assembly recognized *"that the Scheduled Castes were a backward section of the Hindu community who were handicapped by the practice of untouchability"*, and that *"this evil practice of untouchability was not recognized by any other religion and the question of any Scheduled Caste belonging to a religion other than Hinduism did not therefore arise"* **[B. Shiva Rao: The Framing of India's Constitution : A Study, Page 771] .**

13. In light of the above, it is reiterated that the special treatment given to Scheduled Castes is due to the disability of untouchability that members of these castes have

endured. Other Backward Classes, though admittedly socially backward do not suffer from untouchability and are therefore denied the same treatment as Scheduled Castes.

Denial of Benefits to members of Scheduled Castes who have made economic progress

14. During the course of the hearing, the Hon'ble Court had enquired as to why the State Legislature could not take steps to reduce/ deny the benefit of reservation when several members of a particular Scheduled Caste had entered into high paying jobs, government service etc.

15. The Respondents submit that the accent of Article 16 (4) is on social backwardness. The same does not take into account economic conditions. However, even assuming that economic privilege is a ground to deny the benefits of reservation to Scheduled Castes, the same can be done only by Parliament.

16. It is submitted that Article 341 (2); allows Parliament to exclude from the Presidential list *"any caste, race or tribe* ***or part of or group within any caste, race or tribe."*** It is thus clear that in case Parliament is of the opinion that a caste or a part of a caste no longer needs the benefit of reservation, it can exclude such part or group from the Presidential list.

For instance, it is theoretically open to the Parliament to opine that a certain group of Bhangis (listed as entry 8 in the Delhi Scheduled Castes List), by reason of economic empowerment or otherwise, do not suffer from the same disability as other members of the caste and are no longer entitled to the benefits of affirmative action. In this case, the Parliament can remove such group from the presidential list. However, save as aforesaid, the Constitution does not envisage any other method by which reservation can be denied to a member of a scheduled caste.

The Respondents rely on the Constitution Bench's judgment in *Jarnail Singh.* The Court therein has held

> *"27. .....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."***

17. It is submitted that the power to include or exclude caste or groups from the presidential list was left to the Parliament and not to the State legislature in order to ensure that there was no political interference with respect to listing of castes in the schedule. The same is clear from Dr. Ambedkar's speech in the Constituent Assembly. Dr. Ambedkar had stated that the power to amend the presidential list was left with the Parliament in order to *"eliminate any kind of political factors having a play in the matter of the disturbance in the schedule so published by the President."* [cited in Milind v State of Maharashtra, (2001) 1 SCC 4 Paragraph 14]

Conclusion

18. The Petitioners have sought to contend that the Judgment in *E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394* requires re-consideration as the same is contrary to the judgment in *Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.* This is incorrect. The judgment in *Indra Sawhney* is limited to the issue of Other Backward Classes (please see majority of opinion of Justice Jeevan Reddy at Paragraphs 781, 788 and 796-797). As such it has no bearing on the issue of sub-classification of scheduled castes.

19. The Petitioners have further argued that Articles 341 and 16 (4) operate in different domains. According to the Petitioners, Article 341 merely provides the President with the powers to list Scheduled Castes. The power to provide for reservations is a separate power under Article 16(4) and can be exercised de-hors Article 341. The Respondents dispute this position.

20. The object of Article 341(1) is to provide "additional protection to the members of the Scheduled Castes" [vide *Bhaiya Lal v. Harikishan Singh, (1965) 2 SCR 877,* Paragraph 10] If the contention of the Petitioners is taken to its logical conclusion, it will allow the State to deny the benefit of reservation to any caste or group even that is listed in the presidential list. This will render the entire object of Article 341 nugatory.

For instance, a situation may arise where the Parliament, being of the opinion that a particular caste is suffering from untouchability, places the caste in the scheduled caste list. The object of this is to ensure that the benefits of affirmative action under the Constitution accrue to the said caste. This entire exercise can be rendered futile by

the state executive/legislature which if it so chooses, can deny the benefit of reservation to the said caste by way of an executive order/ legislation.

21. It is submitted that a Constitution Bench in *Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312* was faced with the same question that arises before this Hon'ble Court today [Please see question formulated at Paragraph 3, Page 331 of the report]. The Constitution Bench in Bir Singh held that the "*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.*

It went on to hold:

> "*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.* [Please see Paragraph 38]

22. The Petitioners rely on the above to submit the power under Article 16 (4) cannot be exercised de-hors Article 341. Once a caste is listed as a scheduled caste, all benefits arising from the same have to be conferred on it. This has been held by at-least three Constitution benches of this Hon'ble Court, all of which would have to be overruled, in case the Petitioner's submissions are taken to be correct. **[State of Maharashtra v. Milind, (2001) 1 SCC 4; E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394, Bir Singh v. Delhi Jal Board, (2018) 10 SCC 312].**

23. In view of the above, the Respondents submit that:

a. Section 4(5) of The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 is constitutionally invalid.
b. The state did not have the competence to enact Section 4(5) of the Act.
c. The decision in EV Chinniah (supra) does not need reconsideration.

Filed on 21.07.2020

[redacted]